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The Mass Incarceration Crisis as an Opportunity to Rethink Blame

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I. INTRODUCTION

Emblematic of the prison crisis are news photos of hundreds of prisoners sitting aimlessly in triple-decker bunk beds in what used to be a prison gymnasium.[1] The photographs portray a mismatch of policies and resources and spark the question, "What will we do with all the criminals when there is no longer any place to put them?" We have arrived at this crisis from decades of no-holds-barred, "tough-on-crime" policies, and a "severity revolution"[2] in sentencing. The use of imprisonment as a punishment increased; sentences became longer; and parole was abolished in some jurisdictions, depriving officials of a way of easing overcrowding pressure by sorting out and releasing reformed and non-dangerous prisoners.[3] These things are well known, and many people predicted that

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[1] *See* Cal. Dep't of Corr. & Rehab., Prison Overcrowding Photos, http://www. cdcr.ca.gov/News/ PrisonOvercrowding.html (last visited July 18, 2009).

[2] Albert W. Alschuler, *The Failure of the Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901, 903, 931-32 (1991); *see also* JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE 4 (2003) (describing United States as "in the midst of a national get-tough movement").

[3] *See* Alschuler, *supra* note 2, at 936 (describing the benefit of having an agency sort out, after some of the sentence has been served, which prisoners should remain incarcerated from those who should not, rather than doing all such sorting at the time of sentencing.)

these policies would land us where we are now.[4]

Beneath this common knowledge lurks another issue, a legal and moral one: overblaming and overpunishing people convicted of crimes.[5] The common sentencing schemes that arose during the severity revolution, mandatory minimums and guidelines, have contributed to this overcrowding problem because they prohibit a holistic determination of blame in individual sentences. In this short article, I suggest that the overcrowding crisis presents us with an opportunity to address a concomitant overblame and overpunishment crisis.[6] We have a chance to consider whether our sentencing laws cohere with our ideas of blame and appropriate punishment. As Oliver Wendell Holmes wrote, "The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong."[7] My sense is that the sentencing laws I will discuss do not correspond with the actual feelings and demands of the community, because, while they reflect a widespread intolerance of criminal behavior in general (and might be responsive in some cases to a particular heinous crime), these sentencing laws prohibit consideration of factors that people generally consider in deciding blameworthiness in particular cases; so cases of overblame and overpunishment result. Of course, not everyone will agree on the appropriate measure of blame and punishment in every case, but I will take as a given that there will be broad agreement in many cases.[8]

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[4] *See* KATE STITH & JOSE A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 123 (1999) (discussing the effect of federal guidelines and mandatory minimums: "both have ratcheted up the severity of criminal punishment"); Michael Tonry, *The Functions of Sentencing and Sentencing Reform*, 58 STAN. L. REV. 37, 49 (2005).

[5] Regarding overpunishment, *see* Frank O. Bowman III, *Fear of Law: Thoughts on* Fear of Judging *and the State of the Federal Sentencing Guidelines*, 44 ST. LOUIS U. L.J. 299, 351 (2000) (noting the "principled distinction between punishing and over-punishing the guilty"); Paul Butler, *Retribution, for Liberals*, 46 UCLA L. REV. 1873, 1892 (1999) (discussing overpunishment of drug offenders); Lawrence Crocker, *The Upper Limit of Just Punishment*, 41 EMORY L.J. 1059, 1067 n. 19 & 1096 (1992) (mentioning a "right not to be overpunished"); and Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715 (2006) ("The United States' criminal system is infamous for its excesses: too many laws, overcriminalization, and over-punishment"). There are other moral and legal issues, such as subjecting prisoners to harsh conditions, and the failure of prisons to provide rehabilitation, a disproportionate incarceration of poor and minorities, but they are beyond the scope of this article.

[6] So does the doctrinal uncertainty arising from the U.S. Supreme Court's rulings on sentencing in this decade, including the Court's rendering the Guidelines advisory. Douglas A. Berman & Stephanos Bibas, *Making Sentencing Sensible*, 4 OHIO ST. J. CRIM. L. 37, 38 ("[T]he timing is right for the Justices to improve modern sentencing law.").

[7] OLIVER WENDELL HOLMES JR., THE COMMON LAW 22 (Echo Library 2007) (1881).

[8] Alice Ristroph has called determining appropriate level of blame under a retributivist theory "a metaphysical mystery." Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293, 1293 (2006). Ristroph further argues that desert should not be used "as a central and independent sentencing principle." *Id.* at 1298.

I will focus on the way many of our laws overblame. They do so by not allowing for a holistic assessment of a person's blameworthiness, in particular by preventing consideration of mitigating circumstances. Even if the punishment is merited on the limited facts that the law permits to be considered, in many cases the person will have been overblamed and also overpunished.[9] I write primarily from a retributivist viewpoint, but I touch on other purposes of punishment in Parts III and IV.

II. OVERBLAME

In Victor Hugo's novel *Les Miserables*,[10] Jean Valjean, the chief protagonist, was sentenced to hard labor for five years for stealing a loaf of bread to feed his starving sister and her family. Punishment for his escape attempts resulted in his serving a total of 19 years. Upon release, Valjean, marked as an ex-convict, could not find food or shelter until a bishop took him in. The desperate Valjean stole the bishop's silver. After Valjean was arrested, the bishop told police he had given Valjean the silver, and he encouraged him to use it to reform himself. Shortly afterward, Valjean was in the street when a boy dropped a coin that ended up under Valjean's foot. The boy asked Valjean to lift his foot, but Valjean did not understand; frightened, the boy ran away. Valjean realized when he lifted his foot that he had the boy's coin - and that he was guilty of theft. He sought to return the coin but could not find the boy. The crime was reported, and Valjean realized that as a repeat offender, he could be sent to prison for the rest of his life. He assumed a new identity and became a leading businessman and mayor and performed various good works, all the while pursued by Inspector Javert.

While Valjean has become a metaphor for overpunishment and overblame, we seem not to have learned what Victor Hugo was teaching. Our criminal justice system may be more humane than that its 19th-century French counterpart, but we have many Jean Valjeans in our prisons today in the sense that many inmates are serving sentences out of proportion to their blame. It may be hard to discern them among the other men and women in orange jumpsuits, but they are there.

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[9] Avoiding overblame and overpunishment is to be distinguished from exercising mercy. *See* Heidi M. Hurd, *The Morality of Mercy*, 4 OHIO STATE J. CRIM. L. 389, 392 (2007) (distinguishing between "true mercy (a properly-motivated suspension of just deserts) ... [and] real justice (the imposition of just deserts)"). Nor am I arguing that the overblame and overpunishment results from the offender's subjective experience of punishment. *But see* Kenneth W. Simons, Response, *Retributivists Need Not and Should Not Endorse the Subjectivist Account of Punishment*, 109 COLUM. L. REV. SIDEBAR 1, 1 (2009), *available at* http://www.columbialawreview.org/Sidebar/volume/109/1_Simons.pdf.

[10] VICTOR HUGO, LES MISERABLES (1862).

I say this because, like the law that animates Hugo's masterpiece, many of our own substantive criminal laws and sentencing laws would treat Valjean's motive and socio-economic condition as irrelevant. Many of our laws prevent any consideration at sentencing of factors that judges regularly considered in fashioning sentences before the severity revolution–factors that most people ordinarily consider when assessing blame. The procedures that these laws foster prohibit us from thinking about blame in a holistic way, in individual cases. Many of our sentencing laws provide little or no means to distinguish those prisoners who are less blameworthy than others who have committed the same crime, or to distinguish those prisoners who might not meet the rigorous standards of excuse or justification for committing the crime but who might have what can be called excuse- or justification "lite."

Take, for example, mandatory minimum sentences. They are blunt instruments. Imagine a mandatory minimum sentence for drug possession. Possessing more than X but less than Y ounces of cocaine will result in the offender's being sentenced to five years in prison, minimum, and seven years maximum. Assume that Joe possessed X ounces of cocaine.[11] He receives five years, the minimum the law allows. The judge was struck that it was Joe's first criminal offense. Joe intended to sell the drugs, however. He wanted to become a powerful man in his neighborhood, and dealing drugs was his way to do this. Now assume that Jane was caught with Y ounces of cocaine; for that amount, the mandatory minimum is 7 to 10 years. She receives the minimum, because the judge was struck that she was forced into selling the cocaine by her abusive boyfriend, and that she feared for her own safety as well as the for safety of her two children. Selling cocaine was her most attractive option for income, as she lacks marketable skills: she was raised in a poor, inner city neighborhood with sub-par schools where the teachers had to use their own meager salaries to buy the students' writing paper and pencils. The judge says from the bench that he would like to impose a lesser sentenced based on her background and her situation but that the law prevents him from doing so. So now she is punished *more* than Joe, based on the quantity of drugs alone.

The intuitive solution is not to punish Joe more and call it even, but to punish Jane *less*–indeed, less than the mandatory minimum. Her circumstances are ones we view intuitively as mitigating. This is reflected in the (hypothetical, but quite plausible) judge's desire to give her a lighter sentence than the mandatory minimum. She does not fit the drug-dealer

[11] For profiles of people serving mandatory minimum sentences, see Families Against Mandatory Minimums, Profiles in Injustice, http://www.famm.org/ProfilesofInjustice.aspx (last visited July 19, 2009).

archetype that legislators likely had in mind when they devised the mandatory minimum.[12] But there is no way to reduce her sentence. Nor, it should be pointed out, would Jane's fears for her and her children's safety meet the demanding requirements for a mitigating excuse under substantive criminal law doctrine at the guilt adjudication stage, and her needing money to feed herself and her children would not meet the demanding requirements for justification under substantive criminal law, either.[13]

The scheme set forth in the United States Sentencing Guidelines ("Guidelines") would produce a similar result. The Guidelines were mandatory from their effective date in 1987 until 2005, when the United States Supreme Court ruled them "advisory" in *United States v Booker*.[14] The mandatory Guidelines that increased the number of people sent to federal prison during an almost 20-year period set forth presumptive mandatory minimum sentences that could be lowered (by "downward departure") only in very limited situations.[15] A judge was required to determine which box on the 258-box grid mandated the convicted criminal's punishment. She did this by looking at the crime, various aspects of it, the convicted person's criminal history, and the possibility of going above or below the appointed range. Most of the time, downward departures were controlled by prosecutors, who could move for them based on the defendant's cooperation with prosecutors, such as promising to testify against other defendants.[16] The judge herself was severely limited in sentencing a person below the presumptive mandatory minimum. For example, the following were "not ordinarily relevant" grounds for a judge to consider in deciding whether to grant a "departure" (usually downward) though they could have been deemed relevant in "exceptional cases"[17]: age,[18] "Education and Vocational Skills,"[19] "Mental and Emotional

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[12] *See* Tonry, *supra* note 4, at 48 (noting that legislators and executive branch officials think in terms of archetypes and extreme cases).

[13] *See, e.g.*, MODEL PENAL CODE §§ 2.09, 3.02 (1962) (describing "Duress" and "Justification Generally; Choice of Evils").

[14] 543 U.S. 220, 245 (2005).

[15] *See* STITH & CABRANES, *supra* note 4, at 122, 125 (noting that guidelines are merely a complex form of mandatory minimum sentencing, presenting a floor on which a higher sentence can be built).

[16] U.S. SENTENCING GUIDELINES MANUAL § 5K1 (2008).

[17] U.S. SENTENCING GUIDELINES MANUAL, ch. 5, pt. H, introductory cmt. (2008).

[18] U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 (may be relevant where person is elderly and infirm).

[19] U.S. SENTENCING GUIDELINES MANUAL § 5H1.2 (noting that this fact "may be relevant if a defendant misused special skills to commit crime, which may warrant increased punishment under 3B1.3 (Abuse of a Position of Trust or Use of a Special Skill))."

Conditions,"[20] "Physical Condition Including Drug or Alcohol Dependence; Gambling Addiction,"[21] "Employment Record,"[22] and "Military, Civic, Charitable, or Public Service; Employer-Related Contributions; Record of Prior Good Works."[23] The following were simply "not relevant" in determining whether to depart: "Race, Sex, National Origin, Creed, and Socio-Economic Status,"[24] and "Lack of Guidance as a Youth and Similar Circumstances indicating a disadvantaged upbringing."[25] Deeming these factors "not relevant" or "not ordinarily relevant" was supposed to help eliminate sentencing disparity,[26] but it failed to, because many people would consider these factors important for an accurate assessment of blame, and defendants not equally blameworthy have received equal sentences.[27] Before the mandatory Guidelines took hold in 1987, many federal judges used these factors to mitigate severity in sentencing, which is not surprising, given that many people consider such factors in assessing blame.[28]

Under the now advisory Guidelines, judges once again have the discretion to use these factors to sentence defendants outside of what the Guidelines would have required.[29] In *Gall v. United States*,[30] the Supreme

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[20] U.S. SENTENCING GUIDELINES MANUAL § 5H1.3 (2008).

[21] U.S. SENTENCING GUIDELINES MANUAL § 5H1.4 (2008). (This despite noting, "[s]ubstance abuse is highly correlated to an increased propensity to commit crime.").

[22] U.S. SENTENCING GUIDELINES MANUAL § 5H1.5 (2008).

[23] U.S. SENTENCING GUIDELINES MANUAL § 5H1.11 (2008).

[24] U.S. SENTENCING GUIDELINES MANUAL § 5H1.10 (2008).

[25] U.S. SENTENCING GUIDELINES MANUAL § 5H1.12 (2008).

[26] *See* Gall v. United States, 128 S. Ct. 586, 608 (2007) (Alito, J., dissenting) (stating that, some judges, according to their "personal views," would use these factors to aggravate or mitigate a sentence).

[27] *See* STITH & CABRANES, *supra* note 4, at 79-80; Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, CATO POL'Y ANALYSIS NO. 458, at 10-11 (2002).

[28] This point is oft-stated by judges and scholars but without empirical backing *See, e.g., Gall*, 128 S. Ct. at 608 (2007) (Alito, J., dissenting); STITH & CABRANES, *supra* note 4, at 121-22; Alschuler, *supra* note 2, at 950; Tonry, *supra* note 4, at 49. Also, the inability to consider mitigating circumstances can result from other mechanisms, such as a prosecutor's withholding of certain facts. *See* Nelson P. Miller & Joan Vestrand, *Of Shrinking Nights and Cunning Pettifoggers: The Symbolic World of the Model Rules of Professional Conduct*, 110 PENN ST. L. REV. 853, 873 (2006) ("Prosecutors in particular must refrain from condemning by unsupported accusations and from overpunishing through concealment of mitigating circumstances.").

[29] Since *Booker*, the Supreme Court has clarified what it meant in that case by its statement that sentences would be reviewed on appeal for "reasonableness" to mean abuse of discretion. *See Gall*, 128 S. Ct. at 594; Kimbrough v. United States, 128 S. Ct. 558, 576 (2007); Rita v. United States, 127 S. Ct. 2456, 2465 (2007).

A district court judge must first calculate the sentence under the Guidelines. *Gall*, 128 S. Ct. at 596 ("The Guidelines should be the starting point and the initial benchmark."). Then the judge must consider whether that sentence would satisfy 18 U.S.C. § 3553(a), which requires a judge to consider, *inter alia*, whether the sentence is "sufficient, but not greater than necessary, to comply with purposes" including retribution, protecting the public, deterrence, and rehabilitation. *See* 18 U.S.C. § 3553(a)

Court held that a district court did not abuse its discretion in considering, *inter alia*, the defendant's youth at the time he committed his crime of conspiring to sell ecstasy, sentencing him to 36 months probation instead of the 30- to 37-month prison term that the pre-*Booker* Guidelines would have required.[31] Months earlier, Justice Stevens, in his dissenting opinion in *Rita v. United States*, wrote that these 5H1 factors now may be considered.[32] Various lower courts have been applying them.[33] This is a welcome development. The fact remains, however, that for almost 20 years, judges were expressly forbidden to mitigate sentences based on these factors–and were filling up prisons–and today the Sentencing Commission continues to declaim that these factors are "not relevant" or "not ordinarily relevant" at sentencing.[34]

Last, it is true that in some instances under a mandatory sentencing regime, a prosecutor might bend the law or collude with a judge to reduce

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(2006). Usually, a Guidelines sentence is considered to satisfy § 3553(a), and an appellate court may, but is not bound to, presume that such a sentence is reasonable. *Rita*, 127 S. Ct. at 2465. However, an appellate court may *not* presume that a sentence outside of the advisory guidelines is *un*reasonable. *Id.* at 2467.

Delving into the nuances of the district court's discretion and appellate review is beyond the scope of this article. Notably, Chief Justice Roberts wrote that *Booker* and the three 2007 cases (*Gall*, *Kimbrough*, and *Rita*) describing the sentencing judge's discretion "have given the lower courts a good deal to digest over a relatively short period." Spears v. United States, 129 S. Ct. 840, 846 (2009) (Roberts, C.J., dissenting).

[30] 128 S. Ct. 586 (2007).

[31] *Gall*, 128 S. Ct. at 602. The Guidelines state that age is not ordinarily relevant, except that a court may in some cases account for age when the defendant is old and infirm. U.S. SENTENCING GUIDELINES MANUAL § 5H1.1 (2008). In dissent, Justice Alito said that the district court's sentence "amounted to a direct rejection of the Sentencing Commission's authority to decide the most basic issues of sentencing policy." *Gall*, 128 S. Ct. at 608 (Alito, J., dissenting).

[32] *Rita* 127 S. Ct. at 2456, 2473 (2007) (Stevens, J., dissenting) (noting that courts may consider these formerly prohibited factors under the §3553(a) analysis).

[33] *See, e.g.*, United States v. Tomko, 562 F.3d 558, 582, 584-85 (3d Cir. 2009) (noting that courts may consider these factors as "permissible considerations" but that, here, district court over-relied on Tomko's prior good works to extent that sentence was improper); United States v. Simmons, 568 F.3d 564, 569-70 (5th Cir. 2009) (district court may disagree with Guidelines policy considerations such as that of section 5H1.1 that says age cannot be considered for defendants who are not old and infirm); United States v. Pinson, 542 F.3d 822, 838-39 (10th Cir. 2008) (stating, "the Supreme Court has reaffirmed that district courts have wide discretion in choosing the factors it considers during sentencing. This is even true when, as here, the factor is a discouraged one under the guidelines" in affirming sentence where district court relied on defendant's mental condition to increase his sentence); United States v. Sells, 541 F.3d 1227, 1237-38 (10th Cir. 2008) (courts may consider age of defendant to sentence outside of guidelines); United States v. Davis, 538 F.3d 914, 919 (8th Cir. 2008) (*Gall* "made clear that considerations disfavored by the sentencing commission may be relied on by the district court in fashioning an appropriate sentence") (citations omitted); United States v. Villanueva, No. 07-CR-149, 2007 WL 4410378 (E.D. Wis. Dec. 14, 2007) ("But if *Booker* means anything at all, it must mean that the court can give further weight to factors covered by the guidelines, and consider personal characteristics deemed disfavored or discouraged by the guidelines.") (internal citations omitted) (citing, *inter alia*, *Gall*).

[34] *See* U.S. SENTENCING GUIDELINES MANUAL ch, 5, pt. H, introductory cmt. (2008).

a legally required sentence that seems too harsh[35]: but such subterfuge is not a satisfactory solution to the widespread overblame in our criminal justice system. Just because a law might be circumvented in some cases, *sub rosa* and according to unwritten procedures and protocols, does not make the law fair; instead, the felt need to break the law illuminates its unfairness.[36]

III. QUESTIONS SWEPT UNDER THE RUG

Assessing blame is fundamental to criminal law,[37] and there is a rich literature discussing and debating its operative effect in the substantive law. But mandatory minimum sentences and the Guidelines' stinginess regarding grounds for sentencing outside of the Guidelines range make it seem that there is really no debate over how to ascertain blame: "you do the crime, you do the time"–no ifs, ands, or buts about it. Your lack of guidance as a youth, your disadvantaged upbringing, your poverty, your addiction to drugs, your mental illness short of insanity *do not matter*.[38]

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[35] STITH & CABRANES, *supra* note 4, at 7 (noting that this "hidden discretion by prosecutor and judge mocks the precision and obduracy of the Guidelines ... contributing to disparity ... and cynicism in the criminal justice system").

[36] *See* Bowman, *supra* note 5, at 357-58 (stating that such persistent evasion of law means the law needs to be changed, and that he has faith in Guidelines to be changed appropriately over time).

[37] Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 946 (1999) (discussing "the most distinctive and fundamental feature of the criminal law, the ascertainment of blame").

[38] The Sentencing Reform Act of 1984, which created and empowered the Sentencing Commission to create the Guidelines, sets forth that:

> The Commission ... shall consider whether the following matters, among others, with respect to a defendant, have any relevance to the nature, extent, place of service, or other incidents of an appropriate sentence, and shall take them into account only to the extent that they do have relevance--
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> (1) age;
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> (2) education;
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> (3) vocational skills;
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> (4) mental and emotional condition to the extent that such condition mitigates the defendant's culpability or to the extent that such condition is otherwise plainly relevant;
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> (5) physical condition, including drug dependence;
>
> (6) previous employment record;
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> (7) family ties and responsibilities;
>
> (8) community ties;
>
> (9) role in the offense;
>
> (10) criminal history; and
>
> (11) degree of dependence upon criminal activity for a livelihood.
>
> The Commission shall assure that the guidelines and policy statements are entirely neutral as to the race, sex, national origin, creed, and socioeconomic status of offenders should be considered at sentencing.

28 U.S.C. § 994(d) (2000).

Nor, apparently, do the numerous criminological theories about why people commit crimes, which strongly suggest that social factors, economic factors, biology, age, poverty, and other such factors may play a determinative role.[39] In fact, our current laws make it easy for us to imprison people, and for long sentences, because we do not give them a chance to explain themselves, to humanize themselves in our eyes.[40] Our Procrustean laws allow courts to condemn these people as if they had complete free will and committed the crime simply out of a nefarious desire or propensity to commit crime.[41] Indeed, many defendants, on advice from their attorneys, do not bother to give explanations at sentencing, as they know doing so would be futile in influencing their sentence (at least under mandatory minimum sentences and under the mandatory Guidelines).[42] Compare this, however, to our talk-show culture, where people–often celebrities–are sympathized with (by some viewers) as they explain how personal circumstances and difficulties led to their foibles and even in some cases their felonies (whether they were caught or not).

Many of our laws, then, have merely swept under the rug the tricky questions of the extent to which people can fairly and reasonably be blamed for their actions.[43] The questions will not go away, however, and the burgeoning prison population amounts to a growing demand that we address these questions. We may even want to adopt the attitude that, if we are unsure about the answers to these questions, we should take a page

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[39] *See generally* JAMES F. ANDERSON AND LARONISTINE DYSON, CRIMINOLOGICAL THEORIES: UNDERSTANDING CRIME IN AMERICA (2002).

[40] *See* Alexandra Natapoff, *Speechless: The Silencing of Criminal Defendants*, 80 N.Y.U. L. REV. 1449, 1449, 1451, 1465, 1494-95 (2005); Kimberly A. Thomas, *Beyond Mitigation: Towards a Theory of Allocution*, 75 FORDHAM L. REV. 2641, 2644-45, 2667, 2672, 2675 (2007).

[41] On free will, *see* Stephen O'Hanlon, *Toward a More Reasonable Approach to Free Will in Criminal Law*, 7 CARDOZO PUB L. POL'Y & ETHICS J. 395, 397, 402, 425 (2009).

[42] *See* Natapoff, *supra* note 40, at 1450, 1458-60.

[43] Eva Nilsen has argued that mandatory minimum sentences do not even meet the requirement of rationality, because they do not consider any factors other than that the defendant committed the crime:

> Punishment is traditionally justified by either looking backward at the blameworthiness of the criminal, or by looking forward to prevent new crimes and protect public safety. Mandatory minimums do neither: They are not forward-looking, because they irrefutably presume the offender cannot reform, thus rejecting his moral and prudential agency. Nor are they backward-looking, because they ignore circumstances relevant to degree of blame ... Because mandatory minimums blindly apportion moral blame and preventive potential, they are fundamentally different from sentences selected by a judge from a range of possible terms.

Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 172-73 (2007).

from statutory interpretation in criminal law and err on the side of lenience (rule of lenity).[44] Our current bent is the opposite–to err on the side of harshness, a bent that contravenes not only the rule of lenity but also, in a sense, Blackstone's maxim, "Better that ten guilty persons escape than that one innocent suffer."[45] We sentence all 11 men and women harshly to make sure that not a single one of them is *under*punished.[46]

Indeed, our notions of blame seem wildly incoherent. A person might receive a longer mandatory sentence for drugs than for rape or other violent crimes; there is no need for a legislature to justify the difference.[47] The Supreme Court's Eighth Amendment review in non-death penalty cases is so limited that it seems like a post-modern, anything-goes approach. Mandatory minimum life without parole sentence for a first-time offender who possessed more than 650 grams of cocaine? No violation of the Eighth Amendment.[48] A "three strikes and you're out" state law that puts a man behind bars for a minimum of 25 years to life, no parole, for a "wobbler"–a crime that a prosecutor has discretion to charge as a felony or misdemeanor, here, stealing three golf clubs? No violation.[49] Sentence a man under state law to 200 years mandatory minimum, no possibility of parole, for possessing 20 pictures of child pornography? Deny *certiorari*, despite that the man was sentenced more harshly than if he had actually sexually assaulted a child, and despite that under federal law he likely would have been dealt a five-year sentence for possessing the

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[44] *See* McNally v. United States, 483 U.S. 350, 359 (1987).

[45] WILLIAM BLACKSTONE, 4 COMMENTARIES 358 (1826).

[46] *See* Ristroph, *supra* note 8, at 1312-13. Ristroph argues,

> [W]e seem to be much more concerned about the risks of under-punishing than we are about the risks of over-punishing. I suspect this asymmetric risk-aversion is, in part, a consequence of the elasticity of desert: as long as the offender did something wrong, it is easy to conclude that he deserves whatever punishment he gets. Because desert is asymmetrically elastic, it may shield penal practices from rigorous empirical scrutiny.

Id.

[47] *See* Mark Osler, *Indirect Harms and Proportionality: The Upside-Down World of Federal Sentencing*, 74 MISS. L.J. 1, 2 (2006) (describing the wide variation in sentences among different crimes, and stating, concerning one example, "That's right - possessing crack is treated the same as funding al-Qaeda.").

[48] Harmelin v. Michigan, 501 U.S. 957 (1991).

[49] Ewing v. California, 538 U.S. 11 (2003). *See also* Lockyer v. Andrade, 538 U.S. 63 (2003) (no Eighth Amendment violation found on habeas for man sentenced to two consecutive 25-years-to-life sentences under the three strikes rule where one third strike was theft of five videotapes and the other third strike was theft of four videotapes from K-Mart stores, and where trial court refused to classify these "wobblers" as misdemeanors that would have made the three strikes law inapplicable); Rummel v. Estelle, 445 U.S. 263 (1980) (life with possibility of parole for man convicted of third felony fraud not violative of Eighth Amendment).

photos.[50] There seem to be few limits beyond the Court's holding, in 1983, that a life without parole sentence for a seventh nonviolent felony was unconstitutional,[51] and Justice Powell's apothegm that it would be unconstitutional to sentence a person to a "mandatory life sentence for overtime parking."[52] Certainly, there is opportunity for the Court to take a closer look at such harsh sentences and create some limits on state legislatures' denial of convicted criminals' liberty.[53]

IV. WHAT WE TAKE FROM PEOPLE WE LOCK AWAY

When we look at the pictures of the men stacked in triple-decker bunks in the erstwhile prison basketball court, we must consider that some of these men may not be blameworthy, or sufficiently blameworthy, to merit being consigned to one of these bunks, or to merit being consigned to one of these bunks for so long. This requires the sort of imaginative exercise that the late Susan Sontag discussed in her book about war photography, *Regarding the Pain of Others*.[54] We need to envision the pain these men experience at the loss of their liberty, as well as the pain from harsh conditions of confinement,[55] a harshness that has increased over the years.[56] We need to envision the families and friends and lovers these men have left behind.[57]

When we imprison, we take away years from people's lives that can

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[50] Under Arizona law, possession of each image of child pornography is a separate offense, consecutive sentences must be imposed for each offense, and each sentence carries a mandatory minimum of ten years imprisonment with a presumptive term of seventeen years, and a maximum term of twenty-four years. State v. Berger, 212 Ariz. 473, 474 (2006) *cert. denied*, 127 S. Ct. 1370 (2007); *id.* at 486 (Berch, Vice C.J., concurring in part and dissenting in part) (noting that "A presumptive sentence for possession of two images of child pornography (thirty-four years) is harsher than the sentences for second degree murder or sexual assault of a child under twelve (twenty years)."); *id.* at 485 (Berch, Vice C.J., concurring in part and dissenting in part) (noting that the recommended sentence under the Guidelines would be five years).

[51] Solem v. Helm, 463 U.S. 277 (1983) (life without parole for seventh nonviolent felony found to be disproportionate under the Eighth Amendment).

[52] *Rummel*, 445 U.S. at 288 (Powell, J., dissenting).

[53] As Professor Nilsen wrote, "Surely there are guideposts [for proportionality review]. Crimes against persons are more serious than crimes against property; negligent acts are less serious than intentional ones; mental illness mitigates culpability; and so on." Nilsen, *supra* note 43, at 173 (2007). *See also* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145 (2009).

[54] SUSAN SONTAG, REGARDING THE PAIN OF OTHERS 8 (2002) (discussing imagination and empathy in viewing painful photographs).

[55] Nilsen, *supra* note 43, at 123-34.

[56] *Id.* at 116.

[57] *See* U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (2008). (Under the Guidelines, family ties and responsibilities are not ordinarily relevant.) For a spirited critique, *see* Jack B. Weinstein, *The Effect of Sentencing on Women, Men, the Family, and the Community*, 5 COLUM. J. GENDER & L. 169 (1996).

never be returned.[58] When we imprison, say, a 20-year-old for 20 years, we take away crucial years, years when a person may learn a skill or trade or build a career, find a mate, and start a family. A woman may lose her chance to have children. These people will be deprived of the company of the opposite gender (including spouses) and of children (including their own) and thus of the opportunity to acquire the social skills necessary to make such relationships rewarding and fulfilling. Upon release, they have difficulties finding jobs (felons are prevented by law from some lines of work entirely, and many private employers simply refuse to hire ex-convicts),[59] renting places to live,[60] finding mates and sustaining positive relationships.[61] They also may be blocked from functioning as citizens, such as being prohibited from voting. [62] Beyond the imprisoned, communities and families are damaged when adults and parents are incarcerated[63]; this damage is particularly tragic when the punishment is disproportionate to the blame, and especially where the adult is not so blameworthy as to be disabled from leading a productive life in the community.

Is such damage necessary, worth it, or even a fair exchange for the felt need to punish? We need to consider whether taking these years away is appropriate, and even whether it is humane.[64] But many of our laws, as discussed, do not require and may even prohibit such considerations. A more intensive look at these damages could help us devise better incarceration policies.

V. EXPRESS YOURSELF? USE SUBSTANTIVE CRIMINAL LAW, NOT SENTENCING LAW

One function of law is to express community norms and values. The sentencing schemes I have discussed serve this purpose. Mandatory minimum sentences express a harsh attitude of zero tolerance for criminal behaviors. Guidelines that prohibit examination of "excuses," such as lack

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[58] Nilsen, *supra* note 43, at 152.

[59] NORA V. DEMLEITNER, ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 671 (2d ed. 2007).

[60] *Id.*

[61] Nilsen, *supra* note 43, at 122-24; *See generally* Bruce Western, *Incarceration, Marriage, and Family Life* (Russell Sage Found., RSF Working Paper Series, 2004), *available at* http://www.russellsage.org/publications/workingpapers/incarcerationmarriagefamilylife/document.

[62] *See generally* JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY (2006).

[63] *See generally* TODD R. CLEAR, IMPRISONING COMMUNITIES: HOW MASS INCARCERATION MAKES DISADVANTAGED NEIGHBORHOODS WORSE (2007).

[64] Nilsen, *supra* note 43, at 159-69 (arguing that "human dignity" must be "rediscovered' in the Eighth Amendment).

of guidance as a youth, drug addiction, mental distress and the like, express a similar attitude. But this expressiveness comes at a high cost: we lock ourselves into meting out foreordained, immutable sentences. Sometimes it is like cutting off our nose to spite our face, such as when we incarcerate someone who neither deserves nor needs to be incarcerated, requiring that we to pay for the imprisonment through our own taxes.[65]

We might consider that our substantive criminal laws serve this expressive function well enough. Excuses and justifications in the guilt adjudication phase are strictly defined. (I wonder to what extent these strict definitions were created with the judge's broad power to craft an appropriate sentence in mind.) We might consider that *sentencing* laws that brook no excuse are overkill. In some cases, they turn the law into a machine: the defendant had drugs in his apartment, he is guilty of possession, therefore, he must go directly to jail to serve out a mandatory minimum sentence. At this point, we might ask if the law is even truly expressive of community norms and values when it appears to operate as a machine out of our control. The jury's decision of guilty or not guilty is freighted with enormous, uncontrollable consequences – of which the jurors are often unaware.[66] It is unclear whether there is a widely shared intention that our sentencing laws (as seen separately from substantive criminal laws) should express a limited version of retribution where all that matters is that the defendant committed the crime, or a broader version that considers other factors.[67] We could, in any event, draw a sharp line between guilt adjudication and punishment.[68]

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[65] It has been estimated that, on average in the U.S., it costs taxpayers $23,876 per year for each state prisoner; the figure ranges from $45,000 (Rhode Island) to $13,000 (Louisiana). Adam Liptak, 1 in 100 U.S. Adults Behind Bars, New Study Says, N.Y. Times, February 28, 2008 (discussing report from Pew Center on the States), available at http://www.nytimes.com/2008/02/28/us/28cnd-prison.html. Professsor Alschuler argues, "Even from a purely utilitarian perspective, these stakes are high enough that careful, individualized inquiry is likely to be worth the burden." Alschuler, supra note 2, at 905. See also Frank O. Bowman III, Murder, Meth, Mammon, and Moral Values: The Political Landscape of American Sentencing Reform, 44 Washburn L.J. 495, 504 (2005) (mass incarceration may "over-predict[] who will re-offend, and thus overpunish[es] many thousands of defendants whose prison stays may be neither deserved nor socially useful.").

[66] If a jury is aware that a verdict of guilty will lead inexorably to a long, mandatory prison sentence, the jury, lacking a middle ground, might decide to nullify the law and render a verdict of not guilty, which would lead to no imprisonment. The effectiveness of jury nullification as evincing community norms would be enhanced if the jury were informed of the consequences of a guilty verdict. For an argument that jurors should be informed of the mandatory or determinate sentence that will be imposed on the defendant if they find him guilty, see Lance Cassak and Milton Heumann, *Old Wine in New Bottles: A Reconsideration of Informing Jurors About Punishment in Determinate- and Mandatory-Sentencing Cases*, 4 RUTGERS J. L. & PUB. POL'Y 411 (2007).

[67] I thank Ken Simons for this point. On the various understandings of what retribution means in Supreme Court opinions, *see* Dan Markel, *Executing Retributivism:* Panetti *and the Future of the Eighth Amendment*, 103 NORTHWESTERN L. REV. 1163, 1179-82 (2009).

[68] Stith and Cabranes use the image of Justicia, who is blindfolded in the adjudication phase but removes the blindfold at sentencing. STITH & CABRANES, *supra* note 4, at 78. *See also* Berman and

We might re-envision our sentencing laws as having a primary purpose of being *remedial*–in the sense of promoting rehabilitation and restitution to victims, if any, and if possible–rather than expressive; then we could afford ourselves the option of choosing how to apply limited public resources such as prison space. (Now we ascribe more free will to criminals in committing their acts than we allow ourselves in choosing their punishment.) We could ask, in any given case, "Is the person convicted blameworthy enough to merit prison, or a long prison term?" Other aspects of sentencing and punishment could come into the calculus as well: we could ask, "What is the need in this case for incapacitation, rehabilitation, and deterrence?"[69] The fact of conviction alone (or a short sentence) might be sufficient punishment in some cases, given the onerous consequences (direct and collateral). Considering sentencing law as remedial in function would let us "needs test" whether a person convicted of a crime should go to prison, and for how long.[70] We can also consider a wider variety of sanctions beyond incarceration.[71]

Sentencing does have an expressive function, and a sentencing authority should be free to consider that. Now, though, under mandatory minimum sentencing, there is no freedom of choice, no ability to sort according to blameworthiness.[72] We have filled up our prisons under a sort of dead hand control by legislatures (which themselves are often filled with politicians afraid to be perceived as anything other than "tough on crime") and by the United States Sentencing Commission. Greater control over sentencing must be regained so that we may engage in a conscious and conscientious use of overburdened public resources.

Bibas, *supra* note 6, at 38 (calling for strictly differentiating between guilt-adjudication (role of jury) and sentencing (role of judge)).

[69] The Model Penal Code–which focuses less on retribution than on utilitarian purposes of punishment, see MODEL PENAL CODE §1.02(2) (1962)–sets forth in some instances what appears to be a test of necessity for imprisonment. *See* MODEL PENAL CODE §7.03 (1962) and MODEL PENAL CODE §7.04 (1962).

[70] *See* Hon. Richard Lowell Nygaard, *Is Prison an Appropriate Response to Crime?* 40 ST. LOUIS U. L.J. 677, 686 (1996) (suggesting imprisonment only if necessary, and for the shortest time necessary, and stating, "we must contain until corrected; and for the corrected, or those who need no correction–release them before we contaminate them [by subjecting them to prison culture of violence]").

[71] *See* Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VANDERBILT L. REV. 2157, 2162 (2001) (discussing how the increase in prison population has led to increased attention to alternative sanctions).

[72] And under the Guidelines as written (rather than as applied), a court's ability to sort remains severely limited. *See* U.S. SENTENCING GUIDELINES MANUAL ch, 5, pt. H, introductory cmt. (2008).

IV. CONCLUSION

Mandatory minimum sentencing and the aspects of the Guidelines that I have discussed have been widely considered to be a failure.[73] Our prisons are bursting at the seams, the public fisc is drying up. The prison crisis challenges notions that sentencing policies that characterize the severity revolution work to allocate resources effectively, end disparity,[74] or even to reduce crime.[75] Proponents of these sentencing schemes should be on the defensive; their "tough-on-crime" talk should be exposed as hollow and self-defeating, as irresponsible political rhetoric.[76] The current crisis presents an opportunity for us to rethink our sentencing policies.

Assessing blame holistically for each individual sentenced is a good place to start. Doing so will not solve the prison crisis entirely; but that is too high a burden to place on any one proposal, when many causes have contributed to create the problem. At least, we should ensure that when we decide whether to imprison people and mar and stigmatize the rest of their lives, our laws are not making us unconscious to their situation, or to the consequences of our own actions.

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[73] *See* Luna, *supra* note 27, at 3 (2002); Alschuler, *supra* note 2, at 903. It appears that most critics of the Guidelines do not want to return to indeterminate sentencing such as existed before the Guidelines but instead offer various proposals. *See, e.g.*, STITH & CABRANES, *supra* note 4, at 170 (suggesting inter alia vigorous appellate review of sentences); Alschuler, *supra* note 2, at 903 (suggesting "a system of guidelines without boxes in which a sentencing commission's resolution of specific, recurring sentencing issues and of paradigmatic cases would provide benchmarks for sentencing judges" whose sentences would be subject to appellate review); *id.* at 939-49; Tonry, *supra* note 4, at 65-6 (suggesting, in wake of *Booker*, "doing nothing" or a "makeover" of the Guidelines.

[74] STITH AND CABRANES, *supra* note 4, at 107-114.

[75] Michael H. Marcus, *Responding to the Model Penal Code Sentencing Provisions: Tips for Early Adopters and Power Users*, 17 S. CAL. INTERDISC. L.J. 67, 80 (2007). As Professor Kadish wrote 10 years ago:

> Never before have we incarcerated more or held prisoners longer than we do now, and never before have we expended a greater share of our wealth in doing so. We can't know the future, but in this area it's a fair guess that it won't be good. It is controversial and as yet not demonstrable whether the increase in penal severity has been a major factor in falling crime rates. If it turns out to be so, we should be left with the baleful reality that we live in a society that can't keep the peace without keeping huge segments of its population incarcerated. If it turns out not to be so we should be faced with the equally baleful reality that we live in a society that misguidedly diverts shocking amounts of its wealth to imprisoning its people in the futile pursuit of its greater security.

Kadish, supra note 37, at 982.

[76] Tonry, *supra* note 4, at 62 (discussing "latent functions" of sentencing law, which include partisan political gain).