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The Scarlet Letter: Why Courts’ Reliance On Recidivist Statutes During Sentence Enhancement Hearings May Create Fifth and Eighth Amendment Violations

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The Scarlet Letter: Why Courts’ Reliance On Recidivist Statutes During Sentence Enhancement Hearings May Create Fifth and Eighth Amendment Violations

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I. Introduction

Thomas Jefferson once asserted that it is more dangerous to punish a guilty person without the forms of law than if he should escape.¹ Those words are quite relevant considering that the United States has twenty-five percent of the world’s prison population.² As such, there is little doubt that many sentence enhancement hearings have raised “forms of law” issues because many prisoners face unquestioned heightened penalties for already adjudicated offenses in accordance with statutory law.³

¹ See Quotes About Prison, GOODREADS, http://www.goodreads.com/quotes/tag/prison (inferring that the nation faces a prevalent issue of individuals being punished absent the guaranteed protections of the Constitution).
² See Combating Mass Incarceration-The Facts, AMERICAN CIVIL LIBERTIES UNION (June 17, 2011), https://www.aclu.org/combating-mass-incarceration-facts-0 (providing incarceration statistics in support of the idea that prisons are overcrowded, and incarceration for non-violent offenses is a major contributor).
³ See United States v. Mobley, 687 F.3d 625, 629 (4th Cir. 2012) (addressing the issue of whether a prisoner was properly classified as a “career offender” in accordance with a federal recidivist statute when he was caught with a weapon in his possession).
The Federal Sentencing Guidelines contain a recidivist provision, which enables judges to enhance prisoners’ sentences beyond the statutory maximum by classifying them as “career offenders.”

Recidivist statutes have raised considerable constitutional concerns for many years. Of particular concern is that prisoners may have their Fifth and Eighth Amendment rights violated when they are subject to heightened penalties for victimless prior offenses during sentence enhancement hearings. This issue is prevalent in United States v. Mobley,

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6 See Mobley, 687 F.3d at 630 (ruling that defendant’s two prior victimless drug possession convictions combined with his current offense were sufficient to label him a career offender).
where the court classified and punished Mr. Mobley as a “career offender” in accordance with a federal recidivist statute.\textsuperscript{7}

This Comment argues that factoring prior offenses during sentence enhancement hearings violates prisoners’ Fifth and Eighth Amendment rights by imposing additional incarceration time for already adjudicated offenses.\textsuperscript{8} Part II discusses the Fifth and Eighth Amendments, provides an overview of strict scrutiny review for Fifth Amendment claims, and outlines Justice Brennan’s concurrence in \textit{Furman v. Georgia}, which proposes a standard for analyzing punishments under the Eighth Amendment.\textsuperscript{9} Part II also discusses the relevance of the Fifth and Eighth Amendments during sentence enhancement hearings, how \textit{Mobley} may contain a due process issue, and how \textit{Mobley} is relevant to

\textsuperscript{7} See \textit{id.} at 627 (considering Mr. Mobley’s “shank” possession as a “violent offense” in accordance with the career offender enhancement).

\textsuperscript{8} See generally U.S. CONST. amend. V (protecting fundamental rights of life, liberty, and property); U.S. CONST. amend. VIII (guaranteeing the right to be protected from excessive bail, excessive fines, and cruel and unusual punishment).

\textsuperscript{9} See \textit{infra} Part II (discussing the constitutional implications of punishment, and the relationship between Justice Brennan’s four-pronged test in \textit{Furman} and \textit{Mobley}).
Justice Brennan’s Eighth Amendment framework. Part III argues that Mr. Mobley’s Fifth Amendment rights were violated because he was punished as part of a suspect class and was deprived of his fundamental right of liberty, and the deprivations were not substantially related to a compelling government interest under strict scrutiny review. Part III also argues that Mr. Mobley’s Eighth Amendment rights were violated because the court only superficially applied the inherent principles outlined in Justice Brennan’s Furman concurrence during Mr. Mobley’s sentence enhancement hearing. Part IV argues that courts should consider circumstances surrounding an offense in addition to the sentencing guidelines during sentence enhancement hearings and suggests federal recidivist statutes be amended to guide courts to adjudicate enhancements more holistically.

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10 See infra Part II (establishing a connection between sentence enhancement hearings, the Fifth and Eighth Amendments, and Mobley).

11 See infra Part III (asserting that Mr. Mobley was punished for his status as a career offender rather than for his offense).

12 See infra Part III (arguing that broader interpretation of Justice Brennan’s four-pronged test from Furman could have changed the outcome of Mobley).

13 See infra Part IV (suggesting that courts should consider time
Part V concludes that factoring previous victimless offenses into sentencing enhancements violates the Fifth and Eighth Amendments because it deprives prisoners’ fundamental right to travel and places prisoners in a politically powerless position, sufficient to warrant suspect classification.\textsuperscript{14} Part V also concludes that factoring victimless prior offenses into sentencing enhancements violates the Eighth Amendment because heightening a nonviolent individual’s incarceration term degrades human dignity, enforces arbitrary ruling, devalues society’s views on punishment, and imposes excessive punishment.\textsuperscript{15}

II. BACKGROUND

A. The Fifth Amendment: Fundamental Rights and Equal Protection

The Fifth Amendment prohibits the deprivation of life, served for the recent offense, behavior while incarcerated, and the risk of public safety imposing alternatives to incarceration).

\textsuperscript{14} See infra Part V (arguing that prisoners incarcerated for already adjudicated offenses unlawfully restrains them from traveling).

\textsuperscript{15} See infra Part V (concluding that determining a prisoner’s sentence enhancement should be measured by the risk associated with imposing a community based sentence).
liberty, and property from any individual without due process of law.\textsuperscript{16} In \textit{Bolling v. Sharpe}, the Supreme Court held that the concepts of equal protection and due process are not mutually exclusive.\textsuperscript{17} Thus, the Court has interpreted the Fifth Amendment’s Due Process Clause to include an equal protection element.\textsuperscript{18} The Court has since instructed that adjudicating due process claims requires an inquiry into the government’s interests and the private interests affected by governmental action.\textsuperscript{19} In \textit{United States v. Carolene Products Co.}, the Court established that future courts could apply heightened scrutiny when classifications affect the distribution of fundamental

\textsuperscript{16} See generally U.S. \textsc{const.} amend. V (inferring that the Framer’s intentions were to establish guidelines sufficient to afford protections but broad enough to evolve as society progresses).

\textsuperscript{17} See \textit{Bolling v. Sharpe}, 347 U.S. 497, 499 (1954) (holding that discrimination may be so unjustifiable as to violate due process).

\textsuperscript{18} See \textit{id.} (noting that equal protection and due process stem from American ideals of fairness).

\textsuperscript{19} See \textit{Cafeteria & Rest. Workers Union v. McElroy}, 367 U.S. 886, 895 (1961) (considering whether the petitioner’s exclusion by her employer was unconstitutional).
rights.\textsuperscript{20}

In determining whether Fifth Amendment due process rights have been violated, courts’ interpretations have varied when deciding whether individuals’ have been deprived of their fundamental rights of life, liberty, and property.\textsuperscript{21} When determining suspect classifications, courts have considered a group’s discrete and insular nature, immutable characteristics, and history of discrimination.\textsuperscript{22} However, the Supreme Court has not limited qualification for constitutional review to any

\textsuperscript{20} See United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (suggesting that rational basis review will not always satisfy constitutional muster because other classifications may trigger more rigid scrutiny).

\textsuperscript{21} See Marcy Strauss, Reevaluating Suspect Classifications, 35 Seattle U. L.R. 135, 139 (2011) (highlighting courts’ historical determinations of suspect classifications, such as gender, race, and alienage, and fundamental rights such as marriage and travel).

\textsuperscript{22} See id. at 138-39 (discussing discrete and insular groups such as disabled individuals, groups with immutable characteristics such as women, and groups who have faced historical discrimination, such as African Americans).
explicit criteria. In considering constitutional rights, the Court has examined whether the principle is so deeply rooted in the traditions and collective conscience of the people as to be considered as fundamental. However, in Poe v. Ulman, the dissent cautioned courts to consider that the country has historically both developed and broken traditions. Therefore, the Supreme Court has recognized that there is no exclusive and definitive standard for determining Fifth Amendment due process claims.


24 See, e.g., Griswold v. Connecticut, 381 U.S. 479, 491 (1965) (Goldberg, J., concurring) (inferring that the framers valued historical traditions, though they did not explicitly limit fundamental rights to any specific equation).

25 See Poe v. Ullman, 367 U.S. 497, 542 (1965) (Harlan, J., dissenting) (stating courts must consider the broad nature of the due process clause given society’s progression).

26 See id. at 543 (warning that due process liberties are not limited by specific guarantees explicitly stated elsewhere in
B. Strict Scrutiny and Murgia Under the Fifth Amendment

1. The Emergence of Strict Scrutiny

In analyzing Fifth Amendment claims, courts may utilize strict scrutiny review to weigh the government’s interest against a particular legislative classification. The Supreme Court has established two requirements for triggering strict scrutiny review: a group either must prove they are part of a suspect class or that they have been deprived of a fundamental right.

Strict scrutiny review was clearly demonstrated in Loving v. Virginia, where two Virginia residents, a white man and a

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27 See Korematsu, 323 U.S. at 216 (introducing strict scrutiny review to determine the government’s national security interests during wartime and the Japanese Americans’ interests who were subject to the government’s actions).

28 See Doug Linder, Equal Protection and Fundamental Rights, UNIVERSITY OF MISSOURI-KANSAS CITY, http://law2.umkc.edu/faculty/projcts/ftrials/conlaw/fundrights.html (explaining courts have determined factors such as race and gender indicate suspect classification, and factors such as marriage and travel indicate fundamental rights, all of which have triggered strict scrutiny review).
black woman, were married in Washington, D.C. and subsequently
criminalized under a Virginia miscegenation statute prohibiting
interracial marriage.\(^{29}\) The government claimed the statute was
constitutional because it equally punished both black and white
people.\(^{30}\) However, the Court, having found a racial
classification, applied strict scrutiny and held the statute was
unconstitutional because the state had no compelling interest,
independent of odious racial discrimination, which justified
such classification.\(^{31}\) Therefore, strict scrutiny review
requires the government to demonstrate a compelling government
interest, narrowly tailored to achieve that interest, executed

\(^{29}\) See, e.g., Loving v. Virginia, 388 U.S. 1, 3 (1967) (noting
that under the statute it was illegal for interracial couples to
go to another state, get married, and return to Virginia).

\(^{30}\) See id. at 10 (explaining that the state mistakenly cited Pace
v. Alabama, 106 U.S. 583 (1883) to support its equal application
theory because the Court rejected the reasoning of that case
during the 1964 term).

\(^{31}\) See id. at 11 (noting that Virginia’s prohibition of
interracial marriages only involves white individuals, which
indicates that the racial classifications must stand on their
own justification).
by the least restrictive means possible.  

2. A New Suspect Class: Massachusetts Board of Retirement v. Murgia

In 1976, the Supreme Court identified a suspect class when it decided whether a statute mandating a police officer to retire upon his fiftieth birthday violated the officer’s equal protection rights. The police department provided expert testimony asserting that police officers’ job duties require skills which generally diminish upon fifty years of age. Subsequently, the Court held that this case did not trigger strict scrutiny review because mandatory retirement at age fifty does not make officers a suspect class nor does it interfere with a fundamental right. The Court reasoned that the

32 See id. at 12 (applying strict scrutiny and finding that marriage is a fundamental right which cannot be deprived solely on the basis of race).


34 See id. at 311 (stating that age is a very relevant factor when considering possible police duties such as weapons training and handling, chasing suspects by foot, climbing fences, and engaging in tactical apprehension of suspects).

35 See id. at 313 (rejecting the officer’s claim that he was
plaintiff might have qualified as part of a suspect class if he could show he was politically powerless. Thereafter, the Court identified politically powerless individuals as those in need of extraordinary protection from the government based on historical stereotypes not indicative of their true abilities to contribute to society.

3. The Fundamental Right of Travel: Freedom of Movement

Freedom of movement falls under the fundamental right to travel, which is protected by the Due Process Clause of the Fifth Amendment. In Regan v. Wald, the Court decided whether a statute preventing American citizens from traveling to Cuba restricted the complainants’ freedom of movement in violation of discriminated against on the basis of his age).

36 See id. (noting that groups with a history of unequal treatment or unique disabilities compared to others in society identify an individual or group as part of a suspect classification).

37 See id. (inferring that such stereotypes might present the group as deficient in the workforce, where support from the political process would prove otherwise).

the Fifth Amendment.\textsuperscript{39} In this case, respondents were American citizens who wanted to travel to Cuba, but were inhibited from doing so by a statute, which prohibited any transaction involving property tied to Cuban interests.\textsuperscript{40} The statute was amended to narrow the scope of permissible economic transactions in connection with travel to Cuba, and to give the President broad discretion to implement transactional embargos when necessary.\textsuperscript{41} The Court held that the law was constitutional and reasoned that the statute sufficiently demonstrated that national security interests were substantially related to the law’s inhibition of travel to Cuba.\textsuperscript{42} As such, the Supreme Court

\textsuperscript{39} See id. at 240 (referencing respondents’ citation of Kent v. Dulles, 357 U.S. 116, 129 (1958) to reiterate respondents’ argument that the statute violated their freedom of movement).
\textsuperscript{40} See id. at 224 (explaining that the statute sought to regulate any transaction that would contribute to the Cuban economy because of Cuba’s alleged funding of groups that the United States perceived as threats at the time).
\textsuperscript{41} See id. (noting that the amendment ended a five-year period where all travel-related transactions, such as food and lodging, were permissible upon traveling to Cuba).
\textsuperscript{42} See id. at 244 (explaining the Court would not interfere with the Executive Branch’s decision making when foreign relations
in their analysis instructed that courts must consider a law’s language, purpose, and legislative history when applying strict scrutiny review to determine whether an individual’s fundamental rights have been violated.\textsuperscript{43}

C. The Supreme Court and the Eighth Amendment

The Eighth Amendment ensures that the government uses civilized standards when exercising its punishment powers.\textsuperscript{44} As a result, courts have considered societal progression and evolving standards of decency when assessing whether punishments violate the Eighth Amendment.\textsuperscript{45} The Supreme Court has also

\textsuperscript{43} See id. (providing that the law in this case included clear and comprehensible language, was founded on foreign policy concerns, and has historically evolved in accordance with developing national security concerns).

\textsuperscript{44} See Woodson v. North Carolina, 428 U.S. 280, 288 (1976) (positing that contemporary civilized standards have been indentified in prior opinions by examining history and traditional usage, legislative enactments, and jury determinations).

\textsuperscript{45} See Trop v. Dulles, 356 U.S. 86, 100-01 (1958) (noting the Eighth Amendment’s words are not precise, nor is its scope static, therefore, its meaning must be drawn from societal
instructed that courts must consider the circumstances of the offense and the offender’s character and propensities when imposing a severe punishment.\footnote{See Woodson, 428 U.S. at 304 (citing Sullivan v. Ashe, 302 U.S. 51, 55 (1937)) (emphasizing that determining punishment requires broad consideration in order to avoid arbitrary ruling).}

In \textit{Woodson v. North Carolina}, the petitioners appealed a death penalty sentence arising from their participation in an armed robbery.\footnote{See id. at 283 (stating that the offense resulted in a store cashier’s death and a customer being seriously injured).} The Court held that because the law mandatorily imposed the death penalty without subjective review of the offense’s surrounding circumstances, it violated the Eighth Amendment.\footnote{See id. at 306 (holding that because the death penalty is qualitatively different than life imprisonment, it should be applied on a case by case basis).} Thus, the Supreme Court prohibits laws that arbitrarily punish individuals without thorough circumstantial review of the factors surrounding the offense.\footnote{See id. at 304 (noting that consideration of both the offender and the offense is an indispensable progressive and humanizing progression).}
D. Justice Brennan’s Concurrence in Furman v. Georgia: Assessing When Punishment Violates the Eighth Amendment

In 1972, the Supreme Court sought to create clear guidelines in determining whether punishments comport with the Eighth Amendment.\(^{50}\) In Furman v. Georgia, the Court assessed whether a death penalty sentence violated three defendants’ Eighth Amendment rights.\(^{51}\) The trial court found the defendants guilty under a state statute, which gave it broad discretion to decide when to impose the death penalty.\(^{52}\) This case occurred during racially oppressive times, and the number of African-American and Caucasian individuals sentenced to death were

\(^{50}\) See Furman v. State, 167 S.E.2d 628 (Ga. 1969), cert. granted, 408 U.S. 238 (U.S. Jan. 17, 1972) (No. 69-5003) (addressing whether the death penalty infringes upon convicts’ constitutional rights when juries had inherent control over who would be subject to such penalty).

\(^{51}\) See Furman v. Georgia, 408 U.S. 238, 241 (1972) (hearing three consolidated cases for the purpose of certiorari that included one murder and two rape convictions).

\(^{52}\) See id. (noting that such broad discretion raised concern of discretionary abuse because juries could essentially impose the death penalty whenever they wanted).
substantially disproportionate.\textsuperscript{53} This inconsistency immediately triggered Eighth Amendment concerns and the Court subsequently prohibited lawless death penalty impositions by requiring capital cases to be reviewed subjectively.\textsuperscript{54} Though Furman did not address sentence enhancements, Justice Brennan’s concurrence provides an applicable framework, which courts may utilize during sentence enhancement hearings.\textsuperscript{55}

Justice Brennan’s concurrence outlined four considerations to determine “standards of decency” when assessing a particular punishment’s validity.\textsuperscript{56} First, a punishment must not be so

\begin{footnotesize}
\textsuperscript{53} See id. (positing that higher numbers of African Americans being sentenced to capital punishment coincided with white jury members exercising their inherent power during racially oppressive times).

\textsuperscript{54} See id. (holding that the infliction of the death penalty cannot rest on a bright line rule because such a narrow scope violates the Eighth Amendment).

\textsuperscript{55} See id. at 270 (Brennan, J., concurring) (emphasizing the Eighth Amendment’s ambiguity, and the need for the Court to provide clear guidance that comports with societal progress).

\textsuperscript{56} See id. (proclaiming that the Eighth Amendment’s cruel and unusual punishment prohibitions assure the state’s power to punish be exercised within the limits of civilized standards).
\end{footnotesize}
severe that it degrades human dignity.\textsuperscript{57} Second, the State must
not arbitrarily inflict a severe punishment.\textsuperscript{58} Third, a severe
punishment must not be unacceptable to contemporary society.\textsuperscript{59}
Finally, a severe punishment must not be excessive.\textsuperscript{60} This
framework establishes a holistic and tangible test for analyzing
the constitutionality of punishments under the Eighth
Amendment.\textsuperscript{61}

1. \textit{The Human Dignity Prong: Punishment Must Not
Degrade Human Dignity}

A severe punishment degrades human dignity when it denies
an individual’s existence as a member of the human community.\textsuperscript{62}

\begin{flushleft}
\textsuperscript{57} See \textit{id.} at 271 (explaining that the clause’s fundamental
premise is understanding that even the worst criminals are human
beings who possess common human dignity).
\textsuperscript{58} See \textit{id.} at 274 (stating that extremely severe punishments will
be widely applied, thus the clause must protect against the
dangers of arbitrary ruling).
\textsuperscript{59} See \textit{id.} at 279 (declaring that society’s acceptance of a
punishment is measured by the punishment’s use).
\textsuperscript{60} See \textit{id.} (recognizing that excessive punishment generally
exceeds a punishment’s necessity).
\textsuperscript{61} See \textit{id.} at 282 (noting that the Court is unlikely to decide a
punishment’s legitimacy over any one principle).
\textsuperscript{62} See \textit{id.} at 274 (explaining that an individual’s standing in

The Court has recognized that human dignity violations are not measured by the shock value of a punishment, but rather by squaring penal intent with the penalty’s impact on the individual. Therefore, courts must consider that a punishment’s intent does not comport with human dignity if it does not directly address the issues caused by the offense.

In *Weems v. United States*, a prisoner appealed his conviction for falsifying a public document during his tenure as a disbursement officer. The prisoner asserted that his sentence of fifteen years hard labor amounted to cruel and

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63 See *Weems v. United States*, 217 U.S. 349, 381 (1910) (stating that contrasts in penal intent and punishment indicate condemnable sentences, therefore, the penal intent and the punishment must be proportionate to one another).

64 See *id.* (holding that the defendant’s hard labor punishment does not address the statute’s intent of preventing document forgery, and therefore, is disproportionate to the government’s penal intent).

65 See *id.* at 357 (highlighting the defendants heightened responsibility as an officer of the state).
unusual punishment under the Eighth Amendment. The Court held the punishment violated the Eighth Amendment because the imposed sentence was grossly disproportionate to the offense committed.

It reasoned that the purpose and necessity of imposing hard labor was inconsistent with the government’s overall goals in preventing forgery. In formulating its opinion, the Court established that a punishment discards an individual’s humanity when the punishment is inconsistent with its purpose, when it unnecessarily torments individuals, and when it disregards hope for reformation of the criminal.

66 See id. at 359 (explaining the hard labor sentence does not explicitly restrict or limit the physical demands of those serving such a sentence, thus, the defendant was concerned such punishment could be grueling).

67 See id. at 382 (discussing the statute, in question, criminalizes erroneously signing a document regardless of intent, and such crime does not merit grueling hard labor).

68 See id. at 371 (noting the government’s interest in preventing forgery rested on maintaining document efficiency, as stated under the statute, and imposing hard labor would not further those interests).

69 See id. at 366 (inferring that a defendant or prisoner’s standing in society is directly connected to the opportunities
2. The Arbitrary Punishment Prong: States Must Not Arbitrarily Inflict Punishment

Punishment is arbitrary when it broadly inflicts penalty upon some individuals that it does not inflict on others.\textsuperscript{70} In Trop v. Dulles, the petitioner lost his United States citizenship after he was court-martialed for wartime desertion.\textsuperscript{71} Mr. Trop claimed the mandated forfeiture of his citizenship violated his Eighth Amendment rights.\textsuperscript{72} The government contended that the statute did not impose a punishment because the constitutional limitations on Congressional power to punish were inapplicable.\textsuperscript{73} Moreover, the government contended that the available for him to reform).

\textsuperscript{70} See Furman v. Georgia, 408 U.S. 238, 274 (1972) (Brennan, J., concurring) (explaining that the Constitution inherently forbids arbitrary punishment).


\textsuperscript{72} See id. (stating the defendant’s claim that his choice to avoid serving in the military during the war did not justify the government stripping him of his status).

\textsuperscript{73} See id. at 94 (noting that the denationalization act is an Act of Congress, and is thus, a regulation rather than a punishment).
petitioner’s denationalization did not impose any physical harm.\textsuperscript{74} However, the Court discarded the government’s assertions and held that the petitioner’s Eighth Amendment rights were violated because the denationalization destroyed his status in organized society.\textsuperscript{75} Thus, punishments are arbitrary when broadly applied in a manner that destroys a defendant’s standing in a structured society.\textsuperscript{76}

3. The Contemporary Society Prong: Severe Punishment Must Not Be Unacceptable to Contemporary Society

Society’s acceptance of punishment is measured by the present use of the punishment.\textsuperscript{77} Thus, a statute’s legislative

\textsuperscript{74} See id. (rejecting the government’s position that a cruel and unusual punishment must manifest extreme physical suffering, such as hard labor, torture, capital punishment).

\textsuperscript{75} See id. at 101 (emphasizing physical pain is neither necessary or sufficient to impose cruel and unusual punishment, rather cruelty can be found in the devastating impacts on an individual’s sense of existence).

\textsuperscript{76} See Furman v. Georgia, 408 U.S. 238, 279 (1972) (Brennan, J., concurring) (emphasizing that arbitrary punishment is inconsistent with Eighth Amendment principles because broadly applying punishment for some and not others is cruel and unusual).

\textsuperscript{77} See id. at 278 (highlighting objective indicators such as how
authorization does not alone indicate societal acceptance.\textsuperscript{78} Courts have considered that society’s rejection of a punishment strongly indicates that punishment violates human dignity.\textsuperscript{79} In Robinson \textit{v. California}, the defendant was punished for his narcotics addiction.\textsuperscript{80} At trial, the jury instruction provided that circumstantial proof of narcotics addiction was sufficient to convict the defendant.\textsuperscript{81} The Court held that in consideration a punishment’s use and necessity, which demonstrate a contemporary society’s view of a punishment).

\textsuperscript{78} See \textit{id.} at 279 (emphasizing the need for courts to separate the legal authority from the acceptance of such law by society because society may not always approve of a particular law).

\textsuperscript{79} See \textit{id.} (inferring that society’s view of a punishment turns on reasonableness, which illustrates that whether the punishment is cruel and unusual rests on how an ordinary citizen would perceive such punishment).

\textsuperscript{80} See Robinson \textit{v. California}, 370 U.S. 660, 660 (1962) (addressing the question of whether a state statute, which criminalizes narcotics addiction is constitutional under the Eighth Amendment).

\textsuperscript{81} See \textit{id.} at 665 (analogizing labeling someone with an addiction as a criminal specifically because of such addiction with criminalizing a person for having a disease).
of contemporary knowledge, criminalizing drug addiction is cruel and unusual because addiction is predicated on circumstances beyond the individual’s control such as the desire to use drugs, and the inability to withhold drug use.\textsuperscript{82} Thus, courts have factored societal views on punishment in determining whether a particular punishment violates the Eighth Amendment.\textsuperscript{83}

4. The Excessive Punishment Prong: Severe Punishment Must Not Be Excessive

The Supreme Court has acknowledged that excessive punishment is not limited to torturous or barbaric elements.\textsuperscript{84} Rather, it involves inquiry into the punishment’s purpose and

\textsuperscript{82} See \textit{id.} at 667 (considering that the defendant’s addiction was analogous to a disease because he could not help constantly desiring narcotics, nor did his continuous use speak to any desire to harm society).

\textsuperscript{83} See \textit{Furman}, 408 U.S. at 279 (Brennan, J., concurring) (inferring that determining whether a punishment violates the Eighth Amendment requires an examination of how the public would respond to such punishment).

\textsuperscript{84} See \textit{McDonald v. Commonwealth}, 53 N.E. 874, 875 (Mass. 1899) (acknowledging the problematic narrow interpretation of excessive punishment as a product of barbaric or inhumane behavior).
the proportionality of the punishment to the offense.\textsuperscript{85} In *McDonald v. Commonwealth*, the defendant was charged with forging checks.\textsuperscript{86} The defendant had unrelated prior offenses, and was prosecuted under Massachusetts’ law as a habitual offender.\textsuperscript{87} The court held that the defendant was properly charged and sentenced; however, it also acknowledged a prison sentence that is disproportionate to the offense may violate the Eighth Amendment.\textsuperscript{88}

*Ewing v. California* presented a proportionality issue when

\textsuperscript{85} See *Furman v. Georgia*, 408 U.S. 238, 279 (1972) (Brennan, J., concurring) (explaining that punishments must serve a penal purpose, and be weighed against offense’s gravity); see also *McDonald v. Commonwealth*, 53 N.E. 874, 875 (Mass. 1899) (acknowledging that courts may impose excessive punishment by not considering proportionality).

\textsuperscript{86} See *McDonald*, 53 N.E. at 874 (noting that the defendant had forged checks as part of a scheme to illegitimately profit off of other individuals’ assets).

\textsuperscript{87} See *id.* (highlighting the defendant’s prior offenses of theft as a basis for imposing a punishment for his current offense).

\textsuperscript{88} See *id.* (inferring that courts cannot apply a bright line rule to cases with proportionality issues and that courts can do constitutional harm by mis-distributing prison sentences).
the petitioner was convicted of felony grand theft for stealing golf clubs and was sentenced to twenty-five years to life in prison under California’s “Three Strikes Rule.” The Court determined the sentence was not cruel and unusual because it was not grossly disproportionate to the offense committed. Though the McDonald and Ewing courts did not find Eighth Amendment violations, they established that punishments are excessive where they are disproportionate to the offenses alleged.

E. United States v. Mobley: Enhancing a Prisoner’s Sentence Based On Prior Offenses

United States v. Mobley demonstrates how courts have labeled prisoners as career offenders using categorically calculated numerical results during sentence enhancement hearings. In Mobley, the defendant pleaded guilty to

89 See Ewing v. California, 538 U.S. 11, 18 (2003) (stating that the defendant had two burglary convictions prior to this offense).

90 See id. at 33 (Stevens, J., dissenting) (noting that all of the defendant’s offenses were closely related to each other in substance).

91 See Furman v. Georgia, 408 U.S. 238, 279 (1972) (Brennan, J., concurring) (highlighting the Court’s interpretations of excessive punishment despite ruling in favor of the state).

92 See United States v. Mobley, 687 F.3d 625, 627 (4th Cir. 2012)
possessing a prohibited object in prison. Mr. Mobley’s sentence was enhanced under the career offender enhancement statute, which provided for punishment beyond the statutory maximum where a defendant had two prior violent offenses or drug possession charges. Subsequently, Mobley’s prior charges were calculated and he was labeled a career offender. The court did not consider the circumstances underlying the offense, Mr. Mobley’s time served for his previous offenses, or his behavior (labeling Mr. Mobley a career offender based on a presentence investigation report, which categorized him on the basis of a numerical value associated with his prior drug possession convictions).

93 See id. (explaining Mr. Mobley was caught with the prohibited object, a manmade knife (shank), during a doctor’s appointment).

94 See id. (holding that Mr. Mobley’s offense was a violent offense, sufficient to label him career offender under 18 U.S.C.A § 4B1.1 (2013), because Mr. Mobley could only have possessed a shank with the intention of committing a violent act against another person).

95 See id. at 631 (citing the Federal Sentencing Guidelines Manual § 4B1.1 to illustrate criterion, such as age and criminal history, for qualifying a prisoner as a career offender).
while incarcerated.\textsuperscript{96} As such, in \textit{Mobley}, the court did not consider possible Fifth and Eighth Amendment issues arising from punishing Mr. Mobley for his already adjudicated offenses.\textsuperscript{97}

\textbf{III. Analysis}

Prisoners may lose their Fifth Amendment privileges when they are punished for their statuses rather than their offenses.\textsuperscript{98} Mr. Mobley’s career offender classification under the recidivist statute placed him in a suspect class because he was left in a politically powerless position.\textsuperscript{99} Moreover, the

\textsuperscript{96} See \textit{id.} at 627 (considering only the results of the defendant’s PSR in the opinion, which rested exclusively on his criminal history).

\textsuperscript{97} See \textit{id.} (inferring that judges predominantly rely on criminal history when determining sentence enhancements).

\textsuperscript{98} See \textit{Bolling v. Sharpe}, 347 U.S. 497, 499 (1954) (stating Fifth Amendment claims can manifest equal protection elements because equal protection and due process are not mutually exclusive from one another).

\textsuperscript{99} See \textit{Mass. Bd. of Ret. v. Murgia}, 427 U.S. 307, 313 (1976) (explaining that there are no explicit limitations for determining suspect classification, thus, any group that can prove they are placed in a politically powerless position indicate suspect classification).
recidivist statute restricted Mr. Mobley’s freedom of movement upon his sentence reaching the statutory maximum; thus, he was deprived of his fundamental freedom of movement.\(^{100}\) Because of Mr. Mobley’s suspect classification, his deprivation of a fundamental right, and the government’s failure to demonstrate a substantially related interest, Mr. Mobley’s equal protection and due process rights were violated.\(^{101}\)

Prisoners’ Eighth Amendment Rights are violated during sentence enhancements when they are punished for already adjudicated victimless offenses.\(^{102}\) Justice Brennan’s four-part analysis from Furman suggests that factoring non-violent prior offenses into current proceedings to label a prisoner a violent

\(^{100}\) See Regan v. Wald, 468 U.S. 222, 244 (1984) (conceding that the freedom to move and travel is a fundamental right deeply rooted in the Constitution).

\(^{101}\) See Korematsu v. United States, 323 U.S. 214, 216 (1944) (introducing rigid scrutiny review for racial classifications which balanced the government’s and the suspect class’s interests).

\(^{102}\) See Furman v. Georgia, 408 U.S. 238, 271-79 (1972) (Brennan, J., concurring) (providing guidance for future Eighth Amendment inquiries to offset ambiguous and non-static nature of the cruel and unusual punishment clause).
career offender violates the Eighth Amendment. If the court had applied this framework in Mobley, it would have found Mr. Mobley’s sentence enhancement should have considered only his current offense. In considering Mr. Mobley’s prior offenses, the court disregarded the cruel impact of incarcerating him for victimless offenses for which he had already served time. Since the Constitution does not explicitly define cruel and unusual punishment, the court could have utilized Justice Brennan’s framework to consider the validity of Mr. Mobley’s punishment, as opposed to bypassing the Eighth Amendment because the punishment did not necessarily “shock the conscience.”

103 See id. at 277 (noting that such principles should be considered when dealing with the liberty of another human being to avoid cruel and unusual punishment).

104 See United States v. Mobley, 687 F.3d 627, 627 (4th Cir. 2012) (holding that because Mobley’s offense was a “violent offense” under the recidivist statute, sufficient to label him career offender, no further inquiry was necessary).

105 See id. at 628 (ruling only on the basis of the defendant’s criminal history and not considering the impact on Mr. Mobley’s desire to reform, the atrocities of prison, and the impact of enhancement on Mr. Mobley’s ability to reform).

106 See Furman, 408 U.S. at 280 (Brennan, J., concurring)
A. Labeling Prisoners with Prior Victimless Crimes As Career Offenders Based on Recidivist Statutes Violates Prisoners’ Fifth Amendment Rights Because it Places Them in a Suspect Class and Deprives Them of Their Fundamental Right of Liberty.

Mobley raises Fifth Amendment concerns because punishing Mr. Mobley based on his prior convictions and classifying him a career offender placed him in a suspect class.\textsuperscript{107} Moreover, in extending Mr. Mobley’s incarceration beyond the statutory maximum on the basis of his settled prior offenses, he was deprived of his freedom of movement, a fundamental liberty protected under the Due Process Clause of the Fifth Amendment.\textsuperscript{108}

\footnotesize{(inferring that courts have historically associated punishments which “shock the conscience” with barbaric or grossly disproportionate sentences, despite the Constitution’s lack of a bright-line rule defining cruel and unusual punishment).}

\textsuperscript{107} See Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (instructing that a suspect classification requires courts to apply rigid scrutiny to determine whether an individual’s Fifth Amendment rights have been violated).

\textsuperscript{108} See Regan v. Wald, 468 U.S. 222, 244 (1984) (inferring that the fundamental right to travel is directly associated with individuals’ capabilities and opportunities to survive in
1. Mr. Mobley’s Career Offender Classification Placed Him in a Suspect Class Because the Recidivist Statute Placed Him in a Politically Powerless Position.

An individual or group qualifies as a suspect class based on political powerlessness when they have been historically stereotyped based on characteristics not indicative of their abilities. In Murgia, the Court found a statute mandating a police officer to retire at age fifty did not place the officer in a suspect class on the basis of political powerlessness because the law did not discriminate against the elderly, rather it tangibly indicated when individuals could no longer satisfy the police departments’ interests in maintaining efficiency. In Mobley, a recidivist statute classified Mr. Mobley as a career offender in furtherance of public safety. Mobley is

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109 See Murgia, 427 U.S. at 313 (noting that the officer in the case was not part of a politically powerless suspect class explicitly because he did not demonstrate any historical unequal treatment meriting majoritarian support).

110 See id. (holding that the officer’s forced retirement was justified by the competing interests of the police department in achieving efficient policing).

111 See United States v. Mobley, 687 F.3d 627, 629 (4th Cir. 2012) (stating that Mr. Mobley could not have intended to do
clearly distinguishable from *Murgia*, because in *Murgia*, the officer was not part of a historically stereotyped group, whereas in *Mobley*, the recidivist statute infers that all career offenders live complete lives of crime.\textsuperscript{112} Thus, Mr. Mobley’s career offender classification triggers strict scrutiny review, because it demonstrates stereotyped characteristics that are not indicative of his ability to reform, which places him in a politically powerless position.\textsuperscript{113}

Application of strict scrutiny review would have changed the outcome of *Mobley*.\textsuperscript{114} Under the *Loving v. Virginia* analysis, anything except commit a dangerous act of violence in possessing the shank).

\textsuperscript{112} Compare *Murgia*, 427 U.S. at 313 (noting that the statute does not discriminate against the elderly, rather it sets guidelines for police efficiency), with *Mobley*, 687 F.3d at 629 (noting that the possession of a shank in conjunction with Mr. Mobley’s prior possession charges is sufficient to label him a career offender, a classification almost certain to carry stereotyped characteristics).

\textsuperscript{113} See *Murgia*, 427 U.S. at 313 (explaining that if the officer had proven he needed political support he may have had an adequate suspect classification claim).

\textsuperscript{114} See, \textit{e.g.}, *Loving v. Virginia*, 388 U.S. 1, 11 (1967)
the court’s first task would have been to determine the compelling government interest behind the recidivist statute, which enhanced Mr. Mobley’s sentence. Like Loving, where the Court stated the government’s interest in prohibiting interracial marriage was based on racial integrity, in Mobley, the court infers that the government’s competing interest in enforcing a recidivist statute is to uphold public safety. As such, both Loving and Mobley illustrate demonstrated government interests.

(requiring that suspect classification, such as race, is sufficient to trigger the most rigid scrutiny).

115 Cf. id. (explaining that the historical interest behind the Virginia miscegenation statute dates back to colonial times incident to slavery).

116 Compare id. at 6 (explaining that the miscegenation statute was passed incident to extreme nativism after the first World War), with Mobley, 687 F.3d at 629 (inferring that the statutory “career offender” classification is applied in the best interests of other prisoners, staff, and the general public).

117 See Loving, 388 U.S. at 6 (stating that Virginia was one of sixteen states that prohibited interracial marriages on the basis of racial classifications); see also Mobley, 687 F.3d at 629 (asserting that Mr. Mobley’s possession of the shank must be
Next, the court would have had to consider whether the statute was narrowly tailored, executed by the least restrictive means possible.\textsuperscript{118} In \textit{Loving}, the statute was not narrowly tailored and applied in the least restrictive way because it served no legitimate purpose independent of invidious racial discrimination.\textsuperscript{119} Similarly in \textit{Mobley}, the recidivist statute was not applied in the least restrictive manner because it automatically enhanced prisoners’ sentences if they had two prior felony drug offenses to maintain public safety, whereas it could have achieved public safety by imposing an alternative sentence centered on societal reintegration.\textsuperscript{120} Therefore, both cases illustrate statutes that were not enforced using the least handled in consideration of the danger such possession placed prison staff and fellow prisoners in).

\textsuperscript{118} See \textit{Loving}, 388 U.S. at 11 (noting that the statute must be necessary to accomplish a permissible state objective, independent of discrimination).

\textsuperscript{119} See \textit{id.} (explaining that because Virginia prohibits only interracial marriages involving white individuals, the law is specifically designed to maintain white supremacy).

\textsuperscript{120} See United States v. \textit{Mobley}, 687 F.3d at 629 (restating the results of the presentence investigation report as sufficient to classify Mr. \textit{Mobley} a career offender).
restrictive means.\textsuperscript{121}

Though the statute in \textit{Loving} was found to be facially discriminatory, the recidivist statute used in \textit{Mobley} is not entirely unconstitutional.\textsuperscript{122} Rather, the statute may produce unconstitutional results when applied improperly.\textsuperscript{123} If it is wrongfully applied without circumstantial consideration, prisoners face constitutional consequences.\textsuperscript{124} Therefore, if the

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\textsuperscript{121} See id. (inferring that the court’s sole reliance on the presentence investigation report to determine what punishment would best suit public safety is common practice during sentence enhancement hearings).
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\textsuperscript{122} See \textit{Loving}, 388 U.S. at 12 (holding that the statute violated the Lovings’ due process rights and equal protection rights because marriage is a fundamental right that cannot be denied on the basis of racial discrimination).
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\textsuperscript{123} See id. (inferring that courts must consider both whether a law on its face and broad application of that law deprives a fundamental right or creates a suspect classification).
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\textsuperscript{124} Compare id. at 8 (explaining that application of a law must be connected to a legitimate, overriding purpose), with \textit{Mobley}, 687 F.3d at 629 (applying the recidivist statute to Mr. Mobley, whose crimes have all been victimless, for the purposes of upholding public safety).
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court in *Mobley* had applied strict scrutiny review, it would have found the statute was unconstitutional because the statute could have met its public safety aims by mandating reintegration programs, intensive parole programs, and counseling services, rather than heightening Mr. Mobley’s sentence for already adjudicated, victimless crimes.\(^\text{125}\)

2. **Mr. Mobley Was Deprived of a Fundamental Right Because the Recidivist Statute Restricted His Freedom of Movement Without Demonstrating a Substantially Related Government Interest Under the Strict Scrutiny Standard.**

A law deprives an individual’s fundamental right when it restricts exercise of that right without any substantially related compelling government interest.\(^\text{126}\) In *Regan v. Wald*, two Americans claimed a federal statute, which prevented Americans from engaging in any transactions in Cuba, inhibited their travel to Cuba and thus deprived them of their fundamental right

\(^{125}\) *See Mobley*, 687 F.3d at 629 (expressing that the presentence investigation report detailing Mr. Mobley’s prior offenses qualified his sentence for enhancement of a year beyond the statutory maximum).

\(^{126}\) *See Regan v. Wald*, 468 U.S. 222, 244 (1984) (inferring that the Fifth Amendment guarantees the fundamental rights of life, liberty, and property absent a compelling government interest to withhold such rights).
to travel. Conversely, in Mobley, a federal recidivist statute prevented the defendant from traveling because it mandated him to stay in prison for an extended time beyond the statutory maximum for his offense based on a classification. The government’s interest in Regan is clearly different from Mobley, because the government was concerned with upholding national security interests in light of the contentious relationship between the United States and Cuba. Whereas, in Mobley, the government has not demonstrated any competing interest justifying prohibiting Mr. Mobley’s travel, other than the inference of public safety, which could have been attained less restrictively. Thus, Mr. Mobley’s sentence enhancement

127 See id. at 240 (stating that though respondents were allowed to travel to Cuba, prohibition on making any transactions there inhibited their ability to travel).

128 See Mobley, 687 F.3d at 629 (outlining the probation officer’s findings in the pre-sentence investigation report which numerically calculated how much time the court should add in excess of the statutory maximum).

129 See Regan, 468 U.S. at 222 (discussing Cuba’s actions and their effects on relations between the United States and Cuba).

130 See Mobley, 687 F.3d at 629 (inferring that Mobley’s behavior should be considered under the recidivist statute because the
via the recidivist statute demonstrates there was a fundamental right at stake.\footnote{131}{See Regan, 468 U.S. at 222 (explaining that travel and movement are inherent fundamental rights covered under the Fifth Amendment).}

Assuming Mr. Mobley did have a fundamental right at stake, the recidivist statute would not have passed constitutional muster if strict scrutiny review were applied.\footnote{132}{See Korematsu v. United States, 323 U.S. 214, 216 (1944) (explaining that the law was only upheld because the government’s competing interest was narrowly applied and substantially related to the law).}

Concededly, the statute may demonstrate a connection to the government’s interest in upholding public safety; however, here, the statute is clearly not substantially related to such an interest.\footnote{133}{See id. (noting that a law rationally related to a competing government interest is a much lower standard than substantially related, and thus, the question of what level of relation hinges on how narrowly the law is applied).} If the court had applied strict scrutiny to determine whether the statute’s aim of public safety was being executed in the least nature of his shank possession and his prior offenses are enough to label him a risk to society).
restrictive way, it likely would have found other alternatives to enforcing public safety than prohibiting a prisoner’s travel on the basis of already adjudicated victimless crimes.\textsuperscript{134}

Though application of this reasoning may result in increased litigation of prisoners seeking to leave prison, the Constitution does not expressly prohibit increased constitutional claims.\textsuperscript{135} As such, a constitutional claim on Mr. Mobley’s behalf is not invalidated by its impact on future litigation.\textsuperscript{136} Therefore, Mr. Mobley’s fundamental right of liberty was violated when the recidivist statute restricted his freedom of movement because his incarceration extension is not substantially related to a compelling government interest.\textsuperscript{137}

\textsuperscript{134} See Mobley, 687 F.3d at 629 (failing to state in the opinion any alternatives factoring public safety into the validity of Mr. Mobley’s punishment).

\textsuperscript{135} See generally U.S. \textsc{const.} amend. V (offering broad protections under the due process clause but not explicitly limiting any claim to a specific standard).

\textsuperscript{136} See id. (suggesting that the Framers were not concerned that too many people would make constitutional claims).

\textsuperscript{137} See Regan v. Wald, 468 U.S. 222, 240 (1984) (holding the statute valid because the statutorily imposed burden on individuals is justified by the national security interests

The Eighth Amendment principles proposed in the concurrence in Furman are applicable to Mobley. First, Mobley raises a human dignity issue because Mr. Mobley’s sentence factored prior offenses that had already been adjudicated without consideration of his future reintegration into society. Second, Mobley raises an arbitrariness issue because the court utilized a broadly applied statute to punish him. Third, Mobley is relevant to progressive societal views on punishment because society may reject a punishment that subjects a defendant to asserted by the government).


139 See Mobley, 687 F.3d at 628 (stating defendant’s two prior offenses were felony drug possessions that he had already been incarcerated for).

140 See id. at 627 (listing the results of the defendant’s presentence investigation report as a premise for his sentence determination).
repeat penalization for the same offense. Finally, Mobley indicates that Mr. Mobley was excessively punished when he was classified a career offender, which requires “violent offenses,” though he never committed any acts of violence against anyone.  

1. The Court’s Emphasis on Mr. Mobley’s Prior Offenses Degraded His Sense of Human Dignity Because it Disregarded His Standing in Society As a Human Being.

A severe punishment degrades human dignity when it disregards an individual’s existence as a member of the human community. As such, Justice Brennan emphasizes that human dignity is not constrained to punishments that shock the conscience. Unlike Furman, where the defendants were facing

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141 See Furman, 408 U.S. at 279 (Brennan, J., concurring) (noting that if society would deem a punishment cruel and unusual, that particular punishment would likely fall within the prohibitions of the Eighth Amendment).

142 Cf. id. (expressing concern that when offenses are disproportional to punishments, the punishments may be cruel and unusual under the Eighth Amendment).

143 See id. at 274 (listing factors, such as regard for human existence, when determining whether a punishment comports with human dignity).

144 See id. (inferring that the principle of human dignity is inherent in the Eighth Amendment but not explicitly constricted
charges of murder and rape, Mr. Mobley, had been incarcerated for felony possession of illegal drugs.\textsuperscript{145} While the contrast in heinousness of the offenses are stark between \textit{Furman} and \textit{Mobley}, the Court in \textit{Furman} emphasized that the defendants are human, despite their crimes, and should be sentenced accordingly.\textsuperscript{146} Conversely in \textit{Mobley}, the court was emphatically fixated on Mr. Mobley’s prior, non-violent offenses as the dispositive factor during his sentence enhancement hearing.\textsuperscript{147} Such reliance degraded Mr. Mobley’s dignity because it characterized him as a number rather than as a human by numerically categorizing him as a career offender through a criminal history report.\textsuperscript{148}

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\item \textsuperscript{145} See \textit{Mobley}, 687 F.3d at 627 (stating that the defendant had been currently serving time for almost six months for his prior convictions).
\item \textsuperscript{146} See \textit{Furman}, 408 U.S. at 238, 241 (emphasizing that the nature of a defendant’s actions do not change the fact that defendant’s are human).
\item \textsuperscript{147} See \textit{Mobley}, 687 F.3d at 627 (providing no other analysis of how the defendant should be sentenced other than reviewing the numerical results of his criminal history via the Presentence Investigation Report).
\item \textsuperscript{148} See \textit{id.} at 628 (explaining that prior to the sentence
Mobley’s punishment illustrates the court’s loyalty to numeric calculations and disregard for the atrocities of prison.\textsuperscript{149} In doing so, the court embodied Justice Brennan’s concern that courts traditionally over-associate cruel punishment with barbaric and grossly disproportionate elements.\textsuperscript{150} Moreover, they disregard the possibility that punishments short of those that are grossly disproportionate or shock the conscience may also embody Eighth Amendment violations.\textsuperscript{151}

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\textsuperscript{149} See \textit{id.} (fixating on Mr. Mobley’s prior history as a justification for his sentence enhancement and disregarding concerns for whether prisons’ reputable hardships may hinder Mr. Mobley’s ability to reform).
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\textsuperscript{150} See \textit{Furman}, 408 U.S. at 280 (Brennan, J., concurring) (emphasizing the idea that perhaps the Framers did not explicitly define cruel and unusual punishment to enable courts to evolve their standards of imposing punishment overtime).
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\textsuperscript{151} See \textit{id.} at 271-80 (inferring that any punishment may indicate Eighth Amendment violations because nothing in the Constitution expressly limits constitutional review of punishments to only those that shock the conscience).
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Similar inconsistencies can be found when comparing Mobley to Weems.\textsuperscript{152} In Weems, the Court considered whether the defendant’s punishment violated the Eighth Amendment by evaluating how the punishment impacted the defendant’s sense of human dignity.\textsuperscript{153} Conversely, in Mobley the court’s primary inquiry was invested in the defendant’s criminal history, as evidenced by the opinion’s sole reliance on the defendant’s presentence investigation report in determining his sentence enhancement.\textsuperscript{154} In Weems, the defendant’s punishment was found to degrade human dignity because the penalty and the legislative purpose of the penalty were disproportionate.\textsuperscript{155} However, in

\textsuperscript{152} See \textit{Weems v. United States}, 217 U.S. 349, 366 (1910) (concluding that a punishment that degrades human dignity does not require the element of physical harm).

\textsuperscript{153} See \textit{id}. (noting the idea that a crime should follow a person for the rest of their life is not a precept of any amendment to the Constitution).

\textsuperscript{154} See \textit{Mobley}, 687 F.3d at 627 (characterizing Mr. Mobley’s shank possession as a violent offense, without regarding any circumstances surrounding the possession, such as fear for his safety).

\textsuperscript{155} See \textit{Weems}, 217 U.S. at 382 (requiring that punishments must serve a penal purpose because in the absence of such purpose,
Mobley, the court did not consider the contrast between the violence-preventing aims of the recidivist statute and Mr. Mobley’s penalty for already adjudicated, victimless offenses, which ultimately led to a disproportionate penalty.\textsuperscript{156}

Admittedly, asking the court to consider whether a two-year sentence enhancement degrades human dignity is a sharp departure from traditional notions of what constitutes human dignity violations.\textsuperscript{157} However, Justice Brennan’s perspective indicates that human dignity violations have never been explicitly limited to barbaric and torturous punishments or unlawful death sentences.\textsuperscript{158} Moreover, the Supreme Court has warned that courts punishments would be imposed for no other reason other than to inflict suffering).

\textsuperscript{156} \textit{Cf.} Mobley, 687 F.3d at 627 (concluding that Mr. Mobley could be sentenced in accordance with repeat violent offenders despite the fact that all of his crimes have been victimless).

\textsuperscript{157} \textit{See} Weems, 217 U.S. at 382 (noting that for centuries many courts have measured the Eighth Amendment validity of punishments by measuring how torturous and barbaric they are in nature).

\textsuperscript{158} \textit{See} Furman v. Georgia, 408 U.S. 238, 271 (1972) (Brennan, J., concurring) (explaining that the search for what constitutes inhuman treatment must go deeper than facially obvious
must both respect and be aware of historical traditions, as many have been broken, as society has progressed. Therefore, if the court in *Mobley* had applied the *Weems* analysis of human dignity, it would have found that enhancing Mr. Mobley’s sentence for his prior offenses disregarded his human status by heightening his penalty on grounds of violence for victimless acts.

2. The Court Ruled Arbitrarily in *Mobley* Because It Punished Mr. Mobley Differently Than a Prisoner with No Criminal History Would Have Been Punished for the Same Offense.

Arbitrary ruling occurs when a punishment is widely applied

characteristics like barbarism and physical torture).

159 See *Poe v. Ullman*, 367 U.S. 497, 542 (1965) (Harlan, J., dissenting) (recognizing that changing traditions symbolize why the Framers’ did not explicitly state hard and fast rules in the Constitution regarding what constitutes a cruel and unusual punishment).

160 See *Furman*, 408 U.S. at 271-79 (Brennan, J., concurring) (listing four principles for assessing the Eighth Amendment when determining a punishment, which demonstrate that Mr. Mobley’s sentence disregarded his human dignity); see also *Weems*, 217 U.S. at 366 (inferring that the Supreme Court has previously weighed the gravity of a punishment against the impact it would have on human dignity).
upon some individuals and is not applied upon others.\textsuperscript{161} During sentence enhancement hearings, courts may subject prisoners to arbitrary ruling when prior offenses are factored into enhancements.\textsuperscript{162} Such arbitrary punishment occurs because recidivist statutes broadly punish prisoners, which may impact some prisoners sentences differently than others despite the fact that their offenses may be the same.\textsuperscript{163} Mobley lucidly

\textsuperscript{161} See \textit{Furman}, 408 U.S. at 274 (Brennan, J., concurring) (explaining that arbitrary forms of punishment, such as mandatory death penalty statutes, are inherently forbidden by the Constitution).


\textsuperscript{163} See \textit{Furman}, 408 U.S. at 277 (Brennan, J., concurring) (inferring that widely applied punishment and arbitrary ruling are intertwined because often times broadly scoped punishments are more severe on some individuals than others).
exemplifies a case where an arbitrary law directly impacted a prisoner’s sentence because the court specifically referred to his prior offenses without conducting any further inquiry to other circumstances underlying his offense.  

Conversely, in Trop, the defendant prevailed on his Eighth Amendment claim that forfeiting his citizenship based on an Act of Congress was cruel and unusual punishment because the law’s broad scope imposed arbitrary ruling. Both the recidivist statute, which the court in Mobley used to impose a sentence enhancement, and the Act of Congress, which the government used to denationalize the defendant in Trop, are arbitrary documents with a broad scope. Yet, the Act of Congress had no leverage against the Constitution in Trop where the recidivist statute did not even

164 See United States v. Mobley, 687 F.3d 625, 631-32 (4th Cir. 2012) (holding that defendant’s sentence was to be enhanced through the career offender enhancement given his prior possession convictions and his current shank possession charge).


166 See id. (involving an Act of Congress as sole basis for determination for punishment); see also Mobley, 687 F.3d at 631-32 (holding the presentence investigation report alone was sufficient to enhance the defendant’s sentence).
merit constitutional consideration in *Mobley.*\textsuperscript{167} This paradox indicates the Fourth Circuit decided *Mobley* arbitrarily without additional consideration of the subjective elements of the case.\textsuperscript{168} The most obvious display of the court’s arbitrary ruling is the inference that a prisoner who had committed the same offense as Mr. Mobley would have been punished less severely if he had only one prior felony drug possession as opposed to two.\textsuperscript{169}

Many courts may not consider a recidivist statute, which imposes a two-year sentence enhancement as an arbitrary law that

\textsuperscript{167} *Compare Trop,* 356 U.S. at 94 (highlighting the necessity of the Court to check congressional powers to avoid arbitrary ruling), *with Mobley,* 687 F.3d at 631-32 (remaining silent on the issue of whether Mr. Mobley’s sentence raised any constitutional issues).

\textsuperscript{168} *See Furman,* 408 U.S. at 271 (Brennan, J., concurring) (inferring that arbitrary ruling occurs when courts fail to holistically consider an offense’s circumstances when determining whether a particular punishment meets constitutional muster).

\textsuperscript{169} *See id.* at 277 (suggesting that there is scant danger in punishing certain individuals differently than others).
destroys a defendant’s standing in society. However, a holistic review would have afforded Mr. Mobley greater protection because Justice Brennan calls for circumstantial review when determining punishment to avoid arbitrary ruling. In applying this review to both Mobley and Trop, courts would likely conclude that both prisoners and wartime deserters must cope with losing their standing in society. Therefore, if the court in Mobley examined the subjective elements of the case, such as the defendant’s time served, behavior while incarcerated, and the humanity of punishment in general, it may have avoided arbitrarily applying an over-inclusive recidivist statute, which labels every individual with three felony possessions a career violent offender.

170 See id. (discussing that broadly applied laws will undeniably over-include individuals and deprive them of their human place in society).

171 Cf. id. (inferring that a two-year sentence enhancement based on prior offenses as stated in Mobley may impact an individual’s sense of human dignity to the same extent as a denationalization, as stated in Trop).

172 See id. at 279 (noting that arbitrary punishment affects all people who’s standing in society is lost as a result).

173 See id. (inferring that a review of the circumstances
3. Contemporary Society Would Reject the Court’s Ruling in Mobley Because Repeat Punishment for Already Adjudicated Offenses is Not a Widely Accepted Practice.

Society’s acceptance of punishment is measured by the punishment’s present use. Contrary to the concurrence in Furman, the court in Mobley failed to consider whether society would deem Mr. Mobley’s punishment valid under the Eighth Amendment. As such, Mr. Mobley’s sentence enhancement did not comport with the Eighth Amendment.

surrounding Mr. Mobley’s case would have revealed that Mr. Mobley’s time served and good behavior does not demonstrate he is a career offender, but rather a prisoner in pursuit of reform and retribution).

Cf. id. at 278 (explaining that proportionate incarceration terms, social programs, and other alternatives to incarceration are practical enough that society would approve of their imposition).

See id. at 238, 280 (inferring that society’s opinions on punishment are generally aligned with the principles of the Eighth Amendment).

See id. (recognizing that one of the reasons the defendants’ Eighth Amendment rights were violated was because society would likely disapprove of sentencing defendants to death on the basis of a mandatory death penalty statute).
In *Robinson v. California*, the Court found that a statute, which criminalized drug addiction, violated the Eighth Amendment because society would not widely accept an individual’s punishment based on a treatable illness. Conversely in *Mobley*, the court criminalized the defendant on the basis of crimes for which he had already been convicted and penalized. Thus, both *Robinson* and *Mobley* illustrate cases where punishments were imposed for circumstances beyond the defendants’ control. Yet, in contrast to *Robinson*, where the Court specifically considered how society would react to

177 See *Robinson v. California*, 370 U.S. 660, 662 (1962) (suggesting that drug addiction was a disease, best addressed with treatment, rather than incarceration).

178 See *United States v. Mobley*, 687 F.3d 627, 629 (4th Cir. 2012) (stating that the defendant’s prior drug possession convictions were sufficient to label him a “career offender” for the purposes of determining a proper sentence enhancement for his shank possession).

179 See *Robinson*, 370 U.S. at 660 (discussing that the defendant’s drug addiction was a sickness beyond his control); see also *Mobley*, 687 F.3d at 628 (stating the defendant’s prior adjudicated offenses would be factors in determining his sentence enhancement).
criminalizing drug addiction, in *Mobley*, the court did not consider whether society would approve of enhancing prisoners' sentences for already settled offenses.\(^{180}\) If the court in *Mobley* made such inquiry, as the court in *Robinson* did, the outcome would have been substantially impacted because the court would have found that society would likely consider heightening Mr. Mobley’s sentence for already adjudicated offenses unconstitutional, similar to criminalizing drug addiction.\(^{181}\)

Many courts may not consider how society would react to a prisoners’ sentence enhancement because perhaps there is a

\(^{180}\) Compare *Robinson*, 370 U.S. at 660 (stating that society would disapprove of criminalizing the defendant’s drug addiction because such punishment would be cruel and unusual); with *Mobley*, 687 F.3d at 628 (factoring the defendant’s prior adjudicated offenses when determining his sentence enhancement, and making no mention of whether contemporary society would deem such punishment cruel and unusual).

\(^{181}\) See *Furman*, 408 U.S. at 271 (Brennan, J., concurring) (inferring that society’s interpretation of cruel and unusual punishment is generally consistent with the Eighth Amendment); see also *Robinson*, 370 U.S. at 660 (stating that society would deem criminalizing the defendant’s drug addiction cruel and unusual).
notion that society accepts all the laws for which it is subject. However, a law’s legal authority is not a substitute for society’s acceptance of that law. As such, the court in Mobley should have considered whether contemporary society would have approved of his punishment in order to comport with the Eighth Amendment. If it had done so, it would have found that society would have disproved of Mr. Mobley’s punishment, because given his prior victimless offenses, such punishment would serve no useful purpose in alleviating or deterring violent crime.

4. The Court’s Punishment in Mobley Was Excessive Because It Served No More Penal Purpose Than a Less Severe Punishment Would and Was Disproportionate to Mr. Mobley’s Offense.

A punishment is excessive where it unnecessarily inflicts punishment that serves no more purpose than a less severe

182 See Furman, 408 U.S. at 279 (Brennan, J., concurring) (emphasizing that courts have a duty to separate the enactment of the law from society’s acceptance of the law).

183 See id. (noting society’s acceptance of a law is measured by the use of the law).

184 See id. at 280 (asserting that the Eighth Amendment inherently requires assessing society’s interests during the imposition of any punishment).

185 See id. (explaining that society’s approval of punishment is measured by the punishment’s use to society)
punishment would, and where the punishment is disproportionate to the offense.\textsuperscript{186} In \textit{McDonald}, the defendant was convicted of forging checks and sentenced as a habitual offender, due to prior, unrelated offenses.\textsuperscript{187} Similarly in \textit{Mobley}, the defendant was convicted of possessing a shank, deemed by the court as an act of violence, and sentenced as a career offender, due to his prior, unrelated offenses.\textsuperscript{188} However, the rulings in \textit{McDonald} and \textit{Mobley} are contrary to the Supreme Court’s instructions that a punishment must serve a penal purpose.\textsuperscript{189} Mr. Mobley had already served time for the offenses for which he had been

\textsuperscript{186} See \textit{id.} at 279 (explaining that punishments must serve a penal purpose, and be weighed against the gravity of an offense); see also \textit{McDonald v. Commonwealth}, 53 N.E. 874, 875 (Mass. 1899) (acknowledging that courts may impose excessive punishment by not considering whether the punishment is appropriate for the offense).

\textsuperscript{187} See \textit{McDonald}, 53 N.E. at 875 (holding that the frequency of defendant’s prior offenses are sufficient to label him a habitual criminal).

\textsuperscript{188} \textit{Contra Furman}, 408 at 280 (Brennan, J., concurring) (stating a punishment is excessive where it is pointlessly inflicted).

\textsuperscript{189} See \textit{id.} (listing factors such as deterrence and enforcement as penal purposes behind punishment).
convicted and sentenced. Thus, enhancing Mr. Mobley’s sentence beyond the statutory maximum because of his prior convictions cannot be said to promote a specific penal purpose, such as deterrence, because such a factor should have already been considered during his original convictions, which resulted in his current incarceration.

In Ewing v. California, the Court explicitly stated that a punishment is proportionate to an offense to the extent that the offenses are closely related to each other in substance. Contrary to Ewing, where the defendant’s prior offenses of burglary were substantively related to his current offense of robbery, in McDonald, the defendant’s prior offenses of petty theft were substantively unrelated to his current offense of forgery because the act of stealing is distinguishable from the

190 See United States v. Mobley, 687 F.3d 625, 627 (4th Cir. 2012) (noting that defendant had already been incarcerated for almost six months for his possession convictions).

191 See Furman, 408 U.S. at 280 (Brennan, J., concurring) (inferring that punishments must not be overly severe in view of the purposes for which it was imposed).

192 See Ewing v. California, 538 U.S. 11, 18 (2003) (referring to the similarity between defendant’s prior offenses of burglary, and his current offense of armed robbery).
act of forging.\textsuperscript{193} Moreover, in \textit{Mobley}, the defendant’s prior felony drug possession offenses were substantively unrelated to his current offense because possessing drugs is distinguishable from possessing a shank in prison, where the court had only assumed the shank’s intended use was to inflict harm upon other individuals.\textsuperscript{194} Because the court in \textit{Mobley} made a sweeping generalization about Mr. Mobley’s intentions behind possessing a shank, it imposed excessive punishment on him by disregarding the lack of relation between his prior and current offenses.\textsuperscript{195}

Though \textit{Ewing} presents a case where the offense and punishment are grossly disproportionate, if the court in \textit{Mobley} had applied the \textit{Ewing} Court’s analysis during the sentence enhancement hearing, it would have found that enhancing the

\textsuperscript{193} See McDonald v. Commonwealth, 53 N.E. 874, 875 (Mass. 1899) (combining the defendant’s offenses despite the difference in relation and substance between the prior offenses and the current offense).

\textsuperscript{194} See \textit{Mobley}, 687 F.3d at 628 (holding the defendant possessed the shank for no other reason than to commit a violent act, as shanks are made with the intentions of inflicting harm).

\textsuperscript{195} But see \textit{Ewing}, 538 U.S. at 12 (holding that the “3 Strikes” rule was based on proportionality, which is contingent upon the relation of prior offenses and the current offense).
defendant’s sentence on behalf of prior offenses was disproportionate to the current offense because it served no more penal purpose than sentencing him solely on the facts of his current offense.\textsuperscript{196}

Undoubtedly, Mr. Mobley’s punishment to offense ratio is considerably more proportionate than Ewing.\textsuperscript{197} However, the principles underlying the determination of proportionality are the same, regardless of the degree of proportionality.\textsuperscript{198} Though the existing precedent illustrates the general standard that punishments must be grossly disproportionate to the committed offenses, the Constitution does not suggest that proportionality of punishments and offenses must meet any specific threshold to be considered unconstitutional.\textsuperscript{199} This argument only seeks to

\textsuperscript{196} See Mobley, 687 F.3d at 628 (enhancing the defendant’s sentence twenty three months on the basis of his prior offenses).

\textsuperscript{197} See Ewing, 538 U.S. at 28 (responding to defendant’s claim that his punishment of a twenty-five years to life sentence for stealing golf clubs was disproportionate to his offense).

\textsuperscript{198} See id. (stating that the test for determining the proportionality of a punishment includes measuring the gravity of the offense against harshness of the penalty).

\textsuperscript{199} But see id. (inferring that the priority is pleasing the
persuade courts to consider the cruel elements of punishments that have not been constantly regurgitated by courts over the past century. Rather, courts should consider that punishments could be excessive if all the circumstances are not examined to ensure punishments serve a specific penal purpose.

Therefore, the principles set forth in Ewing align with Justice Brennan’s concurrence in Furman, which states that excessive punishment can be cruel and unusual, in the absence of physical harm, where the punishment serves no penal purpose, and where the offenses and punishments are disproportionate to each other; Mr. Mobley’s punishment meets those requirements.

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200 See Furman v. Georgia, 408 U.S. 238, 280 (1972) (Brennan, J., concurring) (discussing that the courts’ tendency to focus on punishments’ barbaric nature when determining Eighth Amendment violations).

201 See id. (explaining that excessive punishment does not require elements of physical harm, nor torturous elements; but rather the inquiry is to how broadly it is applied, and whether it is proportionate to the offense).

202 See id. (explaining that there is a correlation between excessive punishment and cruel and unusual punishment).
IV. Policy Recommendations

Perhaps recidivism statutes are passed with the aims of upholding public safety; however, courts’ tendencies to enforce such statutes contribute to the endemic problem of mass incarceration in the United States.\textsuperscript{203} Though recidivist statutes are necessary for serious violent offenses, many nonviolent offenders remain incarcerated beyond the statutory maximum for their prior victimless crimes.\textsuperscript{204} In consideration of nonviolent offenders, the aims of recidivist statutes should emphasize reforming prisoners during sentence enhancements because such emphasis will reduce both crime and prison


\textsuperscript{204} See Ryan J. Reilly, These 32 People Are Spending Their Lives In Prison For Nonviolent Crimes, HUFFINGTON POST (Nov. 13, 2013), http://www.huffingtonpost.com/2013/11/13/life-without-parole_n_4256789.html (discussing that about 3000 prisoners are sentenced to life-without-parole (LWOP) and are serving time for drug, property, and other nonviolent crimes).
overcrowding. As such, courts should routinely consider the impact of enhancing sentences on mass incarceration, especially when such enhancements are based on prior adjudicated victimless crimes.

A. Because Courts Contribute to Mass Incarceration Each Time They Enhance a Nonviolent Offender’s Prison Sentence, Prisoners Are Being Guided in the Opposite Direction From Reform.

Courts seem to reflexively sentence nonviolent offenders to additional incarceration time during enhancements. This

205 See Greg Berman, Alternatives To Incarceration Are Cutting Prison Numbers, Costs, and Crime, THE GUARDIAN (July 4, 2013), http://www.theguardian.com/commentisfree/2013/jul/04/alternatives-incarceration-prison-numbers (noting New York has reduced incarceration rates by providing convicted offenders with alternatives to incarceration such as job training, job placement, and drug treatment).

206 But see FEDERAL SENTENCING GUIDELINES MANUAL § 4B1.1 (2012) (placing both victimless felony drug possessions and violent offenses in the same category during sentence enhancements).

207 See Andrew Cohen, Wasting Their Lives Away (The Case Against Mandatory Minimums), BRENNAN CENTER FOR JUSTICE (Sept. 20, 2013), http://www.brennancenter.org/analysis/wasting-their-lives-away-case-against-mandatory-minimums (discussing that there have been increased prison sentences on nonviolent offenders due to
inclination is problematic because research indicates nonviolent offenders are best suited to reform when placed in the community.\textsuperscript{208} Courts should consider that alternatives to incarceration such as mental health counseling, job training and placement, and drug and alcohol treatment are more productive in protecting society than re-incarcerating nonviolent offenders.\textsuperscript{209} In applying other forms of punishment outside of incarceration, courts’ proclivity to emphasize purported societal causes of crime rather than individual responsibility for crime).


courts will contribute to breaking perpetuating crime cycles.\textsuperscript{210} Therefore, nonviolent prior offenders should not have their victimless crimes factored into their sentence enhancements.\textsuperscript{211}

B. Recidivist Statutes Should Be Amended to Include Only Violent Offenses Characterized by Actual Harm Not Risk and Additional Provisions Guiding Courts During Sentence Enhancements Because the Current Statutory Language Results in Broad Application of Punishment That Improperly Categorizes Nonviolent Offenders.

Recidivist statutes should contain provisions guiding courts to consider additional factors during sentence enhancements to avoid unnecessarily increasing prisoners’ incarceration times.\textsuperscript{212} Particularly, these factors should


\textsuperscript{211} Contra United States v. Mobley, 687 F.3d 625, 627 (4th Cir. 2012) (disregarding alternatives to incarceration for Mr. Mobley despite the fact that all of his crimes have been victimless).

\textsuperscript{212} But see Federal Sentencing Guidelines Manual § 4B1.1 (2012) (stating the statute is applicable where an individual is over age eighteen and has two prior felony drug or violent offenses).
include time served for prior offenses, prisoners’ behavior while incarcerated, and dangers to society upon prisoners receiving community-based enhancements.\(^{213}\) This approach asks courts to focus on the likelihood that a prisoner would harm someone if he were given an alternative to incarceration.\(^{214}\) Under this approach, nonviolent prisoners would have maximized opportunities to reform and successfully reintegrate into society.\(^{215}\)

V. CONCLUSION

Many prisoners facing sentence enhancements will undoubtedly face heightened incarceration for nonviolent prior


\(^{214}\) See id. (suggesting that punishment could be productive through local supervision of graduated intensity and beneficial by keeping low-risk offenders in the community).

\(^{215}\) See id. (noting that reform seems contrary to the private prison industry’s efforts to profit off mass incarceration).
offenses.\textsuperscript{216} However, after applying both strict scrutiny review under the Fifth Amendment and Justice Brennan’s Eighth Amendment framework from \textit{Furman}, it becomes clear that Jermaine Mobley’s constitutional rights were violated during his sentence enhancement.\textsuperscript{217} The Fifth and Eighth Amendments provide inherent protections for people like Mr. Mobley against what some view as a broken criminal justice system.\textsuperscript{218} Though the Fourth Circuit

\textsuperscript{216} See Combating Mass Incarceration, supra note 203 (inferring that incarceration rates are destined to continue to skyrocket in the absence of major reform).


\textsuperscript{218} See Nick Giles, \textit{To Fix Our Broken Criminal Justice System, Start By Reforming Mandatory Minimums}, THE CONSTITUTION PROJECT (Jul. 2, 2013), http://www.constitutionproject.org/documents/to-fix-
did not consider these constitutional protections, Mr. Mobley’s prior and current victimless offenses, and the statute that categorized him with habitual violent offenders clearly illustrate a discrepancy in dire need of judicial review.\footnote{219} If the court had considered Mr. Mobley’s Fifth and Eighth Amendment rights, Mr. Mobley would have only had his sentence enhanced on the basis of his current offense.\footnote{220} In consideration of prisoners’ sentence enhancements, federal recidivist statutes should, therefore, be amended to preclude prisoners serving time for nonviolent offenses from having those offenses factored into

\footnote{219} See Mobley, 687 F.3d at 627 (enhancing Mr. Mobley’s sentence as his possession charges qualify under the federal recidivist statutes, despite the fact that the statute also qualifies violent offenders).

\footnote{220} See U.S. CONST. amend. V (prohibiting laws that deprive fundamental rights and suspect classes); see also U.S. CONST. amend. VIII (prohibiting degrading, arbitrary, societal impacting, and excessive punishments).
their enhancement hearings.\textsuperscript{221}

\textsuperscript{221} See Alternatives to Prison, supra note 213 (discussing the necessity for major reform and suggesting a good starting point would be measuring a prisoner’s risk to society, which would result in many nonviolent offenders being issued community-based sentences).