Supermajoritarian Criminal Justice

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Abstract

Democracy is often equated with majority rule. But closer analysis reveals that, in theory and by constitutional design, our criminal justice system should be supermajoritarian, not majoritarian. The Constitution guarantees that criminal punishment may be imposed only when backed by the supermajoritarian—historically, unanimous—approval of a jury drawn from the community. And criminal law theorists' expressive and retributive justifications for criminal punishment implicitly rely on the existence of broad community consensus in favor of imposing it. Despite these constitutional and theoretical ideals, the criminal justice system today is majoritarian at best. Both harsh and contested, it has lost the structural mechanisms that could ensure supermajoritarian support. By incorporating new supermajoritarian checks and reinvigorating old ones, we could make criminal punishment consonant with first principles and more responsive to community intuitions of justice.

Table of Contents

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INTRODUCTION

The popular imagination often equates criminality with immorality.[1] We ease our conscience when we lock people up because we assume that lawbreakers are moral transgressors.[2] Similarly, many theorists justify criminal punishments, and distinguish them from civil sanctions, on the ground that criminal punishments express collective moral condemnation.[3] This justification rests on the assumption that the community, as a whole, supports the criminalization of the behavior prohibited by law, as well as the method of its punishment.[4] Within our constitutional structure, the jury trial requirement serves to enforce this link to the collective by guaranteeing that criminal punishment is carried out only with the unanimous assent of a body representative of the community.[5]

The primary contribution of this Article is that it articulates a structural principle implicit in these theoretical and constitutional ideals: criminal punishment requires more than mere majority support. Rather, a healthy, democratic criminal justice system should be *supermajoritarian*. This insight helps to explain some of the shortcom-

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1 *See* Tom R. Tyler & John M. Darley, *Building a Law-Abiding Society: Taking Public Views About Morality and the Legitimacy of Legal Authorities into Account when Formulating Substantive Law*, 28 HOFSTRA L. REV. 707, 716 (2000) (explaining "people's assessment [of] the behaviors prohibited by law [as] contrary to their moral values").

2 *See* Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255, 260 (2012) ("[A]s human beings we are nevertheless naturally motivated to punish people we see as having a bad moral character or a lasting criminal disposition.").

3 *See, e.g.*, Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404–05 (1958) (explaining criminal penalty to attach to conduct that "incur[s] a formal and solemn pronouncement of the moral condemnation of the community").

4 *See* Christopher Slobogin, *Is Justice Just Us? Using Social Science to Inform Substantive Criminal Law*, 87 J. CRIM. L. & CRIMINOLOGY 315, 323 (1996) (citing EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 102 (George Simpson trans.) (1960)) ("There is no way to escape the fact that, at a very basic level, the values of the community govern the content of the criminal law: murder, rape and robbery are crimes because we, as a community, find these acts reprehensible. Indeed, the criminal law would not exist were it not for the 'moral intuitions' of society." (reviewing PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME (1995))).

5 *See, e.g.*, Johnson v. Louisiana, 406 U.S. 356, 396 (1972) (Brennan, J., dissenting); *id.* at 402–03 (Marshall, J., dissenting); Laura I. Appleman, *Local Democracy, Community Adjudication, and Criminal Justice*, 111 NW. U. L. REV. 1413, 1415 (2017) ("From our nation's beginning, a key aspect of the criminal jury trial was, and continues to be, the local community's role in conveying punishment to criminal offenders.").

ings of our modern criminal system and offers a new conceptualization of how we might reform it.

In today's world, the narrative of community consensus is suspect. Criminal punishment bears a far more complex relationship to community judgment than the traditional justifications contemplate. A legislature's criminalization of conduct may reflect not the community's uniform view of the prohibited behavior's immorality, but rather a narrowly won position staked out against a backdrop of contested morality.[6] Criminal laws already on the books may be vestiges of a prior generation's moral sensibilities.[7] At the same time, back end protections against overenforcement of criminal laws are weak. The jury trial, which once tethered criminal convictions to contemporary community consent, is largely an historical relic.[8]

Enforcing a contested view of morality through criminal laws and punishment presents particular problems of justice and legitimacy. These problems are of growing importance at a time of increasing cultural and political polarization in our country.[9] In our fractured soci-

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6 *See* Richard C. Fuller, *Morals and the Criminal Law*, 32 J. CRIM. L. & CRIMINOLOGY 624, 627 (1942) ("The notion that legislatures, in enacting new criminal legislation, are intervening for the 'common good' or 'general welfare' cannot be reconciled with the harsh realism of our politics. Such intervention is usually simply the result of effective pressure exerted by some group with important political influence.").

7 *See* Richard E. Myers II, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1329 (2008).

8 *See* Josh Bowers, *Upside-Down Juries*, 111 Nw. U. L. REV. 1655, 1655 (2017) ("The practical disappearance of the jury trial ranks among the most widely examined topics in American criminal justice.").

9 Our society today is not only pluralistic but also highly fractured along racial, religious, and political lines. *See, e.g.*, Bill Chappell, *Census Finds a More Diverse America, as Whites Lag Growth*, NPR (June 22, 2017, 9:25 AM), https://www.npr.org/sections/thetwo-way/2017/06/22/533926978/census-finds-a-more-diverse-america-as-whites-lag-growth [https://perma.cc/C7TY-YL4S] ("America's diversity remains on the rise, with all racial and ethnic minorities growing faster than whites from 2015 to 2016 . . . ."); ROBERT P. JONES & DANIEL COX, PUB. RELIGION RES. INST., AMERICA'S CHANGING RELIGIOUS IDENTITY (2017), https://www.prri.org/wp-content/uploads/2017/09/PRRI-Religion-Report.pdf [https://perma.cc/GW5Q-HRSR] (describing the drastic change in the American religious composition, including how white Christians occupy less than half the public); Carroll Doherty, *Key Takeaways on Americans' Growing Partisan Divide over Political Values*, PEW RES. CTR. (Oct. 5, 2017), http://www.pewresearch.org/fact-tank/2017/10/05/takeaways-on-americans-growing-partisan-divide-over-political-values/ [https://perma.cc/JJ2G-HMCC] (explaining how there is "little common ground" between the partisan views of Democrats and Republicans); *On Views of Race and Inequality, Blacks and Whites Are Worlds Apart*, PEW RES. CTR. (June 27, 2016), http://www.pewsocialtrends.org/2016/06/27/on-views-of-race-and-inequality-blacks-and-whites-are-worlds-apart/ [https://perma.cc/32UP-CKKR] ("A new . . . survey finds profound differences between black and white adults in their views on racial discrimination, barriers to black progress and the prospects for change."); Nate Cohn, *Polarization is Dividing American Society, Not Just Politics*, N.Y. TIMES (June 12, 2014), https://www.nytimes.com/2014/06/12/upshot/polarization-is-dividing-american-society-not-just-

ety, even criminal laws or punishment policies democratically enacted by a majority of the jurisdiction's legislators may be sharply opposed by a significant minority, or even a majority, of the populace.[10] Other

politics.html [https://perma.cc/DJ5U-D3SY] ("Liberals and conservatives prefer to associate with and live near their fellow partisans . . . [t]he result isn't just polarized politics, but a divided society where liberals and conservatives increasingly keep apart.").

10 Recreational marijuana possession is a federal crime and legal in only nine states and the District of Columbia. *Marijuana Overview*, NAT'L CONF. OF ST. LEGISLATURES (May 28, 2019), http://www.ncsl.org/research/civil-and-criminal-justice/marijuana-overview.aspx [https://perma.cc/EY7F-SQXP]. Yet a strong majority of Americans support legalization. Hannah Hartig & Abigail Geiger, *About Six-in-Ten Americans Support Marijuana Legalization*, PEW RES. CTR. (Oct. 8, 2018), http://www.pewresearch.org/fact-tank/2018/10/08/americans-support-marijuana-legalization/ [https://perma.cc/MQM6-FGJD]. Criminalization is highly contested in other areas, as well, including prostitution, possession of drugs other than marijuana, and euthanasia. *Should Prostitution Be Legalized?*, MARIST POLL (May 31, 2016), http://maristpoll.marist.edu/531-should-prostitution-be-legalized/ [https://perma.cc/NBA3-PZ6Q] ("Nearly half of U.S. residents, 49% report prostitution between two consenting adults should be legal while 44% disagree."); *America's New Drug Policy Landscape*, PEW RES. CTR. (Apr. 2, 2014), http://www.people-press.org/2014/04/02/americas-new-drug-policy-landscape/ [https://perma.cc/K95Z-GAAC] ("67% of Americans say that the government should focus more on providing treatment for those who use illegal drugs such as heroin and cocaine. Just 26% think the government's focus should be on prosecuting users of such hard drugs."); Jade Wood & Justin McCarthy, *Majority of Americans Remain Supportive of Euthanasia*, GALLUP (June 12, 2017), https://news.gallup.com/poll/211928/majority-americans-remain-supportive-euthanasia.aspx [https://perma.cc/DNH3-ZYHQ]. Punishment policies, in addition to substantive criminalization, are also contested—for example, capital punishment, life without parole for juveniles ("LWOP"), and mandatory minimum sentences. Edie Greene & Andrew J. Evelo, *Attitudes Regarding Life Sentences for Juvenile Offenders*, 37 LAW & HUM. BEHAV. 276, 279 (2013) ("For seven of the eight crimes evaluated—all except murder of a stranger—the percentage of respondents who gave a minimum age for LWOP in the juvenile range failed to reach a majority (50%), indicating an overall lack of support for imposing LWOP on juvenile offenders."); Christopher Ingraham, *Americans Overwhelmingly Agree It's Time to End Mandatory Minimum Sentencing*, WASH. POST (Oct. 10, 2014) (reporting results of Pew Center poll finding that "63% of people say that states moving away from the idea of mandatory prison sentences for non-violent offenses is a good thing"); J. Baxter Oliphant, *Public Support for the Death Penalty Ticks Up*, PEW RES. CTR. (June 11, 2018), http://www.pewresearch.org/fact-tank/2018/06/11/us-support-for-death-penalty-ticks-up-2018/ [https://perma.cc/CE23-ZGAD] (reporting "54% of Americans favor the death penalty for people convicted of murder, while 39% are opposed," up from a "four-decade low" of 49% who favored capital punishment in 2016). Sometimes this split public sentiment is reflected in close legislative votes. *See, e.g.*, Tom Angell, *Majority of Delaware Lawmakers Approve Marijuana Legalization Bill, But It Fails*, FORBES, (June 27, 2018, 8:31 PM), https://www.forbes.com/sites/tomangell/2018/06/27/majority-of-delaware-lawmakers-approve-marijuana-legalization-bill-but-it-fails/#7212ede315da [https://perma.cc/6G45-8UUQ]. At other times, legislative votes on criminal justice policies, even ones that eventually become highly contested, are overwhelmingly in support of harsher punishment. For example, the Comprehensive Crime Control Act of 1984 passed the Senate by a vote of 91–1. S. 1762, 98th Cong. (1984). Legislative disconnects with popular opinion may be exacerbated by undemocratic dynamics within our system of representative government, such as gerrymandering, low voter turnout, voter suppression, and the influence of big money in politics. *See, e.g.*, Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. & SOC. SCI. 361, 363 (2008) (reviewing political science literature identifying democratic deficits in elected government insti-

democratically enacted criminal laws may be tangential to the moral intuitions of the majority.[11] When the social meaning of particular behavior is in dispute, criminalization is a kind of coercive governmental speech, weighing in on one side of the debate, backed up by violence.[12] This is a precarious situation for the criminal law itself and for the individuals who find themselves in its crosshairs.

Other scholars in recent years—most notably, Paul Robinson—have focused on the theoretical problem of punishment that is out of keeping with community perceptions of justice.[13] This Article considers similar problems and potential solutions from a different framework: through the lens of how we structure our democratic decisionmaking bodies, rather than by empirically gauging communal morality.[14] Specifically, this Article focuses on how a system that once had significant supermajoritarian features has morphed into one that is at best majoritarian.[15] The loss of supermajoritarian support is a significant problem facing the criminal law today, and the reincorporation of supermajoritarian principles would strengthen its legitimacy, moral coherence, and constitutionality.[16]

Part I is normative. I argue that a well functioning, morally coherent criminal justice system should have supermajoritarian—not majoritarian—support for the punishments it imposes. I explain why a supermajoritarian system of defining and enforcing criminal laws is

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tutions); Corinna Barrett Lain, *Upside-Down Judicial Review*, 101 GEO. L.J. 113, 115–16, 146–57 (2012).

11 *See, e.g.*, Margaret Raymond, *Penumbral Crimes*, 39 AM. CRIM. L. REV. 1395, 1411–17 (2002).

12 *Cf.* Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1610 (1986) (describing judicial interpretation as both "jurispathic"—in that it "kill[s] the diverse legal traditions that compete with the State"—and "homicidal"—in that it ushers in and justifies the State's use of violence).

13 *E.g.*, Paul H. Robinson et al., *The Disutility of Injustice*, 85 N.Y.U. L. REV. 1940, 2017, 2025–26 (2010) [hereinafter Robinson, *The Disutility of Injustice*]; Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1107 (2011) [hereinafter Robinson, *The Ongoing Revolution*]; Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 218–19 (2012).

14 In a similar vein, Douglas Berman has explained the relevance of constitutional criminal *procedure* to the questions of substantive criminal law policy raised by Robinson. Douglas A. Berman, *A Truly (and Peculiarly) American "Revolution in Punishment Theory*," 42 ARIZ. ST. L.J. 1113, 1114 (2011).

15 In this Article, I use the term "majoritarian" or "bare majoritarian" to signify a system that gives power to a simple majority of 51%.

16 In this way, I seek to meaningfully connect criminal procedures to substantive criminal law goals. *See* Stephanos Bibas, *Restoring Democratic Moral Judgment Within Bureaucratic Criminal Justice*, 111 NW. U. L. REV. 1677, 1679 (2017).

most consistent with constitutional principles, theoretical justifications for punishment, and practical efficacy. Criminal convictions secured without a robust community expression of approval are unmoored from core constitutional communitarian protections. Moreover, significant moral dissensus weakens the theoretical justification for criminal punishment. And a simple majoritarian system leaves space for large swaths of the community to disagree with democratically-enacted criminal laws, which may result in flouting of the law and undermining the criminal law's perceived legitimacy.

Part II is descriptive. I detail the majoritarian—and sometimes minoritarian—status quo of our modern criminal law system. Early American criminal justice was marked by a discriminatory and minoritarian conception of those eligible for civic participation, but provided strong supermajoritarian protections within that constrained sphere.[17] Today, we have a broader understanding of the civic community, but our federal and state legislative systems—and hence our systems for enacting criminal laws—largely function as majoritarian or even minoritarian, despite some supermajoritarian features.[18] The protection of unanimous jury verdicts,[19] which once played a critical role in ensuring that criminal punishment conformed to the conscience of the *entire* civic community, has all but disappeared.[20] Nearly all criminal convictions today are the result of a guilty plea rather than a jury trial.[21] Even those defendants who elect to exercise their right to a jury trial are offered a weakened version of that original right.[22] Juries were once charged with deciding the law as well as the facts.[23]

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17 *See infra* Section II.A.

18 *See infra* Section II.B.

19 The common law demanded jury unanimity. *See, e.g.*, 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 349–50 (Thomas M. Cooley ed., 1899). As discussed in more depth *infra* Section I.A, whether the Constitution guarantees unanimous or merely supermajoritarian jury trials is the subject of heated scholarly debate, although the Supreme Court has permitted nonunanimous verdicts in state court proceedings. *See* Apodaca v. Oregon, 406 U.S. 404, 410–14 (1972); Johnson v. Louisiana, 406 U.S. 356, 359–63 (1972). Today, only Louisiana and Oregon allow convictions by nonunanimous verdicts. *See* LA. CONST. ANN. art. I, § 17 (2018); OR. CONST. art. I, § 11 (2018).

20 *See infra* Sections II.A–.B.

21 *See* Missouri v. Frye, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."); Suja A. Thomas, *The Missing Branch of the Jury*, 77 OHIO ST. L.J. 1261, 1262–63 (2016) (noting that juries "try around 1%–4% of criminal cases in federal and state courts").

22 *See* AKHIL REED AMAR, AMERICA'S CONSTITUTION 238 (2005).

23 *See* Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 903 (1994); *see also infra* note 60.

Not so today.[24] Without defying the judge's instructions by exercising their power of nullification,[25] juries today cannot express their disagreement with the morality of the law itself.

Beyond the jury, the Eighth Amendment prohibition of "cruel and unusual punishments"[26] could conceivably place limitations on the crimes and punishments established by majoritarian legislatures. Yet the Supreme Court's Eighth Amendment jurisprudence—particularly when reviewing prison sentences for adult offenders—has been extraordinarily deferential to majoritarian legislatures, earning scholarly criticism for failing to serve a meaningful countermajoritarian function.

Part III suggests mechanisms to revive supermajoritarianism in the prospective development of the criminal law and in the retrospective interpretation of constitutional protections pertaining to the criminal law. Reforms to the jury itself could strengthen its normative role and representativeness of the community.[27] Legislatures could require a supermajority of their members to vote in favor of new criminal laws or to strengthen the penalties for existing criminal laws.[28] Recognizing the supermajoritarian function lost with the demise of the jury trial, we might establish other mechanisms for unanimous or supermajoritarian citizen review at various stages of the criminal justice process.[29] Judicial doctrine could incorporate supermajoritarian principles as well.[30] When inquiring into "evolving standards of decency" in its Eighth Amendment jurisprudence, rather than binding itself to the punitive will of the majority, the Supreme Court could carefully scrutinize criminal justice practices that are condemned by a substantial minority of the population. With these and other reforms, it may be possible to rein in criminal punishments that are out of step

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24 *See* Horning v. District of Columbia, 254 U.S. 135, 138 (1920); Sparf v. United States, 156 U.S. 51, 102 (1895); AMAR, *supra* note 22, at 238.

25 Jury nullification today is a power but not a right, and juries who exercise that power disobey explicit judicial instructions against it. *See, e.g.*, United States v. Thomas, 116 F.3d 606, 615–17 (2d Cir. 1997); Nathan S. Chapman, *The Jury's Constitutional Judgment*, 67 ALA. L. REV. 189, 205 (2015). A Ninth Circuit panel, however, recently held that the power to instruct against nullification has limits. United States v. Kleinman, 880 F.3d 1020, 1032 (9th Cir. 2017) ("Although a court has 'the duty to forestall or prevent [nullification],' including 'by firm instruction or admonition,' a court should *not* state or imply that (1) jurors could be punished for jury nullification, or that (2) an acquittal resulting from jury nullification is invalid." (citation omitted)).

26 U.S. CONST. amend. VIII.

27 *See infra* Section III.A.

28 *See infra* Section III.B.

29 *See infra* Section III.C.

30 *See infra* Section III.D.

with community sensibilities but carried out and justified in the community's name.

I. Supermajoritarian Virtues

In this Section, I consider why supermajoritarian decisionmaking is valuable in the criminal context. I begin with the Constitution, and I argue that the Framers of the Constitution and the Bill of Rights enshrined a supermajoritarian ethic into the American criminal justice system through the institution of the jury.[31] I then summarize some of the theoretical justifications for punishment outside the Constitution and conclude that a criminal justice system buttressed by supermajoritarian support has advantages in terms of moral coherence, legitimacy, and adherence.[32]

A. Constitutional Design

John McGinnis and Michael Rappaport have notably argued that the American constitutional structure is predominantly supermajoritarian rather than majoritarian.[33] They contend that the American innovation[34] of supermajoritarian rules of governance was designed to preserve popular rule while also protecting against the tyranny of the majority—a fundamental concern of framers such as James Madison.[35] McGinnis and Rappaport identify supermajoritarian dynamics in the Constitution not only in its explicitly supermajoritarian requirements,[36] but also in those provisions governing ordinary legislation (as bicameralism and the presidential veto power also effectively require supermajoritarian support)[37] and in the "absolute" constitutional prohibitions set forth in the Bill of Rights

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31 *See infra* Section I.A.

32 *See infra* Section I.B.

33 John O. McGinnis & Michael B. Rappaport, *Our Supermajoritarian Constitution*, 80 Tex. L. Rev. 703, 705 (2002).

34 *See id.* at 722 ("The introduction of super-majority rules thus represents one of the distinctive contributions of the United States to the science of constitutionalism.").

35 *Id.* at 707 ("Supermajority rules are ubiquitous in the Constitution because they are well designed to advance the ultimate purpose of that document: to establish a well-functioning republic. As Madison explained in *The Federalist No. 10*, his most important discussion of republican government, the 'great object to which our inquiries are directed' is 'to secure the public good and private rights against the danger of a [majority] faction, and at the same time to preserve the spirit and form of popular government.' Supermajority rules are, of course, a means of achieving this result, since they both restrain majority factions and retain popular decisionmaking by legislative assemblies." (footnote omitted)).

36 *Id.* at 711–12 (identifying and explaining the significance of "seven express supermajority rules in the original Constitution").

37 *Id.* at 712–16.

(which can be amended through the supermajoritarian procedures set forth in Article V).[38]

Surprisingly, McGinnis and Rappaport do not mention the jury as one of the core supermajoritarian requirements of the Constitution.[39] In a separate work, McGinnis himself casually mentions the jury as a *majoritarian* institution.[40] He is not alone; historical luminaries including Alexis de Tocqueville and others have characterized and celebrated the jury as a great guarantor of majority rule.[41] Yet the institution of the jury at the time of the founding operated with a super-supermajority rule: the requirement of unanimity.[42] To be sure, the Constitution's criminal jury clauses do not specify a voting rule.[43] But it is quite clear that at common law the term "jury" was understood as a "unanimous jury,"[44] and it was celebrated as such by the likes of Blackstone.[45] If we recognize that the Constitution's framers wove together majoritarian and supermajoritarian institutions with intentionality in order to achieve democratic objectives, and that they viewed supermajoritarian institutions as a simultaneous embodiment of and check on the will of the people,[46] then the supermajoritarianism

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38 *Id.* at 716.

39 *See generally id.* (omitting mention of jury as a core supermajoritarian constitutional requirement).

40 John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CALIF. L. REV. 485, 560–61 (2002) ("Second, while the jury is a popular, even populist, institution, it does not typically face the process defects such as the leverage of special interests and the rational apathy of citizens that beset centralized democracy.").

41 *See* Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1185 (1991) (quoting ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293–94 (Vintage Books ed. 1945)) ("As Tocqueville observed, the overall jury system was fundamentally populist and majoritarian: ' . . . The jury system as it is understood in America appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage. They are two instruments of equal power, which contribute to the supremacy of the majority.'").

42 *See* Gary J. Jacobsohn, Commentary, *The Unanimous Verdict: Politics and the Jury Trial*, 1977 WASH. U. L.Q. 39, 40 ("By the end of the eighteenth century, the rule of unanimity had become well established.").

43 U.S. CONST. art. III, § 2; *id.* amend. VI; *see also* Jacobsohn, *supra* note 42, at 40 ("Like much of the common law, however, the Americans incorporated the unanimous jury into their criminal justice system without adopting a constitutional provision requiring its use.").

44 *E.g.*, Apodaca v. Oregon, 406 U.S. 404, 407–08 n.3 (1972) (despite ruling that unanimous jury verdicts were not constitutionally required, recognizing the prevalence of the practice at common law and in eighteenth century America).

45 *See* BLACKSTONE, *supra* note 19, at 349–50 ("[T]he founders of the English law have, with excellent forecast, contrived that . . . the truth of every accusation . . . should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion."); *see also Apodaca*, 406 U.S. at 408 n.3 (describing common law history).

46 *See supra* note 35.

of the jury was an integral part of their design of a fair criminal justice system.

The jury[47] is the centerpiece of the constitutional regulation of criminal punishment. The jury trial is both an individual right of the accused[48] and a structural institution of popular self-governance, codified in Article III[49] and described by some as a "fourth branch" of government.[50] It is the only guarantee that is enshrined both in the Constitution of 1787 and the Bill of Rights.[51] The jury requirement was of paramount importance to the framers; Akhil Amar has described the jury as the "paradigmatic image underlying the Bill of Rights" and has argued that the jury trial right informs and is infused throughout the Bill of Rights, not just the provisions that explicitly mention it.[52]

Many have extolled the jury guarantee as a popular, communitarian protection against government overreaching.[53] But it was more. The jury requirement was a promise that, before anyone could be convicted of a crime,[54] a unanimous jury drawn from the community had

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47 As I will discuss later in this Section, modern Supreme Court precedent recognizes the jury's historical pedigree as a unanimous institution but permits supermajoritarian 12-person juries in state court. *See infra* notes 76–91 and accompanying text. Until I reach a discussion of that precedent, I will discuss the jury as a unanimous institution, because that is clearly the institution the Founders would have recognized. I will then also discuss whether the *Apodaca v. Oregon* and *Johnson v. Louisiana* decisions limit my theory in any meaningful way. 406 U.S. 404 (1972); 406 U.S. 356 (1972).

48 U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . ."). Note that the Fifth Amendment also provides for the protection of a grand jury in criminal cases, but I do not focus on that provision here, since the grand jury was not a unanimous institution.

49 *See* U.S. CONST. art. III, § 2, cl. 3 ("The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.").

50 *See, e.g.*, Jenny E. Carroll, *The Jury's Second Coming*, 100 GEO. L.J. 657, 699 (2012); Dan T. Coenen, *Institutional Arrangements and Individual Rights: A Comment on Professor Tribe's Critique of the Modern Court's Treatment of Constitutional Liberty*, 2001 U. ILL. L. REV. 1159, 1191; Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1392 (2017).

51 Alschuler & Deiss, *supra* note 23, at 870.

52 *See* Amar, *supra* note 41, at 1190–91; Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1169–70 (1995).

53 *See, e.g.*, Apodaca v. Oregon, 406 U.S. 404, 410–11 (1972) (citing Duncan v. Louisiana, 391 U.S. 145, 156 (1968) and Williams v. Florida, 399 U.S. 78, 100 (1970)); Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968); STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 114 (2012); Appleman, *supra* note 5, at 1415.

54 Of course, at the time of the founding the Sixth Amendment only applied against the federal government and thus did not restrict state jury practice. However, all state constitutions

to reach a guilty verdict, thus assuring—at least symbolically, and often in reality—that the community *as a whole*, and not merely a faction or mere majority of the community, would deem the individual guilty and deserving of punishment.[55] As a unanimous institution, the jury is structurally different than a legislature.[56] Critiques of jury unanimity as undemocratic[57] thus miss a critical point: in the context of criminal punishment, bare majority approval is not sufficient to subject the accused to the coercive power of the state. Community *consensus* is more appropriate. Punishment supported only by a majority faction would have been deeply concerning to the Founders.[58] The unanimous jury, by contrast, simultaneously "link[s] law with contemporary society" and "combat[s]" the effects of "community passion and prejudice."[59]

The unanimous founding-era jury, significantly, had a vast power to find both fact and law,[60] thus serving as a potent communitarian check against government overreaching.[61] Juries could determine not

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had similar protections. *See* Alschuler & Deiss, *supra* note 23, at 870 ("Twelve states had enacted written constitutions prior to the Constitutional Convention, and the only right that these twelve constitutions declared unanimously was the right of a criminal defendant to jury trial.").

55 Below I will discuss in much more detail how the reality of the jury requirement, rather than its conceptual ideal, did not adequately capture community will because women, minorities, and those without property were barred from service. *See infra* Section II.A.

56 *See* Richard A. Primus, *When Democracy Is Not Self-Government: Toward a Defense of the Unanimity Rule for Criminal Juries*, 18 CARDOZO L. REV. 1417, 1422–23 (1997).

57 *See id.* at 1420 (describing the critique of the unanimity rule as anti-democratic).

58 *See supra* note 37.

59 Justice Stewart, dissenting in *Johnson*, described the unanimous jury's dual function of linking criminal justice to the community while simultaneously protecting against the unbridled passions of the majority, though without explicitly noting the tension between those roles and the utility of a unanimity requirement in achieving them both. Johnson v. Louisiana, 406 U.S. 356, 399 (1972) (Stewart, J., dissenting) ("The requirement that the verdict of the jury be unanimous, surely as important as these other constitutional requisites, preserves the jury's function in linking law with contemporary society. It provides the simple and effective method endorsed by centuries of experience and history to combat the injuries to the fair administration of justice that can be inflicted by community passion and prejudice.").

60 *See* Chapman, *supra* note 25, at 215 ("[T]here is a great deal of evidence that judges and politicians well into the early national era agreed that the criminal jury had the right, as well as the power, to decide questions of law."); G. Ben Cohen & Robert J. Smith, *The Death of Death-Qualification*, 59 CASE W. RES. L. REV. 87, 87 (2008) ("The Framers understood criminal petit juries to be responsible for making determinations of both fact and law. This 'jury review' power provided the people with a 'check' against the government's judicial function."); Alschuler & Deiss, *supra* note 23, at 903 ("In England, although juries may have often disregarded the instructions of judges, they never acquired de jure authority to do so. In America following the Revolution, however, the authority of juries to resolve legal issues was frequently confirmed by constitutions, statutes, and judicial decisions.").

61 See Chris Kemmitt, *Function over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 U. MICH. J.L. REFORM 93, 110–11 (2006).

only whether a criminal defendant was factually guilty of the offense at issue, but also whether it was morally or constitutionally excessive to impose a particular punishment. It is well established in scholarly literature that juries had a right to acquit against the evidence,[62] and that juries did actively exercise this right, particularly at times of community disagreement with harsh punishment practices.[63]

Thus, the Constitution creates a supermajoritarian structure for imposing criminal punishment. The jury—a powerful political institution designed to represent the interests of the *entire* community—enforces supermajoritarian limits on criminal punishment and connects criminal law to the views of the community as a whole.[64] Although many commentators recognize the significance of the jury as a bulwark against corrupt or overzealous state action and celebrate the jury as a critical link between the community and the criminal justice system,[65] fewer focus on this distinctly supermajoritarian function of ensuring not only bare majority support, but also collective, near-consensus-based acceptance of criminal punishment.

Two important nuances qualify my claim that the jury represents a constitutional commitment to criminal justice supermajoritarianism. First, there is a question about whether unanimity of criminal petit juries is constitutionally required. In *Apodaca v. Oregon*[66] and *John-*

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62 AMAR, *supra* note 22, at 241; Chapman, *supra* note 25, at 205; Amar, *supra* note 41, at 1185.

63 STUART BANNER, THE DEATH PENALTY 90–91 (2003) ("Opposition to capital punishment for property crime thus originated in a changing morality of retribution. Death, many believed, was simply too harsh a punishment for theft. This moral sentiment quickly acquired urgent practical implications, because as belief in the disproportion of death for property crime grew, so did the difficulty of obtaining convictions. The propensity of juries to acquit defendants of property crimes rather than send them to their deaths began to be perceived as a serious problem in the 1760s."); Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 51–59 (2003) (describing a robust history of jury nullification in the eighteenth century); Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 321 (2003) ("In the eighteenth and nineteenth centuries, jurors frequently used their power to determine legal matters as a way of challenging or nullifying unjust legislation.").

64 Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968) ("[O]ne of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system . . . ."); *see* BIBAS, *supra* note 53, at 114.

65 *See* Apodaca v. Oregon, 406 U.S. 404, 410–11 (1972) (citing Duncan v. Louisiana, 391 U.S. 145, 156 (1968) and Williams v. Florida, 399 U.S. 78, 100 (1970)); *Witherspoon*, 391 U.S. at 519 n.15; BIBAS, *supra* note 53, at 114; Appleman, *supra* note 5, at 1415; Carroll, *supra* note 50, at 687; Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 998–99 (2003); Kemmitt, *supra* note 61, at 110–11.

66 406 U.S. 404 (1972).

son v. Louisiana,[67] the Supreme Court held that the Sixth Amendment did not mandate unanimous jury verdicts in state courts, although it preserved the constitutional requirement of unanimous jury verdicts in federal courts.[68] The plurality opinion in *Apodaca* acknowledged that unanimity was the dominant practice at common law, dating back to the Middle Ages.[69] But, in its view, whether the unanimity requirement was constitutionalized at the founding was a closer question. During the drafting of the Sixth Amendment, Madison proposed language that would have, among other things, explicitly preserved the right to a unanimous jury,[70] but this language was ultimately replaced with the less specific text we have today.[71] The drafting history leaves open two plausible interpretations: either the specific reference was omitted as unnecessary because it was already self-evident that a jury would be unanimous, or it was omitted in order to narrow (or permit future generations to narrow) the substantive scope of the right.[72] A majority of the Court decided in favor of the latter interpretation.[73] Other Justices took a sharply divergent view of the history,[74] as well as of the constitutive significance of unanimity to the jury trial right,[75]

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67 406 U.S. 356 (1972).

68 *Johnson*, 406 U.S. at 369 (Powell, J., concurring in No. 69–5035 and concurring in the judgment in No. 69–5046) (agreeing with "an unbroken line of [Supreme Court] cases reaching back into the late 1800's . . . that unanimity is one of the indispensable features of *federal* jury trial" but disagreeing that the unanimity requirement is so fundamental as to be incorporated against the states through the Fourteenth Amendment); *id.* at 395 (Brennan, J., dissenting) (explaining the inconsistent approaches in state and federal court); *Apodaca*, 406 U.S. at 411.

69 *See Apodaca*, 406 U.S. at 407–08 ("[T]he requirement of unanimity arose during the Middle Ages and had become an accepted feature of the common-law jury by the 18th century." (footnote omitted)).

70 Madison proposed language that required trial "by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites." 1 ANNALS OF CONG. 435 (1789) (Joseph Gales ed., 1834); *Apodaca*, 406 U.S. at 409.

71 The Sixth Amendment secures the right to trial "by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law." U.S. CONST. amend. VI; *Apodaca*, 406 U.S. at 409.

72 *See Apodaca*, 406 U.S. at 409–10.

73 *Id.* at 409–10; Williams v. Florida, 399 U.S. 78, 96–97 (1970).

74 Johnson v. Louisiana, 406 U.S. 356, 370–71 (1972) (Powell, J., concurring in No. 69–5035 and concurring in the judgment in No. 69–5046) (concluding that "in accord both with history and precedent, that the Sixth Amendment requires a unanimous jury verdict to convict in a federal criminal trial"); Baldwin v. New York, 399 U.S. 117, 124 n.9 (1970) (Harlan, J., dissenting in No. 188 and concurring in the result in No. 927) (disputing the *Williams* Court's historical and textual analysis and arguing that the Sixth Amendment was more likely predicated on "the assumption that the most prominent features of the jury would be preserved as a matter of course").

75 *See, e.g.*, *Johnson*, 406 U.S. at 396 (Brennan, J., dissenting); *id.* at 402–03 (Marshall, J., dissenting).

and both the accuracy and the advisability of the Court's approach are certainly open to debate.[76]

For purposes of my thesis here, however, it is important to note that, despite rejecting a constitutional unanimity requirement for the states, the *Apodaca* Court implicitly relied on the challenged jury verdicts' *supermajority* voting rules in upholding them. Justice White's plurality opinion in *Apodaca* concluded that a supermajoritarian jury of 10–2 or 11–1 still served the jury's intended structural function to "interpos[e] between the accused and his accuser of the commonsense judgment of a group of laymen."[77] Justice Blackmun, the swing Justice who provided the fifth vote in both *Apodaca* and *Johnson*, made clear that the preservation of a supermajority voting rule of at least 75% in each case, which required that "a substantial majority of the jury" be convinced of guilt, was critical to his decision.[78] Moreover, the Su-

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76 Scholars have debated the relative effectiveness and desirability of unanimous and supermajoritarian juries. A number of interesting empirical studies have shed light on the practical effects of different voting rules for juries. *See, e.g.*, Jason D. Reichelt, *Standing Alone: Conformity, Coercion, and the Protection of the Holdout Juror*, 40 U. MICH. J.L. REFORM 569, 579–80 (2007) (surveying psychological literature about jury deliberations with unanimous and nonunanimous voting rules and noting advantages to the quality of deliberations with unanimous rules); Kim Taylor-Thompson, *Empty Votes in Jury Deliberations*, 113 HARV. L. REV. 1261, 1272–76 (2000) (surveying social science literature and concluding that "[a] shift to majority rule appears to alter both the quality of the deliberative process and the accuracy of the jury's judgment. In the end, the data indicates that unanimity assures viewpoint diversity better than majority rule."). Some scholars support the notion of a supermajority voting rule for juries as a theoretical matter. Michael H. Glasser, *Letting the Supermajority Rule: Nonunanimous Jury Verdicts in Criminal Trials*, 24 FLA. ST. U. L. REV. 659 (1997); Ethan J. Leib, *Supermajoritarianism and the American Criminal Jury*, 33 HASTINGS CONST. L.Q. 141, 196 (2006) (arguing that the constitutional and legislative systems are supermajoritarian and that jury verdicts should be supermajoritarian too). Akhil Amar, who acknowledges the historical unanimity requirement, suggests reforming the jury to allow for supermajority or majority vote to cabin the ramifications of his other proposed reforms. Amar, *supra* note 52, at 1190. Other scholars and judges, including the dissenters in *Apodoca* and *Johnson*, have been sharply critical of doing away with the unanimity requirement. *E.g.*, *Johnson*, 406 U.S. at 396 (Brennan, J., dissenting); *id.* at 402–03 (Marshall, J., dissenting); Aliza B. Kaplan & Amy Saack, *Overturning* Apodaca v. Oregon *Should Be Easy: Nonunanimous Jury Verdicts in Criminal Cases Undermine the Credibility of Our Justice System*, 95 OR. L. REV. 1 (2016); Kate Riordan, *Ten Angry Men: Unanimous Jury Verdicts in Criminal Trials and Incorporation After* McDonald, 101 J. CRIM. L. & CRIMINOLOGY 1403 (2011).

77 *Apodaca*, 406 U.S. at 410–11 ("In terms of this function we perceive no difference between juries required to act unanimously and those permitted to convict or acquit *by votes of 10 to two or 11 to one* . . . in either case, the interest of the defendant in having the judgment of his peers interposed between himself and the officers of the State who prosecute and judge him is equally well served." (emphasis added) (footnote omitted)).

78 *Johnson*, 406 U.S. at 366 (Blackmun, J., concurring) ("I do not hesitate to say, either, that a system employing a 7–5 standard, rather than a 9–3 or 75% minimum, would afford me great difficulty. As MR. JUSTICE WHITE points out . . . 'a substantial majority of the jury' are to be convinced. That is all that is before us in each of these cases.").

preme Court, while permitting six-person juries,[79] has also held that such juries must be unanimous.[80] Thus, current Supreme Court doctrine approves nonunanimous juries in state (but not federal) court, but only so long as they are of sufficient size and reach a decision by a sufficient supermajority margin.

Does it matter to my claim whether the Constitution guarantees a unanimous or merely supermajoritarian jury? Certainly, jury unanimity would enhance the jury's structural impact as a supermajoritarian check. Given the small sample size of the jury, unanimity would do more to ensure community agreement behind a decision to convict. In particular, a unanimity requirement may ensure that minority voices are not drowned out by the majority—that the jury is effectively supermajoritarian and reflective of a greater degree of community consensus rather than merely majoritarian.[81] On the other hand, some scholars have voiced concern that a unanimous jury requirement stymies respect for dissenting viewpoints because of pressure on holdout jurors to conform to majority views.[82] At bottom, however, whether unanimous or not, the jury remains indisputably supermajoritarian. And its centrality to the constitutional design stands for the constitutional principle that punishment should not be imposed unless endorsed by "the community" at large.

The second qualification is that, at the time of the founding, any so-called "supermajoritarian" institution, including the jury, defined supermajority support only in reference to those entitled to participate in democratic governance—which excluded groups such as women and enslaved African Americans. Thus, while early American juries were unanimous, they were not truly representative of the en-

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79 *See* Williams v. Florida, 399 U.S. 78, 103 (1970) (upholding *six*-person nonpetty juries); *see also* Ballew v. Georgia, 435 U.S. 223, 245 (1978) (invalidating *five*-person nonpetty juries).

80 Burch v. Louisiana, 441 U.S. 130, 134 (1979).

81 *See Johnson*, 406 U.S. at 398 (Stewart, J., dissenting) ("[C]ommunity confidence in the administration of criminal justice cannot but be corroded under a system in which a defendant who is conspicuously identified with a particular group can be acquitted or convicted by a jury split along group lines."); *id.* at 396 (Brennan, J., dissenting) ("When verdicts must be unanimous, no member of the jury may be ignored by the others. When less than unanimity is sufficient, consideration of minority views may become nothing more than a matter of majority grace. In my opinion, the right of all groups in this Nation to participate in the criminal process means the right to have their voices heard. A unanimous verdict vindicates that right. Majority verdicts could destroy it."); *see also, e.g.*, Taylor-Thompson, *supra* note 76, at 1264 (explaining how "nonunanimity threatens to eliminate the voices of those who have only recently secured the right to participate in the democratic process").

82 *See* Emil J. Bove III, Note, *Preserving the Value of Unanimous Criminal Jury Verdicts in Anti-Deadlock Instructions*, 97 GEO. L.J. 251, 264 (2008).

tire community.[83] In fact, the post-Civil War history of the American jury shows just how resistant some states would be to transforming the jury into a genuinely supermajoritarian institution. Significantly, it was only after Reconstruction, when the southern states were required to permit African Americans to serve on juries, that Louisiana moved to nonunanimous juries, with the apparent aim of reducing or eliminating the effects of dissent from black jurors. As scholars have noted, the nonunanimous jury "was first adopted in Louisiana at a Constitutional Convention expressly convened 'to establish the supremacy of the white race.'"[84]

Undeniably, the discriminatory demographic composition of the founding-era jury undermines its historical pedigree as a supermajoritarian institution. Yet the same could be said of any of the founding institutions that paired supermajoritarianism with exclusionary conceptions of citizenship and civic participation—including the Constitution itself, which was ratified without the political consent of women or minorities.[85] If we understand the founding principles of the Constitution to include supermajoritarianism, then the jury is just as much, if not more, deserving of that conceptual title than other institutions created within the constitutional structure.

Moreover, the bitter struggle fought after Reconstruction to exclude African Americans from service on juries[86] showed just how significant the supermajoritarian power of the jury was when applied in an egalitarian fashion. Although there was also fierce opposition by white southerners to African Americans voting in majoritarian legislatures,[87] the supermajoritarian structure of the jury gave dissenting minority members a particularly potent power to affect outcomes.[88] The structural reality drove some states to change the jury's historical vot-

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83 *See* Alschuler & Deiss, *supra* note 23, at 884.

84 Thomas Ward Frampton, *The Jim Crow Jury*, 71 VAND. L. REV. 1593, 1597 (2018) (citing Thomas Semmes, Chairman of the Judiciary Committee, Address at the Louisiana Constitutional Convention of 1898, *in* OFFICIAL JOURNAL OF THE PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF LOUISIANA: HELD IN NEW ORLEANS, TUESDAY, FEBRUARY 8, 1898, at 374 (1898)); Robert J. Smith & Bidish J. Sarma, *How and Why Race Continues to Influence the Administration of Criminal Justice in Louisiana*, 72 LA. L. REV. 361, 374 (2012).

85 *See, e.g.*, Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1, 2 (1987).

86 *See* Smith & Sarma, *supra* note 84, at 375–76.

87 Shaw v. Reno, 509 U.S. 630, 639–41 (1993) (describing protracted history of white resistance to and suppression of African American voting beginning after ratification of the Fifteenth Amendment).

88 Smith & Sarma, *supra* note 84, at 375 (describing the white southern fear that freed slaves would be able to "hijack[] sentencing outcomes").

ing rule and move away from unanimity specifically in order to overcome its inherently supermajoritarian effect.[89]

Thus, the primary mechanism in the Constitution for ensuring fairness in the criminal justice system was also structurally designed to ensure supermajority community support for the imposition of punishment: in other words, a constitutional commitment to a supermajoritarian criminal justice system.

B. Morality, Legitimacy, and Compliance

As described above, the voice of the community as a whole finds constitutional expression in the institution of the criminal jury. Similar communitarian echoes can be found in the literature on the theory of punishment, most particularly within expressive theories of criminal law. It is commonly, though not universally, accepted that a primary function of the criminal law is to express—and enforce—society's normative values.[90] Relatedly, some theorists justify punishment as serving the important function of making the community whole again after it has been harmed by a lawbreaker. Both of these ideas depend upon a conception of community consensus about both impermissible harm and permissible punishment. Yet many theorists spend little to no time quantifying what they mean by "community" or "society."[91] What amount of agreement must there be in order to realize these expressive and cohesive goals? Are there ways to structure the criminal justice system to maximize the possibility that criminal punishment *actually*—not just *theoretically*—represents the voice of the community?

My goal in this Section is not to present my own theory of criminal punishment, but rather to show that community intuitions about justice and morality frequently arise as a foundation of the theoretical discussion of punishment. From there, I argue that if we take as a starting point that community consensus matters in justifying punishment, then we ought to structure our criminal justice institutions with intentionality so as to try to capture that consensus. I conclude that supermajoritarian decisionmaking rules would mesh well with expressive theories of punishment and would enhance the responsiveness and utility of the criminal law, particularly in a pluralistic society in

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89 *Id.*

90 *E.g.*, Hart, *supra* note 3, at 404–05; Slobogin, *supra* note 4, at 323.

91 One exception is Robert Weisberg, who honed in on the worrisome amorphousness of the term. Robert Weisberg, *Restorative Justice and the Danger of "Community,"* 2003 UTAH L. REV. 343, 343.

which it is difficult for the community to speak with a unified voice or to share a unified understanding of criminal justice.

The definition of criminal punishment is slippery, especially in the modern age when we have an expansive regulatory state and significant blurring of the lines between civil and criminal law.[92] A common definition in the face of this uncertainty is that criminal punishment is defined as the expression of the collective denunciation of the community at large.[93] This expressive definition has been advanced by legal philosophers ranging from Emile Durkheim[94] and James Fitzjames Stephen[95] in the nineteenth century to modern theorists such as Joel Feinberg[96] and Dan Kahan.[97]

Whether the descriptive attribute of community condemnation *justifies* criminal punishment is a stickier question. Durkheim's answer appears to be yes: to Durkheim, the function and value of criminal punishment is to restore and reinforce society's solidarity.[98] Others, such as H.L.A. Hart, have critiqued the justification of punishment as

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92 In recent years, the Supreme Court has been faced with a number of cases in which it had to decide whether intrusive "civil" consequences were in fact "criminal." *See, e.g.*, Smith v. Doe, 538 U.S. 84, 96 (2003) (concluding that requirements under the Alaska Sex Offender Registration Act were civil rather than criminal); Kansas v. Hendricks, 521 U.S. 346, 361 (1997) (holding that involuntary confinement under the Kansas Sexually Violent Predator Act was civil rather than criminal); Allen v. Illinois, 478 U.S. 364, 365 (1986) (concluding that "proceedings under the Illinois Sexually Dangerous Persons Act" were civil rather than criminal).

93 Although there is no consensus that expressive theories justify punishment, there is a widely shared perception that expressive theories describe aspects of punishment. That is, to understand why and how we punish, we can consider punishment to be a community's act of responsive violence, expressing a message to a variety of audiences. There is also a somewhat less widely shared concern that expressive theories relate to some pathological tendencies of criminal law. John Steele, *A Seal Pressed in the Hot Wax of Vengeance: A Girardian Understanding of Expressive Punishment*, 16 J.L. & RELIG. 35, 40 (2001).

94 *See* DURKHEIM, *supra* note 4, at 80 ("[A]n act is criminal when it offends strong and defined states of the collective conscience."); *see also id.* at 73 ("[T]he only common characteristic of all crimes is that they consist—except some apparent exceptions with which we shall deal later—in acts universally disapproved of by members of each society. . . . [T]he reality of the fact that we have just established is not contestable; that is, that crime shocks sentiments which, for a given social system, are found in all healthy consciences.").

95 *See* 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81 (London, MacMillan & Co. 1883) (Criminal "law gives definite expression and a solemn ratification . . . to the hatred which is excited by the commission of the offence . . . .").

96 *See* Joel Feinberg, *The Expressive Function of Punishment*, 49 THE MONIST 397 (1965), *reprinted in* JOEL FEINBERG, DOING AND DESERVING 95 (Princeton Univ. Press 1970).

97 *See* Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 594–95 (1996).

98 *See* DURKHEIM, *supra* note 4, at 103 ("[S]ince it is the common conscience which is attacked, it must be that which resists, and accordingly the resistance must be collective. . . . The very great intensity and the very definite nature of the sentiments which punishment properly so called avenges, clearly accounts for this more perfect unification.").

an expression of societal morals. To Hart, the harm principle, rather than community's moral intuitions, should be paramount in justifying punishment.[99] And certainly, critics of the justificatory expressive theory abound; many moral philosophers, in particular, prefer to focus on moral reasoning rather than communitarian preferences.[100] Yet other modern scholars have gravitated toward the community's expression of a cohesive moral vision as a justifying force for punishment. Jean Hampton has understood and justified punishment as the community's expression of the victim's moral worth, supplanting the devaluation inflicted by the criminal.[101] In a compelling recent article, Joshua Kleinfeld put forth a theory of criminal punishment that he calls "reconstructivism," which at its core,

> sees criminal law as the defender of a shared moral culture that is important in substantial part because it is shared, rather than solely because it is right (though many within the tradition would stress that it is more likely to be right, and certainly more likely to be functional, in virtue of winning a community's assent over time).[102]

Kleinfeld identifies the "pathology" of contemporary mass incarceration as its *alienating* force: its destruction of the solidarity that forms the heart of the criminal law's function.[103]

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99 Kahan, *supra* note 97, at 596 (citing H.L.A. HART, LAW, LIBERTY, AND MORALITY 65–66 (1963)) ("In his famous rejoinder to Lord Devlin, who had used the expressive theory to criticize proposals to decriminalize homosexuality, H.L.A. Hart assailed this justification for punishment as 'belong[ing] to the prehistory of morality.' 'The idea that we may punish offenders against a moral code, not to prevent harm or suffering or even the repetition of the offence but simply as a means of venting or emphatically expressing moral condemnation, is uncomfortably close to human sacrifice as an expression of religious worship.'" (footnotes omitted)).

100 *See, e.g.*, Zachary R. Calo, *Empirical Desert and the Moral Economy of Punishment*, 42 ARIZ. ST. L.J. 1123, 1124 (2011) (quoting Paul H. Robinson, *The Role of Moral Philosophers in the Competition Between Deontological and Empirical Desert*, 48 WM. & MARY L. REV. 1831, 1834 (2007)) ("Deontological desert is distinguished from other forms of desert in that 'it can provide a foundation for desert that transcends any particular case, community, or culture.'"); Mary Sigler, *The Methodology of Desert*, 42 ARIZ. ST. L.J. 1173, 1174 (2011) (defending moral philosophy rather than community sentiment as the justifiable basis for substantive criminal law).

101 Jean Hampton, *An Expressive Theory of Retribution*, *in* RETRIBUTIVISM AND ITS CRITICS 1 (Wesley Cragg ed., 1992).

102 Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1492–93 (2016).

103 *Id.* at 1494–95 ("By making black Americans feel that the most visible and oppressive part of the legal system does not belong to them, mass incarceration's sociological product is *alienation*. The alienation begins between black Americans and the criminal system but then fans out beyond the criminal system into the relationship between black Americans and the state and society as a whole—inflaming the country's racial tensions and creating problems of democratic governance with far-reaching and unpredictable political effects. . . . The country just can't func-

Thus, community condemnation, at least to some theorists, both defines and justifies criminal punishment. Community condemnation has also been understood as a mechanism to achieve the end goals of punishment. Durkheim and Kleinfeld identify social coherence as an end in and of itself, separate and apart from any retributive or utilitarian goal.[104] Other scholars, however, do not understand the expressive theory as fully distinct from the more traditional theories of retributivism and utilitarianism, but rather a gloss upon them.[105] Retributivists, broadly speaking, see punishment as the just deserts for crime, and consider punishment to be permissible and even morally obligated on the sole basis that the crime has been committed.[106] Utilitarians, also called consequentialists, consider punishment justified only insofar as punishment—a harm—serves some greater societal good such as deterrence or incapacitation.[107]

Recently, Paul Robinson and others have done important work linking the retributive and utilitarian theories of punishment by demonstrating the connection between the community's retributive intuitions and the efficacy of the criminal justice system. Robinson has argued that, when punishments deviate from "empirical desert," as measured by the "community's shared intuitions of justice," the criminal justice system's deterrence function suffers.[108] Compliance with and respect for the law are dependent upon whether the "community" perceives the criminal law to have moral credibility and legitimacy.[109] Although the idea that the criminal law should track community mo-

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tion well with this level of alienation, and if this diagnosis is right—if alienation is at the core of America's crime/race problem—then solidarity is the right medicine."); *id.* at 1496 ("Citizens in a democracy should generally not be alienated from their law because part of what it means to live in a democracy is to have a nonalienated relationship to the law. But they should especially not be alienated from their criminal law. Criminal law fails its solidaristic social function, becomes oppressive and undemocratic, and destabilizes politics when the members of a community feel it does not belong to them.").

104 DURKHEIM, *supra* note 4, at 102–03; Kleinfeld, *supra* note 102, at 1496.

105 Kahan, *supra* note 97, at 595–96 (citing, and ultimately disagreeing with, scholarship claiming that expressivism "dissolves into conventional retributive and deterrence theories and thus need not be independently taken into account").

106 *Id.* at 602.

107 Kleinfeld, *supra* note 102, at 1491–92.

108 Robinson, *The Disutility of Injustice*, *supra* note 13, at 2017, 2025–26; Robinson, *The Ongoing Revolution*, *supra* note 13, at 1107; Bowers & Robinson, *supra* note 13, at 218–19; Janice Nadler, *Flouting the Law*, 83 TEX. L. REV. 1399, 1410–26 (2005).

109 Josh Bowers and Paul Robinson identify "legitimacy" as perceived procedural fairness and "moral credibility" as perceived substantive justice—both of which have been shown to contribute to overall compliance with and respect for law. Bowers & Robinson, *supra* note 13, at 211–12.

rality is not new[110] nor without its critics,[111] Robinson's work has provided fresh insights into how society's perceptions of both procedural and substantive justice affect its citizens' willingness to voluntarily comply with the law.[112] Interestingly, Robinson and others have presented empirical research indicating that there actually is wide consensus about appropriate punishment in particularized factual scenarios;[113] this consensus simply—and unfortunately—does not track a number of key punishment practices we have in place.[114]

Community or societal perceptions of morality have thus been invoked by scholars from multiple different perspectives who are trying to understand what criminal law is, why punishment is justified, and how punishment can be effective. Criminal law theory is filled with references to "the community" or "society," and a number of prominent theorists operate from a baseline assumption that "the community" supports the punishment of the defendant. All of this discussion begs the question: whom are we talking about when we talk about "the community"?

Some commentators point to the democratic state and its democratically enacted laws as the legitimate embodiment of "the community":

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110 Alice Ristroph, *Third Wave Legal Moralism*, 42 ARIZ. ST. L.J. 1151, 1152–53 (2010).

111 Slobogin, *supra* note 4, at 324 ("[T]he community . . . is generally uninformed—both in the sense that it has not thought deeply about the relevant issues, and in the sense that it does not know the legal context in which a given legal provision operates. Therefore, . . . even knowledge that the community resoundingly disfavors a particular legal formulation should usually be irrelevant to deserts analysis; while such knowledge might trigger reconsideration of a given rule, it should not carry any weight in deciding whether that rule is morally defensible.").

112 Others have made similar points. *See, e.g.*, Tyler & Darley, *supra* note 1, at 708. In previous work, I have also pointed analogously to the mass lawbreaking seen throughout the war on drugs as an indication of how community dissensus on punishment threatens legitimacy of and compliance with the criminal law. Aliza Plener Cover, *On Law-Breaking and Law's Legitimacy*, 15 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 310, 312 (2015). Others, however, have challenged Robinson regarding the extent to which normative disagreement with the law breeds noncompliance. *See, e.g.*, Slobogin, *supra* note 4, at 323–27.

113 Paul H. Robinson & Robert Kurzban, *Concordance and Conflict in Intuitions of Justice*, 91 MINN. L. REV. 1829, 1867 (2007) ("[W]e found that, despite the dramatically greater difficulty of this task over those of previous studies, the levels of agreement in rank ordering were astonishingly high. In other words, we failed to find the limits of shared intuitions of justice for core wrongdoing."); *see also* BIBAS, *supra* note 53, at 119 ("Thus, the basic principles of criminal blame and responsibility are hardly arbitrary theories that risk provoking unbounded strife. On the contrary, though there remain pockets of disagreement, there is enormous consensus on a wide range of core cases.").

114 Robinson, *The Disutility of Injustice*, *supra* note 13, at 1974 (reporting results of study of layperson perceptions of just punishment and noting extreme divergences between actual sentencing law and community views of justice in specific crime-control areas: "drug offense penalties, three-strikes (habitual offender) doctrines, strict liability offenses, and felony murder").

> As Hegel appreciated, the modern state is the citizenry's moral representative; in the face of pluralism and religious controversy, it is the only institutional voice of the community's shared moral values. Serious crimes represent serious attacks on those moral views, and in particular, on the conception of worth animating those views, and thus the state is the only institution that can speak and act on behalf of the community against the diminishment accomplished by the crime.[115]

I agree that the state—rather than, for example, a vigilante mob—is the only legitimate institution to express "the community."[116] Yet the common reference to "the state" does not fully answer the question, as state action may be more or less reflective of community sentiment when it is constrained by different decisionmaking rules. Our own constitutional system, as discussed above, endorses different decisionmaking structures, some majoritarian, some supermajoritarian, some countermajoritarian, in different contexts, and these structures work together to create a democratic order. Although a bare majority rule may have legitimacy according to majoritarian democratic theories of governance, agreement about punishment practices between 51% of the community's members against the background of deep contestation does not solve the practical problems that Robinson identifies,[117] nor achieve the social solidarity that Durkheim and Kleinfeld seek.[118] It would be hard to imagine that Robinson's "community's intuitions of justice" are the viewpoints of 51% of the population.[119] A criminal law system that is consistent with the moral intuitions of a bare majority of the population would suffer from significant and sustained problems of legitimacy and moral credibility and, hence, would risk high levels of disrespect and noncompliance. Decisionmaking rules that allow for the imposition of punishment with the support of the bare majority and against the vehement opposition of a large minority would seem to invite just this type of disrespect for law.

When the social harm of criminalized conduct is contested—when the community disagrees about the propriety of the illegal conduct or the amount of punishment that is warranted—then punishment may actually serve to further fracture, rather than heal, the

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115 Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1694 (1992).

116 *Id.*

117 *See* Robinson, *The Ongoing Revolution*, *supra* note 13, at 1090.

118 *See* DURKHEIM, *supra* note 4, at 100–10; Kleinfeld, *supra* note 102, at 1500.

119 *See* Robinson, *The Ongoing Revolution*, *supra* note 13, at 1106–07.

community.[120] In these circumstances, criminal punishment represents not the expressive condemnation by the unified community of a social and moral transgressor, but rather the expressive condemnation by the government of a purely legal transgressor whose conduct is normatively contested. Kleinfeld describes a similar effect and labels it the destructive force of alienation.[121] Recent excesses of the criminal justice system including the war on drugs, mass incarceration, and disparate treatment of African Americans in these and other criminal justice phenomena are paradigmatic examples.[122]

I thus posit that supermajoritarian decisionmaking rules in the criminal justice context are best situated to achieve the positive expressive aims of criminal punishment and to do so in a way that enhances the solidarity of society,[123] as well as the legitimacy, moral credibility, and voluntary compliance with the criminal law.[124]

In making this argument, I am asserting that supermajority support for criminal law policy is a *necessary but not sufficient* condition for the imposition of criminal punishment. I am thus making a different point than that asserted by Lord Devlin in his famous debate with H.L.A. Hart, which was that the criminal law could legitimately punish behavior condemned as "immoral"—specifically homosexuality.[125] Devlin's answer condoning the punishment of immorality has garnered significant, though not universal, criticism.[126] I, however, am making a converse point: the law should not be able to punish behavior that the supermajority *does not* condemn. And when the law *does* choose to punish, that punishment may not be *harsher* than the vast majority of the community is willing to accept.

From this orientation, the will of the people—as expressed by decisions made through supermajoritarian processes—is best understood as an animating justification for, as well as a check upon, coercive punishment. The check of supermajoritarian community sup-

120 *Cf.* DURKHEIM, *supra* note 4, at 100–10 (describing criminal law's function as furthering social solidarity).

121 *See* Kleinfeld, *supra* note 102, at 1494–95.

122 *See e.g.*, *id.*

123 *See* DURKHEIM, *supra* note 4, at 102–03; Kleinfeld, *supra* note 102, at 1496.

124 *See* Bowers & Robinson, *supra* note 13, at 211–12, 218–19; Nadler, *supra* note 108, at 1410–26; Robinson, *The Disutility of Injustice*, *supra* note 13, at 2017, 2025–26; Robinson, *The Ongoing Revolution*, *supra* note 13, at 1107.

125 PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 14 (1965) ("There are no theoretical limits to the power of the State to legislate against treason and sedition, and likewise I think there can be no theoretical limits to legislation against immorality.").

126 Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 132–33 (1999).

port—as expressed constitutionally through the institution of the jury—exists alongside other moral and constitutional ideals which likewise place limits on the community's ability to realize its desired policy outcomes. Most significantly, equal protection, due process, and the prohibition on "cruel and unusual punishments" mean that the community is constrained in its criminal lawmaking.

To make this idea concrete, we can consider the punishment of same-sex intimacy. Under the supermajoritarian principle, if society evolves such that punishment of same-sex intimacy is no longer endorsed by a supermajority of society, then it would be morally indefensible to punish that behavior. The unanimous jury might well have been a protection against such punishment in the past. On the other hand, even if a supermajority of society believes that the punishment of same-sex intimacy is *permissible*, other moral limitations on punishment—constitutionalized through due process and equal protection—would prohibit the community from realizing its goal.

II. Our Quasi-Majoritarian Criminal Justice System

Ensuring supermajoritarian support for criminal punishment is thus important, both from a constitutional perspective and from a theoretical one. In this Section, I survey the mechanisms of our criminal justice system that translate community will into punishment policy. Because of democracy defects in civic and political participation, it would be inaccurate to say that early American criminal law was truly supermajoritarian in practice. But, if we account for that era's cramped understanding of citizenship, we see that substantive criminal law, the procedural adjudication of guilt, and the imposition of punishment all bore certain significant supermajoritarian features. Today, although our conception of citizenship has broadened and become more inclusive, the decisionmaking at each of these junctures is generally majoritarian, at best. In short, the supermajoritarian protections of the criminal justice system have failed to keep up with our expanding conception of citizenship.[127] At the same time, the Supreme Court's evolving constitutional criminal law and procedure jurisprudence—including in the Eighth Amendment arena—has done little to check the policy choices of majoritarian institutions and ensure that criminal punishment remains consistent with broad community values.

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127 For a similar point, see Alschuler & Deiss, *supra* note 23, at 868 ("[A]s the jury's composition became more democratic, its role in American civic life declined.").

A. Quasi-Supermajoritarian Origin Story

In the colonial and founding eras, not only the criminal justice system but the political system as a whole had a highly restrictive and discriminatory understanding of civic participation. As a result, in a fundamental way, the criminal justice system at and near the time of the founding functioned as a minoritarian one, with "community" participation restricted to white, wealthy men.

At the time of the ratification of the Constitution, "[e]very state limited jury service to men; every state except Vermont restricted jury service to property owners or taxpayers; three states permitted only whites to serve; and one state, Maryland, disqualified atheists."[128] In many instances, these excluded groups were barred from jury service well after they were given the right to vote.[129] Indeed, some states denied women the right to serve on juries even after the ratification of the Nineteenth Amendment in 1920.[130] And while, at the founding, only a minority of states explicitly prohibited African Americans from jury service, as a practical matter they were excluded—and not only in slave states.[131] Indeed, at the time of the Civil War, "Massachusetts was the only state that allowed African American men to serve as jurors."[132]

Substantive criminal law was also discriminatory in ways that tracked the exclusion of women and minority groups from jury service. Capital punishment laws, for example, were racialized and "formally unequal" in southern states, with vastly more capital offenses for slaves and free blacks than for whites.[133] Black victims, on the other hand, were devalued: rape of enslaved and later freed black women was not even a crime.[134]

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128 *Id.* at 877.

129 *Id.* at 878.

130 *See* Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 1020–22 (2002).

131 *See* Alschuler & Deiss, *supra* note 23, at 884–85 ("So far as we are aware . . . the first African-Americans ever to serve on a jury in America were two who sat in Worcester, Massachusetts, in 1860. Their service was described as 'the first of such instances' in the state's history, and it was sufficiently unusual to provoke comment elsewhere." (footnote omitted)).

132 Taylor-Thompson, *supra* note 76, at 1279–80.

133 Stuart Banner, *Traces of Slavery: Race and the Death Penalty in Historical Perspective*, *in* FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 99 (Charles J. Ogletree, Jr. & Austin Sarat, eds., 2006).

134 Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 599 (1990) ("Moreover, as a legal matter, the experience of rape did not even exist for black women. During slavery, the rape of a black woman by any man, white or black, was simply not a crime. Even after the Civil War, rape laws were seldom used to protect black women against either white or black men, since black women were considered promiscuous by nature. In con-

The civic "community"—though inclusive for its day and age[135]—was thus narrowly defined. Yet within the confines of that narrow conception, criminal law—from crime definition to the imposition of punishment—enjoyed several features that served to track and implement the will of those deemed eligible for civic participation. These supermajoritarian dimensions were a result not only of constitutionalized guarantees, but also of certain organic features of the criminal justice system that developed over time.

The first and most obvious of these supermajoritarian protections was that the criminal law could not be implemented without the unanimous consent of juries drawn from the community. As discussed in depth above,[136] the institution of the jury played a central role in colonial American criminal justice and in the new constitutional order. The jury trial right was secured not only in the federal Constitution, but also in every state constitution,[137] and in practice the jury played a robust role in ensuring that criminal punishment corresponded with community sentiment.[138] Juries were not shy to nullify when they deemed punishment unwarranted or overly harsh.[139]

After a jury convicted, punishment was transparently and publicly imposed.[140] The community viscerally understood the consequences of punishment.[141] A criminal sentence was not an abstract number of years in prison, under conditions not fully seen or understood.[142] It was a punishment—often a violent one—imposed in the open and in front of the entire community.[143] The transparency of

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trast to the partial or at least formal protection white women had against sexual brutalization, black women frequently had no legal protection whatsoever. 'Rape,' in this sense, was something that only happened to white women; what happened to black women was simply life." (footnotes omitted)).

135 *See* Alschuler & Deiss, *supra* note 23, at 877–78.

136 *See supra* Section I.A.

137 *See supra* note 54.

138 *See* Barkow, *supra* note 63, at 51–53.

139 *See supra* note 63.

140 BANNER, *supra* note 63, at 24, 31–32 ("Until the nineteenth century, hangings were conducted outdoors, often before thousands of spectators, as part of a larger ritual including a procession to the gallows, a sermon, and a speech by the condemned prisoner. Hangings were not macabre spectacles staged for a bloodthirsty crowd. A hanging was normally a somber event, like a church service. Hanging day was a dramatic portrayal, in which everyone could participate, of the community's desire to suppress wrongdoing. It was a powerful symbolic statement of the gravity of crime and its consequences. The person hanged had been condemned in court weeks earlier, but hanging day was a second, more collective condemnation—of the individual and of crime in general. We have no comparable ritual today.").

141 *See id.* at 26.

142 *See id.* at 23.

143 *Id.* at 24.

punishment meant that jurors understood the practical significance of their verdict, and that they could take the severity of punishment into account when choosing whether to convict.[144] Thus, although jurors had no formal role in the sentencing procedure, juries were intimately involved in proportionality review of criminal punishment, and their decision to convict signified community approval of the mandated sanction.[145] It also meant that the community as a whole was symbolically involved in the punishment, even as observers.

Moreover, there is reason to think that even the substantive law itself tracked community intuitions of right and wrong more closely than it does today. As the common law developed in England and in early American criminal systems, only a limited number of felonies existed,[146] and these felonies were largely *mala in se*—wrong in themselves.[147] Though I imagine it would be nearly impossible to prove this with certainty, it is reasonable to believe that much conduct labeled "criminal" was thus broadly condemned as wrongful by the community,[148] despite the fact that criminal offenses derived from common law principles rather than the statutory enactments of democratic legislatures.[149] Indeed, the supermajoritarian consensus may have been due, in part, to the fact that the criminal law was the product of centu-

144 Judge Nancy Gertner, *Juries and Originalism: Giving "Intelligible Content" to the Right to a Jury Trial*, 71 OHIO ST. L.J. 935, 937 (2010) ("Colonial juries were fully aware of the implications of their verdicts. Since most serious offenses were capital crimes, the jury's determination of guilt had specific and well-known consequences. . . . Knowing what they did about punishments enabled them to fulfill their constitutional responsibility." (footnotes omitted)); *see* Kemmitt, *supra* note 61, at 126 ("Common law juries 'authorized' sentences in a very tangible way. Since the criminal code was substantially simpler, juries understood the connection between conviction and punishment and withheld conviction when they disagreed with the resulting punishment. In so doing, jury verdicts authorized the sentences defendants would receive.").

145 Barkow, *supra* note 63, at 69 ("The unreviewable verdict of acquittal allows the jury to continue to check the government based on community sentiment. And, it is a power that enables the jury, in effect, to 'create[] [its] own sentencing discretion' based on its sense of justice." (footnotes omitted)); Kemmitt, *supra* note 61 (making the case for the historical jury as a sentencing or quasi-sentencing body).

146 *See* Guyora Binder, *The Origins of American Felony Murder Rules*, 57 STAN. L. REV. 59, 64–65 (2004).

147 BIBAS, *supra* note 53, at 2 ("For the most part, law was not some newfangled imposition by distant bureaucrats. It reflected the communal moral consensus, the common-law sense of what had always been God's law and man's. Most crimes were not recent creations of the legislature, but the basic *mala in se*, the acts that everyone knew were wrong and forbidden.").

148 Bibas, *supra* note 16, at 1680–81 ("Lay involvement and control were crucial to colonial criminal justice's efficacy. Crimes were defined by the common law, not a technical penal code, and were *mala in se*. They accorded with widely shared intuitions about justice and punishment, giving potential violators ample notice."); *id.* at 1683 ("[T]he colonists had something we lack today: a participatory, democratic justice system, attuned to local needs and moral intuitions.").

149 BIBAS, *supra* note 53, at 2.

ries of common law development.[150] This is not to say that all people in the community agreed with the severity or nature of *punishment* imposed for particular crimes. As discussed above, community disagreement with the severity of punishment for many common law crimes led to jury nullification[151] and eventually to criminal justice reforms such as the division of murder into degrees.[152] Despite disputes over punishment, however, the wrongfulness of most criminally prohibited conduct was likely relatively uncontroversial.[153]

The early American system was thus marked by a mixture of exclusion and inclusion. The civic community was defined narrowly, but criminal law outcomes were tied to the supermajoritarian consent of this group. From this ambivalent history, one can decipher a promise of true supermajoritarianism: if the understanding of citizenship could be expanded, a genuinely supermajoritarian criminal justice system could arise.

B. The Shift to Quasi-Majoritarianism

Today, our understanding of the civic community *has* expanded and, at least formally, embraces women, minorities, and the poor. Yet the promise of a supermajoritarian criminal justice system has not been realized. Significant changes in criminal justice politics and practice have fundamentally altered the supermajoritarian dynamics visible in the early American system. Today, criminal lawmaking, adjudication of guilt, and imposition of punishment all have a distinctly majoritarian or even quasi-majoritarian orientation.

Modern criminal offenses are the product of majoritarian legislative processes rather than common law development.[154] Of course, crimes rooted in the common law still abound, but criminal offenses today are enumerated as statutes in criminal codes.[155] This shift away from common law crimes serves important democratic goals and principles of justice that support, if not demand, the existence of statuto-

150 *See* Bibas, *supra* note 16, at 1682.

151 *See, e.g.*, BANNER, *supra* note 63, at 90–91; Barkow, *supra* note 63, at 51–59 (describing a robust history of jury nullification in the eighteenth century).

152 MODEL PENAL CODE § 210.2 cmt. (AM. LAW INST. 1980); Lauren M. Ouziel, *Beyond Law and Fact: Jury Evaluation of Law Enforcement*, 92 NOTRE DAME L. REV. 691, 713–14 (2016).

153 Bibas, *supra* note 16, at 1680–81.

154 Neil Colman McCabe, *State Constitutions and Substantive Criminal Law*, 71 TEMP. L. REV. 521, 523 (1998).

155 *Id.*

rily enacted criminal codes.[156] But the "democratic" ideal here is majoritarian, not supermajoritarian. Ironically, the codification of the criminal law has had at least two effects that work *against* community consensus on criminal punishment.

The first effect is that criminal law codification has led to an explosion of criminal laws, including a significant increase in regulatory criminal offenses and, consequently, increasingly blurred lines between criminal and civil law. Today, we punish an extraordinarily vast array of crimes—so vast that it cannot be said that most citizens are even aware of the crimes that exist, let alone agree with all of them.[157] The criminal law has expanded both in its breadth and depth. We punish more conduct than we used to, and we punish specific types of conduct in more ways, so that a single wrongful act may carry multiple types of criminal liability.[158] Moreover, while a bedrock principle of the common law was the idea that some kind of culpable *mens rea* would be necessary for criminal responsibility,[159] we have seen a significant expansion of strict liability crimes,[160] as well as an expansion of *malum prohibitum* rather than *malum in se* crimes.[161] It is often hard to decipher why "crimes" are punished criminally rather than civilly, or even which category they belong in.[162] The expansion of criminal law, and in particular the expansion of criminal law into the

156 George P. Fletcher, *Political Theory and Criminal Law*, 25 CRIM. JUST. ETHICS 18, 23 (2006) (describing liberal commitment to "legislation as the proper means of defining the criminal law"); Sanford H. Kadish, *Codifiers of the Criminal Law: Wechsler's Predecessors*, 78 COLUM. L. REV. 1098, 1131–32 (1978) ("Codification . . . represented an attack on the power of lawyers and judges to make and declare law without democratic participation. It offered a plainly articulated body of laws accessible to and understandable by all in place of the oracular, mysterious incantation of doctrinal technicalities by lawyers and judges. And it placed the power over the law squarely in the hands of the people's elected representatives in the legislature.").

157 *See* Douglas Husak, *Crimes Outside the Core*, 39 TULSA L. REV. 755, 768 (2004) ("The single most visible development in the substantive criminal law is that the sheer number of criminal offenses has grown exponentially.").

158 William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512–19 (2001) (detailing the breadth and depth of today's state and federal criminal laws).

159 *See, e.g.*, Morissette v. United States, 342 U.S. 246, 250 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").

160 W. Robert Thomas, Note, *On Strict Liability Crimes: Preserving a Moral Framework for Criminal Intent in an Intent-Free World*, 110 MICH. L. REV. 647, 659 (2012).

161 *See* Ouziel, *supra* note 152, at 715 ("By the early twentieth century, the criminal law had expanded its function beyond societal condemnation, to the regulation of economic and social activity.").

162 *See supra* note 92.

regulatory arena, may create a schism between the community's moral consensus and the code book.

The second consensus-diminishing effect of criminal law codification is that criminal law now exists squarely in the political arena. This shift may have democratic benefits, but it also infuses an explicitly majoritarian, rather than supermajoritarian, ethos into criminal lawmaking. Criminal statutes become law not if "the community" over time agrees that these statutes represent its values, but rather if 51% of legislators do.[163] Modern criminalization occurs even in the face of contested party politics. Although a number of criminal justice policies that are controversial today were passed with broad bipartisan support,[164] partisan criminal justice policy is no small concern. Society has become increasingly polarized, with sharp disagreement between different factions about fundamental policies and moral priorities, including in the criminal arena.[165] Moreover, statutory criminal law leaves room for the defects of the modern electoral system to infect the criminal law system as well. Growing empirical evidence reported in legal and political science scholarship suggests that the supposedly majoritarian political branches do not even live up to the label "majoritarian."[166] Electoral processes that suppress the realization of the majority's preferences include voter suppression, partisan gerrymandering, outsized power of special interest groups and big money in politics, and gaps in legislators' understanding of public sentiment. These dynamics are especially true in the criminal context, where political pressure to be "tough on crime" may outpace considered community sentiment.[167]

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163 There are some supermajoritarian dynamics in legislative processes even today. A filibuster in the U.S. Senate can only be overcome by a three-fifths vote to bring debate to a close. S. COMM. ON RULES & ADMIN., STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, at 15–16 (2013). About 10 states have supermajority cloture rules. Paige Scobee, *Ahoy! The Future of the Filibuster*, NAT'L CONF. OF ST. LEGISLATURES BLOG (June 29, 2016), http://www.ncsl.org/blog/2016/06/29/ahoy-the-future-of-the-filibuster.aspx [https://perma.cc/7G3F-LFRC] (citing MEGHAN REILLY, OFF. OF LEGIS. RES., STATES LIMITING LEGISLATIVE DEBATE (2009)). Moreover, as McGinnis and Rappaport argue, bicameralism and the presidential veto create a de facto supermajoritarianism, as well. McGinnis & Rappaport, *supra* note 33, at 712–16.

164 For example, the Antiterrorism and Effective Death Penalty Act ("AEDPA") passed 91–8 in the Senate and 293–133 in the House. S. 735, H.R. 104-518, 104th Cong. (1996). The Comprehensive Crime Control Act of 1984 passed the Senate by a vote of 91–1. S. 1762, 98th Cong. (1984).

165 *See supra* notes 9–10.

166 Lain, *supra* note 10, at 115–16, 146–57; *see also* Graber, *supra* note 10, at 362–63 (reviewing political science literature focusing on "countermajoritarian difficulties" within the political branches).

167 Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress*

Though the "countermajoritarian difficulty" in the electoral institutions is problematic across multiple policy dimensions, the threat of minoritarian or even bare majoritarian rule is particularly pernicious in the context of criminal law. This is so because, as described above, a core conceptual justification for the idea of criminal punishment—the intentional imposition of pain and deprivation of liberty upon citizens—rests upon the collective will of the community. More practically, criminal punishment represents the zenith of law's coercive power, and the democratic bona fides of criminal laws are thus particularly important.[168]

On the ground, perhaps as a result of some of these difficulties in translating majority sentiment into enacted law, scholars have identified disconnects between actual community sentiment and existing punishment policies.[169] None of this is to deny that some—perhaps even most—criminal laws enjoy widespread community support. But the mere existence of a criminal offense in the code books does not guarantee that it is in fact condemned by a majority—let alone a supermajority—of the jurisdiction's citizens.

Criminal statutes have thus multiplied at the will of majoritarian legislatures. At the same time, the most significant supermajoritarian check on the imposition of punishment, the institution of the jury, has

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Tags to Overfederalization, 54 Am. U. L. Rev. 747, 773–74 (2005) (describing psychological and political dynamics which lead to "a one way ratchet toward the enactment of additional crimes and harsher penalties"); *see also* Barkow, *supra* note 63, at 62 (discussing the contrast between abstract public opinion and more considered, and less harsh, punishment preferences when faced with individual cases).

168 *See* Myers, *supra* note 7, at 1334 ("Criminal law ought to be different from ordinary law because it punishes, often very severely, based on what should be broadly held moral commitments. Given the stakes, the politics of criminal law should be better, not worse, than ordinary politics." (footnote omitted)).

169 *See* Murray, *supra* note 10, at 5 (reporting results of experimental national survey, finding that "[o]ver 60% oppose the inflexible imposition of a mandatory minimum sentence and would give the individual sentencing judge the freedom to depart below it. This position holds across conditions involving the race, prior criminal history and mitigating personal factors of the offender."); *see also id.* at 5 & n.19 (citing "[r]ecent surveys and referenda indicat[ing] that public opinion is becoming even more opposed to lengthy custodial sentences, particularly for nonviolent offenders"); Robinson, *The Disutility of Injustice*, *supra* note 13, at 2025 (concluding, based upon empirical research, that "[t]he current crime-control doctrines seriously conflict with people's intuitions of justice by exaggerating the punishment deserved"); Robinson, *The Ongoing Revolution*, *supra* note 13, at 1107 ("One may well ask how well current American criminal law matches the community's intuitions of justice. The short answer is: not well. Modern crime-control programs, such as three strikes, high drug-offense penalties, adult prosecution of juveniles, narrowing the insanity defense, strict liability offenses, and the felony-murder rule, all distribute criminal liability and punishment in ways that seriously conflict with lay persons' intuitions of justice.").

atrophied. The American jury trial is a vanishing phenomenon. Roughly 94% of state criminal convictions are the product of a guilty plea rather than a jury trial,[170] thus diminishing the community's voice in the criminal process overall. In today's system of pleas, the primary adjudication tends to be the sentencing hearing before the judge, rather than a public jury trial before the community.[171] In most states and under federal law, there is no right to a jury at sentencing other than in capital cases.[172]

The Supreme Court has on occasion grudgingly approved and at other times actively encouraged the practice of plea bargaining that has led to the demise of the jury trial.[173] At no time has the Court meaningfully limited the practice. Interestingly, over the course of the past two decades, the Court has revolutionized its sentencing jurisprudence by expanding the Sixth Amendment right to a jury determination of facts that were once considered "sentencing factors" for a judge to decide.[174] Yet this interest has not translated into an increased practical role for the jury. For instance, in *United States v. Booker*,[175] the Court struck down as unconstitutional the mandatory Federal Sentencing Guidelines, because the Guidelines required judges to increase punishment on the basis of judicial fact-finding beyond what would be permissible on the basis of the jury's verdict.[176] The remedy,

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170 *See supra* note 21.

171 *See* The Honorable Robert J. Conrad, Jr., & Katy L. Clements, *The Vanishing Criminal Jury Trial: From Trial Judges to Sentencing Judges*, 86 GEO. WASH. L. REV. 99, 102 (2018) ("Once viewed as 'trial judges,' federal district judges are increasingly seen as 'sentencing judges.'"); *id.* at 157 ("The absence of jury trials makes the judicial process more secretive and contravenes the 'presumption of openness [that] inheres in the very nature of a criminal trial under [the American] system of justice.' Trials provide a public forum for the airing of grievances, yet the death of trials marks the end of doing justice where disputes are played out under the attentive eye of judge and jury." (footnote omitted)).

172 *See* Hoffman, *supra* note 65, at 966 n.58 (identifying, as of 2003, five states that mandated noncapital jury sentencing—Arkansas, Missouri, Oklahoma, Texas, and Virginia).

173 *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty."); Brady v. United States, 397 U.S. 742, 751–53 (1970) (endorsing guilty pleas as constitutional and explaining the "mutuality of advantage" achieved by plea bargaining); *see also* Lafler v. Cooper, 566 U.S. 156, 186 (2012) (Scalia, J., dissenting) ("Today, . . . the Supreme Court of the United States elevates plea bargaining from a necessary evil to a constitutional entitlement. It is no longer a somewhat embarrassing adjunct to our criminal justice system; rather, as the Court announces in the companion case to this one, 'it *is* the criminal justice system.'").

174 *See, e.g.*, Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

175 543 U.S. 220 (2005).

176 *Id.* at 226–27 (Stevens, J., opinion for the Court in part) (announcing the Sixth Amendment violation).

however, was *not* a more robust role for the jury, but rather advisory guidelines and an increase in discretion for judges.[177]

Many have lamented the decline in the jury trial for a host of compelling reasons.[178] For present purposes, it is important to note that, without the jury trial, the primary structural supermajoritarian protection in the criminal justice system has disappeared as well. The key criminal justice decisionmakers are no longer unanimous or even supermajoritarian jurors but rather are elected, majoritarian prosecutors and, to a lesser extent, judges.[179]

Much recent scholarship has focused on the enormous power of prosecutors in a system dominated by plea bargaining.[180] Criminal justice outcomes are heavily dependent on the bargaining decisions of prosecutors, who have largely unbridled discretion to leverage their charging power to secure guilty pleas.[181] As Jocelyn Simonson has explained, traditional conceptions of criminal procedure, from the names of criminal cases to the Supreme Court's constitutional criminal procedure doctrine, take as a given that prosecutorial interests are aligned with those of "the people."[182] Yet the assumption that prosecutors represent the community as a whole is simply inaccurate.[183]

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177 *Id.* at 245 (announcing the constitutional remedy).

178 *See, e.g.*, Barkow, *supra* note 63, at 36–38 (expressing concern over the loss of the jury as "safety valve" against enforcement of "overinclusive or overrigid criminal laws"); Bibas, *supra* note 16, at 1678 (describing how "professionals have displaced this democratic morality play with a bureaucratic plea bargaining machine" that makes the justice system opaque and inaccessible to laypeople); Conrad & Clements, *supra* note 171, at 157–63 (describing how the decline of the jury trial has had harmful impacts in such areas as public accountability, the evolution of law, defendants' rights, and civic participation through jury service); Iontcheva, *supra* note 63, at 338–53 (detailing democratic harms caused by the loss of jury sentencing).

179 *See* John F. Pfaff, *Waylaid by a Metaphor: A Deeply Problematic Account of Prison Growth*, 111 MICH. L. REV. 1087, 1106 (2013) (asserting that "almost all the growth in prison populations [since 1994] has come from prosecutors' decisions to file felony charges"); Stuntz, *supra* note 158, at 537–38.

180 *See generally* JOHN F. PFAFF, LOCKED IN (2017) (examining the role of prosecutorial power in the rise of mass incarceration); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 961 (2009); Lissa Griffin & Ellen Yaroshefsky, *Ministers of Justice and Mass Incarceration*, 30 GEO. J. LEGAL ETHICS 301, 305 (2017); Jason Kreag, *Prosecutorial Analytics*, 94 WASH. U. L. REV. 771, 773 (2017); John F. Pfaff, *The Micro and Macro Causes of Prison Growth*, 28 GA. ST. U. L. REV. 1239, 1254 (2012); Pfaff, *supra* note 179, at 1106; Stuntz, *supra* note 158, at 533–39.

181 *See* Griffin & Yaroshefsky, *supra* note 180, at 311 ("[T]he availability of mandatory minimum sentences increased the leverage provided to the prosecutor in charging and in plea negotiations."); *see also* Alschuler & Deiss, *supra* note 23, at 927 ("Today prosecutors are the judges of law and fact.").

182 *See* Jocelyn Simonson, *The Place of "the People" in Criminal Procedure*, 119 COLUM. L. REV. (forthcoming 2019) (manuscript at 23–32) (on file with author).

183 *Id.* at 33–35.

Chief prosecutors are sometimes appointed, as in the federal system, but at the state and local level they are generally elected.[184] At best, the electoral system ensures majoritarian support for prosecutors. Yet the democracy deficits in legislative elections, discussed above, may be exacerbated in the election of local prosecutors,[185] and the communities most affected by prosecutorial practices tend to be those most marginalized from electoral politics.[186]

Moreover, plea bargaining has driven the operations of the criminal justice system outside the eye of the community at large.[187] The loss of the public jury trial entails a loss of transparency in reaching criminal justice outcomes.[188] Plea bargaining occurs outside the courtroom and agreements are reached without public understanding.[189] The community has been evicted not only from its decisionmaking role but also from its observational one.[190]

For better or worse,[191] we have sidestepped the constitutionally mandated procedures that structured criminal justice decisionmaking in a way that ensured supermajoritarian support. Some would surely argue—and the Supreme Court has held[192]—that this sidestepping is legitimate and constitutional. The Constitution *guarantees*—but does

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184 Miriam H. Baer, *Sorting out White-Collar Crime*, 97 TEX. L. REV. 225, 262 (2018); Ronald F. Wright, *Beyond Prosecutor Elections*, 67 SMU L. REV. 593, 598 (2014). Line prosecutors, by contrast, are unelected professionals, sometimes in their positions for the long term and sometimes transitory.

185 *See* Bibas, *supra* note 180, at 961; Kreag, *supra* note 180, at 776–77; David W. Rasmussen & Bruce L. Benson, *Rationalizing Drug Policy Under Federalism*, 30 FLA. ST. U. L. REV. 679, 720 (2003); Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 583 (2009); Wright, *supra* note 184, at 599–600.

186 Simonson, *supra* note 182 (manuscript at 5) ("[T]he unequal distribution of political power means that the decisions of 'the People' are often not responsive to the interests of the poor populations of color most likely to come into contact with the criminal process as arrestees, defendants, or victims."). Interestingly, however, in recent years there has been a number of noteworthy prosecutorial elections in which progressive candidates have won on promises to reduce, not increase, incarceration. David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647, 647–49 (2017).

187 Bibas, *supra* note 16, at 1678; Conrad & Clements, *supra* note 171, at 157–59.

188 *See* Conrad & Clements, *supra* note 171, at 157.

189 *See id.* at 157–58.

190 *See id.* at 158–59.

191 While many academics and judges bemoan the victory of plea bargaining over the jury trial, others see some benefits in the efficiency and managed risk of the plea bargaining system. For some defenses of plea bargaining, see Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1978 (1992); Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 636 (2005); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1968 (1992).

192 Brady v. United States, 397 U.S. 742, 751–53 (1970); *see also* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

not *require*—a jury trial.[193] Yet while each instance of plea bargaining may be constitutional, a net harm—or at least a seismic shift—has nonetheless occurred. There has been a reorientation of the constitutionally designed allocation of power and a serious diminution in the structural assurance of supermajoritarian support for punishment.

Even in the six percent or so of cases where the jury does play a role in deciding punishment,[194] the modern institution is a weakened version of its historical form. In the eighteenth and nineteenth centuries, the jury served as a substantive supermajoritarian check on punishment because it was entrusted with significant power to decide questions of fact and law.[195] The jury today is, in the words of Akhil Amar, a "shadow of its former self."[196] It may decide questions of fact, not of law.[197] In most cases, the jury is prohibited from learning the punishment consequences of its decisions, which prevents the jury from acting as the moral conscience of the community in imposing punishment.[198] Some judges have even been prevented from correcting jurors' misperceptions about the severity of punishment.[199] Nor are modern juries instructed on their power to nullify or to act in the interest of justice.[200]

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193 Another argument, which is that the jury is a structural feature of democracy rather than a waivable right, can be made by looking not at the Sixth Amendment, which guarantees the right to a jury trial, but instead at Article III, Section 2, Clause 3, which requires that "[t]he Trial of all Crimes, except in Cases of Impeachment, *shall be* by Jury." U.S. CONST. art. III, § 2, cl. 3 (emphasis added); *see* Amar, *supra* note 41, at 1183, 1196–97.

194 *See supra* note 170 and accompanying text.

195 *See supra* note 60.

196 Amar, *supra* note 41, at 1190.

197 Horning v. District of Columbia, 254 U.S. 135, 138 (1920); Sparf v. United States, 156 U.S. 51, 102 (1895); AMAR, *supra* note 22, at 238; Kemmitt, *supra* note 61, at 94–98 (lamenting the ahistorical reconceptualization of the jury as a fact-finding rather than law-finding or sentencing body).

198 *See* Shannon v. United States, 512 U.S. 573, 579 (1994) ("It is well established that when a jury has no sentencing function, it should be admonished to 'reach its verdict without regard to what sentence might be imposed.' . . . [P]roviding jurors sentencing information invites them to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion." (citation omitted)); *see also* Gertner, *supra* note 144, at 937 ("Modern juries, in contrast [to colonial juries], are not told by the court about mandatory punishments. They are admonished that punishment is exclusively for the judge. Not surprisingly, they are often shocked when, after their verdict, they learn of the severe sentences the law, particularly federal law, requires." (footnotes omitted)).

199 In *United States v. Pabon-Cruz*, the Second Circuit upheld a conviction in which Judge Gerald Lynch had been prevented by mandamus order of the Second Circuit from instructing the jury as to the sentencing consequences of a conviction for advertising child pornography. 391 F.3d 86, 90, 95 (2d Cir. 2004).

200 Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 257 (1996) ("Current practice—with few exceptions—is not to instruct juries that they may nullify."); *see*

The capital context may be one of the few areas in which the unanimous jury today has a meaningful role to play. As a result of nearly 50 years of Supreme Court precedent, sentencing juries are tasked with deciding not only guilt and innocence, but also whether life or death is the appropriate sentence.[201] Even in this area, however, we see a paradigmatic example of how the supermajoritarian jury has been substantially weakened.

Historically, jurors' belief that a punishment—especially the punishment of death—was categorically too harsh was the basis for leniency and a critical component of the supermajoritarian function of the jury.[202] In the modern age, however, through the process of "death qualification," prosecutors are entitled to strike for cause members of the jury venire who are "substantially impair[ed]" in their ability to consider imposing the penalty of death due to their conscientious objections.[203] Yet this conviction that the death penalty was "cruel and unusual" was precisely the kind of law finding authorized to juries in early America.[204] Some might argue that death qualification, like other *voir dire* practices that remove extreme or partisan venire members from the jury, is simply a mechanism to ensure that the outcome of jury trials is not held hostage by fringe viewpoints, but rather so it can track the viewpoint of the majority (or even the supermajority).[205] Yet there is evidence that death qualification can remove sizeable portions of the community. In a study I conducted of capital jury selection in Louisiana from 2009 to 2014, I found that just over 22% of venire

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also United States v. Thomas, 116 F.3d 606, 616 (2d Cir. 1997) ("Inasmuch as no juror has a right to engage in nullification—and, on the contrary, it is a violation of a juror's sworn duty to follow the law as instructed by the court—trial courts have the duty to forestall or prevent such conduct, whether by firm instruction or admonition or, where it does not interfere with guaranteed rights or the need to protect the secrecy of jury deliberations by dismissal of an offending juror from the venire or the jury." (citation omitted)).

201 Hurst v. Florida, 136 S. Ct. 616, 619 (2016) ("The Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose a sentence of death."); Ring v. Arizona, 536 U.S. 584, 609 (2002) (holding that the Sixth Amendment prohibits "a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty").

202 *See supra* note 151.

203 Wainwright v. Witt, 469 U.S. 412, 424 (1985) ("[A] prospective juror may be excluded for cause because of his or her views on capital punishment . . . [when] the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'").

204 Cohen & Smith, *supra* note 60, at 88–89.

205 *Cf.* Amar, *supra* note 52, at 1190 ("[I]f everyone now gets to serve on a jury, and we eliminate all the old undemocratic barriers, preserving unanimity might also be undemocratic, for it would create an extreme minority veto unknown to the Founders. In practice this minority veto could disempower juries by preventing an intolerably large percentage of jury cases from ever reaching a final verdict.").

members were removed on the basis of their objections to the death penalty.[206] In one trial, the percentage was as high as 32%.[207] Both within and outside the capital context, other practices during jury selection—from prosecutorial peremptory challenges[208] to challenges for cause on the basis of disagreement with the war on drugs[209]— similarly constrain the ability of the jury to represent the range of moral viewpoints of the community.

Finally, punishment practices, which once took place in the public square, are today veiled in secrecy. The public has little understanding of what happens inside prisons.[210] Even the death penalty—which one might think that citizens can viscerally understand—is sanitized[211] and hidden from the public.[212] During Clayton Lockett's execution in Oklahoma, Lockett regained consciousness and expressed pain; prison administrators closed the blinds and shielded him from view.[213]

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206 Aliza Plener Cover, *The Eighth Amendment's Lost Jurors: Death Qualification and Evolving Standards of Decency*, 92 IND. L.J. 113, 133 (2016).

207 *Id.* at 133–34.

208 *See, e.g.*, EQUAL JUST. INITIATIVE, ILLEGAL RACIAL DISCRIMINATION IN JURY SELECTION: A CONTINUING LEGACY 5 (2010), http://eji.org/sites/default/files/illegal-racial-discrimination-in-jury-selection.pdf [https://perma.cc/7A3L-D2QK]; Bruce J. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 28–29 (1982).

209 *See* United States v. McCarthy, 961 F.2d 972, 976 (1st Cir. 1992) (affirming dismissal for cause based upon juror "indicating that he favored the legalization of drugs").

210 *See* Andrea C. Armstrong, *No Prisoner Left Behind? Enhancing Public Transparency of Penal Institutions*, 25 STAN. L. & POL'Y REV. 435, 436–37 (2014) ("After the trial . . . even our professed commitment to transparency stops. While we, as a society, may have participated in the reporting, investigation, or prosecution of the crime, society is practically barred from evaluating the punishment itself.").

211 *See* Wood v. Ryan, 759 F.3d 1076, 1102–03 (9th Cir. 2014), *vacated*, 135 S. Ct. 21 (2014) (Kozinski, J., dissenting from denial of rehearing en banc) ("Using drugs meant for individuals with medical needs to carry out executions is a misguided effort to mask the brutality of executions by making them look serene and peaceful—like something any one of us might experience in our final moments. But executions are, in fact, nothing like that. They are brutal, savage events, and nothing the state tries to do can mask that reality. Nor should it. If we as a society want to carry out executions, we should be willing to face the fact that the state is committing a horrendous brutality on our behalf. . . . Sure, firing squads can be messy, but if we are willing to carry out executions, we should not shield ourselves from the reality that we are shedding human blood. If we, as a society, cannot stomach the splatter from an execution carried out by firing squad, then we shouldn't be carrying out executions at all." (citation omitted)).

212 Over the past two decades, states have actively sought to keep lethal injection protocols and sources secret. *See, e.g.*, Eric Berger, *Lethal Injection Secrecy and Eighth Amendment Due Process*, 55 B.C. L. REV. 1367, 1388–95 (2014) (detailing state efforts to ensure lethal injection secrecy and judicial acquiescence); Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 122 (2007).

213 Glossip v. Gross, 135 S. Ct. 2726, 2782 (2015) (Sotomayor, J., dissenting) ("When the paralytic and potassium chloride were administered, however, Lockett awoke. Various witnesses reported that Lockett began to writhe against his restraints, saying, '[t]his s* * * is f* * *ing with

One aspect of the modern jury which may make it more supermajoritarian than during the founding era is the increased diversity of jurors. It is no longer legal to exclude jurors from service on the basis of race or gender,[214] and defendants are guaranteed a jury drawn from a fair cross section of the community.[215] However juries should not be overstated. Jurors of color are regularly and disproportionately excluded from service, through mechanisms including peremptory challenges,[216] felon disenfranchisement,[217] use of voting rolls and motor vehicle records as the basis for juror rolls,[218] and hardship excusals.[219] Though our conception of the civic community has broadened since the founding, we have not yet achieved true representativeness on our juries, even in the rare cases when they have a role to play.

C. The Majoritarian Eighth Amendment

Certain key features of the criminal justice system, therefore, have evolved so as to weaken the link between criminal punishment and the will of a supermajority of the community. Compounding these trends, judicial interpretations of the Eighth Amendment—which could conceivably rein in majoritarian excesses—have explicitly endorsed a majoritarian, rather than countermajoritarian or supermajoritarian, approach to regulating the permissible scope of punishment.[220]

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my mind,' 'something is wrong,' and '[t]he drugs aren't working.' State officials ordered the blinds lowered, then halted the execution. But 10 minutes later—approximately 40 minutes after the execution began—Lockett was pronounced dead." (citations omitted)).

214 *See* J.E.B. v. Alabama, 511 U.S. 127, 129 (1994); Batson v. Kentucky, 476 U.S. 79, 83–84 (1986).

215 *See* Taylor v. Louisiana, 419 U.S. 522, 533 (1975).

216 Aliza Plener Cover, *Hybrid Jury Strikes*, 52 HARV. C.R.-C.L. L. REV. 357, 365–66 (2017) (collecting sources showing disproportionate exercise of peremptory challenges by prosecutors against black jurors); EQUAL JUSTICE INITIATIVE, *supra* note 208, at 5.

217 Vida B. Johnson, *Arresting* Batson*: How Striking Jurors Based on Arrest Records Violates* Batson, 34 YALE L. & POL'Y REV. 387, 415–16 (2016) (describing the racially disparate effect of felon disenfranchisement).

218 *Id.* at 416.

219 *See* Berghuis v. Smith, 559 U.S. 314, 326 n.2 (2010) ("Because such factors disproportionately affect African-Americans, the Sixth Circuit said, Kent County's routine grants of certain hardship exemptions 'produced systematic exclusion within the meaning of *Duren*.' The Sixth Circuit held, however, that the hardship exemptions could not establish a fair-cross-section claim because the State 'has a significant interest [in] avoiding undue burdens on individuals' by allowing such excuses." (citation omitted)).

220 The strengthened criminal procedure protections that we have seen since the Warren Court and beyond, such as the right to appointed counsel for indigent defendants, *Gideon v. Wainwright*, 372 U.S. 335 (1963), the right to effective assistance of counsel, *Strickland v. Wash-*

The Eighth Amendment prohibits the imposition of "cruel and unusual punishments."[221] In previous works, I have argued that the Eighth Amendment, situated among the other countermajoritarian protections in the Bill of Rights, should be understood as a countermajoritarian protection against cruel punishments authorized by the majority, particularly where discriminatorily imposed upon minorities.[222] The Supreme Court, however, has linked Eighth Amendment doctrine to indicators of majoritarian preferences and has often rendered the Eighth Amendment subservient to majority will, rather than a limitation upon it.

The Eighth Amendment as interpreted since the 1950s has been tethered to contemporary understandings of morality. The contours of "cruel and unusual punishment" are largely, though not exclusively,[223] set by referencing popular norms—by ascertaining society's "evolving standards of decency"[224] on permissible punishment. The Supreme Court gauges these "evolving standards of decency" through reference to "objective indicators"—focusing most heavily on majoritarian state legislation and relying, as well, on jury sentencing practices.[225]

The Supreme Court has most actively discussed the Eighth Amendment and "evolving standards of decency" in the context of the death penalty. Since the 1970s, the Court has upheld the constitution-

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ington, 466 U.S. 668 (1984), a reinvigorated right to confrontation, *Crawford v. Washington*, 541 U.S. 36 (2004), a strengthened right to a jury determination of facts formerly labeled "sentencing factors," *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and evolution in the judicial understanding of the right against unreasonable searches and seizures, *Mapp v. Ohio*, 367 U.S. 643 (1961) and *Katz v. United States*, 389 U.S. 347 (1967), all serve to place some checks on the majoritarian criminal justice system. However, they are primarily (a) trans-substantive, focusing on procedural fairness and (b) not supermajoritarian. These doctrines do not impact the quantity of punishment that is imposed once the procedures are followed or the degree of public support needed as a prerequisite for punishment.

221 U.S. CONST. amend. VIII.

222 *See generally* Aliza Cover, *Cruel and Invisible Punishment: Redeeming the Counter-Majoritarian Eighth Amendment*, 79 BROOK. L. REV. 1141 (2014).

223 In the death penalty context, the Court has also applied its own independent judgment to the question of constitutionality. *See* Atkins v. Virginia, 536 U.S. 304, 312 (2002) (quoting Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion)) ("[T]he Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.").

224 Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion) ("The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.").

225 Kennedy v. Louisiana, 554 U.S. 407, 421 (2008); Penry v. Lynaugh, 492 U.S. 302, 331, 335 (1989) *abrogated on other grounds by Atkins*, 536 U.S. 304 ("The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures. We have also looked to data concerning the actions of sentencing juries.").

ality of capital punishment, while actively regulating and restricting its use through the Eighth Amendment.[226] The conclusion in *Gregg v. Georgia*[227] that the death penalty was not inherently "cruel and unusual" was itself based largely on strong empirical evidence of national support for the death penalty, including the post-*Furman* re-enactment of death penalty statutes by 35 state legislatures and by Congress.[228] More recently, the Court has used the concept of "evolving standards of decency" to prohibit particular capital punishment practices, including the execution of juveniles[229] and individuals with intellectual disability[230] and the use of the death penalty to punish nonhomicidal rape[231] and felony murder where the defendant neither killed nor had sufficient *mens rea* with respect to the killing.[232] While the Court has always asserted the ultimate supremacy of its independent constitutional judgment over its inquiry into the objective indicators of "evolving standards of decency,"[233] the result reached by the Court has never departed from its reading of those contemporary standards in any death penalty case.[234] The justificatory significance of majoritarian preferences may be most pronounced in *Atkins v. Virginia*[235] and *Roper v. Simmons*,[236] in which the Court held that individuals with intellectual disability and juveniles could not be executed. Both of these cases reached opposite conclusions of cases decided less than two decades earlier in *Penry v. Lynaugh*[237] and *Stanford v. Kentucky*.[238] The Court reversed course not by saying it had been wrong

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226 *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 578 (2005); *Atkins*, 536 U.S. 304, 321.

227 428 U.S. 153, 179–82 (1976) (plurality opinion).

228 The Court also noted the sentencing of 460 individuals to death by March of 1976. *See id.*

229 *Roper*, 543 U.S. at 578.

230 *Atkins*, 536 U.S. at 321.

231 Kennedy v. Louisiana, 554 U.S. 407, 421 (2008) (holding death penalty unconstitutional for nonhomicidal rape of a child); Coker v. Georgia, 433 U.S. 584, 597 (1977) (plurality opinion) (holding death penalty unconstitutional for nonhomicidal rape of adult woman).

232 Enmund v. Florida, 458 U.S. 782, 801 (1982); *see also* Tison v. Arizona, 481 U.S. 137, 158 (1987) (limiting scope of *Enmund*).

233 *See Atkins*, 536 U.S. at 312 (citing *Coker*, 433 U.S. at 597).

234 *Miller v. Alabama*, which relied on the force of precedent rather than an analysis of legislative enactments to strike down mandatory life without parole for juveniles, came the closest to deviating from contrary evidence of "evolving standards of decency." 567 U.S. 460, 483 (2012); *id.* at 514 (Alito, J., dissenting) ("What today's decision shows is that our Eighth Amendment cases are no longer tied to any objective indicia of society's standards. Our Eighth Amendment case law is now entirely inward looking.").

235 536 U.S. 304 (2002).

236 543 U.S. 551 (2005).

237 492 U.S. 302 (1989).

238 492 U.S. 361 (1989).

before but rather by relying on updated information about "evolving standards of decency."[239] The scope of Eighth Amendment protection expanded on account of a new reading of majoritarian preferences.[240]

Outside the capital context, when reviewing the constitutionality of prison sentences, the Supreme Court has focused the Eighth Amendment inquiry upon whether the punishment is "grossly disproportionate" to the crimes committed,[241] without often invoking the terminology of "evolving standards of decency." In the major cases on gross disproportionality in prison sentencing, the "evolving standards of decency" language is cited only in dissents.[242] However, the Court has reaffirmed in two recent cases on sentencing juveniles to life without parole that proportionality review of prison sentences remains tied to "evolving standards of decency."[243] And if anything, the Court's Eighth Amendment jurisprudence in the prison sentencing context is even more, not less, obsequious to external, majoritarian indicators of societal norms by affording heavy deference to legislative policy choices.[244] In the Court's view, the Eighth Amendment and the

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239 *Roper*, 543 U.S. at 563 ("[I]n *Atkins*[,] [w]e held that standards of decency have evolved since *Penry* and now demonstrate that the execution of the mentally retarded is cruel and unusual punishment."); *id.* at 574 ("To the extent *Stanford* was based on review of the objective indicia of consensus that obtained in 1989 it suffices to note that those indicia have changed." (citation omitted)).

240 *See id.* at 608 (Scalia, J., dissenting) ("What a mockery today's opinion makes of Hamilton's expectation, announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court's decision 15 years ago was *wrong,* but that the Constitution *has changed*."); Cover, *supra* note 222, at 1174–75; John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. U. L. Rev. 1739, 1741 (2008).

241 Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment) ("[The Eighth Amendment] forbids only extreme sentences that are 'grossly disproportionate' to the crime.").

242 *See id.* at 1012–13, 1015 (White, J., dissenting); Rummel v. Estelle, 445 U.S. 263, 291–92 (1980) (Powell, J., dissenting). *But see* Hutto v. Finney, 437 U.S. 678, 685 (1978) ("[The Eighth Amendment] prohibits penalties . . . that transgress today's 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency.'").

243 Miller v. Alabama, 567 U.S. 460, 469 (2012) ("'[T]he concept of proportionality is central to the Eighth Amendment.' And we view that concept less through a historical prism than according to 'the evolving standards of decency that mark the progress of a maturing society.'" (citations omitted)); Graham v. Florida, 560 U.S. 48, 58 (2010) ("To determine whether a punishment is cruel and unusual, courts must look beyond historical conceptions to 'the evolving standards of decency that mark the progress of a maturing society.'"); *id.* at 85 (Stevens, J., concurring) ("'[E]volving standards of decency' have played a central role in our Eighth Amendment jurisprudence for at least a century . . . .").

244 The Supreme Court once assessed the proportionality of prison sentences with the help of "objective criteria, including (i) the gravity of the offense and the harshness of the penalty, (ii) the sentences imposed on other criminals in the same jurisdiction, and (iii) the sentences imposed for commission of the same crime in other jurisdictions." Solem v. Helm, 463 U.S. 277,

judiciary place few if any limits on legislatively sanctioned harsh punishment for noncapital crimes, including nonviolent offenses such as drug crime. The responsibility for setting and enforcing prison sentences resides almost exclusively within the purview of the political branches, with only the slightest role for deferential judicial review.[245] And the modicum of power that the Eighth Amendment retains over prison sentencing practices is constrained and defined by the majoritarian considerations described above.

As a result, the Eighth Amendment has done virtually nothing to stem the tide of punishment endorsed by majoritarian or quasi-majoritarian legislatures. In its deferential stance, the Court has upheld against Eighth Amendment challenge a sentence of life without parole for a defendant convicted of possession of more than 650 grams of cocaine;[246] a sentence of 25 years to life for a recidivist convicted of stealing three golf clubs worth approximately $400 a piece;[247] and "two consecutive terms of 25 years to life" to a recidivist convicted of "stealing approximately $150 in videotapes."[248]

This constitutional orientation toward contemporary social norms has costs and benefits. To proponents of living constitutionalism, the "evolving standards of decency" doctrine prevents the Eighth Amendment from becoming a dead letter.[249] The scope of the Amendment's protection is not constrained, as Justice Thomas would like it to be, by the sensibilities of the eighteenth century framers about barbarous methods of punishment.[250] Instead, the Eighth Amendment protects

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292 (1983). After *Solem v. Helm*, however, the Court has moved more directly to legislative deference. *See, e.g.*, Ewing v. California, 538 U.S. 11, 23 (2003) (plurality opinion) (citing *Harmelin*, 501 U.S. at 1004–05 (Kennedy, J., concurring)) (not requiring a rigorous "comparative analysis 'within and between jurisdictions'" and identifying "the primacy of the legislature" as one of four key factors in assessing constitutionality of prison sentences); *id.* at 28 ("We do not sit as a 'superlegislature' to second-guess these policy choices. It is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons 'advance[s] the goals of [its] criminal justice system in any substantial way.'").

245 *E.g.*, *Ewing*, 538 U.S. at 20–28 (summarizing caselaw on proportionality principle in noncapital cases, emphasizing legislative primacy, and applying the caselaw to California's three-strikes law with heavy deference to state legislature). Elsewhere, I have critiqued the Court's weak and deferential jurisprudence in the prison-sentencing context as an abdication of its obligation to enforce the countermajoritarian Eighth Amendment. Cover, *supra* note 222, at 1171.

246 *Harmelin*, 501 U.S. at 961, 996.

247 *Ewing*, 538 U.S. at 18, 30–31.

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

249 Atkins v. Virginia, 536 U.S. 304, 311–12 (2002) ("A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail.").

250 Baze v. Rees, 553 U.S. 35, 97 (2008) (Thomas, J., concurring).

against punishments that would have been acceptable—or completely unheard of—to the founding generation, or even a single generation before.[251] A dynamic, participatory Eighth Amendment promises engagement and responsiveness between the people and the law.

The "evolving standards of decency" doctrine also has its problems and contradictions. One common critique is that indicators of "evolving standards of decency" are inherently contested and malleable, and the doctrine obscures the Justices' ultimately subjective inquiry into whether punishment is tolerable or intolerable.[252] There is some merit to this critique in the death penalty context;[253] yet "evolving standards of decency" doctrine has, at the very least, constrained the Justices in such a way that they have never decided a capital punishment case without a plausible argument for national consensus on their side.

A second major critique—and in some ways, a contradictory one—is that, through this doctrine, the countermajoritarian judicial branch, interpreting a countermajoritarian individual right, binds itself to the whims of the majority.[254] A majoritarian Eighth Amendment loses its power as a countermajoritarian check against overreaching by the political branches.[255] Where the majority leads, the Supreme Court follows.[256] And, as a consequence, as interpreted by the Court, the Eighth Amendment has had little impact outside narrow doctrinal contexts,[257] most prominently capital punishment; and even there, the

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251 *See supra* notes 239–43 and accompanying text (discussing the judicial and, in the Court's view, societal evolution over less than a generation from *Penry* and *Stanford* to *Atkins* and *Roper*).

252 There has been significant criticism, including from members of the Court, that the Justices decipher ambiguous signals about "evolving standards of decency" in such a way as to support their substantive viewpoint. *E.g.*, Roper v. Simmons, 543 U.S. 551, 611 (2005) (Scalia, J., dissenting); *Atkins*, 536 U.S. at 348–49 (Scalia, J., dissenting).

253 It would be difficult to make this argument in the prison sentencing context, where legislatures reign supreme.

254 *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 68–69 (1980); Cover, *supra* note 222, at 1182; Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1097–98 (2006); Susan Raeker-Jordan, *Kennedy,* Kennedy*, and the Eighth Amendment: "Still in Search of a Unifying Principle"?*, 73 U. PITT. L. REV. 107, 137 (2011); Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 3 n.1 (2007) (citing scholarship).

255 The majoritarian Eighth Amendment doctrine may, in particular, fail to adequately protect minorities when punishment set by the political branches disproportionately impacts them. *See* Cover, *supra* note 222, at 1171–82.

256 At least, the Supreme Court has interpreted objective indicators of evolving standards of decency in such a way that those standards pointed in a direction that it was willing to follow.

257 It has also played a meaningful role in prison conditions litigation, *see, e.g.*, Farmer v. Brennan, 511 U.S. 825, 828 (1994), and, more recently, sentencing juveniles to life without pa-

Court has refused to put an end to a punishment practice that many view to be inconsistent with human dignity.[258]

III. Toward a Supermajoritarian Approach to Criminal Law

Thus far I have argued that supermajoritarianism is central to the constitutional regulation of and theoretical justification for the criminal justice system. I have then explained how, although the civic community has become more egalitarian since the founding, the supermajoritarian features that once defined the criminal justice system have given way to a primarily majoritarian or quasi-majoritarian orientation. This shift has harmed the constitutional design and the theoretical underpinnings of the criminal justice system. This next Section considers new ways in which we may attempt to incorporate supermajoritarian principles into the criminal justice system, with the goal of infusing the criminal justice system with some of the virtues of supermajoritarian community support.

A. Jury Restoration

The most obvious mechanism to restore supermajoritarian protections to our criminal law system is the one the Constitution guarantees: the criminal jury. Douglas Berman, troubled by Paul Robinson's conclusion that some criminal punishments are set at levels inconsistent with community intuitions of justice, similarly suggests "giv[ing] back to grand juries and petit juries the essential power and respect the Framers wanted them to have" and thereby "restor[ing] an American tradition of having our criminal laws always informed by . . . the 'principles by which the community actually makes judgments about justice.'"[259] This suggestion—with which I strongly agree in theory—is difficult to implement in practice. By now, with a system of entrenched plea bargaining, a wholesale return to the jury in its tradi-

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role, *see, e.g.*, Miller v. Alabama, 567 U.S. 460, 465 (2012); Graham v. Florida, 560 U.S. 48, 73 (2010).

258 Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."). Justice Breyer, dissenting in *Glossip v. Gross*, noted that the decline in use of the death penalty in recent years "perhaps reflect[s] the fact that a majority of Americans, when asked to choose between the death penalty and life in prison without parole, now choose the latter." 135 S. Ct. 2726, 2775 (2015) (Breyer, J., dissenting). More recent polls show support for the death penalty at the lowest point since 1972. *See* Jeffrey M. Jones, *U.S. Death Penalty Support Lowest Since 1972*, Gallup (Oct. 26, 2017), https://news.gallup.com/poll/221030/death-penalty-support-lowest-1972.aspx [https://perma.cc/AL8L-CKCZ].

259 Berman, *supra* note 14, at 1121.

tional form is no easy matter. And the petit jury of today exists in a weakened form which cannot be meaningfully expected to control the excesses of *punishment*, over which it generally has no control or even information.[260]

As a starting point, however, there are a number of ways in which the jury could be reformed such that, at least in the small percentage of cases in which a jury trial occurs, the jury has the opportunity to serve as a meaningful supermajoritarian check. Scholars have proposed certain reforms to the jury's power that would bring the institution closer in line with its historical analog, including instructing the jury on the sentencing consequences of its verdict where feasible;[261] restoring the jury's ability to decide questions of law, including the constitutionality of punishment;[262] and allowing instructions and argument on the power to nullify in certain circumstances.[263] It would even be possible to give defendants a right to jury sentencing.[264]

Various reforms to the jury selection process could also make the jury more diverse and representative of the community, and therefore more likely to serve as a genuine supermajoritarian institution. These reforms may include restructuring[265] or eliminating[266] the exercise of

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260 Modern juries generally cannot even hear the sentencing consequences of its decision. *See* Kemmit, *supra* note 61, at 94–98.

261 *See* Gertner, *supra* note 144, at 937; Kemmitt, *supra* note 61, at 97.

262 *See* Chapman, *supra* note 25, at 195 (arguing in favor of the jury's "constitutional competence," at least within limits); Cohen & Smith, *supra* note 60, at 124 (arguing for an end to death qualification and a return to "what the Constitution guarantees: a jury trial wherein jurors have the ability to determine whether a sentence of death is repugnant, if not to the jury as citizens, then to the Constitution of the United States").

263 *See* Caisa Elizabeth Royer, Note, *The Disobedient Jury: Why Lawmakers Should Codify Jury Nullification*, 102 CORNELL L. REV. 1401 (2016) (arguing for codification of jury nullification).

264 *See, e.g.*, Hoffman, *supra* note 65 (arguing in favor of juror sentencing); Iontcheva, *supra* note 63, at 365–81 (detailing a proposal for jury sentencing); Barkow, *supra* note 63, at 107 (arguing for jury determinations of whether to apply mandatory minimum sentences).

265 In previous work, for example, I proposed replacing peremptory challenges with "'hybrid jury strikes'—challenges that lie between successful cause challenges and traditional peremptory strikes" and that would require "ex ante articulation of a race-neutral and meaningful argument for exclusion." Cover, *supra* note 216, at 360. Others have suggested eliminating the prosecutorial peremptory strike while preserving the practice for criminal defendants. *E.g.*, Charles J. Ogletree, *Just Say No!: A Proposal to Eliminate Racially Discriminatory Uses of Peremptory Challenges*, 31 AM. CRIM. L. REV. 1099, 1147–48 (1994); Abbe Smith, *A Call to Abolish Peremptory Challenges by Prosecutors*, 27 GEO. J. LEGAL ETHICS 1163, 1164–65 (2014).

266 Justice Marshall, concurring in *Batson v. Kentucky*, presaged that eliminating the peremptory challenge was the only way to rid the practice of racial discrimination. *See* 476 U.S. 79, 102–03 (1986) (Marshall, J., concurring). Others since have come to similar conclusions. *See, e.g.*, Miller-El v. Dretke, 545 U.S. 231, 273 (2005) (Breyer, J., concurring); Judge Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Domi-*

peremptory strikes, which are often used disproportionately to strike minority venire members, narrowing or ending the practice of death qualification in capital cases,[267] restricting the use of hardship exceptions to jury service, and changing jury venire selection so that it does not rely exclusively on voting rolls.[268]

If juries more accurately reflected the demographics and moral viewpoints of the entire community, and if juries had the power to enforce their common sense intuitions about justice in light of the facts of a given case, jury trials might be more meaningful options for criminal defendants and might offer genuine advantages over plea bargaining. Today, when the evidence appears solid—or solid enough for a jury to believe—that a defendant in fact committed the elements of an offense, there is much to risk and little to gain from going to trial, especially when the prosecutor is willing to offer a plea deal. Yet if the jury had a normative role to play in deciding whether punishment would be excessive in a particular case, then more defendants in morally contested cases would likely stand on their right to a jury trial. In this way, by restoring the jury's historical power, jury trials might become more frequent, especially in situations where confirmation of the community's standards would be most important.[269] Precisely those cases in which appropriate punishment is most disputed—and thus the cases in which supermajoritarian review is most important—would be the ones most likely to go to trial.

B. Supermajoritarian Legislative Processes

I described above how the shift to legislative rather than judge made crimes had the unintended but pernicious consequences of increasing both the volume and the politicization of the criminal law.[270] I

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nated Voir Dire, the Failed Promise of Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 167 (2010); Morris B. Hoffman, *Peremptory Challenges Should Be Abolished: A Trial Judge's Perspective*, 64 U. CHI. L. REV. 809, 809–10 (1997); Amar, *supra* note 41, at 1182–83.

267 *See* Cohen & Smith, *supra* note 60, at 124.

268 *See* Johnson, *supra* note 217, at 416.

269 By way of analogy, some have argued that one of the benefits of plea bargaining today is that "easy" cases are resolved out of court and cases in which there is a genuine factual dispute deserving of jury resolution may end up going to trial. *See* Brady v. United States, 397 U.S. 742, 752 (1970) ("[W]ith the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof."). If the jury had a meaningful role in deciding not just facts but also the appropriateness of punishment, then the close cases with respect to community intuitions of justice would similarly be more likely to go to trial.

270 *See supra* Section II.B.

certainly do not advocate going back to a common law approach to defining criminal laws, although some states continue to endorse the practice alongside legislative codification.[271] Yet the status quo is a problematically majoritarian one. Moving to an ordinary legislative system for enacting criminal laws did not adequately ensure that criminal codes would reflect something close to community consensus.[272] Because of the uniquely coercive effect of criminal legislation and the distinct theoretical and constitutional imperatives in favor of supermajoritarianism in this context, it would be appropriate to institute legislative reforms that are targeted specifically at criminal lawmaking.[273]

One reform that could promote a degree of supermajoritarian protection is a requirement that all legislation creating new crimes or strengthening existing punishments must be passed by a supermajority margin. The precise margin of victory required to pass criminal legislation could be subject to debate, as it would involve a tradeoff between competing values: the greater the supermajority requirement, the more community consensus, but the more difficult it would be to pass new legislation.

The idea of supermajority voting rules for particular substantive areas of legislation is not entirely new. In a different context, McGinnis and Rappaport have proposed supermajority rules for fiscal legislation as normatively desirable and constitutionally sound,[274] and, in practice, various supermajority rules govern taxation and budgeting at both the federal and state levels.[275] Scholarly debate has emerged over

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271 *See* McCabe, *supra* note 154, at 523 (noting that there are exceptions to the trend of state courts declining to declare new or expand the scope of existing common law crimes); *cf.* Fletcher, *supra* note 156, at 23 (explaining that it is not clear whether punishment for common law crimes is constitutional).

272 *See supra* Section II.B.

273 *Cf. supra* note 168.

274 *See* John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365, 367 (1999); John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 483–85 (1995); John O. McGinnis & Michael B. Rappaport, *The Rights of Legislators and the Wrongs of Interpretation: A Further Defense of the Constitutionality of Legislative Supermajority Rules*, 47 DUKE L.J. 327, 327–30 (1997).

275 Elizabeth Garrett, *A Fiscal Constitution with Supermajority Voting Rules*, 40 WM. & MARY L. REV. 471, 479 (1999) (citing the "House of Representatives . . . rule mandating a three-fifths vote to pass a tax rate increase" and discussing other features of congressional budget legislation that are supermajoritarian in practice); Max Minzner, *Entrenching Interests: State Supermajority Requirements to Raise Taxes*, 14 AKRON TAX J. 43, 43–44 (1999) ("The states have extensive experience with supermajority requirements for tax increases. Sixteen states have imposed supermajority requirements for tax hikes, caps on state revenue, or both.").

the constitutionality of congressional supermajority voting rules,[276] and the idea of supermajoritarian fiscal legislation has received pushback.[277] Yet the criminal law context mitigates the normative concerns that have been expressed. In particular, fiscal supermajoritarianism hamstrings government functioning when broad consensus cannot be reached; hurdles to ratcheting up criminal punishment, by contrast, do not limit government from exercising its core responsibilities, but only prevent government from increasing punishment without a broad support base.

Supermajority voting rules would not, of course, ensure that legislation is a perfect reflection of supermajority public sentiment. As noted earlier, a number of factors create disconnects between legislative policy and public opinion, and not all of them would be cured by a supermajority rule. In particular, the public pressures on legislators to be tough on crime in the abstract, the pathologies of gerrymandering, and the distorting effects of money in politics mean that supermajority voting rules for legislation would not necessarily be a complete fix.[278] The numerical margin of a supermajority voting rule would not affect the political processes, incentives, and disconnects underpinning the legislative system. For instance, it is not clear that a supermajority requirement in the legislature would have prevented the rise of mass incarceration and the war on drugs; indeed, some harsh crime bills passed with overwhelming bipartisan support.[279] At the same time, a supermajority rule for new and enhanced punishment would at least require some measure of bipartisan support and hence have a greater chance of representing across-the-board community agreement—and could make a meaningful difference.[280] It would also make it difficult

276 *E.g.*, Dan T. Coenen, *The Originalist Case Against Congressional Supermajority Voting Rules*, 106 Nw. U. L. Rev. 1091, 1096 (2012); Comment, *An Open Letter to Congressman Gingrich*, 104 Yale L.J. 1539 (1995) (signed by 17 law professors).

277 *See e.g.*, Michael Leachman et al., *Six Reasons Why Supermajority Requirements to Raise Taxes Are a Bad Idea*, Ctr. on Budget & Pol'y Priorities (Feb. 14, 2012), https://www.cbpp.org/sites/default/files/atoms/files/2-13-12sfp.pdf [https://perma.cc/CX3T-33V6].

278 *See supra* note 10.

279 *See supra* note 164.

280 Note that the controversial Clinton-era Violent Crime Control and Enforcement Act, which included a harsh federal three-strikes law, passed by a margin of 235–195 in the House and 61–38 in the Senate. *See* H.R. 3355 Recorded Vote, Final Vote Results for Roll Call (Aug. 21, 1994), http://clerk.house.gov/evs/1994/roll416.xml [https://perma.cc/JLU9-4P8V]; H.R. 3355, Vote Summary, Violent Crime Control and Law Enforcement Act of 1994, https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=103&session=2&vote=00295 [https://perma.cc/QW73-GHQA]. While the law received substantial bipartisan support, it would not have passed with a stronger supermajoritarian requirement.

to slip criminal legislation into spending or budgetary bills, to be passed unthinkingly by a legislature prioritizing other issues.

Another mechanism that may increase the likelihood of supermajoritarian support for criminal legislation is, as suggested by Richard Myers II, a mandatory sunset clause for criminal laws.[281] Myers suggests this reform to solve the significant problem of a time lag between contemporary community values and outdated yet still binding criminal legislation—a gap caused at least in part by political pressures which make decriminalization difficult and lead to a one-way ratchet toward increased punishment.[282] Myers's proposed reform would additionally bolster the *supermajoritarian* bona fides of the criminal law. Criminal laws stay in place unless a legislative majority cares enough to mobilize and overturn them. This system does not ensure supermajoritarian support for the full range of laws on the books today.

C. Supermajoritarian Citizen Review

Because both the modern jury and the modern legislature face structural impediments to serving as a true supermajoritarian check on criminal punishment, we should also consider implementing new mechanisms for supermajoritarian citizen input on criminal justice policy.

A rich scholarship has emerged advocating for increased citizen engagement with the criminal justice system. Stephanos Bibas has proposed increasing citizen participation in the criminal justice system to improve democratic accountability and to counteract the "insider" bureaucratic dynamics of modern criminal justice.[283] Jocelyn Simonson has shed light on the opportunities and need for bottom-up civic participation through contestation and grassroots action.[284] Laura Appleman has suggested weaving citizen voices into every stage of the criminal justice process,[285] including through "plea juries"[286] and juries

281 Myers, *supra* note 7 ("Many of these problems and concerns share a common source: the intransigence of criminal law. Once on the books, criminal law is difficult to repeal. It stays with us, despite changing moral convictions and majority preferences. The intransigence, in turn, pressures other parts of the system.").

282 *See id.*

283 Bibas, *supra* note 16, at 1692.

284 Simonson, *supra* note 182 (manuscript at 40–41); Jocelyn Simonson, *Democratizing Criminal Justice Through Contestation and Resistance*, 111 Nw. U. L. Rev. 1609, 1612–13 (2017).

285 Appleman, *supra* note 5, at 1422–24.

286 Laura I. Appleman, *The Plea Jury*, 85 Ind. L.J. 731, 733, 758 (2010).

at bail setting.[287] Josh Bowers has argued for "normative juries" at different stages of criminal proceedings where moral rather than technical legal determinations are more appropriate, such as at charging, bail-setting, and sentencing.[288] Rachel Barkow has advocated for juries to decide whether to apply mandatory minimums.[289]

Below, I contribute three ideas to the mix in an attempt to formalize supermajoritarian citizen review of criminal law at three stages: at the abstract, legislative level, at the front end of the criminal justice system when the coercive power of the state is introduced, and at the back end, when punishment is applied. My goal in sketching out these three proposals, and in referencing above the thoughtful ideas that others have put forth, is not to pinpoint any one specific reform proposal as a magic bullet, or to present a detailed policy plan. Rather, I have two primary objectives. First, I hope to highlight the many ways in which the criminal justice system might be infused with new supermajoritarian protections, at a variety of different moments and through a variety of innovative forms. Second, I hope to place a gloss on the ideas of scholars ahead of me, by emphasizing that efforts to democratize the criminal justice system should have a goal beyond encouraging civic participation. Ideally, reform measures should strive to achieve supermajoritarian support for, not merely public engagement with, the criminal justice system. By overtly recognizing the structural imperative of supermajoritarian criminal justice, we discover a helpful frame for evaluating and, perhaps, enhancing existing reform proposals. For example, through the lens of supermajoritarianism, suggestions to increase jury participation throughout the criminal justice process are particularly appealing, as they would promote unanimous—not merely majoritarian—support for criminal justice outcomes. Other ideas for civic engagement could be strengthened by infusing a supermajoritarian ideal.

My first proposal is to convene a "legislative jury" of approximately 50 people on a periodic basis to review the jurisdiction's criminal legislation, including statutorily authorized punishment for the crimes. Selection for this "legislative jury" would be similar to selection for and service on a grand jury. Because the review would entail significant time and resources, it should take place only every 20 years or so. The review would include a public notice-and-comment period

287 Laura I. Appleman, *Justice in the Shadowlands: Pretrial Detention, Punishment, & the Sixth Amendment*, 69 WASH. & LEE L. REV. 1297, 1364–65 (2012).

288 Bowers, *supra* note 8, at 1659–60.

289 Barkow, *supra* note 63, at 107.

during which criminal justice stakeholders could offer their perspectives on particular laws which need reform. If a supermajority of the "legislative jury" supported the existing legislation by supermajority vote, no further action would be needed. However, if supermajoritarian consensus could not be achieved as to the acceptability of particular laws, the "legislative jury" would have the authority to issue an advisory "verdict," directing the legislature to review and consider amending them.

My second proposal is to foster supermajoritarian input into the criminal justice system at the front end. One can imagine a variety of shapes that supermajoritarian citizen review could take in such diverse areas as coercive police tactics and prosecutorial discretion. I will consider one: a requirement that, before a prosecutor makes a particularly serious charging decision, such as the decision to pursue the death penalty or to seek a particularly onerous sentencing enhancement, she would need to secure supermajoritarian authorization from a body representative of the community—a similar, yet stronger, institution than Josh Bowers's proposed normative grand juries.[290]

My third proposal, targeting the back end of the criminal justice process, is to periodically—perhaps annually—empanel a "criminal outcomes jury," which would be tasked with reviewing a randomized sample of cases that were actually adjudicated and resulted in a guilty plea or a jury verdict of guilt. This "criminal outcomes jury" would not have any power to overturn the criminal convictions or reduce sentences, but would rather review the records of the cases, with the assistance of one or more prosecutors and defense attorneys, and deliberate upon whether the results were "just" or "unjust." The jury would submit a report on its findings both to the legislature and to the courts, prosecutors, and defense bar. The report could be used to justify or catalyze legislative change and could also be used to evaluate prosecutorial practices and to advocate for particular sentences in future cases. The "criminal outcomes jury" could serve some of the purposes of dialogue between the people and legislature traditionally served by juries.[291]

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290 *See also* Bibas, *supra* note 16, at 1692 ("Revived grand juries, or plea juries, could play more meaningful roles in the most serious criminal cases. These juries could check prosecutorial charging and bargaining decisions, especially the (ab)use of mandatory minimum penalties."). *See generally* Josh Bowers, *The Normative Case for Normative Grand Juries*, 47 WAKE FOREST L. REV. 319 (2012) (proposing an equitable, or normative, role for grand juries in determining whether a given case—particularly a public-order case—should be prosecuted).

291 *See* Kemmitt, *supra* note 61, at 108 ("By refusing to convict defendants of crimes with punishments deemed disproportionate by current standards of decency, juries can engage legisla-

These ideas are illustrative examples, designed to begin a discussion about how we might promote supermajoritarian citizen intervention in a world in which reforming the traditional jury and the majoritarian legislative process may not be enough.

D. Supermajoritarian Eighth Amendment Scrutiny

Finally, Supreme Court doctrine could evolve in ways that might account for the loss of other constitutional supermajoritarian protections. As discussed above, the Court's Eighth Amendment doctrine has developed in a distinctly majoritarian direction. A new doctrinal trajectory could do much to enforce the supermajoritarian constitutional principle that has been weakened by the decline of the jury trial.

I am by no means the only critic to voice concerns about the majoritarian doctrinal approach that the Court takes to the Eighth Amendment.[292] Some of these critics have advocated a more explicitly independent and thus countermajoritarian approach to Eighth Amendment jurisprudence.[293] These commentators, however, run up against a competing critique of the Eighth Amendment doctrine: that of judicial overreaching and subjectivity. Despite the concerns about majoritarian influence over Eighth Amendment doctrine, one of the compelling reasons for maintaining the "evolving standards of decency" inquiry is that, untethered from any "objective indicators" of society's viewpoints on permissible punishment, the content of the Eighth Amendment would be determined by the whims of five of nine men and women in black robes who lack democratic accountability.[294] Indeed, some critics of the "evolving standards of decency" doctrine contend that this subjectivity already exists, because the "objective indicia" inquiry creates a veneer, rather than the reality, of a majoritarian constraint. "Objective indicia," critics argue, are fuzzy

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tures in a dialogue in which both institutions work toward a system of punishment that is morally palatable to the population at large.").

292 *See supra* note 254.

293 *E.g.*, Ian P. Farrell, *Strict Scrutiny Under the Eighth Amendment*, 40 FLA. ST. U. L. REV. 853, 903–05 (2013); Mary Sigler, *The Political Morality of the Eighth Amendment*, 8 OHIO ST. J. CRIM. L. 403, 424–29 (2011).

294 Justice Scalia vehemently decried what he perceived as doctrinal subjectivity. *E.g.*, Atkins v. Virginia, 536 U.S. 304, 348–49 (2002) (Scalia, J., dissenting); Roper v. Simmons, 543 U.S. 551, 611 (2005) (Scalia, J., dissenting).

signals subject to genuinely differing interpretations[295] as well as to ends-oriented machinations[296] by members of the Court.[297]

These two contrasting critiques—one of undue deference to majoritarian norms and one of undue subjectivity—create a great Eighth Amendment dilemma: a choice between a majoritarian approach that dilutes the protection of an individual right against majority tyranny and an independent judicial inquiry that threatens to impose subjective value judgments of unelected judges upon the people.

When we focus on a supermajoritarian approach to criminal law, however, there may be a way out of this dilemma. The Eighth Amendment, like other individual rights, should check the will of the majority. Yet the Eighth Amendment, which is tied by text and longstanding doctrine to contemporary standards of morality, should not solely reflect the idiosyncratic moral perspectives of five Justices. If we heed the concerns posed by punishment in the face of moral dissensus and if we focus on the supermajoritarian solution, Eighth Amendment doctrine could achieve *both* the goals of a countermajoritarian check upon governmental excess *and* of judicial objectivity.

At present, when the Court analyzes the constitutionality of a punishment under the Eighth Amendment, it first asks whether society has reached a *majority consensus against* a particular punishment, and it then brings its "independent judgment" to bear to decide whether the punishment violates the Eighth Amendment.[298] The first step is both objective (its strength) and majoritarian (its weakness).

Objectivity and majoritarianism have always been seen to go hand in hand. Yet there is no particular reason why they must. At step one, instead, the Court could ask whether a *substantial portion of the*

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295 Sigler, *supra* note 293, at 410–11.

296 *Atkins*, 536 U.S. at 348–49 (Scalia, J., dissenting); *Roper*, 543 U.S. at 611 (Scalia, J., dissenting).

297 Corinna Barrett Lain in *Deciding Death* argues with nuance for a third alternative: that the "evolving standards of decency" inquiry is both majoritarian as a doctrine and a charade, but that the Eighth Amendment jurisprudence is nonetheless tethered to majoritarian preferences through nondoctrinal means. The real majoritarian influence on the Court comes from extrajudicial majoritarian influences that pervade its decisionmaking not only in the death penalty and Eighth Amendment contexts, but throughout its constitutional jurisprudence. *See* Lain, *supra* note 254, at 35–43.

298 *See, e.g.*, *Roper*, 543 U.S. at 564 ("The beginning point is a review of objective indicia of consensus, as expressed in particular by the enactments of legislatures that have addressed the question. These data give us essential instruction. We then must determine, in the exercise of our own independent judgment, whether the death penalty is a disproportionate punishment for juveniles.").

community considers a particular punishment to be "cruel and unusual" and it could then go on to exercise its own judgment to decide whether the punishment violates the Eighth Amendment. In other words, there would be an expectation that a constitutional punishment would have *supermajoritarian support*; a punishment that did not have this kind of consensus support would be constitutionally suspect. In this way, the "objective indicia" of "evolving standards of decency" would be responsive to *countermajoritarian* forces, rather than majoritarian forces—yet it would still maintain a degree of objectivity. If the Court deems a punishment cruel and unusual when exercising its independent judgment, and that independent judgment is corroborated by the strongly held moral viewpoints of a substantial minority of the community, it could strike down a punishment in a manner that is *both* countermajoritarian *and* objective. In this way, objectivity need not be majoritarian.

In conducting this analysis, the Court should reference something other than mere popular disagreement with a criminal law or criminal punishment. There are countless reasons for people to oppose particular criminal laws: they may believe prisons are overcrowded, courts overwhelmed, or government underfunded; they may believe that similar legislative objectives could be achieved more efficiently through means other than criminalization. These are not reasons to find a particular offense or penalty unconstitutional. Rather, the Court should inquire whether a substantial minority considers imposing punishment for a particular type of offense or at a particular degree of severity to be *grossly excessive, inhumane, or immoral*—to violate the dignity of man. In the face of this type of substantial minority sentiment, paired with the independent judgment of the majority of the Court, the Court should conclude that the punishment violates the Eighth Amendment.

The insight here is not that the minority sense of morality should frustrate the will of the majority. It is, rather, that in the unusual case of criminal punishment, in which the coercive power of the state is being brought to bear upon individual citizens, the strong moral condemnation of a substantial minority of the community is an important indicator that moderation is needed, and when paired with the Court's independent judgment, this condemnation justifies the exercise of the countermajoritarian Eighth Amendment to protect against the punishment.

Conclusion

Through the jury trial guarantee, the Constitution creates a supermajoritarian framework for imposing criminal punishment. Criminal law theorists implicitly depend upon that same supermajoritarian ideal when they justify criminal punishment as the expression of the community's moral condemnation or as the enforcement of community norms. With the virtual disappearance of the jury, the opacity of punishment, and the politicization of crime, however, existing supermajoritarian checks have lost their teeth. The Supreme Court, meanwhile, has acquiesced in a majoritarian vision of criminal justice. The resulting majoritarian status quo has done harm both to the intended constitutional structure and to the legitimacy of punishment.

This harm, however, need not be irrevocable. There are multiple opportunities at various stages of the criminal justice system to introduce new supermajoritarian checks and restore old ones. These initiatives might include jury reform, supermajority voting rules for crime legislation, robust supermajoritarian citizen review of criminal processes, from criminalization to enforcement to imposition of punishment, and development of judicial doctrines responsive to the need for supermajoritarian support. With these and other reform efforts, we might live up to the ideal that criminal punishment should be imposed only under those circumstances in which the community broadly agrees that it is morally defensible to do so.