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(Un)Constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin"

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ABSTRACT. In 2019, all Justices on the U.S. Supreme Court agreed in *Timbs v. Indiana* that the Constitution's prohibition on excessive fines applied to the states. The Court's opinion discussed the Excessive Fines Clause's "venerable lineage" and termed its protections "fundamental." Justice Thomas, concurring, wrote that the English prohibition against excessive fines aimed to insulate citizens from what historians called "ruinous fines."

This Essay puts *Timbs* into the context of the Court's search for metrics to assess the legitimacy of governments' choices about punishment. In and after the 1960s, as convicted and incarcerated people asserted that constitutional law constrained sovereign powers, the Court repeatedly encountered challenges to punishment. I bring together lines of cases that have sat in doctrinal silos to show the links between the concerns animating judicial limits on sentencing and judicial recognition of incarcerated people's rights to safety, sanitation, food, medical care, access to courts, and religious observance. I argue that this body of law, produced through convicted individuals' insistence that they were entitled to constitutional protection, should be read to constitute a nascent anti-ruination principle that all branches of government need to implement.

I. GAINING THE CAPACITY TO CONTEST THE SOVEREIGN PREROGATIVE OF PUNISHMENT

Forfeiting a car in rural Indiana or an automotive business in South Dakota. Losing a driver's license for failure to pay fees or fines in Tennessee, Virginia, New York, and Michigan. Sent to prison for being too poor to pay a $500 fine for a petty theft or for $425 in traffic tickets. Placed in a prison segregated by race; chained; subjected to filth and violence; given only bread and water; or locked into solitary confinement to spend 23/7 in a tiny cell for years on end. Disenfranchised because of a conviction. Denationalized. Executed.

Individuals subjected to each of these punishments have argued to federal judges that the U.S. Constitution bars their imposition. Many have relied on the Eighth Amendment's mandates that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[1]

What do those words mean, and what rights do they confer on individuals? Given that the Eighth Amendment draws on the 1689 English Bill of Rights and on early state constitutions, one might have thought that answers would come from a jurisprudence that was centuries old. Instead, the U.S. Supreme Court has only recently begun to answer a host of questions about constitutional constraints on punishment. Each of the examples with which I began are drawn from cases decided in the last seventy years, and each has prompted at least some Justices — and on occasion the Court — to insist that, although governments have wide latitude in choosing punishments, some are impermissible.

The decision in *Timbs* is thus an important occasion to mark. It is an opportunity to reconsider the import of the Court's punishment jurisprudence to date. In this Essay, I bring together different facets of the Court's case law on criminal sanctions to analyze their contours and how *Timbs* contributes to punishment jurisprudence.

I begin with a sketch of ideas developed long before the 1960s, as theorists argued that certain punishments were illegitimate, and a few Supreme Court decisions addressed the legality of particular sanctions. I then turn to the 1960s, when issues of race and poverty brought the Court into sustained engagement with state-based punishment and firmly established the proposition that the "duly convicted" (to borrow from the Constitution's text) have the authority to contest their punishments. I integrate the law on unconstitutional sentences with the law on unconstitutional prison conditions because both kinds of claims require courts to address the same question: what constrains the sovereign power to punish?

Answers become visible through amalgamating lines of doctrine not regularly grouped together. Whether the legal categories are sentencing, prison conditions, equal protection, due process, or other constitutional provisions, the Court insists that state punishment cannot be aimless or random but must forward legitimate goals of governments. Discussions often proceed along the lines of a utilitarian inquiry that identifies permissible ends ("penological purposes") and, relying on a rationality test, evaluates the means.

As many decisions reflect, the purposes that courts identify are capacious and can be deployed to justify an array of sanctions. What the case law also reflects is that a utilitarian account does not capture the full range of punishment rulings. When horrified by a particular form of punishment and seeing its injustice, the

1. U.S. CONST. amend. XIII.

Court has refused to permit it, even when it is historically grounded, commonplace rather than "unusual" (the term in the Eighth Amendment), and arguably related to licit ends.

In their opinions, judges are neither careful philosophers (drawing distinctions among purposes, principles, and constraints or delineating means and ends) nor rigorous empiricists (cautious about making causal claims). Rather, courts proffer a laundry list of what they deem to be legitimate state goals, including deterrence, incapacitation, retribution, and rehabilitation as well as administrative convenience, community and institutional safety, and expense. Many Justices describe themselves as taking these concerns into account as they assess whether a particular sanction is excessively severe or disproportionate, entails the unnecessary infliction of pain, fails to reflect the decency of the social order, or undermines values such as equality, liberty, religious freedom, and dignity.

As this overview suggests, judges regularly import theories from nineteenth- and twentieth-century sociology, penology, and criminology to construct the rationales for and to explain the modes of punishment. Further, punishment opinions interact with the intellectual currents and popular agendas playing out in politics and in law at the time when decisions are rendered. The Court's deepening involvement with punishment was an artifact of the 1960s civil-rights movement. Pushed into action as social activists challenged the widespread discriminatory deployment of state power, the Court's openness to claims by criminal defendants and prisoners was shared by other branches of government. Likewise, the Court's subsequent retreat from curbing punishments by its adoption of a more deferential posture toward state legislators and prison officials was in sync with a "nothing works" approach that, fueled by racialized fears, displaced concerns about social welfare, discrimination, and rehabilitation. Again, all branches of government linked deterrence to retributivist laws and practices.

I conclude by arguing that the 2019 decision in *Timbs* and the small set of other Excessive Fines Clause rulings can be used to interrupt the siloed discussions of distinctions among either the clauses of the Eighth Amendment or other constitutional provisions applied to punishment. Even as the Court in *Timbs* did not decide the merits of whether the forfeiture at issue was unconstitutional, the Court explained that the principle animating the Excessive Fines Clause was that governments should not use punishment powers to exploit and undermine individuals (as the "draconian fines" of the Black Codes had done), to "retaliate or

chill" speech, or otherwise to abuse people.[2] Justice Thomas, concurring, encapsulated the point by describing the Clause as prohibiting the economic "ruin of [a] criminal."[3]

This prohibition, traced back to Magna Carta, was forged in eras replete with branding, transportation, and execution rather than incarceration. Below, I explore how the prohibition on ruinous fines relates to the development of case law that limits certain sentencing practices and forms of in-prison punishments, yet condones others. By digging into what the civil-rights revolution of the 1960s has produced during the last seventy years, I show that constitutional law has revised what constitutes legitimate aims of punishment, even as the Justices have not described themselves as doing so.

Before the 1960s, prisons could ruin people by leaving them in filth and darkness, feeding them rotten food, and giving no medical care. Until the 1970s, state and federal governments resisted claims that the Constitution compelled different behavior. But as people who were convicted and imprisoned gained recognition that they were entitled to the Constitution's protection, they persuaded courts to impose new boundaries on punishments. The Court's rulings have generated affirmative duties to provide assistance of various kinds and to intervene to prevent harms. These constitutional duties augment whatever common-law and statutory obligations of safekeeping exist.[4]

Examples, discussed below, come from opinions holding that the Cruel and Unusual Punishments Clause prohibits states from confining prisoners in violent and filthy conditions and from deliberately withholding needed medical care. Beginning in the 1960s and 1970s, the Court recognized prisoners' rights to adequate food, exercise, access to courts, religious freedom, some First

2. 139 S. Ct 682, 688-89.

3. *Id.* at 694 (Thomas, J., concurring) (quoting 2 THE HISTORY OF ENGLAND UNDER THE HOUSE OF STUART, INCLUDING THE COMMONWEALTH 801 (1840)). Justice Thomas also invoked other historians who wrote about the imposition of "ruinous fines." *Id.* (quoting LOIS G. SCHWOERER, THE DECLARATION OF RIGHTS, 1689, at 91 (1981)). Justice Thomas viewed the history as making plain that, as a "constitutionally enumerated right," the Excessive Fines Clause was of "a privilege of American citizenship." *Id.* at 698.

4. Duties of safekeeping (breached regularly, as I detail) stem from the common law and from statutes. *See, e.g.*, Spicer v. Williamson, 132 S.E. 291, 293 (N.C. 1926); 18 U.S.C. §§ 4042(a)(2)-(3) (2018). That provision requires the federal Bureau of Prisons to "provide for the safekeeping, care, and subsistence . . . [and] for the protection . . . of all persons" it confines. The state tort remedies for violating obligations of safekeeping are discussed in *Mennici v. Pollard*, 565 U.S. 118 (2012), which declined to permit a *Bivens* action against private prison officials. More recent obligations include making accommodations for disability, even as they are also not regularly implemented. *See* 42 U.S.C. §§ 12131-12132 (2018); Jamelia Morgan, *Caged In: Solitary Confinement's Devastating Harm on Prisoners with Physical Disabilities*, AM. C.L. UNION (2017), https://www.aclu.org/sites/default/files/field_document/010916-aclu-solitarydisabilityreport-single.pdf [https://perma.cc/7KQ9-ZN57].

Amendment opportunities for expression and association, equal protection, and to due process when certain post-conviction decisions are made.

The law that prisoners prompted has also reframed how the people running prisons think about their work. Today, prison systems have stopped arguing that the U.S. Constitution has nothing to say to them. Indeed, directors of correctional institutions have incorporated constitutional obligations into the organization of daily activities. While dysfunctional as care-delivery systems, prisons are one of the few social services standing, providing convicted persons a 1.5 million-person public housing and health care system.

No rosy picture of today's prisons can be painted. During the same years when constitutional law began imposing obligations, prosecutions and prison populations soared. The mandates sketched above are far from implemented in many jurisdictions. Moreover, rights and obligations can be limited when prison officials assert security needs. Further, the Court's law is variegated, as counterexamples—such as the toleration of the death penalty, life without parole (LWOP), and prison overcrowding—demonstrate that many Justices have not been prepared to curb certain forms of destructive punishment.

Nonetheless, by piecing together the mosaic of case law on sentencing, prison conditions, and the Excessive Fines Clause, I show that the anti-ruination principle links many punishment decisions. Although the term "ruin" is not yet part of the Court's lexicon outside the excessive fines context, the word describes some of what law now requires—that governments ought not aim to undermine a person's physical and mental capacities.[5]

I analyze why this constitutional democracy has no licit penological purpose in seeking to ruin people economically or by imposing destructive forms of confinement. More than that: the purposes of punishment have to include recognizing the legal personhood of all individuals by maintaining their well-being even when sanctioning them in ways that reduce their autonomy and impinge on their dignity. Moreover, the idea that governments are not supposed to use their punishment powers to debilitate people is enmeshed in, yet distinct from, whatever obligations to support rehabilitation exist.[6]

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5. In this Essay, I identify anti-ruination principles in extant case law and explore their application to state punishment of convicted individuals. Concern about the destructive force of punitive damages imposed in civil litigation can be found in federal and state case law. For example, in *Adams v. Murakami*, 813 P.2d 1348 (Cal. 1991), the Supreme Court of California relied on some of the history invoked in *Timbs* and insisted that no purpose was legitimately served by "financially destroying a defendant." *Id.* at 1352. My thanks to Nicholas McLean for pointing me to this decision.

6. Federal judges, disturbed by the lack of activity ("idleness" as some termed it) linked the "absence of an affirmative program of training and rehabilitation" to harming people and causing their "physical, mental[, and] social degeneration." *See* Laaman v. Helgemoe, 437 F. Supp. 269, 316 (D.N.H. 1977).

Of course, just as deciding when fines are excessive or disproportionate is a complex and challenging task, so too is identifying how to implement the anti-ruination principle when incarcerating or otherwise sanctioning individuals. What *Timbs* does, read in the context of the rest of the constitutional law curbing some sovereign sanctioning powers, is invite all branches of government to take up the project that "duly convicted" individuals launched: to avoid people's ruin when imposing punishment.

II. WHY SO SLOW?

Why did this body of law emerge only in the last several decades? A formalist account would point to the late date on which the Court held that the Eighth Amendment applied to the states, where most criminal prosecution occurs. That ruling came in 1962; in *Robinson v. California*, the Court concluded that the prohibition against "cruel and unusual punishments" bound states as well as the federal government.[7] Holding that states could not punish an individual based

7. Robinson v. California, 370 U.S. 660, *reh'g denied*, 371 U.S. 905 (1962). After the Court's decision but before the mandate issued, California reported that Lawrence Robinson had died. Over the objections of Justices Clark, Harlan, and Stewart, the Court did not stop its ruling from going into effect. *See Robinson*, 371 U.S. at 905 (Clark, J., dissenting).

Robinson is the touchstone, but the question of incorporation and the impact of the Eighth Amendment had been addressed in several earlier decisions. In 1892, Justices Field, Harlan, and Brewer argued in dissents that the Eighth Amendment and other provisions in the Bill of Rights applied to the states. At issue was Vermont's prosecution of John O'Neil for what the dissenters described as buying liquor in New York. *See* O'Neil v. Vermont, 144 U.S. 323, 337, 363-64 (1892) (Field, J., dissenting); *id.* at 368-69 (Harlan, J., dissenting). Forecasting the *Timbs* debate about the source of incorporation, Justice Field's incorporation argument relied on what he called the "rights belonging to . . . citizens," *id.* at 363 (Field, J., dissenting), while Justice Harlan wrote about the "fundamental rights" belonging to "any person within" the jurisdiction. *Id.* at 370 (Harlan, J., dissenting). *See also* discussion *infra* notes 52-56. In 1947, Justice Black offered an impassioned plea for incorporation of the Bill of Rights when he dissented in *Adamson v. California*, 332 U.S. 46 (1947), which held that while the Due Process Clause protected a right to fair trial, it did not incorporate defendants' Fifth Amendment right against self-incrimination. *Id.* at 50-51. Justice O'Connor, joined by Justice Stevens, argued in 1989 in *Browning-Ferris Industries of Vermont v. Kelco Disposal*, 492 U.S. 257 (1989), that the Excessive Fines Clause ought to be incorporated and that it applied to punitive damages. *Id.* at 284, 287 (1989) (O'Connor, J., concurring in part and dissenting in part).

In addition to incorporation debates, Justices referenced the prohibition on cruel and unusual punishments when analyzing claims of violations of the Due Process Clause or the Privileges or Immunities Clause. For example, decisions about the manner of an execution concluded that a state court ruling had provided the process due or that no right of citizenship had been violated. *See, e.g.*, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 462 (1947); McElvaine v. Brush, 142 U.S. 155, 158 (1891); *In re* Kemmler, 136 U.S. 436, 445 (1890).

A few lower-court decisions also invoked the Fourteenth Amendment when considering a punishment's lawfulness. The well-known example is *Johnson v. Dye*, 175 F.2d 250 (3d Cir.)

on the status of being an addict, *Robinson* opened the door to debates about what other forms of criminalization and punishment were out of bounds.[8] In 1971, the Court assumed that the Eighth Amendment's protection against excessive bail applied to the states.[9] And, in 2019, the Court brought the dangling Excessive Fines Clause into the fold by deciding in *Timbs v. Indiana* that it, too, was incorporated through the Fourteenth Amendment.[10]

(en banc), *rev'd sub nom*. Dye v. Johnson, 338 U.S. 864 (1949). Leon Johnson, convicted in Georgia, fled to Pennsylvania to escape Georgia's brutal chain gang. He filed a habeas petition to avoid extradition. Granting relief, the Third Circuit noted the "evidence . . . that Negro prisoners were treated with a greater degree of brutality than white prisoners though it is difficult to make fine distinctions as to degrees of brutality." *Id.* at 253. The court ruled that "the right to be free from cruel and unusual punishment at the hands of a State is as 'basic' and 'fundamental' . . . as the right of freedom of speech or freedom of religion." *Id.* at 255. The Supreme Court reversed in a per curiam opinion. Dye v. Johnson, 338 U.S. 864, 864 (1940) (per curiam). The only explanation came from a citation to *Ex parte Hawk*, 321 U.S. 114 (1944), which was "the leading case expounding the exhaustion [of state remedies rule]." *See* Note, *Prisoners' Remedies for Mistreatment*, 59 YALE L.J. 800, 803 (1950). Whether a prisoner had to exhaust remedies where apprehended, as contrasted to the jurisdiction from which the prisoner had escaped, was then debated. *See* Fowler V. Harper & Alan S. Rosenthal, *What the Supreme Court Did Not Do in the 1949 Term—An Appraisal of the Writ of Certiorari*, 99 U. PA. L. REV. 293, 300-02 (1950).

Arthur Sutherland argued that federal courts should provide a venue for claims "in case of failure of justice in the state courts." Arthur E. Sutherland, Jr., Comment, *Due Process and Cruel Punishment*, 64 HARV. L. REV. 271, 278 (1950). Analyzing these "asylum" cases, Sutherland concluded that states could not constitutionally inflict cruel and unusual punishment and that chain gangs were such a punishment. Advocating for federal courts to play a role to produce "widespread confidence that criminal justice is administered with substantial fairness . . . in state and federal courts alike," Sunderland identified "[t]he Fourteenth Amendment, prescribing an irreducible common standard of civilization for the entire nation" to be the "only practicable means of achieving this desirable end." *Id.* at 279.

In addition to cases coming from states, the Court had before the 1960s assessed punishment imposed by federal authorities. *See infra* notes 37, 40-46 and accompanying text; *see also* Alexander A. Reinert, *Eighth Amendment Gaps: Can Conditions of Confinement Litigation Benefit from Proportionality Theory*, 36 FORDHAM URB. L.J. 53 (2009).

8. The Court had before then considered individual claims, framed in terms of due process, equal protection, or the First Amendment. In general, the Court did not prohibit the punishment imposed. *See, e.g.*, Howard v. Fleming, 191 U.S. 126 (1903); Williams v. New York, 337 U.S. 241 (1949); Barenblatt v. United States, 360 U.S. 109 (1959).

9. Schilb v. Kuebel, 404 U.S. 357, 365 (1971). Decades later, the Court again assumed that the Excessive Bail Clause was incorporated against the states. *See* McDonald v. City of Chicago, 561 U.S. 742, 764 & n.12 (2010).

10. 139 S. Ct. 682 (2019). Justice Thomas relied on the Privileges or Immunities Clause as the source of incorporation. *See id.* at 691-92 (Thomas, J., concurring). Justice Gorsuch did not take a position on the source for incorporation. *Id.* at 691 (Gorsuch, J., concurring).

That timeline, however, begs the question of *why* these federal constitutional pronouncements are of such recent vintage.[11] Another part of old English law, the "civil death" of people convicted of crimes, played a role. In 1871, the Supreme Court of Appeals of Virginia explained that a person in a penitentiary was "the slave of the State," whose estate, if he had any, was "administered like that of a dead man."[12] Virginia's approach was not atypical in that many states barred incarcerated individuals from conveying property, entering into contracts, and marrying.

The contours varied by jurisdiction and court interpretation. In 1937, commentators writing in a *Harvard Law Review* Note termed the practice "Medieval."[13] Yet decades later, one of the first treatises on the "Law of Correction," published in 1963, tallied seventeen state statutes that continued to impose civil death on individuals sentenced to life (or death).[14] The authors called for abolition, which occurred in most states through repeals or court interpretation.[15]

Outliers remain. In 2016, a federal district court considered the Rhode Island statute providing that incarcerated persons held "for life shall, with respect to all rights of property, to the bond of matrimony and to all civil rights . . . be deemed to be dead in all respects."[16] Assessing the state statute on a rationality test, a

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11. A body of state law addresses state constitutional prohibitions on punishment. Nineteen use the locution of cruel "or" unusual, rather than cruel "and" unusual. Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 63-72 (2008). *See, e.g.,* ARK. CONST. art. II, § 9; CAL. CONST. art I, § 6; MICH. CONST. art. I, § 16. For further discussion on state constitutions, see also E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS 153-60 (2009); and Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and Cruel and Unusual Punishment*, 94 N.C. L. REV. 817, 831-40 (2016).

12. Ruffin v. Commonwealth, 62 Va. (21 Gratt.) 790, 796 (1871). In 1911, citing California law, the U.S. Supreme Court said prisoners' "civic death is perpetual." *See* Finley v. California, 222 U.S. 28, 31 (1911) (quoting People v. Finley, 94 P. 248, 249 (Cal. 1908)). French law also imposed civil death on prisoners. *See* ANNE SIMONIN, LE DÉSHONNEUR DANS LA RÉPUBLIQUE : UNE HISTOIRE DE L'INDIGNITÉ, 1791-1958 (2008). My thanks to Patrick Weil for bringing the French history and its relationship to the law of foreigners and citizenship to my attention.

13. Note, *Civil Death Statutes—Medieval Fiction in a Modern World*, 50 HARV. L. REV. 968, 969 (1937).

14. SOL RUBIN, HENRY WEIHOFEN, GEORGE EDWARDS & SIMON ROSENZWEIG, THE LAW OF CRIMINAL CORRECTION 617-18 (1963). As the book's frontpage states, this project was endorsed by of the National Council on Crime and Delinquency.

15. *Id.* at 620-22. The twentieth-century movement to end post-release civil disabilities related in part to the turn to parole and the promotion of rehabilitation. In 1956, a National Conference on Parole called for abolition of laws limiting civil and political rights, and by the 1980s, most states had repealed them. *See* Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1708, 1715 (2003).

16. Ferreira v. Wall, No. 15-219-ML, 2016 WL 8235110, at *1 n.3 (D.R.I. Oct. 26, 2016). As discussed *infra* note 209, the Supreme Court has held that a prison regulation (rather than a state

federal judge left it in place. Moreover, under both federal and state law, what are now called "collateral consequences"—such as loss of access to federal or state benefits and voting rights—regularly flow from convictions.[17]

Prisoners did have one protected federal civil right. Courts read the Constitution's guarantee that habeas corpus not be "suspended" to mean that prison officials could not "abridge, or impair" people's rights to petition federal courts to contest their detention.[18] In practice, however, prison systems imposed a myriad of impediments to filing claims. And, as I detail below, until the 1960s, courts generally did not entertain claims about the unconstitutionality of the death penalty or about the violence and filth in prisons.

Even the great post-Civil War amendments appeared to lock prisoners out of much of what they promised. The Thirteenth Amendment, ratified in 1865, abolished slavery and "involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted."[19] States relied on that exemption to contract out prisoners' labor as well as to require them to work inside to defray the costs of running prisons.[20] Prisoners fared not much better under the Fourteenth Amendment, which was ratified in 1868 and shielded individuals from state deprivations of equal protection and due process. Section 2, guaranteeing the right of "male inhabitants" to vote in federal elections, excluded people who had participated "in rebellion, or other crime."[21]

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statute) that banned marriage was unconstitutional. *See* Turner v. Safley, 482 U.S. 78, 87 (1987).

17. *See* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT (Marc Mauer & Meda Chesney-Lind eds., 2002).

18. *See Ex parte* Hull, 312 U.S. 546, 549 (1941). The Court held a Michigan regulation requiring in-prison screening "invalid." *Id.* For further discussion of a prisoner's right to habeas corpus, *see also* Cochran v. Kansas, 316 U.S. 255 (1942).

19. U.S. CONST. amend. XIII.

20. REBECCA M. MCLENNAN, THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776-1941, at 9 (2008). *But see* James Gray Pope, *Mass Incarceration, Convict Leasing, and the Thirteenth Amendment: A Revisionist Account*, 94 N.Y.U. L. REV. 1465 (2019). Pope read the Republican proponents of the Thirteenth Amendment as viewing it to prohibit involuntary servitude except if imposed as a punishment. *Id.* at 1469. On Pope's account, convict leasing would not be permissible unless the state mandated work in service of its retribution or rehabilitation goals. *Id.* at 1538-39.

21. U.S. CONST. amend. XIV, § 2. The Court has not been persuaded that the Fourteenth Amendment's exclusion was limited to crimes akin to treason. Under current law, felon disenfranchisement including after release is unconstitutional only if individuals can establish that disenfranchisement was based on racial animus. That test was met in 1985, when the Court concluded that a 1901 amendment to Alabama's Constitution to take away voting rights based on "moral turpitude" aimed to disenfranchise blacks. Hunter v. Underwood, 471 U.S. 222, 224-25 (1985).

Overwhelmingly poor and disproportionately of color, incarcerated people were not only legally excluded; they also lacked resources to pursue claims. Until 1963, the United States did not require the appointment of counsel for criminal defendants facing state felony charges.[22] Current federal constitutional law does not mandate lawyers beyond the first appeal from convictions[23]—leaving most prisoners without representation for habeas petitions or other legal claims.

Another factor slowing the jurisprudence on the constitutional boundaries of punishment is the challenge entailed. Punishment's parameters have preoccupied philosophers and social scientists for centuries.[24] Deciding what law *dictates*, as contrasted with what policy *commends*, requires metrics to sort licit from illicit punishments. Moreover, the potential volume of cases is daunting, given that more than some 1.5 million people are incarcerated,[25] another 4.5 million are held under supervision,[26] and about three-quarters of a million people are in jails on any given day.[27] Opening courts to constitutional claims commits judges to devoting considerable resources to determine whether to override other branches of government at the behest of people convicted of crimes. Yet the 2019 *Timbs* decision reaffirmed courts' duty to consider claims brought by the "duly

22. Gideon v. Wainwright, 372 U.S. 335 (1963). The Court later held that the right to counsel attached if incarceration was to be the result of a conviction, whether for a felony or misdemeanor. Argersinger v. Hamlin, 407 U.S. 25, 30-31 (1972). As Justice Rehnquist wrote thereafter, the touchstone was "actual imprisonment," and not the possibility. Scott v. Illinois, 440 U.S. 367, 373 (1979). A suspended sentence that could result in "the actual deprivation of a person's liberty" also requires that counsel be appointed for indigents. Alabama v. Shelton, 535 U.S. 654, 658 (2002). When states provide appellate rights, state-funded counsel is also required. Halbert v. Michigan, 545 U.S. 605, 610 (2005).

23. *See* Murray v. Giarratano, 492 U.S. 1 (1989); Ross v. Moffitt, 417 U.S. 600 (1974).

24. The literature is vast and the theories and analytics contested. For a sampling of the strands, their overlaps, tensions, lacunae, and variable popularity, see A READER ON PUNISHMENT (R.A. Duff & David Garland eds., 1994); Leora Dahan Katz, *Response Retributivism: Defending the Duty to Punish* (Nov. 2, 2018) (unpublished manuscript) https://papers.ssrn.com/abstract=3264139 [https://perma.cc/UC2F-RKL4]; and Michael Tonry, *Is Proportionality in Punishment Possible, and Achievable?, in* OF ONE-EYED AND TOOTHLESS MISCREANTS: MAKING THE PUNISHMENT FIT THE CRIME? (Michael Tonry ed., 2019).

25. Bureau of Justice Statistics, *Prisoners in 2017*, U.S. DEP'T JUST. 3 (Apr. 2019), https://www.bjs.gov/content/pub/pdf/p17.pdf [https://perma.cc/PK8J-3YZH]. Another estimate is that 1.6 million people are held in state and federal prisons. *See* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), https://www.prisonpolicy.org/reports/pie2019.html [https://perma.cc/PWS8-J2QB].

26. Bureau of Justice Statistics, *Probation and Parole in the United States, 2016*, U.S. DEP'T JUST. 1 (Apr. 2018), https://www.bjs.gov/content/pub/pdf/ppus16.pdf [https://perma.cc/5Y8D-8SQY].

27. Bureau of Justice Statistics, *Jail Inmates in 2017*, U.S. DEP'T JUST. 1 (Apr. 2019), https://www.bjs.gov/content/pub/pdf/ji17.pdf [https://perma.cc/6DXS-QNM6].

convicted" that governments have breached the constitutional boundaries of punishment.

III. THEORIES OF PUNISHMENT'S LEGITIMACY AND ARGUMENTS TO COURTS ABOUT EXCESSIVE SANCTIONS

Before constitutional law became a significant source of regulation, punishment's legitimacy had long been of interest to political, moral, economic, religious, and social theorists. Once judges began to develop the constitutional metrics of state punishment through incorporation of the Bill of Rights, they also incorporated ideas distinguishing legitimate from illegitimate punishments.

Many credit the 1764 publication of *On Crimes and Punishments* by Cesare Beccaria with launching arguments that some punishments were impermissibly excessive.[28] In his campaign against the death penalty, Beccaria offered the formulation that a punishment suffices when "its severity just exceeds the benefit the offender receives from the crime . . . . Any additional punishment is superfluous and therefore a tyranny."[29] In 1775, *The Rationales for Punishments and Rewards* by Jeremy Bentham expanded on Beccaria's utilitarian analysis.[30] Hundreds of others have followed to explain the functions, utilities, and moralities of punishment.

We walk in Beccaria's and Bentham's footsteps when we insist that governments need to explain their choices of punishments in reference to legitimate goals and purposes. Even as divisions have remained deep about how to weigh, operationalize, and reconcile the tensions, a standard list of punishment purposes solidified during the nineteenth and twentieth centuries. Punishment gained "oughts": to deter crime, incapacitate individuals to prevent commission of new crimes, reform or rehabilitate convicted people, express societal disapproval and, under the rubric of retribution, impose forms of deserved deprivation, pain, or suffering.[31]

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28. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (Graeme R. Newman & Pietro Marongiu trans., 5th ed. 2009)(1764). *See* Bernard E. Harcourt, *Beccaria's 'On Crimes and Punishments': A Mirror on the History of the Foundations of Modern Criminal Law*, U. CHI. L. SCH. (2013), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1633&context=law_and_economics [https://perma.cc/UE43-GZB5].

29. BECCARIA, *supra* note 28, at 69.

30. The manuscript was written in the 1770s, translated into French by Pierre Étienne Louis Dumont, and then into English by Richard Smith. One edition, aiming to draw more closely on Bentham's original manuscript, comes from James McHugh. *See* JEREMY BENTHAM, THE RATIONALE OF PUNISHMENT 15-32 (James T. McHugh ed., 2009).

31. Debates include whether the expressive purposes of punishment are distinct from retribution, and how pain and suffering relates to punishment. In his 2018 Tanner lectures, Didier Fassin

But who decides whether this set is complete, overinclusive or underinclusive, and how to achieve any of these objectives, some of which conflict with each other? One answer has been "the experts." During the last 150 years, as governments expanded their efforts to control behavior and their reliance on carceral institutions, they looked to professionals for guidance. Newly minted criminologists, penologists, and prison officials proffered theories about how to "cure" criminals, reform wayward individuals, and constrain unredeemable "predators."[32]

Institutional infrastructures and colonialism spread these views worldwide. Between 1870 and 1920, reformers generated the new profession of corrections and convened national and international conferences where social scientists, religious leaders, philanthropists, and prison managers debated guidelines for sentencing, probation, parole, and prisons.[33] Many advocated for classification of prisoners, individualized treatment, indeterminate sentences that could result in reform through a mix of work and religion, separation of juveniles from adults and women from men, and the alternative sanctions of probation and parole.[34]

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invoked the history of the word "punish," which he traced back to the Latin "punier," translated as "to chastise or to avenge." Latin and Greek sources focused on the payment of a "debt . . . to atone for a crime." Fassin argued that the addition of pain atop the concept of reparation came from Christian theology's commitments to suffering for the commission of sins. As he summarized the argument: "Punishment used to entail a debt to repay; it has become a suffering to inflict." *See* DIDIER FASSIN, THE WILL TO PUNISH 46-47 (C. Kutz ed., 2018).

32. The results in twentieth-century England have been termed a "penal-welfare programme." *See* DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY 36 (2001); *see also* VICTOR BAILEY, THE RISE AND FALL OF THE REHABILITATIVE IDEAL, 1895-1970 at 19-21, 153-61 (2019).

33. The literature is vast. *See, e.g.,* OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY (David J. Rothman & Norval Morris eds., 1998). An account reflecting attitudes of the early twentieth century comes from GEORGE IVES, A HISTORY OF PENAL METHODS: CRIMINALS, WITCHES, LUNATICS (1914).

34. *See, e.g.*, PROCEEDINGS OF THE IX INTERNATIONAL PENITENTIARY CONGRESS HELD IN LONDON, AUGUST 1925, at 39, 47-55 (Sir Jan Simon Van Der ed., 1927); *Prisons and Reformatories at Home and Abroad: The Transactions of the International Penitentiary Congress*, INT'L PENITENTIARY CONGRESS 354-546 (1872), http://data.decalog.net/enap1/liens/congres/CONGRES_PENIT_1872_VOL1_0001.pdf [https://perma.cc/9QN9-WB8Q]; Edgardo Rotman, *The Failure of Reform: United States, 1865-1965*, *in* THE OXFORD HISTORY OF PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY 151-65 (Norval Morris & David J. Rothman eds., 1998). Later in the twentieth century, legislatures embraced guidelines to organize sentencing decisions to reflect several of these purposes. The arguments to do so are mapped in PIERCE O'DONNELL, MICHAEL J. CHURGIN & DENNIS E. CURTIS, TOWARD A JUST AND EFFECTIVE SENTENCING SYSTEM: AGENDA FOR LEGISLATIVE REFORM (1974). The critique of the result can be found in KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS (1998). The impact on individuals is explored in NANCY GERTNER, INCOMPLETE SENTENCES: GANGS, GUIDELINES AND JUDGING (forthcoming 2020).

To maximize their impact, activists from the United States founded the American Prison Association in 1870 and pressed for the creation of the International Penal and Penitentiary Commission (IPPC) in 1872. In the decades that followed, correctional leaders drafted and then convinced the League of Nations in 1934 to adopt the first-ever Minimum Standards for the Treatment of Prisoners, which became the template for the United Nations' current efforts to protect prisoners.[35]

Yet, before the 1960s, the people who were subjected to punishments (along with lawyers and judges) were mostly on the sidelines. In the United States, the writ of habeas corpus had a narrow application, and prisoners lacked recognition as rights-bearers. The Supreme Court thus encountered the question of punishment only when individuals subjected to federal jurisdiction challenged their punishments or when a few state defendants tried (generally unsuccessfully) to obtain relief by relying on the Eighth Amendment, or on the Double Jeopardy, Ex Post Facto, Infamous Crimes, Due Process, and Equal Protection Clauses.

A search of the Court's engagement with punishment before 1960 identified thousands of mentions of the word "punishment," and a much smaller number of cases in which the Court addressed arguments that particular punishments were unlawful.[36] In several rulings, Justices rejected those claims through cursory assertions that punishments (such as the manner of execution[37] or harsher sentences imposed for crimes committed in prison[38] and for interracial sex[39]) were within government authority.

In a few decisions, Justices did address the merits. These cases, sketched below, discussed the purposes of punishment; the reason for a particular sanction;

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35. *See* Sanford Bates, *One World in Penology*, J. CRIM. L. & CRIMINOLOGY 565 (1948); Judith Resnik, *Prisoners Theorizing Punishment: Reflections on Transnational Oppressions and Innovations in Honor of Norman Dorsen*, 41 CARDOZO L. REV. (forthcoming 2020).

36. "Excessive punishments" as the search term located thirteen Supreme Court cases. *See* Memorandum from Tor Tarantola to Professor Judith Resnik (July 29, 2018) (on file with author). A search for punishment more generally yielded more than 1600 references, a small subset of which included discussions about constitutional punishments. *See* Memorandum from Jordan González to Professor Judith Resnik (Nov. 11, 2019) (on file with author).

37. *See, e.g.*, Wilkerson v. Utah, 99 U.S. 130 (1879); *In re* Kemmler, 136 U.S. 436 (1890); McElvaine v. Brush, 142 U.S. 155 (1891).

38. Finley v. California, 222 U.S. 28 (1911); Pennsylvania *ex rel.* Sullivan v. Ashe, 302 U.S. 51 (1937).

39. Pace v. Alabama, 106 US. 583 (1883). Justice Field for the Court ruled that the statute imposing a punishment only when "the two sexes are of different races" was not discrimination under either the 1866 Civil Rights Act (in which Congress provided that all persons were to be subjected to "like punishment") or the Fourteenth Amendment. *Id.* at 585. Rather, the punishment applied to the "offending person, whether white or black." *Id.*

the intent of the person imposing the sanction; the proportionality of the sentence to the offense; the harm to the individual subjected to a punishment; and the justice of the punishment.

One of the early opinions linking the term "excessive" with punishment was *Wilkes v. Dinsman*, decided before the Civil War. A Marine, Samuel Dinsman, argued that naval officer Charles Wilkes had wrongfully refused to release him when his service was to end. Instead, Wilkes put Dinsman in a place "infested with vermin," confined him with "double irons," and lashed him to compel him to continue to work.[40] Dinsman won a jury verdict on trespass and wrongful imprisonment. In 1849, however, the Supreme Court reversed. While opining that the "humblest seaman or marine is to be sheltered under the aegis of the law from any real wrong,"[41] Justice Woodbury concluded that the officer had grounds to require the continued service.[42]

A distinct question was "whether the punishment was inflicted within the license of the law."[43] Describing itself as lacking the power to "decide on the expediency or humanity of the law,"[44] the Court assessed whether the punishment conformed to congressional grants of authority. The Court concluded that whipping and chaining were within the officer's discretion, unless an individual could establish that the punishment was "of excessive severity, arising from ill-will, a depraved disposition, or vindictive feeling."[45] Thus, this common-law foray into the parameters of lawful punishment concluded that punishments ought not be unduly severe or animated by a "malicious and wilful error."[46]

Some forty years later, the Court wrote about the harms of the profound isolation experienced by James Medley, who had been sentenced to death. After

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40. 48 U.S. (7 How.) 89, 97 (1849).

41. *Id.* at 123.

42. *Id.* at 125-27.

43. *Id.* at 127.

44. *Id.*

45. *Id.* at 130. The Court concluded that the trial court's misreading of the obligation to serve in the Navy and its failure to accord sufficient deference to the officer who was to be presumed to have acted lawfully required a new trial. The Navy imposed flogging as a punishment until 1849, when Congress prohibited its use after having received hundreds of petitions condemning the practice. *See* Memorandum from Annie Wang & Megha Ram to Professor Judith Resnik (Apr. 22, 2018) (on file with author); Petitions to End Flogging in the Navy Submitted to the House Committee on Naval Affairs for the 31st Congress (Feb. 13-18, 1850) (on file with the National Archives, RG 233, Sen31A-H12), https://yale.app.box.com/s/fwz4pgjfq6m5zw2ujtf4h5mbxbgzrs2y [https://perma.cc/G3S7-8RVJ].

46. *Wilkes*, 48 U.S. (7 How.) at 130, 131. The Court also invoked the term "excessive" in *Pervear v. Massachusetts*, 72 U.S. (5 Wall.) 475 (1866), holding that the Eighth Amendment "does not apply to State" legislation but that if it did, a sentence of $50 fine and three months hard labor was not "excessive, or cruel, or unusual" for violating liquor laws. *Id.* at 480.

Medley was sentenced to death, Colorado enacted a statute requiring that, before execution, the individual had to be held in solitary confinement.[47] *In re Medley*, decided in 1890, affirmed Medley's release because the revised statute had not been in effect when the crime was committed; consequently, his punishment violated the Ex Post Facto Clause.[48]

In the *Medley* opinion, the new social science of penology took center stage. The Court relied heavily on an "exhaustive article" from the "American Encyclopedia"[49] that described prisons' oppressiveness around the world and that solitary confinement put some prisoners into a "semi-fatuous" condition and rendered others "insane."[50] Within contemporary circles, *Medley* is famous for recognizing the distinctive harms that solitary confinement imposes. However, as a matter of its legal reach, the Court was clear soon thereafter that *Medley* did not make the Cruel and Unusual Punishments Clause applicable to the states and that prison conditions were not in the Court's bailiwick.[51]

Two years thereafter, Justices Field, Harlan, and Brewer discussed punishment's boundaries as they argued that the Eighth Amendment applied to the states.[52] Dissenting in *O'Neil v. Vermont*, they would have held that Vermont's

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47. *In re* Medley, 134 U.S. 160 (1890).

48. *Id*. at 174. The Court reiterated that ruling in 1890 when another person had also been placed in solitary confinement under a statute enacted after he was convicted of murder. *See In re* Savage, 134 U.S. 176 (1890).

49. *Id.* at 167-68. The Court, using the American locution of "Encyclopedia" and citing to volume XIII, discussed *Prison and Prison Discipline*, which can be found in XIV THE AMERICAN CYCLOPAEDIA: A POPULAR DICTIONARY OF GENERAL KNOWLEDGE 6-16 (George Ripley & Charles A. Dana eds.). That article cited Beccaria, Bentham, others, and the work of the international organizations such as the IPPC, as it described "[p]entitentiary science, or the system of detaining, punishing, and reforming criminals, is of modern origin." *Id.* at 6-7.

50. *In re* Medley, 134 U.S. at 168.

51. *In re* Kemmler, 136 U.S. 436, 447-49 (1890). Chief Justice Fuller held that the Fourteenth Amendment did not "radically change the whole theory of the relations of the state and Federal governments to each other, and of both governments to the people." *Id.* at 448. Hence, New York had the final word on its method of execution. The Court reiterated the next year in *McElvaine v. Brush*, 142 U.S. 155 (1891), that *Medley*'s discussion of solitary confinement "illustrated" the violation of the Ex Post Facto Clause but did not alter the Court's position that, if state legislatures concluded the punishment was proper, a petitioner's rights had not been abridged. *Id.* at 158-59. In 2019, a federal court reviewed the Connecticut legislature's requirement that prisoners, who had been sentenced to death but could not be executed because the Connecticut Supreme Court had held its ruling on the unconstitutionality of capital punishment to be retroactive, were to be placed in profound isolation; the court concluded that doing so violated the Eighth Amendment and it was also an unconstitutional bill of attainder. *See* Reynolds v. Arnone, No. 3:13-cv-1465(SRU), 2019 WL 4039015 (D. Conn. Aug. 27, 2019), *appeal filed,* No. 19-2858 (2d. Cir. 2019).

52. O'Neil v. Vermont, 144 U.S. 323 (1892). Justice Blatchford's majority determined that the decision by the Vermont Supreme Court was supported by "a ground broad enough" to uphold

prosecution of John O'Neil for breaching Vermont's laws by purchasing liquor in New York violated the Commerce Clause. The dissenters would have invalidated the sentence that entailed a $6,140 fine, $497.96 in costs, and fifty-four years of imprisonment for the 307 times that O'Neil purchased liquor across state lines.[53] Justice Field commented that any person of "right feeling and heart" should be "shuddering,"[54] as he analogized the prison time to 307 lashings for each offense and argued that Vermont's sanction was "greatly disproportionate to the offences charged."[55] Justice Harlan assessed the "19,914 days" to be cruel and unusual, given the "character of the offenses committed."[56]

About twenty years later, a harsh sentence imposed in the Philippines persuaded the Court to intervene. The 1910 decision *Weems v. United States* explained that "a precept of justice [is] that punishment for crime shall be graduated and proportioned to [the] offense."[57] Paul Weems had been convicted of falsifying a "public document"; he was sentenced to twelve years of "hard and painful labor," with a "chain at the ankle, hanging from the wrist" and a permanent loss of all civil rights.[58] The Court described the punishment as excessive and "unusual in its character,"[59] and discussed the need to reformulate punishments as "public opinion becomes enlightened by a humane justice."[60]

Some fifty years thereafter, a 1958 plurality opinion by Chief Justice Earl Warren embraced that dynamic approach. In *Trop v. Dulles*, he wrote that the Eighth Amendment "must draw its meaning from evolving standards of decency

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the judgment without reaching the federal issue (or what today we call an independent and adequate state ground supporting the judgment). *Id.* at 336-37. In contrast, Justice Field argued that a "lawful transaction in the state of New York" ought not result in a Vermont conviction. *Id.* at 337 (Field, J., dissenting). Federal jurisdiction, predicated on interstate commerce, existed, and Vermont courts had failed, as a matter of due process, to inform an accused of the particulars of the offense. *Id.* at 365-66. Justice Harlan (joined by Justice Brewer) agreed, and both dissents argued that the adoption of the Fourteenth Amendment meant that the Bill of Rights applied. *Id.* at 363 (Field, J., dissenting); *id.* at 370 (Harlan, J., dissenting). *See also* discussion *supra* note 7.

53. O'Neil v. Vermont, 144 U.S. 323, 338 (1892) (Field, J., dissenting); *id.* at 370-71 (Harlan, J., dissenting).

54. *Id.* at 340 (Field, J., dissenting).

55. *Id.*

56. *Id.* at 371 (Harlan, J., dissenting).

57. 217 U.S. 349, 367 (1910).

58. *Id.* at 381.

59. *Id.* at 377.

60. *Id.* at 378. A 1963 treatise termed the decision an "[a]uthoritative rejection of the static interpretation of the Eighth Amendment," as it discussed how "developing humanitarianism" would render other punishments "vulnerable." RUBIN, WEIHOFEN, EDWARDS & ROSENZWEIG, *supra* note 14, at 369, 370-71.

that mark the progress of a maturing society."[61] The Court held unconstitutional a federal statute imposing denationalization on a "native-born American," Albert Trop, who had walked off a stockade in Casablanca during World War II.[62] Reasoning that the Eighth Amendment's "basic concept" was "nothing less than the dignity of man,"[63] denationalization for desertion was impermissible because it destroyed an "individual's status in organized society . . . . [T]he expatriate has lost the right to have rights."[64] To borrow a term from *Timbs*, governments could not ruin a person by denuding them of their citizenship and leaving them stateless.

My synopsis reflects that the sparse pre-1960s federal case law relied on judges' understandings of punishments' harms, a bit of social science, and a sense of modernity that could render once-acceptable practices unlawful. But mostly, federal courts addressed punishment to say that they had nothing to do with it because convicted persons had no authority to contest that application of state power.

Rightlessness is counterintuitive for many of today's readers, accustomed to a social order committed to rights. A way to glimpse how unprotected prisoners were is to review the facts of one case, here standing for hundreds. In the late 1940s, Harry Siegel, Robert Harp, and Maurice Meyer, imprisoned in an Illinois state penitentiary, filed a lawsuit detailing the prison's rampant violence and corruption.[65] With help from a lawyer, the three men told federal judges that, in retaliation for trying to get into court, guards had beaten them and put them into solitary confinement, where for months they were forced to endure filth, darkness, and sleeping on "the cold, damp, concrete floor."[66] Federal trial and

61. 356 U.S. 86, 101 (1958). My thanks to the Honorable Jon O. Newman, who clerked for Chief Justice Warren during that term, for bringing to my attention the student note by Stephen Pollak, written in part at the suggestion of Professor Myles McDougall, which explored the application of the Eighth Amendment to denationalization. *See* Stephen Pollak, Comment, *The Expatriation Act of 1954*, 64 YALE L.J. 1164 (1955).

62. *Trop*, 356 U.S. at 87-88, 101.

63. *Id.* at 100.

64. *Id.* at 101-02. Warren did not cite Hannah Arendt for that proposition, although her book, *The Origins of Totalitarianism*, published in 1951, provided that formulation. *See* HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM (1951).

65. Siegel v. Ragen, 88 F. Supp. 996 (N.D. Ill. 1949), *aff'd*, 180 F.2d 785 (7th Cir. 1950).

66. Complaint at 11, Siegel v. Ragen, 88 F. Supp. 996 (N.D. Ill. 1949) (No. 49 C 47).

appellate judges responded by labeling the allegations matters of "internal discipline," to be left to the unfettered discretion of state prison officials.[67] That approach was so entrenched that it had a name: the "hands-off" doctrine.[68]

In short, for centuries, decisions about the forms of sentences and in-prison punishments belonged to state legislators, state courts, and state prison officials as they ran the primary criminal-law apparatus across the country. States routinely jailed people too poor to pay fines; sentenced thousands to LWOP, the death penalty, or hard labor; regularly deprived individuals in detention of safety, sanitation, exercise, and health care; cut them off from using courts, corresponding with family, and practicing their religion; and sometimes whipped, beat, or starved them. The people subjected to punishments had no way — other than physical protests and eloquence — to constrain the sovereign power of punishment.[69]

IV. THE CIVIL RIGHTS OF PUNISHMENT, THE RELATIONSHIP OF FINES TO PRISON TIME, AND THE SILOS OF CONSTITUTIONAL DOCTRINE

Race and poverty finally brought federal judges into sustained oversight of state-based punishments. The civil-rights revolution of the 1960s pressed the Court to rethink its relationship with America's detained and incarcerated pop-

67. *Siegel*, 180 F.2d at 788. The district court likewise refers to the "internal administration and discipline." *Siegel*, 88 F. Supp at 999.

68. *See* MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS 30-34 (1998); Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994, 2000 (1999).

69. Litigation is a form of protest; as discussed, before the 1960s, a small number of prisoners prompted the U.S. Supreme Court to address the legality of punishments but their claims were mostly rejected. As for political action, prisoners sought relief from horrid conditions through uprisings and hunger strikes. For example, a series of what were termed "riots" in the early 1950s brought public and administrative attention; some experts identified the "causes" to include ineffective management, lack of channels to register grievances, and the challenges of dealing with difficult prisoners. *See* Austin H. MacCormick, *Behind the Prison Riots*, 293 ANNALS AM. ACAD. POL. & SOC. SCI. 17, 19, 23 (1954). Literary accounts of the pains of incarceration have likewise been routes to public engagement and, in the 1970s, to the political mobilization of prisoners and segments of the public. *See, e.g.*, GEORGE L. JACKSON, SOLEDAD BROTHER: THE PRISON LETTERS OF GEORGE JACKSON (1970). *See generally* DAN BERGER, CAPTIVE NATION: BLACK PRISON ORGANIZING IN THE CIVIL RIGHTS ERA (2014).

ulation. Racial discrimination in the death penalty was the impetus for one sequence of decisions.[70] Challenges to racial segregation in prisons and to the targeting of incarcerated Black Muslims and other religious minorities were part of a first wave of prisoners' claims that succeeded.[71] And whether black, white, or otherwise, the people subjected to state punishment were overwhelmingly poor. That indigency was another factor moving some Justices to insist that law had to equip individuals with the means to defend themselves from state prosecutions and that law had to insulate individuals from serving extra prison time only because they were too poor to pay fines.

The shift began when federal courthouse doors opened for habeas claimants contesting convictions and sentences and for affirmative litigation (sometimes through class actions) challenging prison conditions. Prisoners gained lawyering resources and jurisdictional authority through a series of decisions and legislative action. In 1963, in *Gideon v. Wainwright,* the Court recognized rights to counsel for felony defendants,[72] and *Fay v. Noia* broadened the scope of habeas review.[73] In its 1964 decision in *Cooper v. Pate*, the Court applied Section 1983 civil-rights claims to state prison officials.[74]

Public defenders (gaining new funds because of *Gideon*) joined lawyers at the Legal Defense and Education Fund (LDF), the ACLU, and law schools, all of which received foundation grants to support work on civil rights. Political action in prisons, including the uprising at Attica, put prison conditions on newspapers' front pages and marshalled support in some quarters for reform.[75] After

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70. *See* CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT (2016). Antecedents can be found in cases such as *Powell v. Alabama*, 287 U.S. 45 (1932). In *Powell*, the Court responded to the racist trial of the "Scottsboro Boys" by holding that the state had failed to ensure due process by not providing indigent defendants in a capital case with counsel. *Id.* at 73.

71. *See, e.g.*, Cooper v. Pate, 378 U.S. 546 (1964); Sostre v. Rockefeller, 312 F. Supp. 863, 869 (S.D.N.Y. 1970); *aff'd in part, rev'd in part sub nom.* Sostre v. McGinnis, 442 F.2d 178 (2d. Cir. 1971).

72. That obligation has been unevenly and insufficiently implemented. *See* Stephen B. Bright & Sia M. Sanneh, *Fifty Years of Defiance and Resistance After* Gideon v. Wainwright, 122 YALE L.J. 2150 (2013).

73. 372 U.S. 391 (1963). In 1991, the Court abandoned *Fay*. *See* Coleman v. Thompson, 501 U.S. 722 (1991).

74. 378 U.S. 546 (1964). The Court's per curiam opinion built on *Monroe v. Pape*'s 1961 holding that state officials could be liable under 42 U.S.C. § 1983 whether or not a state statute created the alleged constitutional deprivations and without exhausting state court remedies.

75. *See* ATTICA: THE OFFICIAL REPORT OF THE NEW YORK STATE COMMISSION ON ATTICA (1972). Arthur Liman was the reporter for the commission, also known as the McKay Commission, as it was chaired by Robert McKay.

1976, more resources became available because Congress mandated that successful plaintiffs' lawyers could recoup fees from defendants in civil-rights cases.[76]

To provide an account of constitutional punishment law that is lawyer-and-judge-centric is, however, to miss that the law started with the people subjected to these punishments. Credit goes to "duly convicted" prisoners who imagined themselves to be rights-bearing individuals when law told them they were not. Prisoners were the pioneers in theorizing law's relationship to punishment. Supported by social-movement lawyers, prisoners succeeded in generating new legal precepts that stopped governments from imposing any sentence and form of confinement they choose.

To pull together the results requires linking the law of sentencing and the law of prisoners' rights because decision-making about punishment does not stop once a judge or jury imposes a sanction. For people on probation, a diverse set of conditions can require the reorganization of family, housing, and work.[77] If a person is incarcerated, prison officials mete out a variety of additional punishments — whether by whipping as the Navy did in the 1840s and Arkansas prisons did in the 1960s or by contemporary practices such as strip searching, placing people in solitary confinement, sending them to maximum-security facilities, banning family visits, and much else.

Putting questions about sentencing, probation, and prison conditions into different silos or walling off punishment decisions from their implementation and administration misses that assessing the lawfulness of sentences and of prison conditions always requires an evaluation of governments' punishment powers. Moreover, constitutional regulation comes not only by interpreting the Eighth Amendment but also by applying the First, Fourth, and Fourteenth Amendments. The result is a checkerboard of rulings that, unlike the pre-1960s case law, is voluminous.[78] Below, I sketch the contours and detail a few of the decisions to show how, even as the Court has tolerated ruin by death and lifelong imprisonment, many opinions contribute to a jurisprudence aiming to prevent states from causing people's destruction through physical and mental degradation.

The constitutional law of sentencing (as discrete from a myriad of statutory challenges) focuses on the death penalty and LWOP.[79] In brief, the Court attends

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76. Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2018).

77. Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291 (2016) [hereinafter Doherty, *Obey All Laws and Be Good*]; Fiona Doherty, *Intermediate Sentencing Returns: The Invention of Supervised Release*, 88 N.Y.U. L. REV. 958 (2013).

78. I join other scholars in linking some of these bodies of law together. *See, e.g.*, Alexander A. Reinert, *Release as Remedy for Excessive Punishment*, 53 WM. & MARY L. REV. 1575 (2012).

79. I do not here detail the small set of cases assessing the constitutionality of probation, parole, and their revocation. *See, e.g.*, Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973); Doherty, *Obey All*

to the proportionality of the punishment to an offense, the status of the person subjected to a particular punishment, and the rationality of its imposition. Ending the death penalty would have put a stop to one form of ruin. But the Court retreated from doing so; instead, the Court has worried about arbitrariness, as it found some capital decision-making processes insufficiently guided and others so rigid that they did not permit individualized assessments.[80] Yet, the Court has ruled out the death penalty for the mentally infirm and for persons who committed crimes when they were juveniles.[81] Likewise, sentences of LWOP when imposed on persons who committed crimes as juveniles require back-end reevaluations to decide whether release is possible.

Adjusting punishments in light of a person's capacity reflects concern for individuals, because either their age or their disabilities undermine their ability to participate in the criminal law-enforcement process. The Court's proportionality tests have not, however, rendered unconstitutional statutes that require long-term incarceration for minor offenses; thefts of small value can count as a "third strike" that results in a life sentence.[82] These de facto or de jure LWOP cases license forms of ruin, as people are prevented from what living outside of prison can entail, such as family life. But, as I will discuss, while incarcerated, those same people have a modicum of protection against debilitating conditions. Governments still have to protect the safety and some aspects of the well-being of the people confined.

Another strand of sentencing law (albeit not always catalogued under that heading) that intersects with the problem of economic ruin dates from before the Court's high-visibility death-penalty decisions. Financially marginal individ-

Laws and Be Good, *supra* note 77, at 322-23. Nor do I explore the development of the law for those in confinement without convictions who are protected by the Due Process Clause. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520 (1979); Youngblood v. Romeo, 457 U.S. 307 (1982).

80. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

81. The Court held that the death penalty cannot be imposed on individuals with certain cognitive disabilities. Atkins v. Virginia, 536 U.S. 304, 321 (2002). In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court ruled that the death penalty could not be imposed on individuals who committed offenses as juveniles. *Id.* at 578. In *Miller v. Alabama*, 567 U.S. 460 (2012), the Court concluded that imposing a sentence of mandatory LWOP on a person who committed the offense when a minor violates the Eighth Amendment. *Id.* at 489. The Court subsequently ruled that individuals who committed crimes while juveniles and were sentenced to LWOP are entitled to reconsideration. *See* Montgomery v. Louisiana, 136 S. Ct. 718 (2016). Pending as I write is the question of whether *Montgomery* has retroactive application. Malvo v. Mathena, 893 F.3d 265 (4th Cir. 2018), *cert. granted*, 138 S. Ct. 1317 (2019), *argued*, No. 18-217 (Oct. 16, 2019).

82. *See, e.g.*, Rummel v. Estelle, 445 U.S. 263 (1980). For a review and critique of the Court's subsequent prison "duration cases," see SULLIVAN & FRASE, *supra* note 11, at 134-44.

uals challenged the conversion of unpaid fines into prison time in the 1970 decision *Williams v. Illinois*,[83] followed in 1971 by *Tate v. Short*.[84] As continued in 1983 by *Bearden v. Georgia*,[85] these rulings require judges to inquire into individuals' ability to pay fines before ordering incarceration.

Williams is a case in the equal-protection canon because it held, as explained below, that the conversion of a fine to prison time discriminated against the poor. In addition, *Williams* and its progeny are central to understanding the constitutional boundaries of punishment. Long before the 2019 decision *Timbs v. Indiana* applied the Excessive Fines Clause to the states, Justices learned about the impact of punishment on poor people. Indeed, had *Timbs* been decided in the 1960s, *Williams* might also have explored the import of the Excessive Fines Clause.

In 1967, Illinois charged Willie E. Williams with having "knowingly obtained unauthorized control over credit cards, checks and papers of the value of less than one hundred and fifty dollars, the property of Edna Whitney."[86] Williams could not afford to post the ten percent bond for bail set at $2,000,[87] nor did he have funds to hire a lawyer.[88] In a bench trial, a Cook County Circuit Court judge convicted Williams of "theft of property . . . not exceeding $150" and gave him the maximum sentence authorized for that offense: a year in prison, a $500 fine, and five dollars in costs.[89] But after Williams served his time in prison, the state sent him back because he could not afford to pay the $505 owed. Instead, Williams was to "satisfy" the fine at a rate of five dollars a day.[90]

Williams found his way into the annals of law because of a Ford Foundation grant to a University of Chicago legal clinic, which asked the state courts to vacate the sentence, posted a bond for the $500 bail, and brought the case to the U.S. Supreme Court.[91] Illinois insisted on the constitutionality of its practice. As evidence, the state pointed to how commonplace it was: "all 50 states and the

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83. 399 U.S. 235 (1970).

84. 401 U.S. 395 (1971).

85. 461 U.S. 660 (1983).

86. Brief for Appellant at 6, Williams v. Illinois, 399 U.S. 235 (1970) (No. 1089), 1970 WL 136556, at *6.

87. *Id.*

88. *Id.* at 7 n.1. As no transcript was available, the lawyers could not report whether Williams was told of a right to counsel and waived it. *Id.*

89. *Williams*, 399 U.S. at 236 & n.2.

90. *Id.* at 236.

91. Williams was represented by civil-rights luminaries, including Stanley Bass (who argued the case) from Chicago's Community Legal Counsel; Jack Greenberg from the LDF; Haywood Burns from NYU; and Anthony Amsterdam from Stanford. Brief for Appellant, *supra* note 86, at 8-9, 8 n.3.

federal government *today* allow the incarceration of the indigent to collect in labor that which the state cannot collect in money."[92] The City of Chicago's amicus brief went further, arguing that a "system which permitted the indigent to get off with their fines unpaid would discriminate against the great working majority who must pay their fines with their own hard-earned money."[93]

Williams's lawyers countered that imprisonment beyond the statutory limit for the offense violated the Fourteenth Amendment. Chief Justice Warren Burger agreed. Writing for the Court and describing "nonpayment [as] a major cause of incarceration in this country,"[94] Burger concluded that imprisonment exceeding the "maximum period fixed by statute" because of an "involuntary nonpayment of a fine or court costs" was an "impermissible discrimination which rests on ability to pay."[95]

As in the many decisions that followed to form the jurisprudence of constitutional punishment, the Court identified the state's "wide latitude . . . in fixing the punishment for state crimes." But the Court reserved to itself the authority to analyze whether, given that the statute specified the "outer limits" of prison time required to satisfy what the Court termed the state's "penological interests and policies," the state could add prison time for a "certain class of convicted defendants . . . solely by reason of their indigency."[96] The answer was no.

Soon thereafter, in a decision written by Justice Brennan, the Court applied that precept to Preston Tate, who had accumulated $425 in traffic violations and had been "committed" to a "municipal prison farm" to "work off" those fines at five dollars a day.[97] A Houston lawyer, Peter Navarro, had explained that the $425 in fines represented "more than the equivalent of four disability checks" that the Veterans Administration sent to Tate monthly and that supported Tate, his spouse, and two small children.[98] On behalf of Tate, Navarro argued to the

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92. Brief for Appellee at 4-5, *Williams*, 399 U.S. 235 (No. 1089).

93. Brief of the City of Chicago as an Amicus Curiae Urging Affirmance at *3, *Williams*, 1970 WL 136558 (No. 1089).

94. *Williams*, 399 U.S. at 240.

95. *Id.* at 241. Doing so both built on earlier rulings and ignored others. The Court had previously held that poverty could not be a bar to defendants obtaining transcripts requisite for appeal and to appeals themselves. *See* Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). In *Williams*, the Court did not discuss earlier decisions stating that judges had discretion to use incarceration as a penalty for failing to pay a fine. *See* Hill v. Wampler, 298 U.S. 460 (1936); *Ex parte* Jackson, 96 U.S. 727, 736 (1877).

96. *Williams*, 399 U.S. at 241-42.

97. Tate v. Short, 401 U.S. 395, 396-97 (1971). Preston Tate's traffic citations included four instances of driving without a license ($175), two citations for expired license plates ($100), an illegal registration citation ($50), running a stop sign ($50), and running a red light ($50). *See* Joint Appendix at 49, Tate v. Short, 401 U.S. 395 (1971) (No. 324).

98. *See* Joint Appendix, *supra* note 97, at 10.

Texas Court of Criminal Appeals the disproportionality of this "enormous amount of money," as he raised three constitutional deficits: that the fine violated the Eighth Amendment's prohibition against "excessive, cruel, and unusual punishment,"[99] Texas's parallel provision, and the equal-protection guarantees of the Fourteenth Amendment.[100]

In the Supreme Court, the path for Tate's appellate lawyers was clear.[101] A year earlier, in *Williams*, four members of the Court had "anticipated" the question of whether the discrimination principle announced applied to people like Tate (jailed for nonpayment of fines); the four had concluded that the Constitution banned converting fines into jail time.[102] In 1971, ruling for Tate, Justice Brennan reminded states that they had "alternatives"[103] such as seeking payments through installment plans.[104]

The same year, the Court issued another decision, *Boddie v. Connecticut,* obliging states to subsidize the use of courts for people too poor to pay fees when seeking a divorce.[105] But within two years, the effort to build strong links between poverty and equal protection was rejected. In 1973, the majority of five in *San Antonio School District v. Rodriguez* refused to require states to equalize school financing across rich and poor districts.[106] That decision stymied efforts to cast poverty as a constitutional problem akin to race.

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99. *Id.* at 11-12 (citing Robinson v. California, 370 U.S. 660 (1962); Nemeth v. Thomas, 35 U.S.L.W. 2320 (N.Y. Sup. Ct. 1966)). Tate's lawyer characterized Tate's indigency as an involuntary quality akin to illness. Navarro wrote that Tate's ninety-day sentence violated the Eighth Amendment as "even one day in prison would be cruel and unusual punishment for the 'crime' of having the common cold." *Id.* at 11 n.3.

100. *Tate*, 401 U.S. at 399-401.

101. Brief for Petitioner at 10-13, *Tate*, 401 U.S. 395 (No. 70-324). Norman Dorsen of NYU and the ACLU argued the case; Stanley Bass's name (the same lawyer who had argued *Williams* and was then at LDF) appeared on the brief.

102. *Tate*, 401 U.S. at 398 (citing Morris v. Schoonfield, 399 U.S. 508, 509 (1970)). *Morris* was the companion case to *Williams* and was vacated and remanded because Maryland had enacted a statute giving judges greater discretion in assessing and enforcing fines.

103. *Id.* at 399.

104. *Id.* at 400 n.5. Justice Blackmun concurred but raised the concern that the ruling created incentives for states to use incarceration rather than fines. *Id.* at 401 (Blackmun, J., concurring). Justice Harlan's concurrence in *Williams*, which he cited as the basis of his concurrence in *Tate*, is discussed *infra* notes 161-164 and accompanying text.

105. 401 U.S. 371 (1971). For analyses of debates among the Justices about reliance on equal protection and due process, *see* Judith Resnik, Comment, *Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 86, 91 (2011).

106. 411 U.S. 1 (1973). The *Rodriguez* Court rejected poverty as a suspect classification. *Id.* at 28.

Yet, what I have elsewhere called the "alchemy" of due process and equal protection has continued to sustain the *Williams-Tate* line of cases.[107] The Court has not required a showing of intent to discriminate, which is now standard in its equal-protection doctrine, but instead has used a mélange of the two clauses to remedy some of the burdens of poverty in courts.[108] The 1983 decision in *Bearden v. Georgia* is an exemplar, requiring an "ability-to-pay" determination before revocation of probation for nonpayment of a fine and of restitution.[109] In the last few years, lower courts have built on this case law to invalidate bail systems that make no provisions for inquiries into ability to pay[110] and the automatic suspension of driver's licenses for nonpayment of traffic fees or fines.[111]

The other body of constitutional law central to punishment jurisprudence is about in-prison sanctions. Those cases begin in the 1960s, when the federal courts ended their "hands-off" approach toward prisons. The first system-wide case to reach the Supreme Court was *Lee v. Washington*, decided in 1968.[112] The Court upheld a 1966 three-judge court ruling that Alabama's segregation of prisoners into "white" and "colored" housing units was unconstitutional.[113]

In the same year, lower federal courts responded to claims that prison officials were violating the Cruel and Unusual Punishments Clause of the Eighth Amendment. In an opinion by then-Judge Harry Blackmun, the Eighth Circuit

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107. *See, e.g.*, M.L.B. v. S.L.J, 519 U.S. 102, 128 (1996); *see also* Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual Aggregate Litigation*, 148 U. PA. L. REV. 2119 (2000); Judith Resnik, *Equality's Frontiers: Courts Opening and Closing*, 122 YALE L.J. ONLINE 243 (2013).

108. *See Boddie*, 401 U.S. 371; *see also* Mayer v. City of Chicago, 404 U.S. 189, 193-94 (1971). In *Mayer*, the Court required states to provide indigent misdemeanor defendants with records to enable them to appeal.

109. Bearden v. Georgia, 461 U.S. 660 (1983).

110. *See* ODonnell v. Harris Cty., 251 F. Supp. 3d 1052 (S.D. Tex. 2017), *aff'd in part*, *rev'd in part*, 892 F.3d 147 (5th Cir. 2018). After a decision on remand, *ODonnell v. Harris Cty.*, 328 F. Supp. 3d 643 (S.D. Tex. 2018), the court approved a settlement. *ODonnell*, No. 4:16-cv-01414 (S.D. Tex. Nov. 21, 2019) (memorandum and opinion approving the proposed consent decree and settlement agreement and granting the motion to authorize compensation of class counsel); *see also In re* Humphrey, 228 Cal. Rptr. 3d 513 (Ct. App. 2018), *rev. granted,* 417 P.3d 769 (Cal. 2018).

111. Robinson v. Purkey, No. 3:17-cv-01263, 2018 WL 5023330, at *1–2 (M.D. Tenn. Oct. 16, 2018), *appeal docketed*, No. 18-6121 (6th Cir. Oct. 24, 2018). In contrast, a Sixth Circuit decision relied on a rational basis analysis to uphold the state practices. *See* Fowler v. Benson, 924 F.3d 247 (6th Cir. 2019).

112. 390 U.S. 333 (1968).

113. Washington v. Lee, 263 F. Supp. 327 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968). Arkansas ended its formal segregation of prisoners after the 1968 affirmance. *See generally* Judith Resnik, *The Puzzles of Prisoners and Rights: A Tribute to Judge Frank Johnson*, 71 ALA. L. REV. (forthcoming 2020).

concluded that the Arkansas prison system could not whip prisoners for violating its rules.[114] Around the same time, the Second Circuit ruled that a federal judge had wrongly dismissed a challenge to New York, which had put a person "denuded" into a cold, solitary cell for weeks.[115] In both opinions, the appellate courts cited *Trop v. Dulles* and explained that the Eighth Amendment incorporated "standards of decency."[116]

In 1970, another watershed occurred in Arkansas: for the first time, a federal judge concluded that an entire "prison System" constituted cruel and unusual punishment.[117] Two years later, a federal judge condemned Mississippi's Parchman Farm as "unfit for human habitation" and held that conditions there breached the Eighth Amendment.[118] Soon after, a federal judge ruled that Alabama's prisons, where people were left in a "doghouse" ("a concrete building with no windows . . . no lights, no ventilation, no toilets, no furniture, no beds, no running water, and no sinks or showers . . . [and] a single hole in the concrete floor for the men to use in place of a toilet" as punishment for violating prison rules such as being late for work[119]) likewise violated the Eighth Amendment.[120] In 1976, the Supreme Court concluded that the Cruel and Unusual Punishments Clause barred Texas from being deliberately indifferent to the known medical needs of prisoners.[121] In 1978, the Court reviewed almost a decade of recalcitrance in implementing court orders in Arkansas, detailed disgusting conditions,

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114. *See* Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).

115. Wright v. McMann, 460 F.2d 126, 130 (2d Cir. 1972).

116. *Id.*; Bishop, 404 F.2d at 579.

117. The first decision was *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969), sometimes termed "Holt I." The decision on the system-wide class action was Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), generally referenced as "Holt II." The Supreme Court considered implementation of this decision in *Hutto v. Finney*, 437 U.S. 678, 681-85 (1978).

118. Gates v. Collier, 349 F. Supp. 881, 887 (N.D. Miss. 1972), *aff'd and remanded*, 548 F.2d 1241 (5th Cir. 1977). For a detailed account of Mississippi's racist and brutal treatment of prisoners, see DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996).

119. Matthew L. Myers, *12 Years after* James v. Wallace, ACLU NAT'L PRISON PROJECT 8-9 (Fall 1987), https://www.prisonlegalnews.org/media/publications/journal%2013.pdf [https://perma.cc/XC8K-DUCC].

120. The court described that prisoners were locked into a building in which no prison staff were, fed one meal a day, and permitted showers only after many days. *See* Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd in part, rev'd in part and remanded sub nom*. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. granted in part*, *judgment rev'd in part sub nom*. Alabama v. Pugh, 438 U.S. 781 (1978).

121. Estelle v. Gamble, 429 U.S. 97, 104 (1976).

and sustained an attorneys' fee award against the state.[122] By 1987, more than thirty state prison systems were in litigation about constitutional violations.[123]

First Amendment guarantees as well as substantive and procedural due process, sometimes mixed with the Eighth Amendment, have also limited state punishments and protected incarcerated individuals' opportunities for expression, association, and fair treatment. Federal courts look to prison officials' justifications, ask whether they are "'reasonably related' to legitimate penological interests," and at times identify constraints on punishments based on their understanding of the weight to be accorded "fundamental rights" and institutional management concerns.[124]

For example, the Court has rejected state punishments that prevent individuals from religious observance,[125] entering into marriage,[126] or being hitched to posts for hours on end.[127] Further, the Court has required that governments provide some procedural protections before taking away good-time credits.[128] And even as the Court cut back judicial oversight in various ways, including by ruling that prisoners have procedural-due-process protections only when prison officials impose "atypical and significant hardships,"[129] federal courts continue to be called on to assess punishment's lawful parameters.

In 2019, *Timbs* affirmed this obligation. Tyson Timbs alleged that Indiana's seizure of his $42,000 car was "grossly disproportionate" to the gravity of his conviction (dealing in a controlled substance), for which he had been sentenced to one year of home detention and fined "fees and costs totaling $1,203."[130] Writing for the Court, Justice Ginsburg ruled that the Fourteenth Amendment incorporated the Excessive Fines Clause and hence that states had to meet federal punishment standards as well as those of their own constitutions.[131] Justice Thomas

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122. Hutto v. Finney, 437 U.S. 678, 681-85 (1978).

123. *Status Report: State Prisons and the* Courts, ACLU NAT'L PRISON PROJECT 24 (FALL 1987), https://www.prisonlegalnews.org/media/publications/journal%2013.pdf [https://perma.cc/XC8K-DUCC].

124. *See, e.g.*, Turner v. Safley, 482 U.S. 78, 87 (1987).

125. *See* Cruz v. Beto, 405 U.S. 319 (1972) Both the U.S. Constitution and state religious "freedom" legislation can apply.

126. *Turner*, 482 U.S. at 91.

127. Hope v. Pelzer, 536 U.S. 730 (2002).

128. Wolff v. McDonnell, 418 U.S. 539 (1974).

129. Wilkinson v. Austin, 545 U.S. 209, 223 (2005); Sandin v. Conner, 515 U.S. 472, 484 (1995).

130. Timbs v. Indiana, 139 S. Ct. 682, 686 (2019).

131. *Id.* at 689.

concurred. In his view, the Privileges or Immunities Clause gave citizens protection from the government's imposition of "ruinous fines."[132]

While *Timbs* was the first to apply the Excessive Fines Clause to states, the Court has issued four other decisions responding to challenges to *federal* forfeitures.[133] To date, the Court has read the Clause to constrain governments aiming to punish (rather than "remediate") a wrong;[134] the Clause does not protect private parties ordered to pay punitive damages to other private actors.[135] As a result, some civil and criminal sanctions remain in silos, even as they have much in common analytically and experientially. Rather than look to the Eighth Amendment, the Court's analyses of the constitutionality of state punitive damages stem from interpretation of the Due Process Clause,[136] as does the Court's law on detention of individuals held without criminal convictions.[137] The Court has, however, insisted on control over the categorization; the label that governments attach to their actions is not dispositive. Rather, the Clause regulates all government fines and forfeitures designed to punish, whether they are termed "civil," "criminal," "in personam," or "in rem."

This approach meant that the Excessive Fines Clause protected Richard Lyle Austin from the federal government's "civil" forfeiture seeking to take his mobile home and auto body shop after a drug-offense conviction.[138] Justice Blackmun explained that the constitutional point was "to prevent *the government* from abusing its power to punish"[139] by extracting payments "in cash or in kind."[140] In *Timbs*, Justice Thomas reiterated that the Excessive Fines Clause, imported at the founding from England, aimed to ensure that the state "should not deprive

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132. *Id.* at 694 (Thomas, J., concurring) (quoting SCHWOERER, *supra* note 3, at 91). In the cited page, Schwoerer discusses English courts' imposition of financial penalties in the 1680s and thereafter.

133. *See* United States v. Bajakajian, 524 U.S. 321 (1998); Alexander v. United States, 509 U.S. 544 (1993); Austin v. United States, 509 U.S. 602 (1993); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989).

134. *See Browning-Ferris*, 492 U.S. at 275.

135. *See id.* The Court concluded that due process imposed some constraints. *Id.* at 276.

136. *See, e.g.*, *Browning-Ferris*, 492 U.S. at 276.

137. *See, e.g.*, Bell v. Wolfish, 441 U.S. 520, 535 (1979); Youngblood v. Romeo, 457 U.S. 307 (1982).

138. *Austin*, 509 U.S. at 604.

139. *Id.* at 607. Justice Blackmun made clear that unlike some provisions of the Constitution that were "expressly limited to criminal cases," the Eighth Amendment had no such "limitation." *Id.* at 607-08, 608 n.4.

140. *Id.* at 610.

a wrongdoer of his livelihood";[141] governments' sanctioning power ought not result in "the ruin of the criminal."[142]

The potential breadth of this proposition merits discussion. Historians recount that protection against excessive fines did not only inure to the King's "enemies" (and hence a class of potential defendants with resources the King sought to gain or was especially interested in deflating) but also to merchants and other "villains."[143] This cross-class insulation aimed to prevent taking what now would be termed one's "livelihood" and what was then described as one's "contenement," "wainage," or "merchandise."[144]

Of course, a puzzle about these historic protections exists, given that England imposed what today are seen as the "barbaric" punishments of branding and executing people as well as transporting them to colonies.[145] Eighteenth-century commentaries proffered a utilitarian rationale for the incongruity that permitted governments to end a person's life yet not "ruin" a person economically. One explanation was about perverse incentives, if a minor offense left a person in a "worse Condition" than committing a capital crime.[146] Moreover, as Benjamin Franklin put it, taking the property that was "necessary to a Man" was not what the "Welfare of the Publick" could demand.[147]

Return then to Illinois in the late 1960s, where Willie Williams, who had stolen less than $150, was put in prison for twelve months and fined three times that amount. The brief filed for Williams explained that by incarcerating him,

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141. Timbs v. Indiana, 139 S. Ct. 682, 693 (2019) (Thomas, J., concurring) (quoting United States v. Bajakajian, 524 U.S. 321, 335 (1998)). In quoting *Bajakajian*, Justice Thomas referenced the majority opinion that he authored.

142. *Id.* at 694 (quoting 2 THE HISTORY OF ENGLAND UNDER THE HOUSE OF STUART, INCLUDING THE COMMONWEALTH 801 (1840)).

143. *See* Brief Amici Curiae of Eighth Amendment Scholars in Support of Neither Party at 5-6, 8-12, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091), 2018 WL 4381213, at *6; *see also* Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 HASTINGS CONST. L.Q. 833, 854-57 (2013).

144. *See* McLean, *supra* note 143, at 850 n.59, 884.

145. As John Langbein pointed out to me, branding had its utilities, as it marked people (in an era without accessible records) as having avoided hanging one time, and therefore ineligible for rescue a second time. E-mail from John H. Langbein, Sterling Professor Emeritus of Law and Legal History and Professorial Lecturer in Law, Yale Law School, to Judith Resnik, Arthur Liman Professor of Law, Yale Law School (Nov. 29, 2019) (on file with author). *See generally* John Langbein, *The Historical Origins of the Sanction of Imprisonment for Serious Crime*, 5 J. LEG. STUD. 35 (1976).

146. *See* McLean, *supra* note 143, at 864-65 (quoting 1 A COMPLETE COLLECTION OF STATE-TRAILS, AND PROCEEDINGS FOR HIGH-TREASON AND OTHER CRIMES AND MISDEMEANOURS; FROM THE REIN OF KING RICHARD II TO THE REIGN OF KING GEORGE II, at xii (S. Emlyn ed., 3d ed. 1742)).

147. *Id.* at 869 (quoting Letter from Benjamin Franklin to Robert Morris (Dec. 25, 1783), *in* BENJAMIN FRANKLIN: WRITINGS 1079, 1082 (Library of America 1987)).

the state subjected him "to severance of family relations, loss of pay, loss of employment, loss of educational opportunity . . . poor food, and housing."[148] Think also about the pile of traffic fines from Texas that Preston Tate had faced before 1971 and about his lawyer's argument that the sum of $425 was disproportionate given his need to support his family on his $105 monthly Veterans Disability benefits.[149]

The metric by which to judge "excessiveness" can be that a punishment is disproportionate (or "grossly disproportionate") to an offense or to a person's ability to pay. *Williams* and *Tate* exemplify both kinds of excessiveness, as well as discrimination against people with limited income and wealth. In the 1970s, however, before incorporation of the Excessive Fines Clause, the unconstitutionality in *Williams* and *Tate* of converting financial sanctions into prison time rested on the Justices' views that, despite states having licensed that swap, incarceration was incommensurable with money.

Timbs has now dispatched state courts to address constitutional constraints on monetary punishments through both kinds of constitutional protections under federal and state law. Whether courts and legislatures will link the explanations for the prohibition on excessive fines provided in *Timbs* to the disparate

148. Brief for Appellant at 14, Williams v. Illinois, 399 U.S. 235 (1970) (No. 1089), 1970 WL 136556, at *14 & n.9. Williams's brief also pointed out that a survey funded by the Ford Foundation described the squalid conditions in short-term prison facilities.

149. Brief for Petitioner at 5, Tate v. Short, 401 U.S. 395 (1971) (No. 70-324), 1970 WL 136810, at *5.

economic-impact analysis of *Williams-Tate* remains to be seen.[150] In *Timbs*, Justice Ginsburg discussed the incentives to use fines as a "source of revenue,"[151] which she noted was "scarcely hypothetical."[152] Justice Thomas's concurrence mapped the English history about how such fines produced ruination of criminals, the U.S. Constitution's commitment to their prohibition as a "fundamental right of citizenship,"[153] and the concerns about the severe economic penalties imposed by the Black Codes during the era when the Fourteenth Amendment was ratified.[154]

In this past decade, "Ferguson" became the sad shorthand for the role that race and poverty play when localities exploit their power to impose monetary sanctions.[155] Documentation that these practices were not unique to this Missouri town comes from research and litigation around the country, as counties charged families of children held in juvenile detention, assessed indigent defendants "registration fees" for "free" public defenders, or sought payments for time

150. *See* Brandon Buskey, *A Proposal to Stop Tinkering with the Machinery of Debt*, 129 YALE L.J.F. 415 (2020); Beth A. Colgan & Nicholas M. McLean, *Financial Hardship and the Excessive Fines Clause: Assessing the Severity of Property Forfeitures After* Timbs, 129 YALE L.J.F. 430 (2020). As these authors discuss, other questions include whether the Court will modify the standard of "grossly disproportionate" fines that *Bajakajian* developed, generate different tests for fines than for forfeitures, take ability to pay into consideration, and evaluate multiple factors when assessing individuals' economic wherewithal.

Before *Timbs* was decided, Beth Colgan had argued that the Excessive Fines Clause ought to be incorporated and ought to limit the use of regressive fines. *See* Beth Colgan, *The Excessive Fines Clause: Challenging the Modern Day Debtors' Prison*, 65 UCLA L. Rev. 2 (2018). For many examples of the case law and of regulation and legislation on fines and fees, see Judith Resnik, Anna VanCleave, Kristen Bell, Skylar Albertson, Natalia Friedlander, Illyana Green & Michael Morse, *Who Pays? Fines, Fees, Bail, and the Cost of Courts*, ARTHUR LIMAN CTR. FOR PUB. INTEREST LAW (Apr. 18, 2018), https://papers.ssrn.com/abstract=3165674 [https://perma.cc/98Z6-RT5R]; and Judith Resnik, Anna VanCleave, Alexandra Harrington, Jeff Selbin, Lisa Foster, Joanna Weiss, Faith Barksdale, Alexandra Eynon, Stephanie Garlock & Daniel Phillips, *Ability to Pay*, ARTHUR LIMAN CTR. FOR PUB. INTEREST LAW (Mar. 2019), https://papers.ssrn.com/abstract=3387647 [https://perma.cc/8VQN-GW9K].

151. Timbs v. Indiana, 139 S. Ct. 682, 689 (2019) (quoting Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991) (opinion of Scalia, J.)).

152. *Id.* (citing Brief of the American Civil Liberties Union et al., as Amici Curiae Supporting Petitioners at 7, Timbs v. Indiana, 139 S. Ct. 682 (2019) (No. 17-1091), 2018 WL 4462202).

153. *Id.* at 696 (Thomas, J., concurring).

154. *Id.* at 697.

155. *See* Monica C. Bell, *Hidden Laws of the Time of Ferguson*, 132 HARV. L. REV. F. 1, 8–15 (2018).

spent in detention.[156] A new shorthand "LFO"—for "legal financial obligations"—represents mounds of debt[157] and, for some, the loss of driver's licenses, or voting rights, and at times imprisonment for noncompliance with court orders or for committing infractions such as driving without a license.[158]

V. METRICS OF PUNISHMENT: PENOLOGICAL PURPOSES, RATIONALITY, AND RUIN

What emerges from the integration of the constitutional law of punishment is a jurisprudence insistent on purposefulness, deference, embedded in its times, imposing some boundaries on state and federal actors, and yet tolerating a host of sanctions. Holding (for the moment) the death penalty and LWOP aside, the Court has erected a series of buffers against the destruction of "duly convicted" people, which, while far from complete, can be understood as the beginnings of the anti-ruination principle that I introduced at the outset. By way of closing, I summarize several facets of this body of law.

First, the Court has read the Constitution to require that punishment be predicated on licit reasons. Regularly echoing (albeit not often citing) Beccaria and Bentham in a quest for distinctions between licit and illicit punishments and in undertaking means/ends analyses, the Court insists that punishment not be "totally without penological justification."[159]

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156. *See generally* Judith Resnik & David Marcus, *Inability to Pay: Court Debt Circa 2020*, 98 N.C. L. REV. (forthcoming 2020).

157. *See* ALEXES HARRIS, A POUND OF FLESH: MONETARY SANCTIONS AS PUNISHMENT FOR THE POOR (2016).

158. *See, e.g.*, Robinson v. Purkey, No. 3:17-cv-01263, 2018 WL 5023330, at *1–2 (M.D. Tenn. Oct. 16, 2018), *appeal docketed*, No. 18-6121 (6th Cir. Oct. 24, 2018); Theresa Zhen & Brandon Greene, *Pay or Prey: How the Alameda County Criminal Justice System Extracts Wealth from Marginalized Communities*, E. BAY COMMUNITY L. CTR. (2018), https://ebclc.org/wp-content/uploads/2018/10/EBCLC_CrimeJustice_WP_Fnl.pdf [https://perma.cc/G75K-3UYW]; *New York Should Re-Examine Mandatory Court Fees Imposed on Individuals Convicted of Criminal Offenses and Violations*, N.Y.C. B. (2019), https://s3.amazonaws.com/documents.nycbar.org/files/2018410-MandatorySurchargesCriminalCharges.pdf [https://perma.cc/8BHV-FZ8K]; *Driven by Debt: How Driver's License Suspensions for Unpaid Fines And Fees Hurt Texas Families*, TEX. FAIR DEF. PROJECT & TEX. APPLESEED (2018), http://stories.texasappleseed.org/driven-by-debt [https://perma.cc/8VLQ-AF5B]; James Craven & Sal Nuzzo, *Changing Course: Driver's License Suspension in Florida*, JAMES MADISON INST. (2018), https://www.jamesmadison.org/wp-content/uploads/2018/11/Backgrounder_DriverLicense_9.12.18_v02-1.pdf [https://perma.cc/8RKA-9CRZ].

159. Gregg v. Georgia, 428 U.S. 153, 183 (1976) (Stewart, J., joined by Powell & Stevens, J.J.) (plurality opinion). Versions of that proposition can be found in many opinions.

Second, Justices have identified justifications by drawing on a mélange of political, economic, and moral theories shaping permissible "penological purposes," as courts have also categorized some motives and actions as illicit. On the approved list are government efforts to deter, express approbation, be retributive, incapacitate, rehabilitate, and to ensure community (and, in prisons, institutional) safety, and cost conservation.[160] When assessing whether punishments are "cruel and unusual," "disproportional," or "excessive," or violate First, Fourth, and Fourteenth Amendment rights, judges attribute some or many of these goals to decision-makers and then decide for themselves whether the method chosen was rational or not, and even if rational on some dimensions, whether the punishment is nonetheless out of bounds.

An illustration of how jurists supply their own answers comes from Justice Harlan's 1971 concurrence in *Williams v. Illinois*, filed to distance himself from Chief Justice Burger's majority opinion centered on equal protection.[161] Justice Harlan wrote that due process required courts to assess the "rationality of the connection between legislative means and purpose, the existence of alternative means for effectuating the purpose, and the degree of confidence . . . that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen."[162]

Justice Harlan asserted that no penological purpose was served by converting a fine into jail time; on his account, doing so advanced neither rehabilitation nor retribution. Harlan posited that the legislature might have chosen a "lump-sum fine" as a "better deterrent than one payable over a period of time" but thought it unlikely "to represent a considered legislative judgment."[163] Given that Illinois had by statute "declared itself indifferent to fine or jail," Justice Harlan concluded that the administrative convenience of a lump-sum payment over the installment plan would not likely outweigh the individual liberty interest for people "who possess no accumulated assets" and who argued they could only obtain funds to pay the fine outside of prison.[164] The Justice did not discuss that people without assets could lack the ability to make periodic payments, that collection

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160. Again, examples are legion. *See, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 352 (1981); Overton v. Bazzeta, 539 U.S. 126, 133 (2003); O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987).

161. Williams v. Illinois, 399 U.S. 235, 259 (1970) (Harlan, J., concurring).

162. *Id.* at 260.

163. *Id.* at 265.

164. *Id.* Justice Harlan explained that he did not see a "distinction between circumstances where the State through its judicial agent determines that effective punishment requires less than the maximum prison term plus a fine, or a fine alone, and the circumstances [at issue in *Williams*]." *Id.* at 256 n.*.

costs could outstrip the sums owed, or that a fine keyed to individuals' daily earned income (now called "day fines") could be useful.[165]

Another accounting of what makes a punishment impermissible comes from the Court's response to the claim by J.W. Gamble, a Texas prisoner who in 1974 alleged that, after a 600-pound bale of cotton fell on him, the state provided insufficient treatment for his back injury and heart disease. A federal district court dismissed Gamble's handwritten complaint but the Fifth Circuit, noting that Texas then had one full-time doctor for 17,000 prisoners, described the state's care as "woefully inadequate" and ruled that Gamble's constitutional case could proceed.[166]

In the 1976 *Estelle v. Gamble* opinion, Justice Marshall wrote for the Court. Quoting what then-Judge Blackmun had said in 1968 when holding Arkansas's whipping unconstitutional, he explained that the Eighth Amendment embodied "broad and idealistic concepts of dignity, civilized standards, humanity, and decency."[167] Prohibited punishments were not limited to "physically barbarous" treatment; withheld medical treatment could result in "pain and suffering which no one suggests would serve any penological purpose."[168] As a consequence, "deliberate indifference to serious medical needs" violated the Eighth Amendment. The Court did not inquire into whether Texas's system of health care was "unusual," which it was not, as reflected in a record that included studies of other prison systems providing abysmal care doled out only when prison staff permitted it.[169]

An effort at synthesis of the constitutional constraints on confinement came in Justice Powell's 1981 ruling in *Rhodes v. Chapman*. He summarized the Court's law on prison conditions as aiming to prevent "the wanton and unnecessary infliction of pain" by imposing confinement that was "grossly disproportionate to the severity of the crime . . . [or] depriv[ing] inmates of the minimal civilized

165. For a discussion of day-fines, see Beth A. Colgan, *Graduating Economic Sanctions according to Ability to Pay*, 103 IOWA L. REV. 53 (2017).

166. Gamble v. Estelle, 516 F.2d 937, 940-41 (5th Cir. 1975), *rev'd sub nom.* Estelle v. Gamble, 429 U.S. 97 (1976). At various times, two additional doctors and occasional part-time help were available. *Id*. at 941 n.1.

167. Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)). The *Estelle* Court also invoked *Trop v. Dulles,* 356 U.S. 86 (1958). *See Estelle*, 429 at 102.

168. *Estelle*, 429 U.S. at 103. The Court noted the common law also recognized the requirement "to care for the prisoner, who cannot be reason of the deprivation of his liberty, care for himself." *Id.* at 104 (quoting Spicer v. Williamson, 132 S.E. 291, 293 (N.C. 1926)).

169. *See Estelle*, 429 U.S. at 110 n.3 (Stevens, J., dissenting). Justice Stevens referenced studies of terrible medical services in the prison systems of Pennsylvania and California.

measure of life's necessities."[170] Reiterating the Court's reasoning in *Estelle*, "unnecessary and wanton" pain was not limited to the "physically barbarous."[171] Practices that were "totally without penological justification,"[172] such as deliberate indifference to known medical needs, violated the Eighth Amendment.[173]

But what is the "grossly disproportionate," the "minimum civilized measure of life's necessities," the "unnecessary," the "excessive," the "wanton," or the penologically unjustified? The lower courts in *Rhodes v. Chapman* concluded that it was constitutionally intolerable for Ohio to house 2,300 people in a facility designed for 1,620 prisoners.[174] Over Justice Thurgood Marshall's stinging dissent (noting that most of the Supreme Court's windows were larger than the space allotted per person in double cells), Justice Powell justified "the discomfort" of Ohio's double celling by saying that the prison housed "persons convicted of serious crimes."[175] *Rhodes* is foundational to the expansion of incarceration because, by not enforcing architectural capacity rules, the opinion enabled states to prosecute more people without internalizing the costs of confinement in appropriate spaces.

The *Rhodes* decision brings me to a third facet of the constitutional law of punishment. Whether prompted by challenges to sentences or prison conditions and whether reviewing state or federal legislation or executive actions by prison officials, judges regularly invoke a presumption of deference. Distinctions between legislative and executive authority, between senior or lower-level officials within agencies, and between state and federal governments could provide the basis for different forms of deference, predicated on separation of powers and federalism. Indeed, in some cases, judges explain that corrections departments have special expertise, underscore the importance of majoritarian decision-making, or invoke federalism as a constraint on intervention.

Yet in the main, constitutional punishment law does not vary depending on whether a person is convicted in state or federal court, or whether the punishment is imposed through legislation or executive action. Rather, judges insist

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170. Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

171. *Id.* at 346.

172. *Id.* (quoting Gregg v. Georgia, 428 U.S. 153, 183 (1976)).

173. *See Estelle*, 429 U.S. at 103.

174. Chapman v. Rhodes, 434 F. Supp. 1007, 1021 (S.D. Ohio 1977), *aff'd*, 624 F.2d 1099 (6th Cir. 1980), *rev'd*, 452 U.S. 337 (1981).

175. *Rhodes*, 452 U.S. at 349. The Court had, by then, also upheld double celling for pretrial detainees. *See* Bell v. Wolfish, 441 U.S. 520 (1979). The trial judge had distinguished that ruling on the grounds that such conditions were short-term, as contrasted with the years that people held in the prison would have to spend in such density. Chapman v. Rhodes, 434 F. Supp. 1007, 1020 (S.D. Ohio 1977)

that the political branches have the primary role in crafting and meting out punishments and that judicial overrides should be the exception.[176]

Fourth, animating that doctrine of deference is concern about stopping points, which Justices often expressly acknowledge.[177] If the forfeiture of Richard Austin's business is too great a penalty and Tyson Timbs's loss of his Land Rover may also be excessive, what about $500 fines imposed on individuals who have no way to pay them? If whipping is impermissible, what about putting someone in solitary confinement, limiting food, or transferring a person far from home?

Such slippery slopes are, not surprisingly, constantly asserted by governments arguing that courts should extricate themselves from punishment oversight. As early as 1974, when the law of prison conditions was just emerging, the Court heard a case about whether a state had unfettered authority to void earned "good-time" credits.[178] The Attorney General of Nebraska warned the Court that state prison administrators were wondering "if incarceration is any longer a legal form of punishment for those convicted of crimes."[179]

Hyperbolic and, at one level, *correct*. As courts responded by directing prison administrators to make changes, courts did *end* the lawless "form of punishment" that *was* incarceration in many jurisdictions at the time. Governments lost the total control that they had asserted was intrinsic to their administration of prisons.

For example, when the Court held in 1974 that "no iron curtain" separated prisons from the Constitution and that states had to provide due-process-compliant hearings before withdrawing good-time credits,[180] the Court set in motion profound changes in the daily regime of institutions. That mandate has been operationalized by corrections departments around the country. One illustration

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176. *See, e.g.,* Sharon Dolovich, *Forms of Deference in Prison Law*, 24 FED. SENT'G REP. 245, 245-59 (2012). As I discuss, courts accord deference to legislative and to executive decision-making (including lower-echelon state actors) on punishment and do not, counterintuitively for those steeped in the literature analyzing the distinctions between those two branches, vary the degree of deference depending on whether a contested practice comes from one branch or the other.

177. The idea that deference made sense when line-drawing was difficult was discussed in *Rummel v. Estelle*, 445 U.S. 263 (1980), upholding a mandatory life sentence for three crimes that amounted to theft of $230. Justice Rehnquist's majority opinion stated that "[p]enologists themselves have been unable to agree whether sentences should be light or heavy, discretionary or determinate. This uncertainty reinforces our conviction that any 'nationwide trend' toward lighter, discretionary sentences must find its source and is sustaining force in the legislatures, not in the federal courts." *Id.* at 283-84 (footnotes omitted).

178. Wolff v. McDonnell, 418 U.S. 539 (1974).

179. Brief for Petitioner at 16, *Wolff*, 418 U.S. at 539 (No. 73-679).

180. *Wolff*, 418 U.S. at 555-56.

comes from 2018 data in Oregon, when the state confined about 14,000 people in prison. Its Department of Corrections conducted more than 10,000 due-process disciplinary hearings, and in some thirteen percent, hearing officers dismissed the case.[181]

Another example of the Court's impact (intersecting with market incentives) comes from what happened after the 1976 decision in *Estelle v. Gamble* concluding that "deliberate indifference to serious medical needs" violates the Eighth Amendment. Although on remand Gamble lost his claim because of what the appellate court termed the "rigorous guidelines" imposed by the Supreme Court,[182] the decision has spawned structural injunctions and professional and corporate networks of prison health-care providers.[183] Lower courts have read the opinion to require the provision of mental-health services, screening for hepatitis C and administering the medicine that cures it, as well as medically assisted treatment (MAT) for certain forms of substance abuse.[184] These many cases can be summed up as a prohibition on creating conditions that are ruinous of people's health, even as painful accounts of correctional officials' interference with delivery and of medical failures are plentiful.[185]

By the 1980s, however, courts' willingness to reconsider other aspects of prisons subsided. Part of the retreat came from the enormity of the task. What was (and is) the metric by which to determine the legality of sentences and of

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181. Telephone interview with the Assistant Inspector General for Hearings, Oregon Department of Corrections (Nov. 15, 2019); E-mail from the Assistant Inspector General for Hearings, Oregon Department of Corrections, to Judith Resnik, Arthur Liman Professor of Law, Yale Law School (Nov. 18, 2019) (on file with author).

182. Within nine months of the Supreme Court's ruling, the appellate court dismissed Gamble's case because he could not meet the burden the Court had imposed of showing the prison system's indifference. Gamble v. Estelle, 554 F.2d 653, 653-54 (5th Cir. 1977) (per curiam). That outcome was forecast in part by Justice Stevens's dissent, in which he objected to the majority's focus on the "subjective motivation of persons accused of violating the Eighth Amendment" rather than clarifying that the allegations, pleaded pro se, were sufficient to allege a violation of the "the standard of care required by the Constitution." Estelle v. Gamble, 429 U.S. 97, 109 (Stevens, J., dissenting). Justice Stevens would have held intent irrelevant; whether the alleged failures "were the product of design, negligence, or mere poverty, they were cruel and inhuman." *Id.* at 116-17.

183. *See, e.g.,* Brown v. Plata, 563 U.S. 493 (2011).

184. Hoffer v. Inch, 382 F. Supp. 3d 1288 (N.D. Fla. 2019); Hoffer v. Jones, 323 F.R.D. 694 (N.D. Fla. 2017); Hoffer v. Jones, 290 F. Supp 2d. 1292 (N.D. Fla. 2017). These three cases have been consolidated and an appeal has been filed in the Eleventh Circuit. Hoffer v. Inch, No. 19-11921 (11th Cir. 2019); *see also* Michael Linden, Sam Marullo, Curtis Bone, Declan T. Barry & Kristen Bell, *Prisoners as Patients: The Opioid Epidemic, Medication-Assisted Treatment, and the Eighth Amendment*, 46 J.L., MED., & ETHICS 252, 252-53 (2018).

185. The experiences of the doctor who had been the medical director for Rikers Island provide a detailed illustration of the failures of care. *See* HOMER VENTERS, LIFE AND DEATH IN RIKERS ISLAND (2019).

prison practices? State legislatures always justify their sentences as good for the body politic. Prison officials likewise explain what they do in terms of expertise, cost, and safety. One or more of the standard penological purposes can be marshalled to justify sanctions, as evidenced by decisions discussing deterrence and retribution in support of upholding the death penalty.[186] Where is the line between the rights the Constitution protects and decisions left to legislators or to prison officials?

A good deal of legal commentary responds by looking for answers in the interpretative approaches to the Constitution that jurists chose.[187] Law professors debate the appropriate sources informing the meaning of the words "cruel" and "unusual,"[188] the interaction of these words, the baselines by which to assess either, the relevance of intent and impact,[189] and whether the Eighth Amendment's constraints have different effects on judges, legislators, and the executive branch.[190] Yet punishment jurisprudence entails visceral responses by Justices that result in their stopping certain modes of punishment.

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186. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 183-87 (1976) (plurality opinion).

187. Scholars debate, for example, the import of the word "and" in the phrase "cruel and unusual," as contrasted with parallel state constitutional clauses that have the phrase "cruel or unusual." *See, e.g.*, Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?,* 87 WASH. U. L. REV. 567 (2010); Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 839-42 (1969); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1896 (1833).

188. John F. Stinneford, *The Original Meaning of 'Cruel'*, 105 GEO. L.J. 441 (2017).

189. Margo Schlanger, *The Constitutional Law of Incarceration, Reconfigured*, 103 CORNELL L. REV. 357 (2018); Stinneford, *supra* note 188.

190. While the Supreme Court has, since the 1960s, assumed that the Eighth Amendment applies to prison officials, Justice Thomas has argued that it does not but is limited to governing sentences imposed. *See, e.g.*, Hudson v. McMillian, 503 U.S. 1, 17 (1992) (Thomas, J., dissenting); Helling v. McKinney, 509 U.S. 25, 40 (1993) (Thomas, J., dissenting); Christopher E. Smith, *Rights Behind Bars: The Distinctive Viewpoint of Clarence Thomas*, 88 DETROIT MERCY L. REV. 829 (2011); Linda Greenhouse, Opinion, *Clarence Thomas, Silent but Sure*, N.Y. TIMES (Mar. 11, 2010, 9:37 PM), https://opinionator.blogs.nytimes.com/2010/03/11/clarence-thomas-silent-but-sure [https://perma.cc/VT59-27P3]. Yet Justice Thomas has on occasion joined decisions that assume the application of the Eighth Amendment. *See, e.g.*, Sandin v. Conner, 515 U.S. 472, 487 n.11 (1995). Others view the Eighth Amendment as primarily limiting the punishments that judges could impose. *See* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 133-34 (2012). What is "unusual" is likewise debated. One view is that a punishment is unusual if it departs from "longstanding common usage." *See* John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1749-51 (2008). That approach requires measuring both what counts as a common usage and as a departure. *Id.* at 1778-817.

Thus, a fifth facet of constitutional punishment law is that it cannot be placed into analytic silos or neatly integrated through a uniform approach because Justices have generated a motley crew of concepts to justify when to acquiesce and when to overrule the punishment practices of the other branches.[191] Recall Chief Justice Warren's distress in 1958 at denationalization, which the Court considered soon after fascism and World War II had dislocated millions. Rendering people stateless was unconstitutional because the Eighth Amendment enshrined "nothing less than the dignity of man."[192] Justice Powell voiced comparable concern for the destructive power of the state in his 1980 dissent in *Rummel v. Estelle*, which tolerated California's mandatory life sentence for a third theft when the total sum stolen was $230. Justice Powell read the Constitution to license courts to consider "disproportionality" as well as "barbarous methods of punishment"; the focus had to be on what a person deserved, and "not simply on whether punishment would serve a utilitarian goal."[193]

In 1989, Justice Scalia likewise reported that some punishments were intolerable. Even as he posited himself a loyalist to original meaning, Justice Scalia famously commented that he could not imagine that "any federal judge"—including those considering "themselves originalists"—would uphold a state law authorizing "public lashing or branding."[194] And he did not address whether starving, leaving individuals naked, or holding people in the freezing cold or in extreme heat was permissible—perhaps because such inflictions seemed so obviously barbaric, even though all of them have been imposed during the last seventy years.

Sixth, to date, the "usual" has not been central when judges evaluate prison conditions under the Eighth Amendment but has become relevant to decisions on procedural-due-process claims under the Fourteenth Amendment. In the last several decades, litigation has documented terrible treatment in prisons around

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191. Richard Posner called the Eighth Amendment ("like much else in the Bill of Rights") a "Rorschach test," in which judges see "the reflection of his or her own values, shaped by personal experience and temperament as well as by historical reflection, public opinion, and other sources of moral judgment." Johnson v. Phelan, 69 F.3d 144, 151 (7th Cir. 1995) (Posner, J., concurring in part and dissenting in part). He objected to the majority's conclusion that the Constitution did not limit "cross-sex monitoring" in prison. *Id.* at 153.

192. Trop v. Dulles, 356 U.S. 86, 100 (1958).

193. 445 U.S. 263, 288 (Powell, J., dissenting). Justices Brennan, Marshall, and Stevens joined Justice Powell. *Id.* at 285. Justice Powell offered three "objective factors": the nature of the offense, the sentence imposed by other jurisdictions for the same crime, and what other criminals within the same jurisdiction received. *Id.* at 295.

194. Antonin Scalia, *Originalism, The Lesser Evil*, 57 U. CINN. L. REV. 849, 861 (1989). In a 2013 interview, Justice Scalia recanted. *See* Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 4, 2013), https://nymag.com/news/features/antonin-scalia-2013-10 [https://perma.cc/G237-4PQJ].

the country. In the late 1960s, Arkansas was an outlier in whipping people. But Arkansas's prisons, with their crowded, dirty, and violent conditions, were not atypical when judges held them unconstitutional.[195] Similarly, the holding in 1976 about deliberate indifference to known medical needs did not rest on a finding that Texas's lack of medical care was unusual. More generally, outlawing the squalor of prison conditions in dozens of states required judges to ignore that such degradation was commonplace across the United States.[196] In short, whether self-avowed textualists, originalists, or committed to "evolving standards of decency" and human dignity, courts on occasion find horrific conditions constitutionally intolerable.

Yet in considering procedural-due-process claims, the Court now requires inquiries into whether prison officials are proposing to subject individuals to "atypical" (that is, unusual) prison conditions. Beginning in the mid-1970s and formalized in the mid-1990s, the Court circumscribed access to judicial oversight of correctional decisions about transfers of prisoners from one facility to another or to segregation within a facility. To state a claim, the Court required prisoners to demonstrate that they have been subjected to an "atypical and significant hardship."[197] The Court has not specified the baseline from which to assess atypicality.[198] In the voluminous case law, baselines vary; some lower courts look to

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195. Jackson v. Bishop, 404 F.2d 571, 579-81 (8th Cir. 1968); Holt v. Sarver, 309 F. Supp. 362 (E.D. Ark. 1970), *aff'd and remanded*, 442 F.2d 304 (8th Cir. 1971). The Supreme Court reviewed aspects of this litigation in *Hutto v. Finney*, 437 U.S. 678 (1978).

196. *See, e.g.*, Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala 1976), *aff'd in part, rev'd in part and remanded sub nom*. Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. granted in part*, *judgment rev'd in part sub nom*. Alabama v. Pugh, 438 U.S. 781 (1978); Palmigiano v. DiPrete, 700 F. Supp. 1180 (D.R.I. 1988); Palmigiano v. Garrahy, 639 F. Supp. 244 (D.R.I. 1986).

This eclectic and capacious approach to constitutional interpretation has parallels in other areas of the Court's jurisprudence. For example, some members of the Supreme Court have invoked the Eleventh Amendment to expand the protections of sovereign immunity outside the text (which specifies only that the federal courts shall not hear cases brought by citizens of one state against another). In *Alden v. Maine*, 527 U.S. 706 (1999), for example, Justice Kennedy wrote that "States' immunity from suit is demarcated not by the text of the Amendment alone but by fundamental postulates implicit in the constitutional design." *Id.* at 728-29. Just as several Justices have moved beyond text in the context of the Eleventh Amendment, some Justices also approach the Eighth Amendment by looking to what it stands for. Whether five members of the current Court will continue to do so remains unclear. *See, e.g.,* Bucklew v. Precythe, 139 S. Ct. 1112 (2019), discussed *infra*, notes 217-222 and accompanying text; Brown v. Plata, 563 U.S. 493, 547 (2011) (Scalia, J., dissenting, joined by Thomas, J.); *id.* at 564 (Alito, J., dissenting, joined by Roberts, C.J.), discussed *infra* notes 203, 205, 211 and accompanying text.

197. *See* Sandin v. Connor, 515 U.S. 472, 484 (1995); Wilkinson v. Austin, 545 U.S. 209, 223 (2005).

198. *See Wilkinson*, 545 U.S. at 223.

conditions in a particular facility, to people held in general population, or to the most restrictive security settings a prison imposes.[199]

Seventh, understanding the Court's decisions on punishment requires knowing their dates. As my sketch of more than a hundred years of law reflects, the door-opening decisions of the 1960s and 1970s were artifacts of the civil-rights revolution. Congress joined judges by authorizing attorneys' fee awards to successful plaintiffs in 1976 and by dispatching the Department of Justice in 1980 to pursue claims on behalf of institutionalized persons whose civil rights were violated by states.[200]

The door-closing rulings (like *Rhodes v. Chapman*) came as the country shifted from concerns about race and poverty to a "war on crime" and a "war on drugs."[201] In the 1980s, more than thirty states amended their constitutions to protect victims' rights;[202] none added provisions to protect prisoners. Again, approaches in the federal courts and Congress were parallel. In the 1990s, Congress provided new funds for prison construction and imposed new burdens on individuals and groups of prisoners seeking judicial remedies for convictions and conditions of confinement.[203]

The constitutional law of that decade reflected the retreat. The Court shaped rules, some condoning the use of the death penalty and others curtailing access to courts to argue about punishment's illegitimacy.[204] Further, during these

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199. *See, e.g.*, Hatch v. Dist. of Columbia, 184 F.3d 846 (D.C. Cir. 1999); Sealey v. Giltner, 197 F.3d 578 (2d Cir. 1999).

200. Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2018); Civil Rights of Institutionalized Persons Act of 1980, Pub. L. No. 96-247, 94 Stat. 349 (codified as amended in scattered sections of 42 U.S.C. (2018)).

201. Recent analyses of what brought the United States to its current massive numbers of incarcerated individuals come from MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010); MARIE GOTTSCHALK, CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF POLITICS (2015); and ELIZABETH HINTON, FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA (2016).

202. *See* Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 614 (2009). Others are critical of a role at sentencing for victims. *See* Kristin Henning, *What's Wrong with Victims' Rights in Juvenile Courts?: Retributive Versus Rehabilitative Systems of Justice*, 91 CALIF. L. REV. 1107 (2009).

203. Congress appropriated nearly $8 billion in funding for prisons in 1994. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 20109, 108 Stat. 1818. Congress also imposed new limitations on individuals contesting the legality of their convictions or conditions of confinement. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214; Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, tit. VIII, 110 Stat. 1321; Margo Schlanger, *Trends in Prisoner Litigation as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153 (2015).

204. Analysis of the Court's retreat comes from Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development*

years, the Court expanded its deference to correctional officials through a variety of tests. One formulation, discussed above, is that prisoners can only argue for procedural due process if they can show that a particular prison decision imposes an "atypical and significant hardship."[205] Through equating what was typical in prison with what was constitutional, the Court could be seen to have returned to a version of its "hands-off" doctrine.

But not quite. The "atypical" test means that judges keep for themselves some form of oversight—which is the eighth facet of this integration of constitutional punishment law. Constitutional rights, even when constricted, matter. The deference paid to legislators and correctional officials is not absolute, and the fear of slippery slopes does not always preclude merits review. Between 1995 and 2019, the exacting "atypical and significant hardship" test has resulted in hundreds of federal lower-court opinions quoting those words when assessing government-imposed punishment.[206] This case law provides windows into the degradations imposed by solitary confinement, as some judges object and many others tolerate the housing of people in utter isolation in tiny spaces for years on end. The documentation of conditions has become part of popular mobilization and legislation action aiming at solitary's abolition.

The volume of contemporary lower-court law brings me to my final point: that revisions are needed in the language and metrics of the current constitutional law of punishment. Justices continue to use frames provided by Beccaria, Bentham, and their followers in penology and criminology. Even as many of those analyses were animated by "humanitarian and social" concerns for prisoners,[207] their terms and precepts were formulated in eras when convicted persons had no power to stop the state from imposing any of its chosen methods of punishment. Because many practices licensed before the 1960s are now unlawful,

and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences, 113 MICH. L. REV. 1219 (2015).

205. Wilkinson v. Austin, 545 U.S. 209 (2005); Sandin v. Conner, 515 U.S. 472 (1995). *See generally* Judith Resnik, *Not Isolating Isolation*, *in* SOLITARY CONFINEMENT 89 (Jules Lobel & Peter Scharff Smith eds., 2019). A body of law, exemplified by the Supreme Court's decision in *Brown v. Plata*, 563 U.S. 493 (2011), continued to address conditions of confinement under the Eighth Amendment.

206. *See* Judith Resnik, Hirsa Amin, Sophie Angelis, Megan Hauptman, Laura Kokotailo, Aseem Mehta, Madeline Silva, Tor Tarantola & Meredith Wheeler, *The Relationship of Typicality to the Constitutionality of Punishment: The Practices of Solitary Confinement and the Analytics of its Legality*, 114 NW. U. L. REV. (forthcoming 2020).

207. That phrase comes from the opening explanation of the League of Nations' 1934 Minimum Standard Rules for the Treatment of Prisoners. *See* Penal Administration, *Report of the Fifth Committee to the Assembly*, League of Nations Doc. A.64 1930 IV (1930), https://yale.app.box.com/file/428394464476 [https://perma.cc/P8EC-2RMS].

the description of the justifications for punishment and the tests of punishment's legality are out of sync.

As I have recounted, the relationship of the state to criminal defendants and prisoners has radically changed. Affirmative duties, albeit far from universally implemented, exist.[208] Justice Powell's "minimal civilized measure of life's necessities" have come to include adequate amounts of food, exercise, clothes, heat, safety, and health care.[209] And more than protectionist care (being "adequately warehoused"[210]) is required. Those obligations flow from recognition of incarcerated people's dignity or analyses of constitutional rights other than the Eighth Amendment.[211] As a consequence, prison officials cannot ban prisoners from marrying, practicing their religion, reaching out to courts, or reading and writing, nor can prison officials segregate by race or impose certain punishments without according procedural-due-process protections.

This revolution in prisoners' rights is familiar in the sense that it has parallels in the development of the rights of detainees, schoolchildren, recipients of government benefits, and anyone walking down the street. Whether dealing with a

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208. *See* CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS (John J. Gibbons & Nicholas de B. Katzenbach) (2006). Recent examples include California's treatment of prisoners in the first decade of the twenty-first century, as chronicled in *Brown v. Plata*, 563 U.S. 493 (2011), and current litigation about the conditions imposed in Alabama. *See* Braggs v. Dunn, 257 F. Supp. 3d 1171 (D. Ala. 2017); Braggs v. Dunn, 367 F. Supp. 3d 1340 (D. Ala. 2019).

209. One caveat is that, as noted *supra* note 16 and accompanying text, a federal district court in 2016 concluded that "legitimate penological interests" rendered a state civil death statute barring people sentenced to life from marrying to meet the rational basis test. *See* Ferreira v. Wall, No. 15-219-ML, 2016 WL 8235110 (D.R.I. Oct. 26, 2016). That court read *Turner v. Safley*, 482 U.S. 78, 87 (1987), which invalidated a prison regulation that banned marriage, to have left open the legality of state statutes prohibiting marriage for subsets of incarcerated persons. The cases on association and expressive rights as well as those on conditions could be read as founded on liberty and/or dignity. Based on an analysis of the California prison litigation of the last two decades, Jonathan Simon has argued that dignity has become an important source of constitutional constraints on the treatment of prisoners and that American law ought to turn more to it. *See* JONATHAN SIMON, MASS INCARCERATION ON TRIAL (2016).

210. Laaman v. Helgemoe, 437 F. Supp. 269, 306 (D.N.H. 1977). That court, having found that "New Hampshire felons [were] adequately warehoused" held unconstitutional the conditions that failed to respond to "the whole person as a human being." *Id.* at 307, 315-31. *See* discussion *infra* notes 223-234 and accompanying text.

211. *See* Trop v. Dulles, 356 U.S. 86, 100-01 (1958); Brown v. Plata, 563 U.S. 493, 510 (2011); Michael Tonry, *Punishment and Human Dignity: Sentencing Principles for Twenty-First Century America*, 47 CRIME & JUST. 119 (2018); SIMON, *supra* note 209. Another view is that the principle of parsimony should guide punishment's applications. *See* THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014).

student, a recipient of social benefits, a person encountering the police, a criminal defendant, or an incarcerated person, state actors are in roles that have been restructured through social movements marshalling legal help. The jobs of correctional staff, state teachers and administrators, police officers, and judges have been recast through mandates to accord fair and nondiscriminatory treatment when delivering services, adjudicating, or protecting the body public and the fisc. Just as police officers have to understand their interactions with the individuals they stop (frisked, arrested, or not) as purposeful exercises of government power, state actors tasked with punishment have to understand themselves as safeguarding and respecting the rights of individuals when punishing them.

VI. RUINATION

Bringing the various legal precepts together reveals the contours of an anti-ruination principle that should be named to reflect and shift government practices and individuals' experiences. States in this constitutional order cannot aim to take a person "down" or, borrowing from the English historians quoted in *Timbs*, to "ruin" a person. Translating this proposition into the Court's reliance on a language of purposefulness, state punishment has to preserve (rather than diminish) people's capacities to function physically, mentally, and socially, even as governments may also aim to deter, incapacitate, be retributivist, rehabilitative, protect institutional safety, and minimize costs.

One could posit that this proposition is a constraint *on* the various purposes of punishment as well as a goal *of* punishment. Locating anti-ruination on both sides of that ledger marks that prisoners, believing that the Constitution spoke to them, transformed ideas as well as practices about how governments can punish them. The new era of punishment they produced has generated a complex constitutional relationship between governments and the people whose autonomy they constrain.

Putting this proposition into practice is harder than stating it as an obligation. What does anti-ruination mean and how does it relate to arguments about whether states ought (or have) to provide rehabilitation? Concerns about what I am calling ruin (and what others called debilitation) came to the fore in some of the 1970s institutional-conditions decisions. Judges recoiled not only at the filth and violence but also at the idleness stemming from the absence of any opportunities for education, recreation, and vocational training.[212] Their decisions

212. In the Arkansas prison litigation, for example, Chief Judge J. Smith Henley stated: "[t]he absence of an affirmative program of training and rehabilitation may have constitutional significance where in the absence of such a program conditions and practices exist which actually militate against reform and rehabilitation." Holt v. Sarver (*Holt II*), 309 F. Supp. 362, 379 (E.D. Ark. 1970). Judge Frank Johnson, ruling on the constitutionality of Alabama's prisons,

recorded distress at the "degeneration" of individuals and called for programs to buffer against personal deterioration.[213] Parallel concerns can be found in cases about the involuntary confinement of mentally disabled individuals; judges wrote about a right to "habilitation" as a way to preserve whatever skills people possessed upon entering and to buffer against deterioration or degeneration.[214]

But after some district judges issued injunctions requiring activities and programs for prisoners, appellate courts pulled back. Illustrative is a 1977 statement from the Fifth Circuit that, when a state "furnishes its prisoners with reasonably adequate food, clothing, shelter, sanitation, medical care, and personal safety, so as to avoid the imposition of cruel and unusual punishment, that ends its obligations under Amendment Eight."[215] That court insisted that the Constitution did not obligate states to provide "prisoners, as individuals or as a group . . . with any and every amenity which some person may think is needed to avoid mental, physical, and emotional deterioration."[216] While prohibiting governments from ruining people does not require "any and every amenity," it does entail taking seriously the task of preventing "mental, physical, and emotional deterioration." That mandate is what the law of constitutional punishments should be read to mean.

Yet the obvious rebuttal is that the death penalty, LWOP, solitary confinement, and incarceration itself are in tension with the anti-ruination principle. A vivid example comes from the same term in which *Timbs* was decided. When interpreting the Cruel and Unusual Punishments Clause in 2019 in *Bucklew v. Precythe*, a five-person majority permitted use of a method of execution that would be brutally painful.[217] As in *Timbs*, the Court's opinion is laced with his-

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wrote that a prison system could not "be operated in such a manner that it impedes an inmate's ability to attempt rehabilitation, or simply to avoid physical, mental or social deterioration." Pugh v. Locke, 406 F. Supp. 318, 329 (M.D. Ala. 1976). Judge Hugh Henry Bownes invoked both decisions in his lengthy opinion about conditions in New Hampshire's prison, and he described "[i]dleness and boredom" as sources of "debilitation." Laaman v. Helgemoe, 437 F. Supp. 269, 317 (D.N.H. 1977).

213. *See, e.g.*, *Laaman*, 437 F. Supp. at 315-16. Judge Bownes distinguished a "constitutional right to rehabilitation" from a right to "avoid physical, mental or social degeneration." *Id.* at 316.

214. *See, e.g.*, Youngberg v. Romeo, 457 U.S. 326, 325, 327 (1982) (Blackmun, J., concurring, joined by Brennan & O'Connor, J.J.). Another formulation was a "right to treatment" for the involuntarily civilly confined. *See* Wyatt v. Stickney, 325 F. Supp. 781, 784 (M.D. Ala. 1971), *aff'd in part, rev'd in part sub nom.* Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

215. Newman v. Alabama, 559 F.2d 283, 291 (5th Cir. 1977), *aff'g in part, rev'g in part, and remanding sub nom.* Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976).

216. *Newman*, 559 F.2d at 291.

217. Bucklew v. Precythe, 139 S. Ct. 1112 (2019).

tory, but unlike *Timbs*, readers learn nothing about the risk of state abuse of punishment powers.[218] Further, the majority refused to focus on the suffering of the punished, as it had when explaining the Excessive Fines Clause.[219] Instead, the majority affiliated itself with a historical approach that looked to the founding era to learn about what punishments were in common usage.[220] This framing can be found in other decisions by current members of the Court. For example, Justice Thomas has disavowed the application of the Eighth Amendment to prisons, and he and other Justices have raised objections to class-wide relief in prison conditions litigation (and otherwise).[221]

Given that all Justices agreed in *Timbs* about the application of the Excessive Fines Clause to states and its history of protecting against the devastating power of the state, how can Justices both hold that governments can constitutionally execute individuals and conclude that the purpose of the Excessive Fines Clause was to insulate people (or citizens) from state efforts to ruin them economically? Some Justices could respond that doing so is loyal to the Constitution's historical meaning. Further, under a purposivist approach, Justices could view legislative authority for the death penalty as rationally serving the penological purposes of incapacitation, deterrence, and retribution.[222] In contrast, for people who have committed crimes and are not executed, the state has no purpose in rendering them dysfunctional—either in their communities (per *Timbs*) or in prison (under my reading of the law). Of course, were my view of the constitutional import of punishment law embraced—that it obliges the state to protect the legal personhood of all persons—it would also make death a sanction beyond state power.

Imprisonment in general and LWOP in particular raise questions about their fit with an anti-ruination principle. Substantial evidence documents the health

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218. Justice Breyer's dissent argued that the Eighth Amendment is not a "static prohibition" but bans "gruesome punishments" (whether used at the Founding or not) that entail "excessive suffering." Bucklew v. Precythe, 139 S. Ct. 1112, 1136, 1144 (2019) (Breyer, J., dissenting).

219. Justice Gorsuch's opinion for the Court described in disquieting detail some punishments of the founding era; he concluded that "the Eighth Amendment does not guarantee a prisoner a painless death—something that, of course, isn't guaranteed to many people, including most victims of capital crimes," but forbids "long disused (unusual) forms of punishment that intensified the sentence of death with a (cruel) 'superadd[ition]'" of "'terror, pain, or disgrace.'" *Bucklew*, 139 S. Ct. at 1124 (citing Baze v. Rees, 553 U.S. 35, 48 (2008)).

220. *Id.* at 1112, 1124.

221. *See* Brown v. Plata, 563 U.S. 493, 550 (2011) (Scalia, J., dissenting, joined by Thomas, J.); *id.* at 565 (Alito, J., dissenting, joined by Roberts C.J.).

222. *See* Phoebe C. Ellsworth & Lee Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 CRIME & DELINQ. 116 (1983).

hazards of incarceration for the people living and working in prisons.[223] Abolition is one response.[224] Another is to reconstitute what incarceration entails. The destructive force of incarceration is an artifact of decisions about prisons' structure. As counterintuitive as it may seem, some facilities can be organized to respect degrees of autonomy as well as to provide support for individuals, often in need of mental-health care and treatment for addiction.[225] Illustrative are efforts to make confinement as close to community life as possible by having people wear their own clothes, receive MAT and intensive therapy, work in and outside of facilities, and participate in the political life of their communities such as through voting. Further, when prisons regularly provide family access and conjugal visits (as a few do), being in prison would not be so destructive to parenting and other relationships, nor would it end the possibility of procreation.

On the other hand, a ready example of "ruin" comes from the extensive documentation of the harms that profound isolation inflicts on people's brains and bodies, as well as the suffering it imposes.[226] Humans, like other animals, rely

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223. *See, e.g.,* Craig Haney, *The Psychological Effects of Imprisonment*, *in* THE OXFORD HANDBOOK OF SENTENCING AND CORRECTIONS 584-605 (Joan Petersilia & Kevin R. Reitz eds., 2012). Findings of higher suicide rates and stress-related illness for staff include Steven J. Stack & Olga Tsoudis, *Suicide Risk Among Correctional Officers: A Logistic Regression Analysis*, 3 ARCHIVES SUICIDE RES. 183 (1997), https://link.springer.com/article/10.1023/A:1009677102357 [https://perma.cc/33EH-WTJN]; Frances E. Cheek & Marie Di Stefano Miller, *The Experience of Stress for Correction Officers: A Double-Bind Theory of Correctional Stress*, 11 J. CRIM. JUST. 105 (1983), https://www.sciencedirect.com/science/article/pii/0047235283900466 [https://perma.cc/A94X-AT7H]; F. E. Cheek, *Stress Management for Correctional Officers and Their Families*, AM. CORRECTIONAL ASS'N (1984). *See generally* Cyrus Ahalt, Colette S. Peters, Heidi Steward & Brie A. Williams, *Transforming Prison Culture to Improve Correctional Staff Wellness and Outcomes for Adults in Custody "The Oregon Way,"* 8 ADVANCING CORRECTIONS J. (2019).

224. *See Allegra McLeod, Envisioning Abolition Democracy*, 132 HARV. L. REV. 1613 (2019); ANGELA Y. DAVIS, ARE PRISONS OBSOLETE? (2003).

225. Some organizations, for example, are dedicated to these reforms. AMEND, https://amend.us [https://perma.cc/ZSX6-GC9G]; Karen Bouffard, *States Put Norway-Style Prison Reforms to Work in the U.S.*, DETROIT NEWS (Oct. 11, 2019, 11:15 AM EST), https://www.detroitnews.com/story/news/special-reports/2019/10/11/states-put-norway-style-prison-reforms-to-work/1682876001 [https://perma.cc/GZ7F-8C36].

226. *See, e.g.*, ALBERT WOODFOX, SOLITARY: MY STORY OF TRANSFORMATION AND HOPE (2019); Dwayne Betts, *Only Once I Thought About Suicide*, 125 YALE L.J.F. 222 (2016), https://www.yalelawjournal.org/forum/only-once-i-thought-about-suicide [https://perma.cc/H8QJ-3UPJ]; Lauren Brinkley-Rubenstein, Josie Sivaraman, David L. Rosen, David H. Cloud, Gary Junker, Scott Proescholdbell, Meghan Shanahan & Shabbar I. Ranapurwala, *Association of Restrictive Housing During Incarceration with Mortality After Release*, JAMA NETWORK OPEN (2019), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2752350 [https://perma.cc/WDK2-ANUD]; Craig Haney, *Restricting the Use of Solitary Confinement*, ANN. REV. CRIMINOLOGY 285, 295 (2018); TERRY ALLEN KUPERS, SOLITARY: THE INSIDE STORY OF SUPERMAX ISOLATION AND HOW WE CAN ABOLISH IT (2017). An overview of the history

on social interaction, on the rhythms of the sun, and on physical space sufficient for movement and exercise. Setting out to deprive people of sociability, leaving them in darkness or in perpetual light, and limiting their environment to a small cubical should be understood — as a few lower courts now have — to render solitary confinement an impermissible form of punishment.[227]

This Essay has been court-centric, both because the 2019 ruling in *Timbs* was its prompt and because prisoners' succeeded in enlisting judges to revise the permissible in punishment. But the work of implementing an anti-ruination approach to punishment has not been and need not be limited to or focused on courts. Movements now underway to limit the use of incarceration are called "right on crime" and "smart on crime," and they rely on a mix of moral and fiscal reform agendas often associated with conservative politics.[228] In 2010, the ACLU, expanding on a "stopmax" effort of the American Friends Service Committee, launched a "Stop Solitary" campaign that has garnered a good deal of attention.[229] Reform has also come from within, as prison administrators joined academics in documenting the use of isolation and in condemning its excesses. In 2016, the American Correctional Association revised its prison accreditation rules to circumscribe restrictive housing (the umbrella term for various kinds of solitary confinement) for subpopulations that include people under eighteen, those seeking safety given their sex/gender identity, or people with serious mental illness.[230] In 2017, the Colorado Department of Corrections issued regulations ending the placement of individuals in isolation for fifteen days or more.[231] Around

and its current use comes from David M. Shapiro, *Solitary Confinement in the Young Republic*, 133 HARV. L. REV. 542 (2019).

227. The harms to health have been part of the basis for some judges holding that solitary confinement constitutes cruel and unusual punishment. *See* Reynolds v. Arnone et al., No. 3:13-cv-1465(SRU), 2019 WL 4039015 (D. Conn. 2019), *appeal filed,* No. 19-2858 (2d. Cir. 2019); Porter v. Clark, 923 F.3d 348 (4th Cir. 2019); Reyes v. Clarke, 2:19-cv-00035 (W.D. Va. 2019).

228. *See* DAVID DAGAN & STEVEN M. TELES, PRISON BREAK: WHY CONSERVATIVES TURNED AGAINST MASS INCARCERATION (2016).

229. *See, e.g.*, Andalusia Knoll, *The National StopMax Campaign Conference*, LEFT TURN, http://www.leftturn.org/national-stopmax-campaign-conference [https://perma.cc/ST76-P8LV]; *We Can Stop Solitary*, AM. C.L. UNION, https://www.aclu.org/issues/prisoners-rights/solitary-confinement/we-can-stop-solitary [https://perma.cc/GZ3M-T8VJ].

230. The American Correctional Association calls for prisoners younger than 18 not to be placed in restrictive housing, and encourages periodic mental health screenings during periods of extended restrictive confinement. *Restrictive Housing Expected Practices*, AM. CORRECTIONAL ASS'N (2018), http://www.aca.org/ACA_Prod_IMIS/ACA_Member/Standards Accreditation/Standards/Restrictive_Housing_Committee/ACA_Member/Standards_and_Accreditation/Restrictive_Housing_Committee/Restrictive_Housing_Committee.aspx?hkey=458418a3-8c6c-48bb-93e2-b1fcbca482a2 [https://perma.cc/YBU9-96TQ].

231. *See* Rick Raemisch, *Why I Ended the Horror of Long-Term Solitary in Colorado's Prisons*, AM. C.L. UNION (Dec. 5 2018, 4:30 PM), https://www.aclu.org/blog/prisoners-rights/solitary

the country, other prison systems are revising policies to make it harder to put people into solitary confinement and to limit the degree of its isolation.[232] Legislatures have taken up the issues; several states have enacted statutes regulating solitary, and more bills have been proposed.[233]

Yet, while not assuming that change will necessarily come from the judiciary, I also believe that some of what has moved courts before is once again present. As I have explained, analysis of the constitutional law of punishment requires attending to the eras in which decisions are rendered. The potential for courts to recognize that the law has already begun to give meaning to an anti-ruination principle comes in part from its congruence with other contemporary currents. Across the political spectrum, the consensus is that the criminal law-enforcement system is dysfunctional. A wide array of reforms are emerging from within and outside of government. Prisoners and their families have mobilized support for changes through courts and otherwise. The people who run prisons are acutely aware of legal obligations. Moreover, prison officials see up close the neediness of the people imprisoned, many of whom struggle with mental-health issues and addiction, and they know the challenges that working in prisons imposes on often ill-equipped staff. One marker of pressures for change is that Congress, despite its members' discord, enacted the First Step Act. That legislation begins to regulate the overuse of imprisonment, calls for more services to incarcerated people, and offers more routes to exit.[234]

We are thus in *medias res*. The potential exists for a full-throttle commitment to the proposition that, in democratic orders, punishment practices cannot aim to ruin duly convicted individuals who, like everyone else, are rights-bearing individuals.[235] A host of questions would then arise about the metes and bounds

-confinement/why-i-ended-horror-long-term-solitary-colorados-prisons [https://perma.cc/5URK-Q5KL]; COLO. CODE REGS. § 650-03 (IV)(A)(2)(a) (2018).

232. *Working to Limit Restrictive Housing: Efforts in Four Jurisdictions to Make Changes*, ASS'N OF STATE CORRECTIONAL ADMINS. & LIMAN CTR. FOR PUB. INT. L. (Oct. 2018); https://law.yale.edu/sites/default/files/area/center/liman/document/asca_liman_2018_restrictive_housing_efforts_in_four_jurisdictions_to_make_changes.pdf [https://perma.cc/9T2U-BV8D].

233. *See, e.g.*, Isolated Confinement Restriction Act, N.J. Laws A314/S3261 (effective Aug. 1, 2020); *see also Regulating Restrictive Housing: State and Federal Legislation on Solitary Confinement as of July 1, 2019 A Research Brief*, LIMAN CTR. FOR PUB. INT. L. (July 18, 2019), https://law.yale.edu/sites/default/files/area/center/liman/document/restrictive_housing_legislation_research_brief.pdf [https://perma.cc/6HJL-NLSV].

234. First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194.

235. An obvious example of the reluctance to do so is the 1987 decision *McCleskey v. Kemp*, 481 U.S. 279 (1987). Justice Powell described the breadth of the task if race disparities (and "even gender") were to be factored into analyses of the constitutionality of punishment on individuals.

of anti-ruination, from the structural changes demanded to whether assessments need to be individualized. Evaluating punishment practices on the metric of anti-ruination should become the work of all branches of government, just as rethinking punishment has been central to the sentenced and incarcerated individuals who have propelled the new constitutional law on punishment.

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Id. at 316-19. *See* Reva B. Siegel, *Blind Justice: Why the Court Refused to Accept Statistical Evidence of Discriminatory Purpose in* McLeskey v. Kemp *– And Some Pathways for Change*, 112 NW. L. REV. 1269, 1279-81 (2018).

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