

Is Mass Incarceration Unconstitutional? The Case for Eighth Amendment Limits on Noncapital Sentences

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I. INTRODUCTION

In January of 2016, The Canadian Supreme Court struck down a *one-year* mandatory minimum sentence for drug trafficking as cruel and unusual punishment in violation of the Canadian Charter of Rights and Freedoms.¹ The United States Supreme Court, in what remains binding precedent, has sanctioned death in prison for theft of \$150 worth of video tapes.² While the Eighth Amendment has emerged as a meaningful check against executions, and life sentences for juveniles, it remains a dead letter for all but a few of the more than two million people in America's jails and prisons.³

Like the guarantee of Equal Protection in an era of "separate but equal," the prohibition against Cruel and Unusual Punishment is a statement of law and moral imperative, dormant but ever salient against a backdrop of state-sanctioned cruelty on a massive scale. As a growing reform movement struggles to nudge the penal system toward justice, the mass suffering of mass incarceration persists. That suffering includes 25,000 people subject to the torture of solitary confinement,⁴ more than 3,000 condemned to die in prison for nonviolent offenses, and hundreds of thousands serving disproportionate sentences that cost billions and provide no public safety benefit.

It is suffering born disproportionately by Black Americans and Hispanic Americans. According to the Bureau of Justice Statistics, one-third of black men born in 2001 will be imprisoned at least once in their lifetimes, compared to one in seventeen white men.⁵ And disparities often cannot be explained by different crime rates. For example, while black Americans and

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¹ *R. v. Lloyd*, [2016] 1 S.C.R. 130 (Can.).

² *Lockyer v. Andrade*, 538 U.S. 63 (2003).

³ PETER WAGNER & BERNADETTE RABUY, PRISON POLICY INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2016 1 (2016), <http://www.prisonpolicy.org/reports/pie2016.html>.

⁴ *Davis v. Ayala*, 135 S. Ct. 2187, 2208–09 (2015) (Kennedy, J., concurring) (citing AMNESTY INT'L, ENTOMBED: ISOLATED IN THE US FEDERAL PRISON SYSTEM (2014)).

⁵ THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION 8 (2003), <http://www.bjs.gov/content/pub/pdf/piusp01.pdf>.

white Americans use drugs at the same rate, black Americans are much more likely to be arrested, prosecuted and imprisoned for drug crimes.⁶ Mass incarceration has been called “the New Jim Crow.” Whether or not the phrase adequately explains the origins of mass incarceration, it aptly describes the depth of the moral failing.

Pundits rightfully laud progress. The national imprisonment rate has declined by seven percent since 2006.⁷ Many states have reduced imprisonment of low-level drug and property offenders. Yet the imprisonment rate remains three times what it was in 1980,⁸ and the politics of punishment remain a formidable obstacle to reform. Releasing all people in prisons for drug possession would reduce the overall population by less than four percent.⁹ To get to a fifty percent reduction—still well above the rate of any first world democracy—would mean releasing violent offenders.¹⁰ To do so would require a radical transformation of the political landscape.

It is telling that a modest proposal for federal sentencing reform, one that could have reduced the federal population by fewer than 10,000 people (less than 1% of the national prison population), failed in the United States Senate in the final months of the Obama administration. Today, in many states and federally, legislative reform is impossible or confined to policies aimed at a relatively small number of “low-level” offenders. As in an earlier era, the political process is proving impotent in the face of humanitarian crisis. Today, as then, that process is failing a discrete, insular, and disenfranchised population. Under such circumstances, the courts have a legal and moral obligation to act.

The Supreme Court’s tepid approach to the Eighth Amendment reflects not only the Court’s recent conservatism, but also a legitimate fear of intruding on state sovereignty in an area of political salience. This article aims to show that such an intrusion is not only legally and morally warranted, but can be done in a coherent manner with no more subjectivity than other areas of law. After years of retrenchment on criminal law, the Supreme Court stands on a precipice. It should robustly apply the Eighth

⁶ See MICHELLE ALEXANDER, *THE NEW JIM CROW* 96–97, 97 n.10 (The New Press 2010) (Reviewing data on disparate incarceration rates and survey research demonstrating “remarkably similar rates” of drug use by different racial groups).

⁷ LAUREN-BROOKE EISEN & JAMES CULLEN, BRENNAN CTR. FOR JUSTICE, *UPDATE: CHANGES IN STATE IMPRISONMENT 1* (2016), <https://www.brennancenter.org/sites/default/files/analysis/UpdateChangesinStateImprisonment.pdf>.

⁸ Compare E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, *PRISONERS IN 2014* 7 (2015), <http://www.bjs.gov/content/pub/pdf/p14.pdf> (finding an imprisonment rate for sentenced individuals of 471 per 100,000 in 2014), with BUREAU OF JUSTICE STATISTICS, *BULLETIN: PRISONERS IN 1980* 1 (1981), <http://www.bjs.gov/content/pub/pdf/p80.pdf> (finding an imprisonment rate of 140 per 100,000 in 1980).

⁹ Just 3.6 percent of incarcerated people are serving time for drug possession crimes. CARSON, *supra* note 9, at 16.

¹⁰ See *id.* Violent offenders made up 53.2 percent of the total prison population in 2014.

Amendment to non-capital sentences for all adults. It should, in effect, find mass incarceration unconstitutional.

II. THE CASE FOR ROBUST APPLICATION

The case for a robust Eighth Amendment was propounded as early as 1910. In a case overturning a sentence of 15 years' hard labor for falsifying a document, Justice Joseph McKenna, reflected on the intent of the drafters of the Amendment:

Their predominant political impulse was distrust of power . . . with power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute intelligent providence to its advocates we cannot think that it was intended . . . to prevent only an exact repetition of history . . . [The Founders feared that] [c]ruelty might become an instrument of tyranny; of zeal for a purpose, either honest or sinister.¹¹

In 1910, Justice McKenna imagined the possibility of an honest and democratic zeal blurring into tyranny expressed as excessive imprisonment—for him there was no great leap from “the tyranny of the Stuarts” that informed the Founder’s fear of government, to something akin to mass incarceration in the 20th and 21st centuries. Both are state-sanctioned cruelty inimical to a free republic.

A. The Eighth Amendment at the Founding

Jurists and scholars contest the “original intent” of the Founders with regard to “cruel and unusual punishment.” While some, with Justice McKenna, see a broad intent to limit criminal punishment as a weapon of state power, others see a more limited fear of pre-existing forms of brutality. Justice Scalia, a proponent of the latter camp, argued that the framers must have considered and rejected a proportionality requirement, as such language existed in contemporary state constitutions.¹² Yet there is little

¹¹ *Weems v. United States*, 217 U.S. 349, 372–73 (1910). In the next paragraph, he offered the following endorsement of an “evolving” constitution: “Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions.” *Id.* at 373.

¹² *Harmelin v. Michigan*, 501 U.S. 957, 977 (1991).

direct evidence the framers contemplated proportionality at all, and the idea lacks coherence in a system lacking gradations of punishment, one consisting primarily of public spectacles of corporal punishment and execution, designed to deter crime before it happened.¹³

Even if one accepts the narrow reading of the founder's intent, there remains the purposivist response to strict originalism. Whatever its origins, the broad language may have been intended to, in Justice McKenna's words, prevent criminal law from becoming an "instrument of tyranny." If the mode of that tyranny switches from corporal punishment to incarceration, the constraint must shift with it.

Akhil Amar has argued that the founders intended the clause to "restrain lawless and bloody judges," not invalidate laws enacted by democratically elected legislatures.¹⁴ He notes that the founders copied the language nearly verbatim from the English Bill of Rights of 1689, designed for that purpose.¹⁵ This reading, he argues, is more consistent with the overall intent of the Bill of Rights as originally conceived—to ensure popular, democratic accountability vis-à-vis the new central government.¹⁶ Yet Amar contends that that reading could not survive the Fourteenth Amendment—that read through "the lens of Reconstruction," the Clause must be seen to provide "judicially enforceable bite against state legislatures," such as those that had passed criminal laws used to oppress slaves and later freedmen.¹⁷

B. The Eighth Amendment after Reconstruction

An Eighth Amendment that checks mass incarceration is one applied against the states, one "incorporated" through the Due Process Clause of the Fourteenth Amendment. The history of the Fourteenth Amendment, of the founding of the Bill of Rights as a check against *state* power, is both illustrative of the need to robustly constrain punishment to protect liberal democracy, and relevant to interpretation of the Eighth Amendment.

In viewing the Eighth Amendment through "the lens of reconstruction," Amar cites the drafters' association between cruel and unusual punishment and the barbarities of the Slave Power, including "the lash and the scourge" and "laceration of the body." But his account does not emphasize the more immediate context of the Amendment's passage—the postwar use of state criminal law to subjugate freedmen who sought to claim the equal citizenship that would be codified in the Amendment.

According to Eric Foner's seminal history of Reconstruction, southern states enlisted criminal punishment to subordinate black citizens "virtually

¹³ Note, *The Eighth Amendment, Proportionality, and the Changing Meaning of "Punishments,"* 122 HARV. L. REV. 960 (2009).

¹⁴ AKHIL AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 279 (2000).

¹⁵ *Id.*

¹⁶ *Id.* at 87, 129.

¹⁷ *Id.* at 279–80.

from the moment the Civil War ended.”¹⁸ As state militias terrorized black belt counties, state courts dispensed cruel and unequal “justice”:

If employers could no longer subject blacks to corporal punishment, courts could mandate whipping as a punishment for vagrancy or petty theft. If individual whites could no longer hold blacks in involuntary servitude, courts could sentence freedmen to long prison terms, force them to labor without compensation on public works, or bind them out to white employers who would pay their fines.¹⁹

The laws used to attempt the subjugation of southern blacks were not just the infamous black codes, but also traditional and necessary criminal laws with enhanced punishments, for example petty theft made punishable by death.²⁰ This was the context—state-sanctioned physical terror and confinement used, along with private terror, to deny freed slaves their equal citizenship—in which Congressional Republicans drafted and passed the 14th Amendment. Foner describes their intent:

[I]t [was] abundantly clear that Republicans wished to give constitutional sanction to states' obligation to respect such key provisions [of the Bill of Rights] as . . . protection against cruel and unusual punishment [T]he [Fourteenth] Amendment was deemed necessary, in part, precisely because every one of them was being systematically violated in the South in 1866.²¹

The history and text of the Fourteenth Amendment make clear that it meant to establish the equal citizenship of freed slaves, to incorporate them into a liberal, democratic polity. Those who passed the Amendment knew that that required more than an explicit guarantee of equality; it required an actualization of the democracy-reinforcing rights of the first eight amendments for the new citizens. Chief among these was the right to be free from cruel and unusual punishment—one of the primary tools for subjugation of new citizens in the postwar period.

¹⁸ ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877 198 (Henry S. Commager and Richard B. Morris eds., 1998).

¹⁹ *Id.* at 205.

²⁰ *Id.* at 202.

²¹ *Id.* at 258–59. John Bingham, the principal author of Section I of the Fourteenth Amendment, stated at least twice that Section I would ban cruel and unusual punishments by the states. JOHN D. BESSLER, CRUEL AND UNUSUAL: THE AMERICAN DEATH PENALTY AND THE FOUNDERS' EIGHTH AMENDMENT 204 (2012).

C. *The Text in Context*

A careful reading of the text of the Eighth Amendment, in the context of the Bill of Rights, and in the light of the history of reconstruction, shows the special significance of the Amendment as a democracy-reinforcing protection.

The simplest textual argument for a robust proportionality mandate relies on the excessive fines clause. Quoting Benjamin Oliver, Justice White expressed doubt that the constitution would ban excessive—disproportionate—fines, but place no restrictions whatsoever on prison terms. The likely explanation is that prison sentences were not the dominant, or even a particularly common form of punishment at the founding, or at the time of the adoption of the English Bill of Rights, from which the founders lifted the phrase.²²

Looking beyond the Amendment itself, to its place in the Bill of Rights, strengthens the argument for a strong interpretation. Professor Neuborne has argued that the First Amendment and the Bill of Rights should be read as a cohesive whole, a “poem” whose composition and order provide a blueprint for the preservation of liberal democracy.²³ He has argued that, even if unintentional, the order of the Amendments reveals the Bill for what it is—a carefully composed blueprint for democracy’s security system. Thus, the primary democracy-protecting rights, the rights to believe and speak freely, begin the Bill, which goes on to protect the free-speaking polity against oppressive power from both the military—the second and third Amendments—and the civilian justice system—the Fourth through Eighth Amendments. Neuborne makes the case for the special significance of the First Amendment, which declares the *affirmative* rights necessary for a free populace in a liberal democracy. The last of the substantive amendments, the Eighth, also merits special attention.

The Eighth Amendment stands out both for its bold, passive-voice command, and its direct invitation for an evolving constitutional jurisprudence: “Cruel and unusual punishment [shall not be] inflicted.” Physical force—killing, torture, and detention—were and are the primary tools of tyranny. The Eighth Amendment then, is an intuitive constraint on executive power, and a logical bookend to the bill of rights. If the First Amendment declares an affirmative right to expression foundational to liberal democracy, the Eighth is its negative corollary, a right to be free from oppressive force that stifles that expression.²⁴

²² *The Eighth Amendment, Proportionality, and the Changing Meaning of “Punishments,”* *supra* note 14, at 967–72.

²³ BURT NEUBORNE, *MADISON’S MUSIC: ON READING THE FIRST AMENDMENT* (2015).

²⁴ Professor Amar has argued that the Amendments are historically tied in that “the most grisly punishments in England had typically been inflicted on those who spoke out against the Government.” AMAR, *supra* note 15, at 82.

While a similar case can be made for the Fourth, Fifth, Sixth, and Seventh, the Eighth, like the First, is singular. The Eighth Amendment is the final bulwark against state-sanctioned tyranny. It is a stopgap for the innocent, when all procedural protections have failed—a stopgap not subject to disputed facts, nor discretionary interpretations of vague legal doctrines. More importantly, it is a substantive limitation on the police power. It ensures that even legitimate criminal laws legitimately enforced do not become tools of subjugation, preventing the attainment of full and equal citizenship. Incarceration isolates and silences people—it removes them from the polity, wholly negating the affirmative rights enshrined in the First Amendment. It is the only way to effectively suspend citizenship. It was, in that sense, a natural response to the “threat” of equal citizenship of freed slaves.

Reading the Eighth Amendment in the Context of the Bill of Rights, the Fourteenth Amendment, and their histories, shows that eliminating cruel and unusual punishment is not merely humane, but necessary for the maintenance of a liberal democracy of equal citizenship. Justice McKenna persuasively argued that the Amendment must evolve to be commensurate with that purpose. Today, that means robust regulation of non-capital sentences—a constitutional response to mass incarceration.

Both a purpose-focused analysis of original intent—of the founders of the Bill of Rights and the Reconstruction Amendments—and a contextual reading of the text of the Amendment in light of that purpose, support robust application of the Eighth Amendment to incarceration sentences. But they do not unambiguously dictate it. As with desegregation, the nation confronts a humanitarian and political crisis—unnecessary suffering and undemocratic subjugation on a mass scale. And as with desegregation, the broad and forceful language of the constitution lends itself to the moral imperative. Charles Black famously recognized that the illegality of segregation rested “on the ground of history and of common knowledge about the facts of life.”²⁵ The legality of prison sentences should be judged in light of the facts and history of mass incarceration—of a cruel, unusual, discriminatory, and anti-democratic epidemic of imprisonment.

III. TOWARD A MORE OBJECTIVE STANDARD OF PROPORTIONALITY

The intuitive idea that a cruel punishment is one that is disproportionate to the crime committed has long been recognized by the Supreme Court, albeit in a constrained and often incoherent manner.²⁶ For non-capital cases,

²⁵ Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *Yale L.J.* 421, 427 (1960).

²⁶ Professor Ian Farrell has commented on the intuitive nature of the proportionality principle:

Whether we characterize it as an intuition about justice, as part of our “felt sense of justice,” as a considered conviction, or a common-sense notion of justice, it can hardly be doubted that the vast majority of people—including people who are attracted to utilitarian understandings of morality—are strongly committed to the

the Court ultimately settled on a threshold question of “gross disproportionality,” which in practice has meant complete deference in non-capital cases, even upholding life sentences for drug possession and recidivist theft.

The gross disproportionality standard emerged in Justice Kennedy’s concurrence in *Harmelin v. Michigan*. Kennedy justified the deferential standard with four principles:²⁷

1. Criminal sentencing is a highly subjective endeavor, “properly within the province of the legislatures, not courts.”²⁸
2. Courts cannot non-arbitrarily choose among “the variety of legitimate penological schemes.”²⁹
3. Criminal law and sentencing are quintessential state powers, and divergence is an “inevitable, often beneficial, result of the federal system.”³⁰
4. It is difficult or impossible to find objective factors to inform proportionality review that distinguishes among sentence lengths.³¹

Essentially, Kennedy argues that robust proportionality review would violate traditional principles of separation of powers and federalism without a sufficiently objective standard. Whether or not Kennedy’s concerns were valid given the state of theory and research at the time, they no longer justify such a deferential approach.

The federalism and separation of powers concerns can be addressed with a strong enough objective standard. While not every right has a remedy, a law that sanctions or mandates clearly unconstitutional conduct generally cannot stand on federalism grounds alone. A new, more objective standard would entail a more probing, philosophically-grounded analysis of morally deserved punishment, and a more probing, empirically-grounded analysis of socially optimal punishment. These moral and social benefits of a prison term would in turn be weighed against a more probing account of the actual experience, and suffering, of years behind bars.

Considering political process strengthens the case for robust enforcement under such a standard. Without having answered the question of what objective standards should inform constitutionality, one can

belief that punishment ought to be proportional to the crime for which it is imposed. That the requirement of proportionality has been incorporated into such a wide range of punishment theories is testament to the depth of our commitment to the proportionality requirement.

Ian P. Farrell, *Gilbert & Sullivan and Scalia: Philosophy, Proportionality, and the Eighth Amendment*, 55 *Vill. L. REV.* 321, 361 (2010).

²⁷ *Harmelin*, 501 U.S. at 998.

²⁸ *Id.*

²⁹ *Id.* at 1001.

³⁰ *Id.* at 999.

³¹ *Id.* at 1000–01.

presume, at a minimum, that the Eighth Amendment requires a rational relationship between crime and sentence, one relying on some combination of accepted theories of punishment. As will be shown, political and institutional incentives push legislators to abandon rationality entirely in sentencing, and instead play on the public's fear of crime by calling for severe sentences little-connected to moral culpability or public safety. Knowing this political deficit, judges should view sentencing laws with heightened skepticism, even if they don't do so in the formal method of "strict scrutiny."

A. A Broad but Grounded Inquiry – The Canadian Model

In *Lockyer v. Andrade*, a majority of the United States Supreme Court frankly stated: "[o]ur cases exhibit a lack of clarity regarding what factors may indicate gross disproportionality."³² The Court, repeatedly invoking the need for deference and restraint, appeared unconcerned.³³ In a companion case, *Ewing v. California*, the Court made a passing reference to: "the State's public-safety interest in incapacitating and deterring recidivist felons," but it did not probe those theories, instead asserting that the sentence "reflect[ed] a rational legislative judgment."³⁴ The four dissenters in *Lockyer* asked both what theory the state used to justify the sentence, and whether or not it reasonably applied that theory. They easily determined the sentence to be grossly disproportionate.³⁵

The Canadian Supreme Court also uses a "grossly disproportionate" standard, but one with considerably more doctrinal depth, and bite. Relying in part on an expansive doctrine permitting facial challenges based on plausible applications—akin to First Amendment jurisprudence in the United States—the Canadian Supreme Court has invalidated a one-year mandatory minimum imposed on a man who possessed crack cocaine, methamphetamine, and heroin with intent to sell, and a three-year mandatory minimum imposed on a man who discarded an unlicensed, loaded firearm.³⁶

Canadian Supreme Court precedent requires that the Court consider the sentencing objectives laid out in the Canadian Criminal Code.³⁷ The code requires consideration of one or more of a list of objectives: (a) denouncing unlawful conduct; (b) deterrence; (c) incapacitation, "where necessary;" (d) rehabilitation; (e) restitution to victims and the community; and (f) promoting acceptance of responsibility and remorse. The Court also considers other factors laid out in the Code:

³² *Lockyer*, 538 U.S. at 72.

³³ *Id.*

³⁴ *Ewing v. California*, 538 U.S. 11, 29–30 (2003).

³⁵ *Lockyer*, 538 U.S. at 77–83 (Souter, J., dissenting).

³⁶ *R. v. Lloyd*, [2016] 1 S.C.R. 130 (Can.); *R. v. Nur*, [2015] 1 S.C.R. 773, 791.

³⁷ *R. v. Lloyd*, [2016] 1 S.C.R. 130, para. 22 (Can.).

any aggravating and mitigating factors . . . the principle that a sentence should be similar to sentences imposed on similar offenders for similar offenses committed in similar circumstances; the principle that where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh; and *the principle that courts should exercise restraint in imposing imprisonment*.³⁸

In recent cases striking down mandatory minimums, the Canadian Supreme Court invoked this standard, but ultimately conducted a relatively shallow analysis comparing the gravity of the crime to the sentence. Nonetheless, the Court's stated framework calls for a more thorough analysis, one that at the least names and interrogates the objectives of punishment.

Notably, while the United States Supreme Court has cited the multiple potential objectives of sentencing as a reason to avoid a robust proportionality inquiry, the Canadian Supreme Court refers to them as helpful, indeed necessary metrics with which to conduct that inquiry. Thus, in a prior case it described its fundamental inquiry as whether or not the punishment "goes beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives."³⁹

Another noteworthy difference: The Canadian Court considers a general principal of restraint in imposing prison sentences. This may serve as a reminder not to ignore the other side of the proportionality equation—to carefully consider the actual experience of prison, including the suffering endured by incarcerated people and its costs to society.

These two elements—a willingness to interrogate any and all objectives of punishment, and a searching inquiry into the gravity of incarceration, could form the basis for a new standard for proportionality review. With the aid of theoretical and quantitative criminology, substantially objective analysis is possible under such a standard.

B. Rational Sentencing under Multiple Theories of Punishment

Interrogating all objectives of punishment is not as daunting as it appears. There is consensus among criminologists and philosophers that punishment can be justified on four grounds—retribution, deterrence, incapacitation, and rehabilitation. This can be further simplified to two theories: retributive, which asks what punishment is morally deserved, and

³⁸ R. v. Nur, [2015] 1 S.C.R. 773, 799 (Can.). (citations omitted and emphasis added). The Canadian Supreme Court has also impugned mandatory minimum sentences, which "by their very nature, have the potential to depart from the principle of proportionality in sentencing," and declared that general deterrence cannot justify an otherwise grossly disproportionate sentence.

³⁹ R v. Smith, [1987] 1 S.C.R. 1045, 1049 (Can.).

utilitarian, which asks which punishment most benefits society by reducing crime at an optimal cost. For the public, it is intuitive that sentencing should take account of both theories—that people who harm others deserve punishment, and that future harm must be prevented, and crime kept low. Among philosophers too, there is broad agreement that combining both theories “is a keystone of any convincing account of just punishment.”⁴⁰

Justice Stevens advocated for such an approach in his dissent in *Ewing v. California*, finding it unremarkable that a court would consider all objectives in evaluating proportionality. Stevens first argues that the restrictions on excessive bail and fines in the Amendment indicate a broad general intention to restrict excessive punishments. He then makes the case for evaluation of proportionality under all theories of punishment:

Throughout most of the Nation's history—before guideline sentencing became so prevalent—federal and state trial judges imposed specific sentences pursuant to grants of authority that gave them uncabined discretion within broad ranges. . . . It was not unheard of for a statute to authorize a sentence ranging from one year to life In exercising their discretion, sentencing judges wisely employed a proportionality principle that took into account all of the justifications for punishment—namely, deterrence, incapacitation, retribution, and rehabilitation. . . . Likewise, I think it clear that the Eighth Amendment's prohibition of “cruel and unusual punishments” expresses a broad and basic proportionality principle that takes into account all of the justifications for penal sanctions. It is this broad proportionality principle that would preclude reliance on any of the justifications for punishment to support, for example, a life sentence for overtime parking.⁴¹

For Stevens, relying on all of the accepted justifications for punishment is the intuitive approach, one well-tested by generations of discretionary sentencing.

The affirmative case for such an approach can be abutted by a strong negative case against relying exclusively on either retributive or utilitarian frameworks. The folly of relying exclusively on one theory can be illustrated by examples:

- Someone who commits an infamous financial crime, wiping out the retirement savings of thousands of people, may so mar his reputation

⁴⁰ Farrell, *supra* note 26, at 360.

⁴¹ *Ewing*, 538 U.S. at 34–35 (Stevens, J., dissenting).

that there is little risk of recidivism—no one would ever agree to deal with the fraudster. Nonetheless, retributive justice demands that he serve some time in prison.

- Punishing theft with severe corporal punishment, such as chopping off hands, would be highly effective at deterring potential thieves and relatively inexpensive, yet retributive justice forbids such cruelty.
- Those who take someone's life may deserve life imprisonment. However, when one considers the minimal risk of recidivism for elderly prisoners, and the extremely high cost of incarcerating them—costs that could save lives if invested in effective policing, the idea that all murders merit life sentences without the possibility of parole becomes untenable.
- Carelessness crimes such as regulatory offenses prohibiting the selling of tainted food, may not involve any intent to harm others. Moral culpability is minimal, and retributive justice demands little punishment. However, the need to incent precaution and protect victims demands a more severe sanction.

These examples make clear that just sentencing requires consideration of both retributive and utilitarian objectives, and while intelligent people will disagree on the precise manner in which they should be weighed, there are objective metrics that can guide that analysis.

C. Objectivity in Retributive Justice – Guiding Principles for Determining Morally Deserved Punishment

Retributive justice, the need to deliver morally deserved punishment, is necessarily the more subjective of the goals of punishment. Nonetheless, assessing the moral gravity of crimes along a few widely accepted metrics injects a degree of objectivity. *How Many Americans are Unnecessarily Incarcerated?*,⁴² a report I co-authored for the Brennan Center for Justice, uses a four-factor analysis to determine which crimes should have a default sanction of prison, and which an alternative. The first three factors reflect a scholarly and popular consensus as to what determines the moral gravity of a crime. They are (with slightly altered headings here): (1) potential harm; (2) actual harm; and (3) degree of intentionality. Using these metrics at the very least incents a more comprehensive analysis, lessening the risk of selective focus on emotionally salient details, and enhancing the legitimacy of a judicial evaluation of moral gravity.

⁴² JAMES AUSTIN ET AL., BRENNAN CTR. FOR JUSTICE, *HOW MANY AMERICANS ARE UNNECESSARILY INCARCERATED* 49–52 (2016), https://www.brennancenter.org/sites/default/files/publications/Unnecessarily_Incarcerated_0.pdf.

1. Potential Harm

This factor reflects the intuitive idea that a crime that poses a greater risk to victims and to society deserves a more serious punishment. Harm includes psychological harm, physical harm, and property loss. A crime may harm discernible people, institutions, or society at large. Financial fraud, for example, harms both the specific people defrauded, and a capitalist economy that depends on good faith transactions. Many serious crimes involve only potential harm. For example, an attempted murder in which the target does not know of the attempt may not harm a victim at all, although it has great potential to do so.

2. Actual Harm

This factor reflects the intuitive idea that actual harm deserves special consideration. Where a victim has been harmed in some way, that person, his family and friends, and society feel a greater need for retribution, for vindication of the value of the victim.

Bodily harm marks the most common distinction in popular discussion of crime. Violent crime is the crime most feared by individuals and most destructive to society. The special significance of bodily harm is both intuitive and deeply rooted in American law. Criminal law in every state reserves the most serious punishments for infliction of bodily harm. Constitutional law also reflects the importance of bodily harm.⁴³

Today, criminologists and the public recognize the parallel significance of psychological harm. Some crimes that involve no physical contact at all, such as burglary of an unoccupied home, may also cause significant fear and mental anguish. Only a holistic view of harm can adequately capture the public's concern for victims.

3. State of Mind

"Intent," or *mens rea* is a core tenet of liability in American criminal law. The Model Penal Code, a model set of criminal laws produced by the American Law Institute that forms the basis of many state criminal codes, requires that all crimes have some mental state element, at a minimum negligence (carelessness, or a lack of "reasonable care"), but usually knowledge or intent. This means someone must know they are committing the criminal act or have the will or desire to commit the act in order to be held guilty of that crime. The intuitive idea that mental state affects culpability is reflected in the different crimes of killing in almost every jurisdiction. All states have determined that a planned murder deserves a

⁴³ The Fourth Amendment provides heightened protections against violations of "bodily integrity," and the Fifth and Fourteenth Amendments ensure a right to "personal security," a right to not be deprived of basic physical well-being.

more severe punishment than a negligent killing, such as one that results from drunk driving, although the harm to the victim is the same.

D. Equal Suffering as a Benchmark for Retributive Proportionality

If scrutiny of the above factors ensures a more complete and accurate account of the moral gravity of a crime, they are only part of a more objective approach to retributive proportionality. There remains the question of how to weigh the moral gravity of a crime against a term of imprisonment. One intuitive benchmark for this comparison is equal suffering, “an eye for an eye.” Notably, in the death penalty context, legislatures and the Supreme Court have implicitly or explicitly rejected simple parity of punishment and harm to the victim. No state automatically imposes the death penalty for committing any crime, including first-degree murder. And while the Supreme Court’s death penalty jurisprudence has focused on avoiding arbitrary imposition, the Court has emphasized requirements that juries find murders exceptionally grave in upholding capital punishment.⁴⁴

The notion that “death is different” is a hallmark of Eighth Amendment and criminal procedure jurisprudence, yet it is remarkable how radically the contours of debate change from death to other punishments. The possibility that execution is a cruel—if not disproportionate—punishment even for the most heinous murders is an unremarkable proposition, even if it has not yet commanded a majority on the Supreme Court.⁴⁵ It is unremarkable even though the suffering endured by victims in the gravest murders is undoubtedly more than would be suffered by the perpetrator in execution. It is unremarkable even though it is less than an eye for an eye. This is not simply because death is different, but because American constitutional democracy prioritizes liberty over order, because it fears state power more than individual power, and because what is cruel when inflicted by a private person may be crueler when imposed by a powerful state, one with the potential to restrict liberty on a mass scale. These rationales are particularly salient in the context of the death penalty, of state power to end citizens’ lives, but they should not be irrelevant in considering prison sentences and the civic and social death they impose.

It is thus remarkable that judges have unflinchingly condoned life in prison for nonviolent crimes under recidivist statutes. That is, they have not flinched in imposing the immense suffering of a lifetime in prison for crimes

⁴⁴ See *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (sanctioning capital punishment where the statutory scheme limited arbitrary imposition by mandating that a jury find at least one of a list of aggravating circumstances); see also *Ring v. Arizona*, 536 U.S. 584, 607–08 (2002) (“Unlike Arizona, the great majority of States responded to this Court’s Eighth Amendment decisions requiring the presence of aggravating circumstances in capital cases by entrusting those determinations to the jury.”).

⁴⁵ See e.g., *Glossip v. Gross*, 135 S. Ct. 2726, 2755–77 (2015) (Breyer, J., dissenting) (arguing that the death penalty may categorically violate the Eighth Amendment).

such as minor drug dealing or theft, which while not harmless, cannot have caused a degree of suffering that approaches that of a lifetime behind bars.

There is an irreducible kernel of subjectivity in determining retributive proportionality. But by comparing the suffering caused by a crime—or potential suffering averted by prevention of a crime—to the suffering of spending years in prison, and by recognizing, as so many readily do in the context of capital punishment, that even parity of suffering may be disproportionate and cruel, judges can ground judgments of retributive proportionality in moral-philosophical reasoning readily understood and accepted by the public.

*E. Objectivity in the Pursuit of Public Safety – The Data on Deterrence, Incapacitation, and Rehabilitation.*⁴⁶

Utilitarian justice is more concrete and measurable than retributive justice—policymakers agree that the goal is to reduce crime as much as possible at a socially optimal cost, and a growing body of research shows how to set sentence lengths in order to do so.

1. The Effect of Incarceration on Crime

While data describing the impact of incarceration on crime writ large cannot substitute for individual-level analysis, it should inform evaluation of the public safety value of an incarceration sentence. If, as the preponderance of research suggests, increased incarceration has had a minimal, if any positive effect on crime over the past three decades, then judges should view with skepticism claims that long sentences for minor crimes are proportional because of their public safety value.

Studies suggest that by the 2000's increased incarceration has had almost no impact on crime, while in the 1990's any effect was moderate. This is likely because of diminishing returns. Serious and repeat offenders are the most likely to be caught, so each additional offender is less serious. The Brennan Center's regression analysis, which accounted for diminishing returns, found that increased incarceration accounted for none of the 50% decline in violent crime since 1990, and just 7% of the 46% decline in property crime.⁴⁷ Other studies are marginally more sanguine.⁴⁸ Taken

⁴⁶ Section E relies on and borrows from research I contributed to as a co-author of the Brennan Center report, JAMES AUSTIN ET AL., *supra* note 42.

⁴⁷ OLIVER ROEDER ET AL., BRENNAN CTR. FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE 8–9 (2016), <https://www.brennancenter.org/publication/what-caused-crime-decline> (summarizing conclusions as to causes of the crime decline from 1990 to 2013).

⁴⁸ *See id.* at 22. The authors reviewed prior research on the impact of incarceration on crime, including Thomas B. Marvell & Carlisle E. Moody, *Prison Population Growth and Crime Reduction*, 10 J. QUANTITATIVE CRIMINOLOGY 109, 131 tbl. IV (1994). The authors calculated that if the Marvell and Moody's estimate of the effect of incarceration on crime was correct, then increased incarceration may have accounted for thirty percent of the crime decline in 1990.

together, they suggest it is highly unlikely that incarceration accounts for more than 30% of the dramatic decline in crime since 1990, the vast majority of that effect occurring in the 1990's, when the incarceration rate was significantly lower.

2. Deterrence: Longer Sentences Have Little Public Safety Value

A principal public safety rationale for long sentences is deterrence, the idea that punishment serves to dissuade people from committing crimes. Deterrence is generally categorized as specific, wherein an actual punishment dissuades someone from committing another crime, and general, whereby the fear of potential punishment deters would be offenders. Research shows little to no deterrent effect, specific or general, for very long sentences.

a. Specific Deterrence

Reviewing an extensive body of research, the Brennan Center's report concluded:

Social science evidence indicates that in the worst-case scenario, longer lengths of stay produce higher recidivism rates, while the best-case scenario points to diminishing returns of incarceration on public safety. It also provides compelling evidence of the possibility that there is no relationship at all between long lengths of stay and recidivism rates. After decades of using long prison stays as a response to crime, these studies strongly encourage a need to rethink this approach.⁴⁹

This makes sense. Up to a point, a longer sentence may convey greater societal disapproval, and do more to push a prisoner to recognize his misdeeds. But when very long sentences feel disconnected to the original conduct, their moral force is diminished. And where prisons provide little rehabilitative programming and little preparation for reentry, while removing people from work and family ties in their communities, longer sentences will make people less able to reintegrate, and more likely to commit another crime.

b. General Deterrence

The evidence for general deterrence, the idea that longer sentences deter crime among the general public, is even weaker than that for specific deterrence. General deterrence relies on the assumption of a rational

⁴⁹ JAMES AUSTIN ET AL., *supra* note 42, at 37.

offender, someone who weighs the costs and benefits of committing a crime before deciding to act. The idea that longer sentences will have a greater deterrence effect depends on a number of assumptions: that the potential offender is aware that his conduct can be punished by incarceration of a particular length; that he believes he could be caught, convicted, and sentenced; and that he appreciates the difference in the sentence length and weighs the relative severity of different lengths. Particularly for young people whose brains are not fully developed, it is difficult to grasp the difference in sentence lengths before experiencing incarceration.

The theoretical weakness of general deterrence is born out in empirical studies. The prominent scholars who authored *The Growth of Incarceration in the United States*, published by the National Research Council, confidently state, “increasing already long sentences has no material deterrent effect.”⁵⁰ The Brennan Center similarly concludes that studies “find this theory does not hold true .”⁵¹

3. *The Relative Efficacy of Alternatives to Incarceration*

Even short prison stays may not be an effective deterrent *relative to available alternatives*. While some research suggests that up to a point increasing length of stay may reduce recidivism, a growing body of research shows that people sentenced to alternatives to incarceration, such as intensive probation or community service, are less likely to reoffend than similar people sentenced to prison stays.⁵²

For example, a 2009 analysis by criminologists at Carnegie Mellon, the University of Cincinnati, and Xavier University, of forty-eight studies concluded that prison either increased reoffending or did not affect it, compared to alternatives to prison.⁵³ A 2011 follow-up study reached a more definite conclusion: “[w]ith some confidence, we can conclude that, across all offenders, prisons do not have a specific deterrent effect. Custodial

⁵⁰ THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 140 (Jeremy Travis et al. eds., 2014). While they confidently assert the inefficacy of long sentences, the authors recognize that some research has shown a substantial deterrent effect of “swift and certain” short-term incarceration.

⁵¹ JAMES AUSTIN ET AL., *supra* note 42, at 36–37. One such study relied on a natural experiment in California. California’s draconian three-strikes law—recently reformed by ballot initiative—allowed for sentences of 25-years-to-life for a third felony, after two serious or violent prior felony convictions. The third felony could be for crimes as minor as drug possession or theft. For those subject to the law, this dramatically increased the potential sanction, from as little as one year in prison to more than 25 years. This well-publicized extreme increase should have been easily understood and weighed by potential offenders, yet it led to a significant—but in light of the radically life-altering heightened sanction, surprisingly small—20 percent lower arrest rate for eligible offenders. The 20 percent seems smaller still in light of the astronomical cost of incarcerating people who commit low-level crimes for more than two decades. E. Helland & A. Taborrak, *Does Three Strikes Deter? A Nonparametric Estimation*. 42 J. HUMAN RES. 309 (2007)

⁵² JAMES AUSTIN ET AL., *supra* note 42, at 22.

⁵³ See Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Jonson, *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 178 (2009).

sentences[, i.e., jail and prison,] do not reduce recidivism more than noncustodial sanctions.”⁵⁴

4. *The Limitations of Incapacitation*

Incapacitation means simply that people in prison cannot commit crimes against people in the general public. Research on incapacitation is less conclusive, but points toward a limited effect on crime, with diminishing returns for a higher incarceration rate.

The simplest measure of the effect of incapacitation is the percentage of all crime that would have been committed by incarcerated people. What would have been committed by those incarcerated in turn depends on what alternatives to incarceration those people would have faced—for example parole supervision, treatment in the community, or no sanction at all—and how effective those alternatives are at reducing or preventing recidivism. Yet this measure still overestimates the incapacitation effect. If long terms of incarceration do not reduce recidivism rates, and if criminal careers usually involve a finite number of criminal incidents, then longer sentences merely defer criminal activity, rather than prevent it.

A number of other factors may limit the incapacitation effect. Like deterrence, incapacitation is subject to diminishing marginal returns. Research shows that frequency of offending is highly variable. Some people commit crimes frequently, while others do so sporadically or in a few isolated incidents. Because those who commit crimes most regularly are the most likely to be caught, the more people you incarcerate, the more likely you are to incarcerate infrequent offenders.⁵⁵ Criminal replacement also limits incapacitation. For those crimes committed as part of a group or organization, it may be that incapacitation of one member has no effect on the overall number of crimes committed by the group. The group will simply find someone to replace the incarcerated person.

These confounding variables make estimating the crime prevented through incapacitation an onerous task. As stated by Todd Clear and Dennis Schrantz, “[t]here is no settled estimate of the amount of crime prevented through incapacitation; estimates vary from as high as 287 crimes averted per year per person incarcerated (Zedlewski, 1987) to as low as less than 1 crime for every new person added to the prison population (Western, 2006).”⁵⁶

⁵⁴ See Francis T. Cullen, Cheryl Lero Jonson & Daniel S. Nagin, *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, 91 PRISON J. 48S, 60S (2011).

⁵⁵ This is corroborated by research showing that the overall effect of incarceration on crime has decreased substantially over the past thirty years. See JAMES AUSTIN ET AL., *supra* note 42 (finding a minimal impact of incarceration on crime); GROWTH OF INCARCERATION, *supra* note 50, at 143 (reviewing research on the relationship between incarceration and crime).

⁵⁶ Todd R. Clear & Dennis Schrantz, *Strategies for Reducing Prison Populations*, 91 PRISON J. 138S, 154S (2011), <http://tpj.sagepub.com/content/early/2011/07/23/0032885511415238.full.pdf>.

Even if, in spite of all the limitations discussed, there remains a robust incapacitation effect, incapacitation is an inefficient means of reducing crime. In economic terms, incapacitation is worthwhile if the crimes prevented would have cost more than incarceration itself. While deterrence offers a permanent crime-reduction benefit for a limited period of incarceration, incapacitation only functions as long as the person is behind bars, and costing the state money. By taking resources that could be spent on more and better policing, or economic uplift, which more efficiently reduce crime, over-incarceration aimed at incapacitation may be detrimental to public safety.

5. Rehabilitation

Any rehabilitative effect of prison stays, a benefit to incarcerated people and society, should weigh in favor of proportionality. However, considering rehabilitation is unlikely to alter the analysis of the utilitarian benefits of longer prison stays. This is because the best, and perhaps only scientific measure of rehabilitation is recidivism rates, already considered in evaluating specific deterrence. Where considering rehabilitation could make a difference is in evaluating the severity of longer prison stays. Some of that evaluation is exogenous to the actual conditions of confinement—a function of the simple fact of being forcibly removed from society and separated from loved ones. Still, conditions of confinement, and the extent to which imprisonment entails hardship and boredom, or self-actualization and rehabilitation, is relevant in weighing whether a prison sentence is cruel and unusual. Given the dominance of the warehousing model of incarceration, it seems unlikely that positive conditions of confinement—quality in-prison treatment, education, and work programs—would substantially alter the calculus in most cases.

6. Relevance to Robust Proportionality Review

At least as to the public safety benefits of incarceration, Justice Kennedy was wrong—or is no longer correct—that there are “no objective factors” to inform proportionality review. The growing body of research on the public safety benefits, or lack thereof, of longer prison stays, has reached a point where a judge could make a reasonably informed assessment of the utilitarian, or public safety value of a particular sentence alleged to be disproportionate.

Yet even if judges are unwilling to conduct a probing inquiry into asserted public safety benefits, the reviewed research suggests they should not accept the argument that the mere possibility of such benefits is sufficient to find a sentence proportional. They should, at the least, consider whether the punitive excess of the sentence is so great as to outweigh the potential safety benefit.

The above is not meant of a comprehensive account of existing research, and even such an account would leave substantial uncertainty. Yet this research suggests judges assessing long sentences should approach asserted public safety justifications with skepticism.

IV. CONSIDERING THE ACTUAL EXPERIENCE OF IMPRISONMENT

In stark contrast to its extended narrative on the seriousness of the crime—possessing 650 grams of cocaine—Justice Kennedy’s concurrence in *Harmelin* declines to ask what it means to spend a lifetime in prison. Its commentary on the sentence itself is limited to two words, “severe and unforgiving.”⁵⁷

Two decades later, in a different legal context, Justice Kennedy would embrace a probing inquiry into the experience of imprisonment, and conclude that the overcrowding crisis in California’s prisons was cruel and unusual. In *Brown v. Plata*, Justice Kennedy approved a lower court order requiring population reduction in California’s prisons because of unconstitutionally inadequate medical and mental health care. *Brown v. Plata* is notable both for its implications as to Justice Kennedy’s evolving perception of the Eighth Amendment, as well as for what it says about the power of depicting the actual experience of imprisonment. The extensive factual record, necessitated by the stringent requirements of the *Prison Litigation Reform Act*, and expertly developed by the plaintiffs’ lawyers, painted a clear and compelling picture of the horrors of confinement in California’s overcrowded prisons, a picture that lent both moral and legal legitimacy to the plaintiff’s claims.⁵⁸

Kennedy’s opinion in *Plata* cites numerous examples from the record, which included “14 days of testimony and . . . a 184-page” lower court opinion.⁵⁹ Kennedy’s invocation of that record includes descriptions of “needless suffering and death,” including a man who died of medical neglect, a delay in treatment of one year after referral for an evaluation that never took place.⁶⁰ It includes descriptions of unsanitary medical “care” in converted storage rooms and bathrooms, and rampant violence leading to regular lockdowns lasting more than one week.⁶¹ In an unusual testament to the importance of the record, the majority opinion includes an appendix with shocking pictures showing overcrowded living quarters in a converted gymnasium, and tiny “holding cells for people waiting for mental health crisis bed[s].”⁶²

⁵⁷ *Brown v. Plata*, 563 U.S. 493 (2011).

⁵⁸ Norman Spaulding, Professor, Lecture at Stanford School of Law.

⁵⁹ *Brown*, 563 U.S. at 509.

⁶⁰ *Id.* at 508.

⁶¹ *Id.* at 519.

⁶² *Id.* at 547–49.

When the experience of incarceration was no longer an abstraction, fitting uneasily into the moral and empirical puzzle of proportionality, but a startling reality, Justice Kennedy proved willing to mandate a reduction in prison population, one that likely led to the release of many whose crimes were as or more severe than that at issue in cases he had upheld against proportionality challenges. Recall in *Andrade*, for example, Kennedy voted to uphold a life sentence for retail theft.

The bleakness of imprisonment revealed in the *Plata* litigation is not unusual. Rehabilitative programming in prison is severely lacking. For example, less than half of incarcerated people who commit their offenses under the influence of drugs receive treatment during incarceration.⁶³ Inmates, almost half of whom lack a high school education, also rarely receive the education they need.⁶⁴ Overcrowding exacerbates the lack of resources.⁶⁵ Even when rehabilitative programming is available, unsafe or unhealthy conditions in prisons limit their efficacy. For example, inmates face a high risk of sexual and physical violence while in prison.⁶⁶ A recent study found that 13 percent of people in state and federal correctional facilities *report* having been violently victimized while incarcerated.⁶⁷ The actual incidence is likely much higher.

Beyond the effects of trauma endured in prison, former inmates reentering society face a host of legal and economic shackles that make reoffending more likely. These include ineligibility for occupational licenses, such as a permit to become a barber; ineligibility for public housing; diminished employability; and relationship strains. The effects are well documented. To give one example, a criminal record lessens the chance

⁶³ CHRISTOPHER J. MUMOLA & JENNIFER C. KARBERG, BUREAU OF JUSTICE STATISTICS, DRUG USE AND DEPENDENCE, STATE AND FEDERAL PRISONERS, 2004 1 (2007), <http://www.bjs.gov/content/pub/pdf/dudsfp04.pdf>.

⁶⁴ Nearly forty percent of incarcerated people have less than a high school education, and less than fifteen had any postsecondary education. In 2004, only about half of people incarcerated in state prisons reported having participated in any education program. LOIS M. DAVIS ET AL., RAND CORP., EVALUATING THE EFFECTIVENESS OF CORRECTIONAL EDUCATION 2–4 (2013), http://www.rand.org/pubs/research_reports/RR266.html.

⁶⁵ In Alabama, for example, the prison system operates at almost 200 percent capacity. THE COUNCIL OF STATE GOV'TS, JUSTICE CTR., ALABAMA'S JUSTICE REINVESTMENT APPROACH 2 (2015), <https://csgjusticecenter.org/wp-content/uploads/2015/05/AlabamasJusticeReinvestmentApproach.pdf>. This forces inmates to join lengthy wait-lists to participate in limited education, work, and drug treatment programs. DAVID CLOUD, VERA INST. OF JUSTICE, ON LIFE SUPPORT: PUBLIC HEALTH IN THE AGE OF MASS INCARCERATION 12 (2014), <http://vera.org/pubs/public-health-mass-incarceration>.

⁶⁶ CLOUD, *supra* note 65, at 14. Four percent of adults in state and federal prisons, and about ten percent of youth in state juvenile facilities *reported* experiencing sexual violence. ALLEN J. BECK, BUREAU OF JUSTICE STATISTICS, PREA DATA COLLECTION ACTIVITIES, 2013 (2013), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4637>. The actual incidence of sexual violence may be much higher.

⁶⁷ Paul-Philippe Pare & Matthew W. Logan, *Risks of Minor and Serious Violent Victimization in Prison: The Impact of Inmates' Mental Disorders, Physical Disabilities, and Physical Size*, 1 Soc'y & MENTAL HEALTH 106, 113 (2011).

of a job interview call back by nine percent for white applicants, and fifteen percent for black applicants.⁶⁸

Making matters worse, prisons have become ill-equipped mental hospitals, warehousing sick people without preparing them to reenter society.⁶⁹

Recently, the experience of imprisonment has attracted broader attention. The grieving mothers of Sandra Bland and Kalief Browder have helped to expose the terrible psychic burden of confinement in jails; reporters have sought to shed light on the traumatic and chronically insecure lives of people in prisons; and popular culture has taken notice of the humanity and suffering of incarcerated people.⁷⁰ There is no sound legal reason why the gravity of a crime should merit a probing inquiry, but the severity of punishment should not. As *Plata* so dramatically showed, the lived experience, and lived suffering of mass incarceration is both morally compelling and highly relevant to the question of what is “cruel and unusual.” A judge carefully considering whether a sentence is disproportionate to a crime must consider both sides of the equation; in so doing she should consider not merely the length of separation from family and society, but also the quality of life and extent of suffering during that separation.

V. POLICING THE POLICE POWER: THE CASE FOR CLOSE SCRUTINY OF SENTENCING LAWS

“Representation reinforcement” theory contends that “judicial scrutiny should increase when a socially subordinated group cannot compete fairly in the political process.”⁷¹ In a seminal article attacking the theory, Lawrence Tribe invoked the potential class of “burglars.”⁷² The theory depended, he argued, on circular reasoning—only by establishing *ex ante* that a class deserved protection, did it become relevant that it could not achieve robust representation in the political process.⁷³ Burglars are a despised minority

⁶⁸ COUNCIL OF ECON. ADVISORS, EXEC. OFFICE OF THE PRESIDENT OF THE U.S., ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 45–47 (2016), https://www.whitehouse.gov/sites/default/files/page/files/20160423_cea_incarceration_criminal_justice.pdf.

⁶⁹ JAMES AUSTIN ET AL., *supra* note 42, at 13.

⁷⁰ See, e.g., Jennifer Gonnerman, *Before the Law*, THE NEW YORKER (Oct. 6, 2014), <http://www.newyorker.com/magazine/2014/10/06/before-the-law>; Shane Bauer, *My four months as a private prison guard*, MOTHER JONES (Jul./Aug. 2016), <http://www.motherjones.com/politics/2016/06/cca-private-prisons-corrections-corporation-inmates-investigation-bauer>; Activists and reformers have also embraced the issue of prison conditions. See, e.g., FRED PATRICK ET AL., VERA INST. OF JUSTICE, REIMAGINING PRISON (2016), <https://www.vera.org/projects/reimagining-prison>.

⁷¹ Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1364 (2011).

⁷² Lawrence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1075 (1980).

⁷³ *Id.* at 1075–77.

with no political power, yet no reasonable person would believe that criminal laws should be subject to heightened scrutiny for discriminating against the class of people who commit crimes. Positing a class of burglars pithily debunked the theory, but it may not be so absurd to evaluate sentencing laws with exacting scrutiny.

Professor Jane Schacter has argued for a simpler and more compelling iteration of the theory—the idea that an analysis of political process should inform the substantive question of rationality.⁷⁴ For example, in the context of equal protection for LGBT people, a legislative process characterized by animus, rather than reasoned deliberation, in which LGBT people had no voice, should inform a judgment as to whether or not a law makes a reasonable distinction among LGBT people and others.⁷⁵ The logic is simple. If the constitution requires that laws satisfy particular standards, and the legislative process makes clear that those standards were ignored or given insufficient attention, or that animus, or some other consideration overwhelmed the mandatory constitutional consideration, then judges should be skeptical that the law has, by providence alone, satisfied those standards.

Thus, Schacter argues that having established that LGBT people should be protected by the constitutional guarantee of equality, one should be skeptical that political process characterized by animus and the political powerlessness of LGBT people adequately protected that right. Similarly, having established that those convicted of crimes should be protected by a constitutional guarantee of proportional punishment, one should be skeptical that a political process characterized by demagoguery and acute power imbalances will adequately protect that right.

A strong case can be made that the characteristics of legislative process for sentencing laws make it unlikely that lawmakers adequately consider Eighth Amendment Proportionality. There is firstly, no constituency with significant political power to represent the interests of criminal defendants or the constitutional value of proportionality. Convicted people themselves are generally poor, poorly connected, and disenfranchised. Indigent defense attorneys are overwhelmed, underfunded, and lack experience in lobbying. Prosecutors, by contrast, are often well organized and experienced lobbyists. They are generally elected officials with a strong incentive to push for harsher sentencing laws. Mandatory minimums and higher sentencing ranges provide leverage in plea bargaining, allowing prosecutors to more easily obtain admissions of guilt by threatening charges carrying severe sentences.

⁷⁴ Schacter, *supra* note 61, at 1369.

⁷⁵ *Id.* at 1405–06.

And as a number of scholars have pointed out, prosecutors have a “free lunch.”⁷⁶ Locally-elected prosecutors can reap the political benefits of appearing tough on crime—and any short-term crime reduction benefit from incapacitation—when they send more people to prison, but they and their constituents don’t directly pay for prisons, which are a part of the state budget. Even progressive prosecutors may have little incentive to push for lower maximum sentences. Under current systems, they generally maintain the capacity to be lenient, where they choose. Finally, it’s worth noting that many elected officials are former prosecutors while very few are former defense attorneys, and even fewer have been criminal defendants.

It’s also relevant that crime, as a political issue, lends itself to fear-mongering and demagoguery, rather than rational analysis of proportionality. The political salience of crime is largely one sided. As with terrorism, the legitimate fears of an insecure electorate can be readily exploited. When crime is up, the media pays attention, and politicians can benefit from “tough on crime” rhetoric and harsher policies. But the opposite is not true—when crime is down politicians cannot readily exploit liberal rhetoric or policies. Politicians have lost elections for being “soft on crime”—most notably Michael Dukakis, (in)famously attacked for having allowed the release of a man who then committed a gruesome murder—but, until recently, have faced almost no consequences for undue severity. Even the horrific suffering in California’s overcrowded prisons could not induce a legislative response without the pressure of a lawsuit.

Thus, rather than conduct an evidence-based analysis of how to promote public safety, politicians too often accepted the unfounded consensus that “nothing works” and pushed incapacitation as the only legitimate way to reduce crime; and rather than conduct a reasoned analysis of morally appropriate punishment, politicians embraced the racialized myth of inherent criminality—most infamously the idea of “superpredators”—and unapologetically promoted sentences as draconian as life in prison for crimes as minor as street dealing or repeat theft.

Judges considering legislative intent should first consider actual evidence of the legislative process that produced the law at issue. But knowledge of the political realities of legislating crime and punishment should inform how they view that evidence, and, even in the absence of direct evidence of legislative process (for example, in-ballot initiatives), how they view the law at issue. An honest account of the less-than-rational politics of crime and punishment need not lead to a formal change in legal reasoning, to anything akin to heightened scrutiny, but it ought to produce a heightened skepticism that many or most sentencing laws have achieved a

⁷⁶ In arguing for robust proportionality review under state constitutions, Samuel Weiss identified both the “free lunch” problem and the broader structure of perverse political incentives in sentencing. Samuel Weiss, *Into the Breach, The Case for Robust Noncapital Proportionality Review Under State Constitutions*, 49 HARV. C.R.-C.L.L. REV. 569 (2014).

minimum requirement of proportionality, a skepticism that should in turn inform a courts willingness to closely interrogate the asserted benefits, moral and utilitarian, of long prison stays.

It is no answer that states have their own proportionality requirements, rooted in state constitutions and enforceable by state courts. State courts have proven as unwilling as the Supreme Court to robustly apply such requirements to non-capital sentences, and they have much stronger incentives not to do so. Most state judges, like local prosecutors, are directly elected or subject to retention elections, and they face similar incentives. And as long as they can justify inaction with reference to an equally conservative federal interpretation, they are likely to do so.

VI. THE “UNUSUAL” REQUIREMENT

There is an argument that disproportionate sentences, evaluated under the framework laid out above, should be invalidated regardless of how they compare to other sentences. The strongest case is not that “cruel and unusual” is a term of art, and that consequently unusual can be ignored, but rather that the remaining text of the Amendment, prohibiting excessive bail and excessive fines, suggests a straightforward intent to prohibit excessive punishments. As discussed, it should not be surprising that imprisonment, a relatively rare punishment at the time of the founding, should have been left out. As stated by Justice Stevens in his dissent in *Ewing*, “it ‘would be anomalous indeed’ to suggest that the Eighth Amendment makes proportionality review applicable in the context of bail and fines but not in the context of other forms of punishment, such as imprisonment. . . . Rather, by *broadly prohibiting excessive sanctions*, the Eighth Amendment directs judges to exercise their wise judgment in assessing the proportionality of all forms of punishment.”⁷⁷

If courts continue to use a disjunctive approach, with a distinct comparative analysis to determine whether as sentence is unusual, they can do so in a more robust manner. When assessing whether or not a sentence is constitutionally “unusual,” courts should consider the same principles and data laid out here. In evaluating sentences to which the challenged sentence is being compared, they should consider all theories of punishment, including the public safety value of the punishment, and the actual experience of imprisonment in that jurisdiction. This ensures that what is compared is not simply the crime and sentence length, but the proportionality of crime and sentence, bearing in mind the multiple objectives of punishment, as they are served in different real world contexts.

And in the contemporary world context, one of many liberal democracies around the world with similar crime profiles, that similarly seek

⁷⁷ *Ewing v. California*, 538 U.S. 11, 33 (2003) (Stevens, J., dissenting) (citations omitted).

to balance individual freedom and the need for order, courts should not hesitate to make international comparisons. The interpretation of “unusual,” like that of “cruel” should evolve to take account of a world in which the sentencing of individual judges is severely constrained by legislative mandates, making aberrations by individual judges less likely, and in which there are many liberal democracies implementing systems of justice with the same goals of promoting public safety in a just manner. There is some precedent for international comparison in Eighth Amendment cases. The Supreme Court has referenced criminal law in other countries in striking down the death penalty for felony murder and for juvenile offenders.⁷⁸

Like evaluation of what is so disproportionate as to be “cruel,” analysis of when a sentence is sufficiently “unusual” cannot be wholly objective. Critics will balk at the possibility of setting threshold numbers of similar cases or jurisdictions with similar sentencing laws. Yet as in many other areas of law, the question of unusualness could be developed on a case-by-case basis, with due attention to the state of research on sentencing in the United States and around the world, and to the received legitimacy of the Court’s analysis by the public, criminal justice practitioners, and criminal justice experts.

VII. CONCLUSION

In *Harmelin*, Justice Kennedy asserted that robust proportionality review would violate traditional principles of separation of powers and federalism without a sufficiently objective standard. That assertion had a kernel of truth. A sound empirical analysis of the public safety benefits of particular sentences is possible. And careful consideration of accepted metrics of moral gravity, and comparison of harm inflicted with the experience—and suffering—of incarceration, can guide judges in evaluating retributive proportionality. But there will remain a core of subjectivity.

That should not preclude robust review. Interpreting the constitution demands a degree of subjectivity. There is no entirely objective answer to what is a “reasonable” justification for discrimination, to what process is due, to what unwritten rights lie between the lines or embedded in a clause, to what is “inherent in ordered liberty,” to give just a few examples.⁷⁹

⁷⁸ See Jason Chandler, *Foreign Law – A Friend of the Court: An Argument for Prudent Use of International Law in Domestic, Human Rights Related Constitutional Decisions*, 34 SUFFOLK TRANSNAT’L L. REV. 117, 132 (2011) (citing *Enmund Florida*, 458 U.S. 782 (1982) and *Thompson v. Oklahoma*, 487 U.S. 815 (1988)).

⁷⁹ In his dissent in *Ewing v. California*, Justice Stevens laid out the case for robust review under the Eighth Amendment in spite of the inherent subjectivity of the endeavor: “

The absence of a black-letter rule does not disable judges from exercising their discretion in construing the outer limits on sentencing authority that the Eighth Amendment imposes. After all, judges are “constantly called upon to draw . . . lines in a variety of contexts,” . . . and to exercise their judgment to give meaning to the Constitution’s broadly phrased protections. For example, the Due Process

Still, limiting state power in a politically salient area should not be taken lightly. A Court understandably cautious about such an intrusion need not begin by invalidating short sentences, or otherwise radically altering state sentencing schemes. By accepting and deciding only cases on the fringe of American—and therefore world—criminal sentencing, the Court could still have a meaningful impact. Projecting an example of reasoned proportionality analysis could remove the shroud of fear and animus from the debate on sentencing, much as happened in the case of gay marriage. And by signaling a conflict between cherished constitutional values—above all, democracy of equal citizenship, but also mercy and limited government—and excessive punishment, the Court could encourage legislators to reform sentencing. Finally, it is worth noting that the framework laid out here, and the research therein, while more sophisticated than the Court's current approach—or current abdication—could benefit from refinement in the process of litigation.

Robust review under the Eighth Amendment would not be unusually subjective, but it would be unusual in the severity of the humanitarian crisis it could help to relieve. One should not tread lightly in making comparisons to segregation and the struggle for civil rights. Yet with the growing consensus that we are living in an era of mass incarceration, one fraught with unsettling parallels to that struggle, should come a renewed commitment to actualizing the ideals of our constitution. A New Jim Crow demands a new constitutional response.

Clause directs judges to employ proportionality review in assessing the constitutionality of punitive damages awards on a case-by-case basis. Also, although the Sixth Amendment guarantees criminal defendants the right to a speedy trial, the courts often are asked to determine on a case-by-case basis whether a particular delay is constitutionally permissible or not.

Ewing v. California, 538 U.S. 11, 33–34 (2003) (Stevens, J., dissenting) (citations omitted).