February 29 (Class 6) Life and Death Sentencing

Mass incarceration is the product of this country's last sentencing reform movement. Sentencing policy shifted away from rehabilitation towards the retributive, punitive model. At the same time, reformers across the political spectrum supported "truth in sentencing" initiatives, as well as efforts to limit the sentencing discretion of judges, whom many perceived as arbitrary and discriminatory in their sentencing choices. In seeking to standardize punishment, policymakers also attempted to bring white-collar sentences in line with sentences for other types of offenses. The combined result of these reforms was a massive and sustained ratcheting up of punishment for all offenses, with little ability to consider the individual circumstances of defendants to mitigate punishment. Courts abdicated any role that they might have played in tempering these harsh outcomes by essentially abandoning Eighth Amendment-based proportionality review of sentences, other than the death penalty.

Today the pendulum is swinging back. For the first time in roughly 40 years, there is widespread political support to reduce prison sentences. This has been driven by increased social mobilization around criminal justice issues, shifting attitudes regarding drugs, and fiscal concerns. In addition, although many believed that the jurisprudence of death would always be different, the Eighth Amendment has reemerged as a tool for challenging non-death sentences. This class surveys trends in U.S. sentencing laws; the different legal doctrines that structure sentencing today; and the changing role of the Eighth Amendment, which shows renewed promise as a vehicle for reform.

William J. Stuntz, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011) excerpt

Rummel v. Estelle, 445 U.S. 263 (1980) excerpt

Harmelin v. Michigan, 501 U.S. 957 (1991) excerpt

Case of Vinter And Others v. The United Kingdom, Applications Nos. 66069/09, 130/10 And 3896/10, (Jul. 9, 2013) excerpt

Press Release in *Trabelsi v. Belgium*, Application No. 140/10 (Apr. 9, 2014)

James Q. Whitman, *Harsh Justice* (2003), Introduction excerpt

James Q. Whitman, *Equality in Criminal Law: The Two Divergent Western Roads*, 1 J. Legal Analysis 119, (2009)

Sixth Amendment - Right to Jury Trial - Mandatory Minimum Sentences - Alleyne v. United States, 127 Harv. L. Rev. 248 (2013) excerpt (*Apprendi* and its progeny in 60 seconds)

Miller v. Alabama, 132 S. Ct. 2455 (2012) excerpt

Carol S. Steiker & Jordan M. Steiker, *The Death Penalty and Mass Incarceration: Convergences and Divergences*, 41 Am. J. Crim. L. 189 (2014)

Playbook for Change? States Reconsider Mandatory Sentences, Vera Institute of Justice (Feb. 2014) (only need to skim)

A Punishment Tsunami

The mid-twentieth century's lenient turn was the product of more detached police, more liberal prosecutors, and a political disconnect between a justice system that served one set of voters but was governed by another. Yet for all that, the justice system's sharp turn toward lenity remains a puzzle. There was no obvious policy reason why prison populations should have fallen in the teeth of rising crime, as they did in the North in the 1950s and throughout the country in the late 1960s and early 1970s. Nor was there any obvious political advantage to be gained by reducing criminal punishment, again in the midst of steeply rising

levels of criminal violence. Lenity was partly the consequence of suburbanites' indifference to rising urban crime. Still, by definition, indifference is less than passionate; it is hard to believe there were large political returns to be had for politicians who pushed the number of inmates in their jurisdictions downward. It seems safe to say that, had the mid-century drop in America's prison population never happened, no one would be surprised.

The punitive turn was different: it had both an obvious policy justification and carried the equally obvious promise of political benefit. The size of the increase in late twentieth-century prison populations may surprise, but the fact and timing of the increase should not.

The policy justification was simple: by the early 1970s, punishment per unit crime had fallen massively, and crime had risen massively, especially in increasingly violent cities. Recovering the justice system's ability and willingness to punish serious crimes was a legitimate goal, even a social necessity. Proof is impossible, but the low and falling prison populations of the 1960s and early 1970s probably contributed to rising levels of serious crime during those years—even though comparably low prison populations in the early 1900s seem not to have had a similar effect. The small number of inmates in the later period coincided with high and rising crime rates: much higher than anything northern cities saw in the twentieth century's early years. By the late 1960s, the moderately lenient justice system of a century ago had become something much more extreme. Wherever the line is between a merciful justice system and one that abandons all serious effort at crime control, the nation had crossed it. A turn toward more punishment was natural.

As for politics, the punitive turn was partly the consequence of the trends that preceded it. Simultaneously rising crime and falling punishment were bound to create a backlash, and the backlash was bound to result in rising prison populations. By providing focal points for public anger, the coincidence of urban race riots and pro-defendant Warren Court decisions like *Mapp* and *Miranda* helped to nationalize the backlash and made it more extreme when it came. Entrepreneurial politicians like George Wallace, Ronald Reagan, and Richard Nixon on the right and Lyndon Johnson, Robert Kennedy, and Nelson Rockefeller on the left tapped into that backlash and added to its force. None of this should

come as a surprise. Unlike the lenient turn of the 1950s and 1960s, the punitive turn that followed was inevitable.

Its scope and size *weren't* inevitable. Imprisonment rates did not just rise sharply in the late twentieth century; those rates quintupled. African American imprisonment rates came to exceed the rate at which Stalin's Soviet Union incarcerated its citizens. Residents of black neighborhoods increasingly believed, with reason, that their life choices were limited to those Pushkin identified two centuries ago: they could ally themselves with their prison-bound young men or with the system that bound them. Tyrants, traitors, prisoners—none were good options. No wonder black neighborhoods in the early twenty-first century, when imprisonment rates were reaching their peak, spawned a "don't snitch" movement.[13]

Why, then, did the punitive turn amount to a turn toward extremism and excess? We have explored two reasons: a political backlash that led to a partisan bidding war, and the rise of procedural rights crafted by the Supreme Court and the subsequent rise of rules governing the all-too-easy waiver of those rights. Four more reasons stand out. First, the punitive turn was so punitive because it was so long-lasting—and it lasted so long in large part because the crime wave that prompted it lasted even longer. Second, the allocation of budget authority—state and federal governments fund the prisons, and local governments pay for their own policing—made imprisonment cheap for local officials, who proceeded to impose far too much of it—which is why the populations of our cities are not only overpunished but also underpoliced. Third, the law of guilty pleas made such pleas easy for prosecutors to extract, which allowed the justice system to increase dramatically the ratio of convicted felons to prosecutors and defense lawyers. Fourth and finally, substantive criminal law changed in ways that likewise encouraged more guilty pleas and fewer jury trials. The law once gave juries and judges the power to decide whether the defendant had behaved badly enough to justify criminal punishment. Today's substantive law leaves that power in prosecutors' hands.

Take these points in turn. If the punitive turn went too far, it did so because it lasted for more than a generation, not a decade or two. The 1920s and 1930s also saw imprisonment rates rise sharply; the end of that

period witnessed a crime drop comparable with the one in the 1990s. Both times, punishment and crime rose in tandem while the justice system fought a drug war. Both times, after an extended period of failure, crime turned down sharply. Both times, the imprisonment rate kept rising for several years after crime began to fall. In the first period, the average annual rate of increase in the nation's imprisonment rate was 4 percent; in the second period, the rate of increase was 5 percent—higher, but not dramatically so. But the first period saw imprisonment rise for sixteen years; the latter period saw prison populations rise for twice that length of time. That fact, plus the harsh drug sentences of the late twentieth- and early twenty-first centuries (which had no counterpart in the Prohibition era), explains why imprisonment rose 85 percent in the 1920s and 1930s but more than 400 percent in the thirty years after 1972.[14]

In other words, America's inmate population rose so *high* because it rose for so *long*—and the wave of incarceration that swept over the country beginning in the mid-1970s lasted so long in large part because the crime wave that prompted it lasted even longer. Crime began rising in the Northeast in the early 1950s, spreading to the rest of the nation in the 1960s. After 1973, crime fell modestly in the nation as a whole, but the trends were different in high-crime cities, where crime continued to rise for the balance of the 1970s and again in the late 1980s. Depending on where in the country one lived, one saw either a thirty- or forty-year-long wave of violent crime. A thirty-year run-up in the prison population was a natural consequence. Instead of rising punishment driving crime rates down, rising urban crime drove punishment ever higher.[15] Causation was running in the wrong direction.

The second cause has to do with the politics of budgets, which gave local prosecutors every incentive to send as many defendants as possible to the ever-more-swollen state penitentiaries. States pay for those penitentiaries, but local officials—chiefly prosecutors and trial judges—make the decisions that fill them. To the local voters who elect those officials, and hence to the officials they elect, prison sentences are nearly a free good. Meanwhile, local governments, not states, pay more than 90 percent of the tab for the local police forces that are responsible for the overwhelming majority of street-level law enforcement.[16] Policing and imprisonment are substitutes: they are the two main ways governments spend

money to battle crime, and historically, more of one tends to mean less of the other. One of these alternatives is heavily subsidized; the other isn't. No wonder the number of urban police officers per unit population held steady in the 1970s and 1980s, while the imprisonment rate more than tripled. The upshot is a radically different justice system than America once had: in 1970, there were more than twice as many local police officers as prison inmates; today, there are more than twice as many prisoners as local cops.[17]

The point is not that this allocation of power and budget responsibility dictated a huge run-up in the prison population. Authority over prisons and policing was allocated in the same way in the 1960s and early 1970s, when prison populations were low and falling. Rather, the point is that once political pressure was brought to bear on local prosecutors to ramp up criminal punishment, as happened beginning in the mid-1970s, no force pushed in the opposite direction. Once the punitive turn got rolling, it kept rolling; there was nothing to stop it. The justice system became the rough equivalent of a vessel with no one at the wheel, its course and speed set by forces that were opaque even to the government officials who were subject to them.

The consequence was a failure of democratic governance. Where state and local officials alike were responsible for rising levels of imprisonment, neither was truly responsible. Prosecutors sent more and more defendants to state prisons in part because state legislators kept building more prison cells: a classic application of the *Field of Dreams* principle—if you build it, they will come. For their part, the legislators kept adding to their states' stock of prison beds because local prosecutors kept sending defendants to state prisons: if they're coming, you must build it. Neither set of officials fully controlled the process by which those prison beds were made and filled, so neither was able to slow or reverse that process. And the voters with the largest stake in that process—chiefly African American residents of high-crime city neighborhoods—had the smallest voice in the relevant decisions.

These claims run counter to the growing academic conventional wisdom that politicians consciously used the criminal justice system as an alternative means of governing the nation's poor.[18] That conventional wisdom gives too much credit to the politicians, whose conduct offers

little evidence that they were seeking to create a justice system like the one we have today. And if the politicians did consciously choose the system we have, their predecessors in the 1960s and early 1970s must have chosen the justice system *they* had: a justice system dominated by lenity, not severity. Absent a theory that explains why politicians' and voters' preferences changed so radically in such a brief period of time, it seems more likely that the various actors in the system did what came naturally. They followed their own preferences when the voters allowed, and made choices that conformed to short-term political incentives when the voters insisted on a different tack. Cumulatively, those choices changed the justice system radically: first in one direction, then the other. But neither the officials in charge of criminal justice—from Supreme Court Justices to state legislators, from prosecutors to police chiefs—nor the voters planned on such radical change, in either direction.

The need to rein in criminal justice budgets might have placed limits on the rise of the prison population had that need existed. It didn't, because those budgets were too small. In fiscal year 2005—after the run-up in imprisonment—corrections budgets amounted to a mere 2.6 percent of state spending nationwide. That is one-fifth of state expenditures on education, barely half what state governments spend on health care or highways. Cities' and counties' spending on local jails amounted to even less: only 1.6 percent of local budgets. Federal spending on federal prisons was smaller still: less than three-tenths of 1 percent of overall federal spending, and that was before federal spending took a huge upward turn in the wake of the 2008 financial crisis.[19] These figures were simply too small to exert much pressure on government budgets, especially during the boom years of the 1980s and 1990s when government revenues rose steadily and steeply.[20]

Plus, as governments discovered during the twentieth century's last decades, sharp increases in corrections spending need not be accompanied by proportionate increases in spending on courts, lawyers, and police officers. Prisoners might be expensive to incarcerate, but they were cheap to arrest and convict. Arrests per police officer rose by one-third between 1976 and 1989.[21] Felony prosecutions per prosecutor doubled between 1974 and 1990.[22] Per-case spending on lawyers for indigent defendants fell by half between 1979 and 1990.[23] These data all point to the

same conclusion: as imprisonment ramped up through the 1970s and 1980s, America's criminal justice system grew much more efficient—fewer personnel were needed to send more inmates to the nation's prisons and jails.

The punitive turn's third and fourth causes have to do with legal doctrine, and require more explanation. The presence of more than 1.3 million inmates in state prisons, using only 60 percent more prosecutors than had been used to incarcerate 200,000, required a justice system that tried many fewer cases and pled out many more.[24] That justice system in turn required a body of law governing guilty pleas that did little governing, leaving prosecutors free to extract such pleas by any means that suited them. The generation after 1970 saw the emergence of that body of law. The second legal change was more far-reaching. Guilty pleas are easily induced when the law that defines crime is both broad and specific, leaving little room for defense arguments that might lead to jury acquittals. Historically, American criminal law was at once narrow and vague. Both features changed gradually over the course of the twentieth century—but the change was especially stark in the decades that saw America's inmate population explode.

Change in the character of substantive criminal law—the body of law that defines crimes—had the same effect. Three mutually reinforcing changes were key: criminal liability rules grew broader, the number of overlapping criminal offenses mushroomed, and the definition of crimes grew more specific. These changes rested on a larger change in criminal lawmaking: legislators, not appellate judges, became the system's chief lawmakers. Instead of restating the common law of crimes, American criminal codes have become more code-like and more expansive. Each of these shifts in substantive criminal law made it possible for prosecutors to prosecute more defendants, and each made it easier for prosecutors to induce a larger share of those defendants to plead guilty.

The most important change may have come in what lawyers call the law of *mens rea,* the law of criminal intent. Traditionally, that body of law required proof that the defendant acted with a state of mind that was worthy of moral blame. Some vestiges of that earlier state of affairs still exist in American law; the law of homicide is the clearest example.[30] But for the most part, the concept of wrongful intent—the idea that the state must prove the defendant acted with a "guilty mind," the English translation for the Latin *mens rea*—has gone by the boards. Criminal intent has become a modest requirement at best, meaningless at worst.

Drugs (and Violence)

Nowhere have the consequences of expanded criminal liability been greater than in the criminal law of drugs. Recall the criminal law of alcohol during Prohibition: possession of liquor was not a crime, and would-be defendants were permitted to serve alcohol to guests in their homes. No such limits apply to today's drug crimes, as *United States v. Hunte* (1999)[60] illustrates. Cheryl Hunte had the poor judgment to have a

boyfriend, Joseph Richards, who was a "known drug dealer." Hunte joined Richards and one of his colleagues for a road trip during which Richards picked up several thousand dollars' worth of marijuana. Hunte made none of the plans, participated in neither the relevant negotiations nor the drugs' packaging, and, save for smoking one joint, did not handle the drugs. Most important of all, Hunte neither funded the drugs' purchase nor stood to gain from their sale. She was simply along for the ride. Even so, a panel of judges from the United States Court of Appeals for the Seventh Circuit affirmed her conviction for possession of marijuana with intent to distribute and conspiracy to do the same, on the ground that there was "some nexus between the defendant and the drugs."[61]

Hunte captures the character of contemporary drug law. Distribution is proved by proving possession of more than user quantity, and (as Cheryl Hunte learned to her dismay) possession need not depend on whether the defendant has actually handled the merchandise. Worse, drug law—state and federal alike—assigns punishment based on the weight of the drugs found in the defendants' possession. That principle leads to decisions like *Whitaker v. People* (2002),[62] in which the Colorado Supreme Court affirmed the twenty-year prison sentence of a "mule" carrying a suitcase full of methamphetamine on a Greyhound bus. David Whitaker was charged with importing methamphetamine into the state and with possession with intent to distribute the drug. The government was not required to prove that Whitaker knew how much methamphetamine he carried, nor that he knowingly crossed a state border, nor that he stood to make a large profit from his errand.[63] (Major dealers rarely travel on Greyhound buses.) As in *Hunte*, both liability and punishment rested on the drugs and on the defendant's proximity to them.

Drug laws like those at issue in *Hunte* and *Whitaker* make both convictions and draconian prison sentences nearly automatic. All plausible mitigating arguments—I was traveling with my boyfriend; I had no idea how much I was carrying; at worst, I'm a small player in a large criminal enterprise—are deemed out of bounds. No wonder the rate of imprisonment for drug crime has multiplied tenfold since the early 1970s; today's rate exceeds the total imprisonment rate in 1975.[64] Nothing remotely comparable happened during Prohibition, in large part because the law of Prohibition made mass imprisonment for alcohol violations impossi-

ble. With respect to drug crime, the law makes mass imprisonment easy.

This has given rise to another phenomenon that has fueled the rise of American prison populations: the use of easily proved drug offenses to punish harder to prove violent felonies. Consider a recent story about a Boston gang bust:

> Authorities said yesterday they are keeping a promise to prosecute 25 members of a violent street gang they hold responsible for 57 shootings and six slayings in Dorchester and Mattapan in two years.
>
> The Lucerne Street Doggz, who authorities said have about 40 members ranging in age from 18 to 28, now face federal and state gun and drug trafficking charges that could keep some jailed for up to 40 years.
>
> "We told them we wanted them to put their guns down," Police Commissioner Edward F. Davis said at a press conference . . . "The ones that continued are being prosecuted today," Davis said. "We are following through on the warning that was issued" . . .
>
> Seeking to break the gang's grip and improve the quality of life for residents, authorities said, they held two meetings last year involving gang members, police, job training groups, members of the 10 Point Coalition, and law enforcement.
>
> During the meetings, dubbed Operation Ceasefire, authorities detailed the prison sentences that courts can impose for crimes involving guns and drugs, according to an affidavit by Boston police Sergeant John J. Ford . . . [65]

The reason for the bust was the spate of shootings for which the Lucerne gang is responsible. But the crimes charged are selling drugs, and buying and selling unregistered guns.

That story is not unusual, and not limited to Boston. For the past generation, punishing drug and gun crime (by "gun crime," I mean offenses involving gun registration and licensing, not the use of guns to commit violent felonies) have been used as means of battling violent crime. Even when the drug in question is marijuana, prosecutors regularly justify drug prosecutions as surrogates for violent crime charges.[66] The pattern

is especially clear in the federal system. Bill Clinton instructed the FBI to treat gangs like the Lucerne Street Doggz as it had treated the Mafia, and charging proxy crimes was a key means of taking down Mafia families, dating back to Robert Kennedy's tenure in the Justice Department.[67] The Lucerne story illustrates the degree to which the pattern has taken hold in local prosecutors' offices as well.

The historical norm was very different. During Prohibition, unrelated charges like the tax charge that sent Al Capone to prison were sometimes used to target bootleggers, but alcohol charges were not used to target more traditional crimes. The other vices that federal and state law have forbidden over the years were used strategically against high-profile mobsters such as Lucky Luciano or the various Mafia defendants, who faced federal gambling charges—but Mob cases were rare, and nearly all of them were federal. With few exceptions, laws banning violent felonies were enforced straight up, as is proved by the high acquittal rates in homicide cases that were common a century ago. Charges like those in the Lucerne case were unknown. Why did that state of affairs change?

There are three answers: historical coincidence, a changed political structure, and law enforcement necessity. Mass markets for illegal drugs arose just after the wave of violence that swamped northern cities, and just when political pressure was forcing big-city prosecutors to ramp up criminal punishment. For urban police looking to increase their arrest numbers and urban prosecutors seeking higher conviction rates, drug cases were a godsend. As for political structure, local electorates seem to like transparent charging practices—meaning that the crimes charged are the reasons for criminal punishment. That is probably why drug sentences are so much more severe in urban black neighborhoods than in wealthier and whiter suburbs.[68] Suburban drug cases are prosecuted directly, not as a substitute for other crimes. In most suburbs, criminal justice remains a locally democratic enterprise. In high-crime cities that enterprise has changed, and not for the better.

The third reason—law enforcement necessity—requires explanation. Police clearance rates in violent crime cases were high in the past because the cases were easy. Killings tended to follow a few simple fact patterns; identifying the killer was not hard. As Roger Lane has noted, that state of affairs changed beginning in the mid-twentieth century: both stranger

killings and robbery-murders rose, and the friends-and-family killings that had dominated homicide statistics in the past declined sharply.[69] Clearance rates fell.[70]

As evidence-gathering in violent crime cases grew more difficult, the law of criminal procedure placed more restrictions on it. Confessions and eyewitness testimony are crucial to the prosecution of many violent felonies. Thanks to *Miranda,* confessions grew harder for the police to obtain in the 1960s,[71] especially from suspects savvy enough to understand the value of their procedural rights. As for eyewitness testimony, criminal violence is frightening, not only to its victims but to those who see and hear it as well; witnesses fear becoming victims themselves if they testify. The rise of violent urban gangs in the last generation is partly attributable to the gangs' skill at silencing would-be witnesses.[72] Both the rise of police interrogation doctrine and the rise of urban gangs made violent crime cases harder to build and harder to win—especially in high-crime city neighborhoods.

In earlier generations, these problems might have produced procedural reforms designed to make policing and prosecution of violent offenses easier. But constitutional law bars the most obvious reforms. *Miranda* grants sophisticated suspects the right to be free from all police questioning, not merely the coercive kind—and that right cannot be undone by mere politicians. The same is true of the right to confront the state's witnesses, which forces American prosecutors to build cases on live testimony rather than the written case files European prosecutors use.[73] Drug law seemed to offer a ready solution to these problems. Physical evidence—the drugs themselves, the paraphernalia used to consume them, the cash used to buy them—is omnipresent in drug cases, making eyewitness testimony either peripheral or needless. Police investigation is cheap: a single street stop or buy-and-bust might produce multiple arrests, with many fewer man-hours than in a robbery or homicide investigation. And drug markets in poor city neighborhoods were and are associated with high rates of violence in those neighborhoods.[74] For all these reasons, the substitution of drug prosecutions for violent felony cases was natural.

Drug laws passed in the 1970s, 1980s, and 1990s facilitated that substitution. Draconian sentences far beyond anything attached to vice

crimes in the past were attached to possession of even small quantities of selected drugs—and the drugs selected for such severe treatment were those used and sold in poor black neighborhoods.[75] As *Hunte* illustrates, the definitions of the relevant crimes were mechanical; no open-ended defenses or intent arguments were made available to the unlucky defendants charged with drug offenses. Late twentieth-century drug statutes, state and federal alike, did what the Mann Act had done three-quarters of a century earlier: instead of defining the prohibited conduct, they aimed to make punishment for other conduct easier.[76]

That proposition makes sense of several otherwise puzzling features of drug enforcement and drug politics. Both the timing and demographics of drug punishment track violent crime, not drug crime. The thirty years after 1960 saw an unprecedented explosion in criminal violence. The thirty years after 1970 saw an unprecedented explosion in drug punishment. As for demographics, blacks are imprisoned for drug crime at nine times the rate of whites. Rates of illegal drug use vary little across the races. Rates of criminal violence vary much more: in 2006, the murder rate among whites stood at 3 per 100,000; among blacks, the analogous figure was 24.[77]

The link between drug enforcement and violent crime also explains the absence of large-scale political opposition to contemporary drug laws, despite the draconian punishments those laws impose on drug offenders. Much milder punishments for other vices prompted much more political opposition in the late nineteenth and early twentieth centuries. That earlier age was more moralist than ours: early twentieth-century Americans criminalized all forms of extramarital sex; twenty-first-century Americans make adult consensual sex a constitutional right.[78] Yet Prohibition proved politically unsustainable, while the drug war is politically untouchable. If drug enforcement *isn't* a response to criminal violence, these political facts seem inexplicable.

There is more. Politicians and judges alike worried obsessively about the chronically inconsistent enforcement of the Eighteenth Amendment, and about what those enforcement patterns said about the rule of law in America.[79] Drug enforcement has been plagued by inconsistency and discrimination far worse than anything Prohibition produced, yet the drug war's supporters still refuse to abandon their cause. Everything about the

war on drugs and the politics associated with it makes sense only on the assumption that drugs were not the war's primary target. Violence was.

So, in the many cases in which direct punishment for violence was impossible, drug laws have made indirect punishment easy. That increased both the size and the racially disproportionate character of state prison populations in two mutually reinforcing ways. First, the use of drug charges as a substitute for violent felony charges increased sentences for *non*violent drug crimes. Drug crimes were not solely proxy crimes; a large fraction of incarcerated drug offenders, like Hunte and Whitaker, were suspected of drug crimes and nothing else. But the laws authorizing their punishment were designed with violent offenders in mind. So nonviolent drug offenders were, in effect, punished both for the crimes they committed and for the violence of the drug markets in which they participated. Because poor city neighborhoods had the most violent drug markets, residents of those neighborhoods received the most severe drug sentences. The use of drug crime as a (partial) proxy for violence amounted to a sentencing enhancement, and a dramatic one at that, for black drug crime.

Second, because drug punishment was and is a poor tool for deterring violence, violence levels remained high even as drug punishment escalated, which reinforced political support for tough drug punishment in a vicious circle. Recall the Lucerne Street bust. The gun and drug charges filed in that case may track gang members' history of criminal violence, but only in the aggregate. The gang was targeted because of the many acts of violence its members committed, and (at least in part) because of the many acts of violence members of other Boston gangs committed. But no gang member knows which particular acts of violence prompt such targeting. From the point of view of any individual offender, the odds that any particular shooting will lead to a later drug trafficking prosecution must be very low. Meanwhile, the gains from the shooting, or at least a large share of them—vengeance, status within the gang, a reputation for toughness—are captured by the perpetrator. One reason why violence by drug-dealing gangs remains high is that, from the point of view of the perpetrators, it pays.

The consequence is massive drug punishment that deters neither violence nor drug crime. Its dominant incentive effect has more to do with

politics than with crime. From its inception, the drug war has been fueled by violence in urban black neighborhoods. Continued violence means a continuing supply of the symbols on which the symbolic politics of crime feeds. Politically speaking, the drug war is self-sustaining as long as it continues to create casualties. Tragically, those are never in short supply.

445 U.S. 263

Supreme Court of the United States

William James RUMMEL, Petitioner,
v.
W. J. ESTELLE, Jr., Director, Texas Department of Corrections.

Decided March 18, 1980.

Mr. Justice REHNQUIST delivered the opinion of the Court.

Petitioner William James Rummel is presently serving a life sentence imposed by the State of Texas in 1973 under its "recidivist statute," formerly Art. 63 of its Penal Code, which provided that "[w]hoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary." On January 19, 1976, Rummel sought a writ of habeas corpus in the United States District Court for the Western District of Texas, arguing that life imprisonment was "grossly disproportionate" to the three felonies that formed the predicate for his sentence and that therefore the sentence violated the ban on cruel and unusual punishments of the Eighth and Fourteenth Amendments. The District Court and the United States Court of Appeals for the Fifth Circuit rejected Rummel's claim, finding no unconstitutional disproportionality. We granted certiorari and now affirm.

I

In 1964 the State of Texas charged Rummel with fraudulent use of a credit card to obtain $80 worth of goods or services. Because the amount in question was greater than $50, the charged offense was a felony punishable by a minimum of 2 years and a maximum of 10 years in the Texas Department of Corrections. Rummel eventually pleaded guilty to the charge and was sentenced to three years' confinement in a state penitentiary.

In 1969 the State of Texas charged Rummel with passing a forged check in the amount of $28.36, a crime punishable by imprisonment in a penitentiary for not less than two nor more than five years. Rummel pleaded guilty to this offense and was sentenced to four years' imprisonment.

In 1973 Rummel was charged with obtaining $120.75 by false pretenses. Because the amount obtained was greater than $50, the charged offense was designated "felony theft," which, by itself, was punishable by confinement in a penitentiary for not less than two nor more than 10 years. The prosecution chose, however, to proceed against Rummel under Texas' recidivist statute, and cited in the indictment his 1964 and 1969 convictions as requiring imposition of a life sentence if Rummel were convicted of the charged offense. A jury convicted Rummel of felony theft and also found as true the allegation that he had been convicted of two prior felonies. As a result, on April 26, 1973, the trial court imposed upon Rummel the life sentence mandated by Art. 63.

* * *

II

Initially, we believe it important to set forth two propositions that Rummel does not contest. First, Rummel does not challenge the constitutionality of Texas' recidivist statute as a general proposition. In *Spencer v. Texas, supra*, this Court upheld the very statute employed here, noting in the course of its opinion that similar statutes had been sustained against contentions that they violated "constitutional strictures dealing with double jeopardy, *ex post facto* laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities." Here, Rummel attacks only the result of applying this concededly valid statute to the facts of his case.

Second, Rummel does not challenge Texas'

authority to punish each of his offenses as felonies, that is, by imprisoning him in a state penitentiary. Cf. *Robinson v. California* (statute making it a crime to be addicted to the use of narcotics violates the Eighth and Fourteenth Amendments). See also *Ingraham v. Wright* (Eighth Amendment "imposes substantive limits on what can be made criminal and punished as such . . ."). Under Texas law Rummel concededly could have received sentences totaling 25 years in prison for what he refers to as his "petty property offenses." Indeed, when Rummel obtained $120.75 by false pretenses he committed a crime punishable as a felony in at least 35 States and the District of Columbia. Similarly, a large number of States authorized significant terms of imprisonment for each of Rummel's other offenses at the times he committed them. Rummel's challenge thus focuses only on the State's authority to impose a sentence of life imprisonment, as opposed to a substantial term of years, for his third felony.

This Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime. See, *e.g., Weems v. United States* . . . . In recent years this proposition has appeared most frequently in opinions dealing with the death penalty. . . . Rummel cites these latter opinions dealing with capital punishment as compelling the conclusion that his sentence is disproportionate to his offenses. But as Mr. Justice STEWART noted in *Furman*:

> "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."

This theme, the unique nature of the death penalty for purposes of Eighth Amendment analysis, has been repeated time and time again in our opinions. . . . Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel.

Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare. In *Weems v. United States, supra,* a case coming to this Court from the Supreme Court of the Philippine Islands, petitioner successfully attacked the imposition of a punishment known as "*cadena temporal*" for the crime of falsifying a public record. Although the Court in *Weems* invalidated the sentence after weighing "the mischief and the remedy" its finding of disproportionality cannot be wrenched from the extreme facts of that case. As for the "mischief," Weems was convicted of falsifying a public document, a crime apparently complete upon the knowing entry of a single item of false information in a public record, "though there be no one injured, though there be no fraud or purpose of it, no gain or desire of it." The mandatory "remedy" for this offense was *cadena temporal*, a punishment described graphically by the Court:

> "Its minimum degree is confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council. These parts of his penalty endure for the term of imprisonment. From other parts there is no intermission. His prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow

> of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicil without giving notice to the 'authority immediately in charge of his surveillance,' and without permission in writing."

Although Rummel argues that the length of Weems' imprisonment was, by itself, a basis for the Court's decision, the Court's opinion does not support such a simple conclusion. The opinion consistently referred jointly to the length of imprisonment and its "accessories" or "accompaniments." . . . . Thus, we do not believe that *Weems* can be applied without regard to its peculiar facts: the triviality of the charged offense, the impressive length of the minimum term of imprisonment, and the extraordinary nature of the "accessories" included within the punishment of cadena temporal.

Given the unique nature of the punishments considered in *Weems* and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.[11] Only six years after *Weems*, for example, Mr. Justice Holmes wrote for a unanimous Court in brushing aside a proportionality challenge to concurrent sentences of five years' imprisonment and cumulative fines of $1,000 on each of seven counts of mail fraud. . . . According to the Court, there was simply "no ground for declaring the punishment unconstitutional."

Such reluctance to review legislatively mandated terms of imprisonment is implicit in our more recent decisions as well. As was noted by Mr. Justice WHITE, writing for the plurality in *Coker v. Georgia*, our Court's "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent." Since *Coker* involved the imposition of capital punishment for the rape of an adult female, this Court could draw a "bright line" between the punishment of death and the various other permutations and commutations of punishments short of that ultimate sanction. For the reasons stated by Mr. Justice STEWART in *Furman*, this line was considerably clearer than would be any constitutional distinction between one term of years and a shorter or longer term of years.

Similarly, in *Weems* the Court could differentiate in an objective fashion between the highly unusual *cadena temporal* and more traditional forms of imprisonment imposed under the Anglo-Saxon system. But a more extensive intrusion into the basic line-drawing process that is pre-eminently the province of the legislature when it makes an act criminal would be difficult to square with the view expressed in *Coker* that the Court's Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual Justices.

* * *

III

The most casual review of the various criminal justice systems now in force in the 50 States of the Union shows that the line dividing felony theft from petty larceny, a line usually based on the value of the property taken, varies markedly from one State to another. We believe that Texas is entitled to make its own judgment as to where such lines lie, subject only to those strictures of the Eighth Amendment that can be informed by objective factors. See *Coker v. Georgia*. Moreover, given Rummel's record, Texas was not required to treat him in the same manner as it might treat him were this his first

"petty property offense." Having twice imprisoned him for felonies, Texas was entitled to place upon Rummel the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the State.

The purpose of a recidivist statute such as that involved here is not to simplify the task of prosecutors, judges, or juries. Its primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction.

We therefore hold that the mandatory life sentence imposed upon this petitioner does not constitute cruel and unusual punishment under the Eighth and Fourteenth Amendments. The judgment of the Court of Appeals is

Affirmed.

* * *

Mr. Justice POWELL, with whom Mr. Justice BRENNAN, Mr. Justice MARSHALL, and Mr. Justice STEVENS join, dissenting.

The question in this case is whether petitioner was subjected to cruel and unusual punishment in contravention of the Eighth Amendment, made applicable to the States by the Fourteenth Amendment, when he received a mandatory life sentence upon his conviction for a third property-related felony. Today, the Court holds that petitioner has not been punished unconstitutionally. I dissent.

I

The facts are simply stated. In 1964, petitioner was convicted for the felony of presenting a credit card with intent to defraud another of approximately $80. In 1969, he was convicted for the felony of passing a forged check with a face value of $28.36. In 1973, petitioner accepted payment in return for his promise to repair an air conditioner. The air conditioner was never repaired, and petitioner was indicted for the felony offense of obtaining $120.75 under false pretenses. He was also charged with being a habitual offender. The Texas habitual offender statute provides a mandatory life sentence for any person convicted of three felonies. Petitioner was convicted of the third felony and, after the State proved the existence of the two earlier felony convictions, was sentenced to mandatory life imprisonment.

* * *

This Court today affirms the Fifth Circuit's decision. I dissent because I believe that (i) the penalty for a noncapital offense may be unconstitutionally disproportionate, (ii) the possibility of parole should not be considered in assessing the nature of the punishment, (iii) a mandatory life sentence is grossly disproportionate as applied to petitioner, and (iv) the conclusion that this petitioner has suffered a violation of his Eighth Amendment rights is compatible with principles of judicial restraint and federalism.

* * *

B

The scope of the Cruel and Unusual Punishments Clause extends not only to

barbarous methods of punishment, but also to punishments that are grossly disproportionate. Disproportionality analysis measures the relationship between the nature and number of offenses committed and the severity of the punishment inflicted upon the offender. The inquiry focuses on whether, a person deserves such punishment, not simply on whether punishment would serve a utilitarian goal. A statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice. The Court concedes today that the principle of disproportionality plays a role in the review of sentences imposing the death penalty, but suggests that the principle may be less applicable when a noncapital sense is challenged. Such a limitation finds no support in the history of Eighth Amendment jurisprudence.

The principle of disproportionality is rooted deeply in English constitutional law. The Magna Carta of 1215 insured that "[a] free man shall not be [fined] for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be [fined] according to its gravity." By 1400, the English common law had embraced the principle, not always followed in practice, that punishment should not be excessive either in severity or length. One commentator's survey of English law demonstrates that the "cruel and unusual punishments" clause of the English Bill of Rights of 1689 "was first, an objection to the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties." Granucci, *supra*.

In *Weems v. United States*, a public official convicted for falsifying a public record claimed that he suffered cruel and unusual punishment when he was sentenced to serve 15 years' imprisonment in hard labor with chains. The sentence also subjected Weems to loss of civil rights and perpetual surveillance after his release. This Court agreed that the punishment was cruel and unusual. The Court was attentive to the methods of the punishment, but its conclusion did not rest solely upon the nature of punishment. The Court relied explicitly upon the relationship between the crime committed and the punishment imposed:

> "Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense."

In both capital and noncapital cases this Court has recognized that the decision in *Weems v. United States* "proscribes punishment grossly disproportionate to the severity of the crime."* *

In order to resolve the constitutional issue, the *Weems* Court measured the relationship between the punishment and the offense. The Court noted that Weems had been punished more severely than persons in the same jurisdiction who committed more serious crimes, or persons who committed a similar crime in other American jurisdictions.

Robinson v. California established that the Cruel and Unusual Punishments Clause applies to the States through the operation of the Fourteenth Amendment. The Court held that imprisonment for the crime of being a drug addict was cruel and unusual. The Court based its holding not upon the method of punishment, but on the nature of the "crime." Because drug addiction is an illness which may be contracted involuntarily, the Court said that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a

cruel and unusual punishment for the 'crime' of having a common cold."

In *Furman v. Georgia*, the Court held that the death penalty may constitute cruel and unusual punishment in some circumstances. The special relevance of *Furman* to this case lies in the general acceptance by Members of the Court of two basic principles. First, the Eighth Amendment prohibits grossly excessive punishment. Second, the scope of the Eighth Amendment is to be measured by "evolving standards of decency."

In *Coker v. Georgia*, this Court held that rape of an adult woman may not be punished by the death penalty. The plurality opinion of Mr. Justice WHITE stated that a punishment is unconstitutionally excessive "if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." The plurality concluded that the death penalty was a grossly disproportionate punishment for the crime of rape. The plurality recognized that "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent." To this end, the plurality examined the nature of the crime and attitudes of state legislatures and sentencing juries toward use of the death penalty in rape cases. In a separate opinion, I concurred in the plurality's reasoning that death ordinarily is disproportionate punishment for the crime of raping an adult woman. Nothing in the *Coker* analysis suggests that principles of disproportionality are applicable only cases. Indeed, the questions posed in *Coker* and this case are the same: whether a punishment that can be imposed for one offense is grossly disproportionate when imposed for another.

In sum, a few basic principles emerge from the history of the Eighth Amendment. Both barbarous forms of punishment and grossly excessive punishments are cruel and unusual. A sentence may be excessive if it serves no acceptable social purpose, or is grossly disproportionate to the seriousness of the crime. The principle of disproportionality has been acknowledged to apply to both capital and noncapital sentences.

* * *

IV

The Eighth Amendment commands this Court to enforce the constitutional limitation of the Cruel and Unusual Punishments Clause. In discharging this responsibility, we should minimize the risk of constitutionalizing the personal predilictions of federal judges by relying upon certain objective factors. Among these are (i) the nature of the offense; . . . (ii) the sentence imposed for commission of the same crime in other jurisdictions, . . . and (iii) the sentence imposed upon other criminals in the same jurisdiction, ...

A

Each of the crimes that underlies the petitioner's conviction as a habitual offender involves the use of fraud to obtain small sums of money ranging from $28.36 to $120.75. In total, the three crimes involved slightly less than $230. None of the crimes involved injury to one's person, threat of injury to one's person, violence, the threat of violence, or the use of a weapon. Nor does the commission of any such crimes ordinarily involve a threat of violent action against another person or his property. It is difficult to imagine felonies that pose less danger to the peace and good order of a civilized society than the three crimes committed by the petitioner. Indeed, the state legislature's recodification of its criminal law supports this conclusion. Since the petitioner was convicted as a habitual offender, the State

has reclassified his third offense, theft by false pretext, as a misdemeanor. . . .

B

Apparently, only 12 States have ever enacted habitual offender statutes imposing a mandatory life sentence for the commission of two or three nonviolent felonies and only 3, Texas, Washington, and West Virginia, have retained such a statute. Thus, three-fourths of the States that experimented with the Texas scheme appear to have decided that the imposition of a mandatory life sentence upon some persons who have committed three felonies represents excess punishment. . . . .

More than three-quarters of American jurisdictions have never adopted a habitual offender statute that would commit the petitioner to mandatory life imprisonment. The jurisdictions that currently employ habitual offender statutes either (i) require the commission of more than three offenses, (ii) require the commission of at least one violent crime, (iii) limit a mandatory penalty to less than life, or (iv) grant discretion to the sentencing authority. In none of the jurisdictions could the petitioner have received a mandatory life sentence merely upon the showing that he committed three nonviolent property-related offenses. . . .

C

Finally, it is necessary to examine the punishment that Texas provides for other criminals. First and second offenders who commit more serious crimes than the petitioner may receive markedly less severe sentences. The only first-time offender subject to a mandatory life sentence is a person convicted of capital murder. A person who commits a first-degree felony, including murder, aggravated kidnaping, or aggravated rape, may be imprisoned from 5 to 99 years. Persons who commit a second-degree felony, including voluntary manslaughter, rape, or robbery, may be punished with a sentence of between 2 and 20 years. A person who commits a second felony is punished as if he had committed a felony of the next higher degree. Thus, a person who rapes twice may receive a 5-year sentence. He also may, but need not, receive a sentence functionally equivalent to life imprisonment.

The State argues that these comparisons are not illuminating because a three-time recidivist may be sentenced more harshly than a first-time offender. Of course, the State may mandate extra punishment for a recidivist. See *Oyler v. Boles*. In Texas a person convicted twice of the unauthorized use of a vehicle receives a greater sentence than a person once convicted for that crime, but he does not receive a sentence as great as a person who rapes twice. Such a statutory scheme demonstrates that the state legislature has attempted to choose a punishment in proportion to the nature and number of offenses committed.

Texas recognizes when it sentences two-time offenders that the amount of punishment should vary with the severity of the offenses committed. But all three-time felons receive the same sentence. In my view, imposition of the same punishment upon persons who have committed completely different types of crimes raises serious doubts about the proportionality of the sentence applied to the least harmful offender. Of course, the Constitution does not bar mandatory sentences. I merely note that the operation of the Texas habitual offender system raises a further question about the extent to which a mandatory life sentence, no doubt a suitable sentence for a person who has committed three violent crimes, also is a proportionate punishment for a person who has committed the three crimes involved in this case.

D

Examination of the objective factors traditionally employed by the Court to assess the proportionality of a sentence demonstrates

that petitioner suffers a cruel and unusual punishment. Petitioner has been sentenced to the penultimate criminal penalty because he committed three offenses defrauding others of about $230. The nature of the crimes does not suggest that petitioner ever engaged in conduct that threatened another's person, involved a trespass, or endangered in any way the peace of society. A comparison of the sentence petitioner received with the sentences provided by habitual offender statutes of other American jurisdictions demonstrates that only two other States authorize the same punishment. A comparison of petitioner to other criminal sentenced in Texas shows that he has been punished for three property-related offenses with a harsher sentence than that given first-time offenders or two-time offenders convicted of far more serious offenses. The Texas system assumes that all three-time offenders deserve the same punishment whether they commit three murders or cash three fraudulent checks.

The petitioner has committed criminal acts for which he may be punished. He has been given a sentence that is not inherently barbarous. But the relationship between the criminal acts and the sentence is grossly disproportionate. For having defrauded others of about $230, the State of Texas has deprived petitioner of his freedom for the rest of his life. The State has not attempted to justify the sentence as necessary either to deter other persons or to isolate a potentially violent individual. Nor has petitioner's status as a habitual offender been shown to justify a mandatory life sentence. My view, informed by examination of the "objective indicia that reflect the public attitude toward a given sanction," *Gregg v. Georgia*, is that this punishment violates the principle of proportionality contained within the Cruel and Unusual Punishments Clause.

* * *

Supreme Court of the United States

Ronald Allen HARMELIN, Petitioner
v.
MICHIGAN.

Decided June 27, 1991.

Justice SCALIA announced the judgment of the Court and delivered the opinion of the Court with respect to Part IV, and an opinion with respect to Parts I, II, and III, in which THE CHIEF JUSTICE joins.

Petitioner was convicted of possessing 672 grams of cocaine and sentenced to a mandatory term of life in prison without possibility of parole. The Michigan Court of Appeals initially reversed his conviction because evidence supporting it had been obtained in violation of the Michigan Constitution. On petition for rehearing, the Court of Appeals vacated its prior decision and affirmed petitioner's sentence, rejecting his argument that the sentence was "cruel and unusual" within the meaning of the Eighth Amendment. The Michigan Supreme Court denied leave to appeal, and we granted certiorari.

Petitioner claims that his sentence is unconstitutionally "cruel and unusual" for two reasons: first, because it is "significantly disproportionate" to the crime he committed; second, because the sentencing judge was statutorily required to impose it, without taking into account the particularized circumstances of the crime and of the criminal.

* * *

IV

Petitioner claims that his sentence violates the Eighth Amendment for a reason in addition to its alleged disproportionality. He argues that it is "cruel and unusual" to impose a mandatory sentence of such severity, without any consideration of so-called mitigating factors such as, in his case, the fact that he had no prior felony convictions. He apparently contends that the Eighth Amendment requires Michigan to create a sentencing scheme whereby life in prison without possibility of parole is simply the most severe of a range of available penalties that the sentencer may impose after hearing evidence in mitigation and aggravation.

As our earlier discussion should make clear, this claim has no support in the text and history of the Eighth Amendment. Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history. As noted earlier, mandatory death sentences abounded in our first Penal Code. They were also common in the several States—both at the time of the founding and throughout the 19th century. See *Woodson v. North Carolina*. There can be no serious contention, then, that a sentence which is not otherwise cruel and unusual becomes so simply because it is "mandatory." See *Chapman v. United States*.

Petitioner's "required mitigation" claim, like his proportionality claim, does find support in our death penalty jurisprudence. We have held that a capital sentence is cruel and unusual under the Eighth Amendment if it is imposed without an individualized determination that that punishment is "appropriate"—whether or not the sentence is "grossly disproportionate." See *Woodson v. North Carolina, supra; Lockett v. Ohio*; *Eddings v. Oklahoma, supra; Hitchcock v. Dugger*. Petitioner asks us to extend this so-called "individualized capital- sentencing doctrine," *Sumner v. Shuman,* to an "individualized mandatory life in prison without parole sentencing doctrine." We refuse to do so.

Our cases creating and clarifying the "individualized capital sentencing doctrine" have repeatedly suggested that there is no comparable requirement outside the capital

context, because of the qualitative difference between death and all other penalties. . . .

> "The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity." *Furman v. Georgia* (Stewart, J., concurring).

It is true that petitioner's sentence is unique in that it is the second most severe known to the law; but life imprisonment *with* possibility of parole is also unique in that it is the third most severe. And if petitioner's sentence forecloses some "flexible techniques" for later reducing his sentence, . . . it does not foreclose all of them, since there remain the possibilities of retroactive legislative reduction and executive clemency. In some cases, moreover, there will be negligible difference between life without parole and other sentences of imprisonment—for example, a life sentence with eligibility for parole after 20 years, or even a lengthy term sentence without eligibility for parole, given to a 65–year–old man. But even where the difference is the greatest, it cannot be compared with death. We have drawn the line of required individualized sentencing at capital cases, and see no basis for extending it further.

The judgment of the Michigan Court of Appeals is

Affirmed.

Justice KENNEDY, with whom Justice O'CONNOR and Justice SOUTER join, concurring in part and concurring in the judgment.

I concur in Part IV of the Court's opinion and in the judgment. I write this separate opinion because my approach to the Eighth Amendment proportionality analysis differs from Justice SCALIA's. Regardless of whether Justice SCALIA or Justice WHITE has the best of the historical argument, . . . *stare decisis* counsels our adherence to the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years. Although our proportionality decisions have not been clear or consistent in all respects, they can be reconciled, and they require us to uphold petitioner's sentence.

I - A

Our decisions recognize that the Cruel and Unusual Punishments Clause encompasses a narrow proportionality principle. We first interpreted the Eighth Amendment to prohibit " 'greatly disproportioned' " sentences in *Weems v. United States*. Since *Weems*, we have applied the principle in different Eighth Amendment contexts. Its most extensive application has been in death penalty cases. . . .

The Eighth Amendment proportionality principle also applies to noncapital sentences. In *Rummel v. Estelle*, we acknowledged the existence of the proportionality rule for both capital and noncapital cases, but we refused to strike down a sentence of life imprisonment, with possibility of parole, for recidivism based on three underlying felonies. In *Hutto v. Davis*, we recognized the possibility of proportionality review but held it inapplicable to a 40–year prison sentence for possession with intent to distribute nine ounces of marijuana. Our most recent decision discussing the subject is *Solem v. Helm*. There we held that a sentence of life imprisonment without possibility of parole violated the Eighth Amendment because it was "grossly disproportionate" to the crime of recidivism based on seven underlying nonviolent felonies. The dissent in *Solem* disagreed with the Court's application of the proportionality principle but observed that in extreme cases it could apply to invalidate a

punishment for a term of years. . . . .

B

Though our decisions recognize a proportionality principle, its precise contours are unclear. This is so in part because we have applied the rule in few cases and even then to sentences of different types. Our most recent pronouncement on the subject in *Solem*, furthermore, appeared to apply a different analysis than in *Rummel* and *Davis. Solem* twice stated, however, that its decision was consistent with *Rummel* and thus did not overrule it. *Solem*, *supra.* Despite these tensions, close analysis of our decisions yields some common principles that give content to the uses and limits of proportionality review.

The first of these principles is that the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is "properly within the province of legislatures, not courts." *Rummel*. Determinations about the nature and purposes of punishment for criminal acts implicate difficult and enduring questions respecting the sanctity of the individual, the nature of law, and the relation between law and the social order. "As a moral or political issue [the punishment of offenders] provokes intemperate emotions, deeply conflicting interests, and intractable disagreements." D. Garland, Punishment and Modern Society 1 (1990). The efficacy of any sentencing system cannot be assessed absent agreement on the purposes and objectives of the penal system. And the responsibility for making these fundamental choices and implementing them lies with the legislature. . . . Thus, "[r]eviewing courts ... should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes." *Solem. . . .*

The second principle is that the Eighth Amendment does not mandate adoption of any one penological theory. "The principles which have guided criminal sentencing ... have varied with the times." *Payne v. Tennessee*. The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation. . . . And competing theories of mandatory and discretionary sentencing have been in varying degrees of ascendancy or decline since the beginning of the Republic. . . .

Third, marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure. . . . "Our federal system recognizes the independent power of a State to articulate societal norms through criminal law." *McCleskey v. Zant*. State sentencing schemes may embody different penological assumptions, making interstate comparison of sentences a difficult and imperfect enterprise. . . . And even assuming identical philosophies, differing attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes. Thus, the circumstance that a State has the most severe punishment for a particular crime does not by itself render the punishment grossly disproportionate. . . .

The fourth principle at work in our cases is that proportionality review by federal courts should be informed by "'objective factors to the maximum possible extent.'" . . . .

All of these principles—the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors—inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime. . . .

II

With these considerations stated, it is necessary to examine the challenged aspects of petitioner's sentence: its severe length and its mandatory operation.

A

Petitioner's life sentence without parole is the second most severe penalty permitted by law. It is the same sentence received by the petitioner in *Solem.* Petitioner's crime, however, was far more grave than the crime at issue in *Solem.* . . .

Petitioner was convicted of possession of more than 650 grams (over 1.5 pounds) of cocaine. This amount of pure cocaine has a potential yield of between 32,500 and 65,000 doses. A. Washton, Cocaine Addiction: Treatment, Recovery, and Relapse Prevention 18 (1989). From any standpoint, this crime falls in a different category from the relatively minor, nonviolent crime at issue in *Solem.* Possession, use, and distribution of illegal drugs represent "one of the greatest problems affecting the health and welfare of our population." *Treasury Employees v. Von Raab*. Petitioner's suggestion that his crime was nonviolent and victimless, echoed by the dissent is false to the point of absurdity. To the contrary, petitioner's crime threatened to cause grave harm to society.

Quite apart from the pernicious effects on the individual who consumes illegal drugs, such drugs relate to crime in at least three ways: (1) A drug user may commit crime because of drug-induced changes in physiological functions, cognitive ability, and mood; (2) A drug user may commit crime in order to obtain money to buy drugs; and (3) A violent crime may occur as part of the drug business or culture. See Goldstein, Drugs and Violent Crime, in Pathways to Criminal Violence 16, 24–36 (N. Weiner & M. Wolfgang eds. 1989). Studies bear out these possibilities and demonstrate a direct nexus between illegal drugs and crimes of violence. To mention but a few examples, 57 percent of a national sample of males arrested in 1989 for homicide tested positive for illegal drugs. National Institute of Justice, 1989 Drug Use Forecasting Annual Report 9 (June 1990). The comparable statistics for assault, robbery, and weapons arrests were 55, 73, and 63 percent, respectively. In Detroit, Michigan, in 1988, 68 percent of a sample of male arrestees and 81 percent of a sample of female arrestees tested positive for illegal drugs. National Institute of Justice, 1988 Drug Use Forecasting Annual Report 4 (Mar.1990). Fifty-one percent of males and seventy-one percent of females tested positive for cocaine. And last year an estimated 60 percent of the homicides in Detroit were drug related, primarily cocaine related. U.S. Department of Health and Human Services, Epidemiologic Trends in Drug Abuse 107 (Dec.1990).

These and other facts and reports detailing the pernicious effects of the drug epidemic in this country do not establish that Michigan's penalty scheme is correct or the most just in any abstract sense. But they do demonstrate that the Michigan Legislature could with reason conclude that the threat posed to the individual and society by possession of this large an amount of cocaine—in terms of violence, crime, and social displacement—is momentous enough to warrant the deterrence and retribution of a life sentence without parole. See *United States v. Mendenhall* (Powell, J., concurring in part and concurring in judgment) ("Few problems affecting the health and welfare of our population, particularly our young, cause greater concern than the escalating use of controlled substances"); *Florida v. Royer* (BLACKMUN, J., dissenting) (same). See also *Terrebonne v. Butler* (CA5 1988) (en banc).

The severity of petitioner's crime brings his sentence within the constitutional boundaries established by our prior decisions. In *Hutto v. Davis,* we upheld against proportionality attack a sentence of 40 years' imprisonment for

possession with intent to distribute nine ounces of marijuana. Here, Michigan could with good reason conclude that petitioner's crime is more serious than the crime in *Davis.* Similarly, a rational basis exists for Michigan to conclude that petitioner's crime is as serious and violent as the crime of felony murder without specific intent to kill, a crime for which "no sentence of imprisonment would be disproportionate," *Solem*. Cf. *Rummel,* (Powell, J., dissenting) ("A professional seller of addictive drugs may inflict greater bodily harm upon members of society than the person who commits a single assault").

Petitioner and *amici* contend that our proportionality decisions require a comparative analysis between petitioner's sentence and sentences imposed for other crimes in Michigan and sentences imposed for the same crime in other jurisdictions. Given the serious nature of petitioner's crime, no such comparative analysis is necessary.

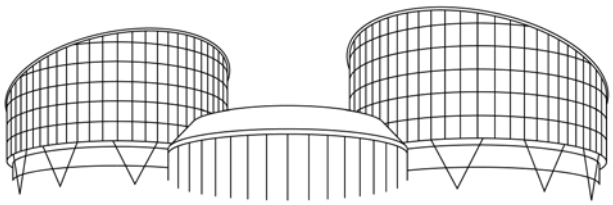
* * *

B

Petitioner also attacks his sentence because of its mandatory nature. Petitioner would have us hold that any severe penalty scheme requires individualized sentencing so that a judicial official may consider mitigating circumstances. Our precedents do not support this proposition, and petitioner presents no convincing reason to fashion an exception or adopt a new rule in the case before us. The Court demonstrates that our Eighth Amendment capital decisions reject any requirement of individualized sentencing in noncapital cases. *Ante,* at 2701–2702.

* * *

For the foregoing reasons, I conclude that petitioner's sentence of life imprisonment without parole for his crime of possession of more than 650 grams of cocaine does not violate the Eighth Amendment.*



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF VINTER AND OTHERS v. THE UNITED KINGDOM

(Applications nos. 66069/09, 130/10 and 3896/10)

JUDGMENT

STRASBOURG

9 July 2013

This judgment is final but may be subject to editorial revision.

PROCEDURE

1. The case originated in three applications . . . against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three British nationals, Mr Douglas Gary Vinter ("the first applicant"), Mr Jeremy Neville Bamber ("the second applicant") and Mr Peter Howard Moore ("the third applicant"), on 11 December 2009, 17 December 2009 and 6 January 2010 respectively.

2. The first applicant was born in 1969 and is currently detained at Her Majesty's Prison Frankland. He is represented before the Court by Mr S. Creighton, a lawyer practising in London with Bhatt Murphy Solicitors, assisted by Mr P. Weatherby QC, counsel, and Professor D. van Zyl Smit. * * *

3. The applicants alleged that the whole life orders which had been imposed on them amounted to ill-treatment contrary to Article 3 of the Convention. * * *

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Introduction

4. Since the abolition of the death penalty in England and Wales, the sentence for murder has been a mandatory sentence of life imprisonment. Currently, when such a sentence is imposed, the trial judge is required to set a minimum term of imprisonment, which must be served for the purposes of punishment and retribution, taking into account the seriousness of the offence. The principles which guide the trial judge's assessment of the appropriate minimum term are set out in schedule 21 to the Criminal Justice Act 2003 (see paragraphs 38–39 below). Once the minimum term has been served, the prisoner may apply to the Parole Board for release on licence.

Exceptionally, however, "a whole life order" may be imposed by the trial judge instead of a minimum term if, applying the principles set out in schedule 21, he or she considers that the seriousness of the offence is exceptionally high.

The effect of a whole life order is that the prisoner cannot be released other than at the discretion of the Secretary of State. The power of the Secretary of State to release a prisoner is provided for in section 30(1) of the Crime (Sentences) Act 1997. The Secretary of State will only exercise his discretion on compassionate grounds when the prisoner is terminally ill or seriously incapacitated (see Prison Service Order 4700 set out at paragraph 43 below).

5. Prior to the entry into force of the 2003 Act, it was the practice for the mandatory life sentence to be passed by the trial judge and for the Secretary of State, after receiving recommendations from the trial judge and the Lord Chief Justice, to decide the minimum term of imprisonment which the prisoner would have to serve before he would be eligible for early release on licence. At the time, the minimum term was also referred to as the "tariff" part of the sentence.

It was also open to the Secretary of State to impose a "whole life tariff" on a prisoner. In such a case, it was the practice of the Secretary of State to review a whole life tariff after twenty-five years' imprisonment to determine whether it was still justified, particularly with reference to cases where the prisoner had made exceptional progress in prison (see the case of *Hindley* at paragraph 46 below).

With the entry into force of the 2003 Act (and, in particular, section 276 and schedule 22 to the Act, which enact a series of transitional measures concerning existing life prisoners: see paragraphs 40 and 41 below), all prisoners whose tariffs were set by the Secretary of State have been able to apply to the High Court for review of that tariff. Upon such an application the High Court may set a minimum term of imprisonment or make a whole life order.

6. This case concerns three applicants who, having been convicted of murder in separate criminal proceedings in England and Wales, are currently serving mandatory sentences of life imprisonment. All three applicants have been given whole life orders. . . . All three applicants maintain that these whole life orders, as they apply to their cases, are incompatible *inter alia* with Articles 3 and 5 § 4 of the Convention. The facts of the applications, as submitted by the parties, may be summarised as follows.

B. Mr Vinter

7. On 20 May 1996, the first applicant was sentenced to life imprisonment for the murder of a work colleague, with a minimum term of ten years. He was released on licence on 4 August 2005.

8. He began living with a woman who was to become the victim of his second murder offence. The couple married on 27 June 2006. On 31 December 2006 the first applicant was involved in a fight in a public house and charged with affray (using or threatening unlawful violence). His licence was revoked and he was recalled to prison. In July 2007, having pleaded guilty to the charge of affray, he was sentenced to 6 months' imprisonment. He was released on licence again in December 2007 and returned to live with his wife and her four children. The couple became estranged and the first applicant left the marital home.

9. On 5 February 2008, the first applicant followed his wife to a public house. He had been drinking and had taken cocaine. The couple argued and

the wife's daughter, who was present, telephoned the police to alert them to the dispute. The first applicant ordered his wife to get into a car. When the daughter tried to get into the car to protect her mother, the first applicant forcibly removed her. He then drove off with his wife. When the police telephoned her to ascertain if she was safe, the first applicant forced his wife to tell them that she was fine. The first applicant also telephoned the police to tell them that his wife was safe and well. Some hours later he gave himself up to the police, telling them that he had killed her. A post-mortem examination revealed that the deceased had a broken nose, deep and extensive bruising to her neck (which was consistent with attempted strangulation), and four stab wounds to the chest. Two knives were found at the scene, one of which had a broken blade.

10. On 21 April 2008, the first applicant pleaded guilty to murder and instructed his counsel not to make any submissions in mitigation lest it add to the grief of the victim's family. The trial judge considered that the first applicant fell into that small category of people who should be deprived permanently of their liberty. He passed the mandatory life sentence and made a whole life order.

11. The Court of Appeal dismissed his appeal on 25 June 2009. It considered the general principles for determining the minimum term of a mandatory life sentence (as set out in schedule 21 to the 2003 Act: see paragraphs 38 and 39 below). It found that, given the circumstances of the offence, there was no reason whatever to depart from the normal principle enshrined in schedule 21 to the 2003 Act that, where murder was committed by someone who was already a convicted murderer, a whole life order was appropriate for punishment and deterrence.

* * *

II. RELEVANT DOMESTIC LAW AND PRACTICE

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III. RELEVANT EUROPEAN, INTERNATIONAL AND COMPARATIVE LAW ON LIFE SENTENCES AND "GROSSLY DISPROPORTIONATE" SENTENCES

12. The relevant texts of the Council of Europe, the European Union and other international legal texts on the imposition and review of sentences of life imprisonment, including the obligations of Council of Europe member States when extraditing individuals to States where they may face such sentences, are set out in *Kafkaris*, cited above, at §§ 68-76. Additional materials before the Court in the present cases (and those materials in

Kafkaris that are expressly relied on by the parties) may be summarised as follows.

A. Council of Europe texts

1. Resolution 76(2)

13. Starting in 1976, the Committee of Ministers has adopted a series of resolutions and recommendations on long-term and life sentence prisoners. The first is Committee of Ministers Resolution 76(2) of 17 February 1976, which made a series of recommendations to member States. These included:

> "1. pursue a criminal policy under which long-term sentences are imposed only if they are necessary for the protection of society;
> 2. take the necessary legislative and administrative measures in order to promote appropriate treatment during the enforcement of [long-term] sentences;
> ...
> 9. ensure that the cases of all prisoners will be examined as early as possible to determine whether or not a conditional release can be granted;
> 10. grant the prisoner conditional release, subject to the statutory requirements relating to time served, as soon as a favourable prognosis can be formulated; considerations of general prevention alone should not justify refusal of conditional release;
> 11. adapt to life sentences the same principles as apply to long-term sentences;
> 12. ensure that a review, as referred to in [paragraph] 9, of the life sentence should take place, if not done before, after eight to fourteen years of detention and be repeated at regular intervals;"

2. Recommendation 2003(23)

14. Recommendation 2003(23) (on the management by prison administrations of life sentence and other long-term prisoners) was adopted by the Committee of Ministers on 9 October 2003. The recommendation's preamble states that:

> "the enforcement of custodial sentences requires striking a balance between the objectives of ensuring security, good order and discipline in penal institutions, on the one hand, and providing prisoners with decent living conditions, active regimes and constructive preparations for release, on the other ..."

Paragraph 2 of the recommendation goes on to state the aims of the management of life sentence and other long term prisoners should be:

> "– to ensure that prisons are safe and secure places for these prisoners and for all those who work with or visit them;
> – to counteract the damaging effects of life and long-term imprisonment;
> – to increase and improve the possibilities for these prisoners to be successfully resettled in society and to lead a law-abiding life following their release."

Included in the recommendation's general principles for the management of such prisoners are: (i) individualisation principle (that consideration should be given to the diversity of personal characteristics to be found among life sentence and long-term prisoners and account taken of them to make individual plans for the implementation of the sentence) and; (ii) the progression principle (that individual planning for the management of the prisoner's sentence should aim at securing progressive movement through the prison system) (see paragraphs 3 and 8 of the recommendation). The report accompanying the recommendation (prepared under the auspices of the European Committee of Crime Problems adds that progression has as its ultimate aim a constructive transition from prison life to life in the community (paragraph 44 of the report).

Paragraph 10 (on sentence planning) provides that such plans should be used to provide a systematic approach *inter alia* to: progressive movement through the prison system from more to less restrictive conditions with, ideally, a final phase spent under open conditions, preferably in the community; and conditions and supervision measures conducive to a law-abiding life and adjustment in the community after conditional release.

Paragraph 16 provides that, since neither dangerousness nor criminogenic needs are intrinsically stable characteristics, risk and needs assessments should be repeated at intervals.

Finally, paragraphs 33 and 34 (on managing reintegration into society) provide:

> "33. In order to enable life sentence and other long-term prisoners to overcome the particular problem of moving from lengthy incarceration to a law-abiding life in the community, their release should be prepared well in advance and take particular account of the following:
>
> – the need for specific pre-release and post-release plans which address relevant risks and needs;
>
> – due consideration of the possibility of achieving release and the continuation post-release of any programmes, interventions or treatment undertaken by prisoners during detention;
>
> – the need to achieve close collaboration between the prison administration and post-release supervising authorities, social and medical services.
>
> 34. The granting and implementation of conditional release for life sentence and other long-term prisoners should be guided by the principles set out in Recommendation Rec(2003)22 on conditional release."

In respect of paragraph 34, the report accompanying the recommendation states (at paragraph 131):

> "Recommendation Rec(2003)23 contains the principle that conditional release should be possible for all prisoners except those serving extremely short sentences. This principle is applicable, under the terms of the Recommendation, even to life prisoners. Note, however, that it is the possibility of granting conditional release to life prisoners that is recommended, not that they should always be granted conditional release."

3. Recommendation 2003(22)

15. Recommendation 2003(22) (on conditional release) was adopted by the Committee of Ministers on 24 September 2003. It is summarised at length in *Kafkaris* (cited above, see paragraph 72 of the judgment). In summary, it provides a series of recommendations governing preparation for conditional release, the granting of it, the conditions which may be imposed and procedural safeguards. Among its general principles are paragraphs 3 and 4(a), which provide:

> "3. Conditional release should aim at assisting prisoners to make a transition from life in prison to a law-abiding life in the community through post-release conditions and supervision that promote this end and contribute to public safety and the reduction of crime in the community.
>
> 4.a. In order to reduce the harmful effects of imprisonment and to promote the resettlement of prisoners under conditions that seek to guarantee safety of the outside community, the law should make conditional release available to all sentenced prisoners, including life-sentence prisoners."

The Explanatory Memorandum accompanying the Recommendation states in respect of paragraph 4:

> "Life-sentence prisoners should not be deprived of the hope to be granted release either. Firstly, no one can reasonably argue that all lifers will always remain dangerous to society. Secondly, the detention of persons who have no hope of release poses severe management problems in terms of creating incentives to co-operate and address disruptive behaviour, the delivery of personal-development programmes, the organisation of sentence-plans and security. Countries whose legislation provides for real-life sentences should therefore create possibilities for reviewing this sentence after a number of years and at regular intervals, to establish whether a life-sentence prisoner can serve the remainder of the sentence in the community and under what conditions and supervision measures."

* * *

C. European Union law

16. Article 5(2) of the Framework Decision of the Council of the European Union of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States provides:

> "if the offence on the basis of which the European arrest warrant has been issued is punishable by custodial life sentence or life-time detention order, the execution of the said arrest warrant may be subject to the condition that the issuing Member State has provisions in its legal system for a review of the penalty or measure imposed, on request or at the latest after 20 years, or for the application of measures of clemency to which the person is entitled to apply for under the law or practice of the issuing Member State, aiming at a non-execution of such penalty or measure."

D. Life sentences in the Contracting States

17. On the basis of the comparative materials before the Court, following practices in the Contracting States may be observed.

First, there are currently nine countries where life imprisonment does not exist: Andorra, Bosnia and Herzegovina, Croatia, Montenegro, Norway, Portugal, San Marino, Serbia and Spain. The maximum term of imprisonment in these countries ranges from twenty-one years in Norway to forty-five years in Bosnia and Herzegovina. In Croatia in a case of cumulative offences, a fifty-year sentence can be imposed.

Second, in the majority of countries where a sentence of life imprisonment may be imposed, there exists a dedicated mechanism for reviewing the sentence after the prisoner has served a certain minimum period fixed by law. Such a mechanism, integrated within the law and practice on sentencing, is foreseen in the law of thirty-two countries: Albania (25 years), Armenia (20), Austria (15), Azerbaijan (25), Belgium (15 with an extension to 19 or 23 years for recidivists), Bulgaria (20), Cyprus (12), Czech Republic (20), Denmark (12), Estonia (30), Finland (12), France (normally 18 but 30 years for certain murders), Georgia (25), Germany (15), Greece (20), Hungary (20 unless the court orders otherwise), Ireland (an initial review by the Parole Board after 7 years except for certain types of murders), Italy (26), Latvia (25), Liechtenstein (15), Luxembourg (15), Moldova (30), Monaco (15), Poland (25), Romania (20), Russia (25), Slovakia (25), Slovenia (25), Sweden (10), Switzerland (15 years reducible to 10 years), the former Yugoslav Republic of Macedonia (15), and Turkey (24 years, 30 for aggravated life imprisonment and 36 for aggregate sentences of aggravated life imprisonment).

In respect of the United Kingdom, the Court notes that, in Scotland, when passing a life sentence, a judge is required to set a minimum term, notwithstanding the likelihood that such a period will exceed the remainder of the prisoner's natural life: see the Convention Rights (Compliance) (Scotland) Act 2001.

Third, there are five countries which make no provision for parole for life prisoners: Iceland, Lithuania, Malta, the Netherlands and Ukraine. These countries do, however, allow life prisoners to apply for commutation of life sentences by means of ministerial, presidential or royal pardon. In Iceland, although it is still available as a sentence, life imprisonment has never been imposed.

Fourth, in addition to England and Wales, there are six countries which have systems of parole but which nevertheless make special provision for certain offences or sentences in respect of which parole is not available. These countries are: Bulgaria, Hungary, France, Slovakia, Switzerland (for

sex or violent offenders who are regarded as dangerous and untreatable: see the CPT report at paragraph 64 above) and Turkey.

* * *

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

18. Before the Grand Chamber, the applicants maintained their complaints that their whole life orders were incompatible with Article 3 of the Convention, which provides as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

* * *

C. The Grand Chamber's assessment

1. "Gross disproportionality"

19. The Chamber found that a grossly disproportionate sentence would violate Article 3 of the Convention. The parties accepted that proposition in their submissions before the Chamber and have continued to do so in their submissions to the Grand Chamber. The Grand Chamber agrees with and endorses the Chamber's finding. It also agrees with the Chamber that it will only be on rare and unique occasions that this test will be met (see paragraph 83 above and paragraphs 88 and 89 of the Chamber's judgment).

2. Life sentences

20. Since, however, the applicants have not sought to argue that their whole life orders are grossly disproportionate, it is necessary to examine, as the Chamber did, whether those whole life orders are in violation of Article 3 of the Convention on other grounds. The general principles which guide that examination are as follows.

21. It is well-established in the Court's case-law that a State's choice of a specific criminal justice system, including sentence review and release arrangements, is in principle outside the scope of the supervision the Court carries out at the European level, provided that the system does not contravene the principles set forth in the Convention (see *Kafkaris*, cited above, § 99).

22. In addition, as the Court of Appeal observed in *R v. Oakes* (see paragraph 50 above), issues relating to just and proportionate punishment

are the subject of rational debate and civilised disagreement. Accordingly, Contracting States must be allowed a margin of appreciation in deciding on the appropriate length of prison sentences for particular crimes. As the Court has stated, it is not its role to decide what is the appropriate term of detention applicable to a particular offence or to pronounce on the appropriate length of detention or other sentence which should be served by a person after conviction by a competent court . . ..

23. For the same reasons, Contracting States must also remain free to impose life sentences on adult offenders for especially serious crimes such as murder: the imposition of such a sentence on an adult offender is not in itself prohibited by or incompatible with Article 3 or any other Article of the Convention (see *Kafkaris*, cited above, § 97). This is particularly so when such a sentence is not mandatory but is imposed by an independent judge after he or she has considered all of the mitigating and aggravating factors which are present in any given case.

24. However, as the Court also found in *Kafkaris*, the imposition of an irreducible life sentence on an adult may raise an issue under Article 3 (ibid.). There are two particular but related aspects of this principle that the Court considers necessary to emphasise and to reaffirm.

25. First, a life sentence does not become irreducible by the mere fact that in practice it may be served in full. No issue arises under Article 3 if a life sentence is *de jure* and *de facto* reducible (see *Kafkaris*, cited above, § 98).

In this respect, the Court would emphasise that no Article 3 issue could arise if, for instance, a life prisoner had the right under domestic law to be considered for release but was refused on the ground that he or she continued to pose a danger to society. This is because States have a duty under the Convention to take measures for the protection of the public from violent crime and the Convention does not prohibit States from subjecting a person convicted of a serious crime to an indeterminate sentence allowing for the offender's continued detention where necessary for the protection of the public . . .. Indeed, preventing a criminal from re-offending is one of the "essential functions" of a prison sentence . . . . This is particularly so for those convicted of murder or other serious offences against the person. The mere fact that such prisoners may have already served a long period of imprisonment does not weaken the State's positive obligation to protect the public; States may fulfil that obligation by continuing to detain such life sentenced prisoners for as long as they remain dangerous (see, for instance, *Maiorano and Others*, cited above).

26. Second, in determining whether a life sentence in a given case can be regarded as irreducible, the Court has sought to ascertain whether a life prisoner can be said to have any prospect of release. Where national law affords the possibility of review of a life sentence with a view to its

commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy Article 3 . . ..

27. There are a number of reasons why, for a life sentence to remain compatible with Article 3, there must be both a prospect of release and a possibility of review.

28. It is axiomatic that a prisoner cannot be detained unless there are legitimate penological grounds for that detention. As was recognised by the Court of Appeal in *Bieber* and the Chamber in its judgment in the present case, these grounds will include punishment, deterrence, public protection and rehabilitation. Many of these grounds will be present at the time when a life sentence is imposed. However, the balance between these justifications for detention is not necessarily static and may shift in the course of the sentence. What may be the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence. It is only by carrying out a review of the justification for continued detention at an appropriate point in the sentence that these factors or shifts can be properly evaluated.

29. Moreover, if such a prisoner is incarcerated without any prospect of release and without the possibility of having his life sentence reviewed, there is the risk that he can never atone for his offence: whatever the prisoner does in prison, however exceptional his progress towards rehabilitation, his punishment remains fixed and unreviewable. If anything, the punishment becomes greater with time: the longer the prisoner lives, the longer his sentence. Thus, even when a whole life sentence is condign punishment at the time of its imposition, with the passage of time it becomes – to paraphrase Lord Justice Laws in *Wellington* – a poor guarantee of just and proportionate punishment (see paragraph 54 above).

30. Furthermore, as the German Federal Constitutional Court recognised in the *Life Imprisonment* case (see paragraph 69 above), it would be incompatible with the provision on human dignity in the Basic Law for the State forcefully to deprive a person of his freedom without at least providing him with the chance to someday regain that freedom. It was that conclusion which led the Constitutional Court to find that the prison authorities had the duty to strive towards a life sentenced prisoner's rehabilitation and that rehabilitation was constitutionally required in any community that established human dignity as its centrepiece. Indeed, the Constitutional Court went on to make clear in the subsequent *War Criminal* case that this applied to all life prisoners, whatever the nature of their crimes, and that release only for those who were infirm or close to death was not sufficient (see paragraph 70 above).

Similar considerations must apply under the Convention system, the very essence of which, as the Court has often stated, is respect for human dignity (see, *inter alia*, *Pretty v. the United Kingdom*, no. 2346/02, § 65, ECHR 2002-III; and *V.C. v. Slovakia*, no. 18968/07, § 105, ECHR 2011 (extracts)).

31. Indeed, there is also now clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved.

32. The Court has already had occasion to note that, while punishment remains one of the aims of imprisonment, the emphasis in European penal policy is now on the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence . . .. In the Council of Europe's legal instruments, this is most clearly expressed in Rule 6 of the European Prison Rules, which provides that all detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty, and Rule 102.1, which provides that the prison regime for sentenced prisoners shall be designed to enable them to lead a responsible and crime-free life (see paragraph 77 above).

33. The relevant Council of Europe instruments set out in paragraphs 60–64 and 76 above also demonstrate, first, that commitment to rehabilitation is equally applicable to life sentence prisoners; and second, that, in the event of their rehabilitation, life sentence prisoners should also enjoy the prospect of conditional release.

Rule 103 of the European Prison Rules provides that, in the implementation of the regime for sentenced prisoners, individual sentence plans should be drawn up and should include, *inter alia*, preparation for release. Such sentence plans are specifically extended to life sentenced prisoners by virtue of Rule 103.8 (see paragraph 77 above).

Committee of Ministers Resolution 76(2) recommends that the cases of all prisoners – including life sentence prisoners – be examined as early as possible to determine whether or not conditional release could be granted. That resolution also recommends that review of life sentences should take place after eight to fourteen years of detention and be repeated at regular intervals (see paragraph 60 above).

Recommendation 2003(23) (on the management by prison administrations of life sentence and other long-term prisoners) emphasises that life sentence prisoners should benefit from constructive preparation for release, including, to this end, being able to progress through the prison system. The recommendation also expressly states that life sentence prisoners should enjoy the possibility of conditional release (see, in particular, paragraphs 2, 8 and 34 of the recommendation and paragraph 131 of the report accompanying the recommendation, all set out in paragraph 61 above).

Recommendation 2003(22) (on conditional release) also makes clear that conditional release should be available to all prisoners and that life sentence prisoners should not be deprived of the hope of release (see paragraph 4(a) of the recommendation and paragraph 131 of the explanatory memorandum, both set out paragraph 62 above).

The Committee for the Prevention of Torture has expressed similar views, most recently in its report on Switzerland (see paragraph 64 above).

34. This commitment to both the rehabilitation of life sentence prisoners and to the prospect of their eventual release is further reflected in the practice of the Contracting States. This is shown in the judgments of the German and Italian Constitutional Courts on rehabilitation and life sentences (set out in paragraphs 69–71 and 72 above) and in the other comparative law materials before the Court. These show that a large majority of Contracting States either do not impose life sentences at all or, if they do impose life sentences, provide some dedicated mechanism, integrated within the sentencing legislation, guaranteeing a review of those life sentences after a set period, usually after twenty-five years' imprisonment (see paragraph 68 above).

35. The same commitment to the rehabilitation of life sentence prisoners and to the prospect of their eventual release can be found in international law.

The United Nations Standard Minimum Rules for the Treatment of Prisoners direct prison authorities to use all available resources to ensure the return of offenders to society (see Rules 58–61, 65 and 66, quoted at paragraph 78 above) Additional, express references to rehabilitation run through the Rules (see paragraph 79 above).

Equally, Article 10 § 3 of the International Covenant on Civil and Political Rights specifically provides that the essential aim of the penitentiary system shall be the reformation and social rehabilitation of prisoners. This is emphasised in the Human Rights Committee's General Comment on Article 10, which stresses that no penitentiary system should be only retributory (see paragraphs 80 and 81 above).

Finally, the Court notes the relevant provisions of the Rome Statute of the International Criminal Court, to which 121 States, including the vast majority of Council of Europe member States, are parties. Article 110(3) of the Statute provides for review of a life sentence after twenty-five years, followed by periodic reviews thereafter. The significance of Article 110(3) is underscored by the fact that Article 110(4) and (5) of the Statute and Rules 223 and 224 of the ICC's Rules of Procedure and Evidence set out detailed procedural and substantives guarantees which should govern that review. The criteria for reduction include, *inter alia*, whether the sentenced person's conduct in detention shows a genuine dissociation from his or her crime and his or her prospect of resocialisation (see Rule 223(a) and (b), set out at paragraph 65 above).

3. General conclusion in respect of life sentences

36. For the foregoing reasons, the Court considers that, in the context of a life sentence, Article 3 must be interpreted as requiring reducibility of the

sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds.

37. However, the Court would emphasise that, having regard to the margin of appreciation which must be accorded to Contracting States in the matters of criminal justice and sentencing (see paragraphs 104 and 105 above), it is not its task to prescribe the form (executive or judicial) which that review should take. For the same reason, it is not for the Court to determine when that review should take place. This being said, the Court would also observe that the comparative and international law materials before it show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter (see paragraphs 117 and 118 above).

38. It follows from this conclusion that, where domestic law does not provide for the possibility of such a review, a whole life sentence will not measure up to the standards of Article 3 of the Convention.

39. Although the requisite review is a prospective event necessarily subsequent to the passing of the sentence, a whole life prisoner should not be obliged to wait and serve an indeterminate number of years of his sentence before he can raise the complaint that the legal conditions attaching to his sentence fail to comply with the requirements of Article 3 in this regard. This would be contrary both to legal certainty and to the general principles on victim status within the meaning of that term in Article 34 of the Convention. Furthermore, in cases where the sentence, on imposition, is irreducible under domestic law, it would be capricious to expect the prisoner to work towards his own rehabilitation without knowing whether, at an unspecified, future date, a mechanism might be introduced which would allow him, on the basis of that rehabilitation, to be considered for release. A whole life prisoner is entitled to know, at the outset of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on this ground already arises at the moment of the imposition of the whole life sentence and not at a later stage of incarceration.

4. The present case

40. It remains to be considered whether, in the light of the foregoing observations, the present applicants' whole life orders meet the requirements of Article 3 of the Convention.

41. The Court would begin by observing that, as the Chamber found in its judgment (at paragraph 94), it is not persuaded by the reasons adduced by the Government for the decision not to include a twenty-five year review in the current legislation on life sentences in England and Wales, the 2003 Act (see paragraph 95 above) . It recalls that such a review, albeit vested in the executive, existed in the previous statutory system (see paragraph 46 above).

The Government have submitted that the twenty-five year review was not included in the 2003 Act because one of the intentions of the Act was to judicialise decisions concerning the appropriate terms of imprisonment for the purposes of punishment and deterrence (see paragraph 95 above). However, the need for independent judges to determine whether a whole life order may be imposed is quite separate from the need for such whole life orders to be reviewed at a later stage so as to ensure that they remain justified on legitimate penological grounds. Furthermore, given that the stated intention of the legislative amendment was to remove the executive entirely from the decision-making process concerning life sentences, it would have been more consistent to provide that, henceforth, the twenty-five year review, instead of being eliminated completely, would be conducted within a wholly judicial framework rather than, as before, by the executive subject to judicial control.

42. Moreover, there is a lack of clarity as to the current law concerning the prospect of release of life prisoners. It is true that section 30 of the 1997 Act provides the Secretary of State with the power to release any prisoner, including one serving a whole life order (see paragraph 42 above). It is also true that, in exercising that power – as with all statutory powers – the Secretary of State is legally bound to act compatibly with the Convention (see section 6(1) of the Human Rights Act, set out at paragraph 33 above). As the Government suggested in their pleadings before the Court, it would therefore be possible to read section 30 as not just giving a power of release to the Secretary of State, but as imposing a duty on him to exercise that power and to release a prisoner if it can be shown that his or her continued detention has become incompatible with Article 3, for example, when it can no longer be justified on legitimate penological grounds.

This was, in effect, the reading given to section 30 by the Court of Appeal in *Bieber* and re-affirmed by it in *Oakes* (see, in particular, paragraph 49 above, setting out paragraphs 48 and 49 of *Bieber* and the Court of Appeal's observation that while the section 30 power had been used sparingly, there was no reason why it should not be used by the Secretary of State to effect the necessary compliance with Article 3 of the Convention).

This reading of section 30 ensuring some prospects under the law for release of whole life prisoners would, in principle, be consistent with this Court's judgment in *Kafkaris*, cited above. If it could be established that, in

the applicants' cases, a sufficient degree of certainty existed as to the state of the applicable domestic law to this effect, it could not be said that their sentences were irreducible and thus no violation of Article 3 would be disclosed.

43. However, the Court must be concerned with the law as it presently stands on the published policies as well as in judicial dicta and as it is applied in practice to whole life prisoners. The fact remains that, despite the Court of Appeal's judgment in *Bieber*, the Secretary of State has not altered the terms of his explicitly stated and restrictive policy on when he will exercise his section 30 power. Notwithstanding the reading given to section 30 by the Court of Appeal, the Prison Service Order remains in force and provides that release will only be ordered in certain exhaustively listed, and not merely illustrative, circumstances, namely if a prisoner is terminally ill or physically incapacitated and other additional criteria can be met (namely that the risk of re-offending is minimal, further imprisonment would reduce the prisoner's life expectancy, there are adequate arrangements for the prisoner's care and treatment outside prison, and early release will bring some significant benefit to the prisoner or his or her family).

44. These are highly restrictive conditions. Even assuming that they could be met by a prisoner serving a whole life order, the Court considers that the Chamber was correct to doubt whether compassionate release for the terminally ill or physically incapacitated could really be considered release at all, if all it meant was that a prisoner died at home or in a hospice rather behind prison walls. Indeed, in the Court's view, compassionate release of this kind was not what was meant by a "prospect of release" in *Kafkaris*, cited above. As such, the terms of the Order in themselves would be inconsistent with *Kafkaris* and would not therefore be sufficient for the purposes of Article 3.

45. Moreover, the Prison Service Order must be taken to be addressed to prisoners as well as to prison authorities. It does not, however, include the qualifying explanations, deriving from the Court of Appeal's reasoning in *Bieber* and relied on by the Government in their pleadings before this Court, as to the effect of the Human Rights Act and of Article 3 of the Convention on the exercise of the Secretary of State's power to release under section 30 of the 1997 Act. In particular, the Order does not reflect the possibility – made available by the Human Rights Act – for even whole life prisoners to seek release on legitimate penological grounds some time into the service of their sentence. To that extent, on the basis of the Government's own submissions as to the state of the applicable domestic law, the Prison Service Order is liable to give to whole life prisoners – those directly affected by it – only a partial picture of the exceptional conditions capable of leading to the exercise of the Secretary of State's power under section 30.

46. As a result, given the present lack of clarity as to the state of the applicable domestic law as far as whole life prisoners are concerned, the Court is unable to accept the Government's submission that section 30 of the 1997 Act can be taken as providing the applicants with an appropriate and adequate avenue of redress, should they ever seek to demonstrate that their continued imprisonment was no longer justified on legitimate penological grounds and thus contrary to Article 3 of the Convention. At the present time, it is unclear whether, in considering such an application for release under section 30 by a whole life prisoner, the Secretary of State would apply his existing, restrictive policy, as set out in the Prison Service Order, or would go beyond the apparently exhaustive terms of that Order by applying the Article 3 test set out in *Bieber*. Of course, any ministerial refusal to release would be amenable to judicial review and it could well be that, in the course of such proceedings, the legal position would come to be clarified, for example by the withdrawal and replacement of the Prison Service Order by the Secretary of State or its quashing by the courts. However, such possibilities are not sufficient to remedy the lack of clarity that exists at present as to the state of the applicable domestic law governing possible exceptional release of whole life prisoners.

47. In light, therefore, of this contrast between the broad wording of section 30 (as interpreted by the Court of Appeal in a Convention-compliant manner, as it is required to be as a matter of United Kingdom law in accordance with the Human Rights Act) and the exhaustive conditions announced in the Prison Service Order, as well as the absence of any dedicated review mechanism for the whole life orders, the Court is not persuaded that, at the present time, the applicants' life sentences can be regarded as reducible for the purposes of Article 3 of the Convention. It accordingly finds that the requirements of Article 3 in this respect have not been met in relation to any of the three applicants.

48. In reaching this conclusion the Court would note that, in the course of the present proceedings, the applicants have not sought to argue that, in their individual cases, there are no longer any legitimate penological grounds for their continued detention. The applicants have also accepted that, even if the requirements of punishment and deterrence were to be fulfilled, it would still be possible that they could continue to be detained on grounds of dangerousness. The finding of a violation in their cases cannot therefore be understood as giving them the prospect of imminent release.

* * *

FOR THESE REASONS, THE COURT

1. *Holds*, by sixteen votes to one, that there has been a violation of Article 3 in respect of each applicant; . . .

3. *Holds*, by sixteen votes to one, that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the first applicant;

4. *Holds*, by sixteen votes to one,
(a) that the respondent State is to pay the first applicant, within three months, EUR 40,000 (forty thousand euros), to be converted into pounds sterling at the rate applicable at the date of settlement, in respect of costs and expenses, plus any tax that may be chargeable;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, unanimously, the remainder of the first applicant's claims for just satisfaction.

Done in English and in French, and notified at a public hearing in the Human Rights Building, Strasbourg, on 9 July 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'Boyle — Deputy Registrar
Dean Spielmann — President

* * *

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Press Release
issued by the Registrar of the Court

ECHR 247 (2014)
04.09.2014

The extradition of an individual to a State in which he or she is liable to an irreducible life sentence is contrary to the Convention

In today's **Chamber** judgment[1] in the case of **Trabelsi v. Belgium** (application no. 140/10), which is not final, the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights, and

a violation of Article 34 (right of individual application).

The case concerned the extradition, which has been effected despite the indication of an interim measure by the European Court of Human Rights (Rule 39 of the Rules of Court), of a Tunisian national from Belgium to the United States, where he is being prosecuted on charges of terrorist offences and is liable to life imprisonment.

The Court considered that the life sentence to which Mr Trabelsi was liable in the United States was irreducible inasmuch as US law provided for no adequate mechanism for reviewing this type of sentence, and that it was therefore contrary to the provisions of Article 3. It concluded that Mr Trabelsi's extradition to the United States entailed a violation of Article 3 of the Convention.

Furthermore, the failure of the Belgian State to observe the suspension of extradition indicated by the Court had irreversibly lowered the level of protection of the rights secured under Article 3, which Mr Trabelsi had attempted to uphold by lodging his application with the Court, and had interfered with his right of individual application.

Principal facts

The applicant, Nizar Trabelsi, is a Tunisian national who was born in 1970. He is currently incarcerated in the United States.

On 30 September 2003 he was sentenced by the Brussels Regional Court to ten years' imprisonment, upheld on appeal, for having, among other offences, attempted to blow up a Belgian military base and having instigated a criminal conspiracy.

On 26 January 2005 Mr Trabelsi was sentenced *in absentia* by a Tunisian military court to ten years' imprisonment for belonging to a terrorist organisation abroad in peacetime. In 2009 the Permanent Military Court in Tunis issued a warrant for the applicant to be brought before it, for which an application for enforcement was submitted to the Belgian authorities.

On 25 August 2005, meanwhile, the applicant submitted an asylum application in Belgium, which was dismissed in 2009.

On 8 April 2008 the US authorities transmitted to the Belgian authorities a request for Mr Trabelsi's extradition, based on an indictment issued by the District Court of the District of Columbia on

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

16 November 2007. The indictment included four charges against Mr Trabelsi for offences relating to Al-Qaeda-inspired acts of terrorism*,* specifying that for the first two charges he was liable to a sentence of life imprisonment and for the other two a fifteen-year term.

On 19 November 2008 the Nivelles Regional Court declared the arrest warrant issued by the US District Court enforceable *vis-à-vis* offences other than those of which Mr Trabelsi had already been convicted in Belgium. His subsequent appeals against that decision were dismissed.

On 10 June 2010 the Brussels Court of Appeal issued a favourable opinion on Mr Trabelsi's extradition, specifying a number of conditions, including the fact that the death penalty should not be imposed on him or, failing that, should not be enforced, that the life sentence should be accompanied by the possibility of commutation of sentence and that Mr Trabelsi should not be re-extradited to a third country without the agreement of Belgium. By a diplomatic note of 10 August 2010 the US authorities repeated their guarantees in this respect.

On 23 November 2011 the Minister for Justice, drawing on the assurances provided by the US authorities, adopted a ministerial decree granting the applicant's extradition to the US Government.

Meanwhile, on 6 December 2011 Mr Trabelsi lodged a request with the European Court of Human Rights for the indication of an interim measure pursuant to Rule 39 of the Rules of Court with a view to suspending his extradition. On the same day the Court acceded to his request and indicated to the Belgian Government that it should not extradite Mr Trabelsi to the United States. The Belgian Government submitted several requests for the lifting of this measure, which was nonetheless maintained for the duration of the proceedings before the Court.

On 3 October 2013 Mr Trabelsi was extradited to the United States, where he was immediately detained.

Complaints, procedure and composition of the Court

Mr Trabelsi complained that his extradition to the United States of America would expose him to treatment incompatible with Article 3 (prohibition of inhuman or degrading treatment). He contended that some of the offences for which his extradition had been granted carried a maximum life prison sentence which was irreducible *de facto,* and that if he were convicted he would have no prospect of ever being released. Still under Article 3 (prohibition of inhuman or degrading treatment), he also complained of his conditions of detention in Belgium, particularly the numerous transfers to which he had been subjected. Relying on Article 6 § 1 (right to a fair trial), he submitted that he had not had the benefit of a fair trial or the safeguards which should have accompanied criminal proceedings during the judicial procedure for enforcement of the US arrest warrant. He also alleged that his extradition entailed a violation of Article 4 of Protocol No. 7 (right not to be tried or punished twice). Furthermore, he complained that his extradition to the United States constituted interference with his private and family life in Belgium, in breach of Article 8 (right to respect for private and family life). Lastly, under Article 34 (right of individual application), he complained that his extradition to the US had taken place in breach of the interim measure indicated by the Court by virtue of Rule 39 of the Rules of Court.

The application was lodged with the European Court of Human Rights on 23 December 2009.

Judgment was given by a Chamber of seven judges, composed as follows:

Mark **Villiger** (Liechtenstein), *President*,
Ann **Power-Forde** (Ireland),
Ganna **Yudkivska** (Ukraine),
André **Potocki** (France),
Paul **Lemmens** (Belgium),
Helena **Jäderblom** (Sweden),

Aleš **Pejchal** (the Czech Republic),

and also Claudia **Westerdiek**, *Section Registrar.*

Decision of the Court

Article 3 (with regard to the applicant's extradition to the United States)

The Court firstly reiterated that the imposition of a sentence of life imprisonment on an adult offender was not in itself prohibited by any Article of the Convention, provided that it was not disproportionate. On the other hand, if it was to be compatible with Article 3 such a sentence should not be irreducible *de jure* and *de facto*. In order to assess this requirement the Court had to ascertain whether a life prisoner could be said to have any "prospect of release" and whether national law afforded the "possibility of review" of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner[2]. Moreover, the prisoner had to be informed of the terms and conditions of this review possibility at the outset of his sentence[3].

The Court then observed that Article 3 implied an obligation on Contracting States not to remove a person to a State where he or she would run the real risk of being subjected to prohibited ill-treatment. In matters of removal of aliens, the Court affirmed that, in accordance with the preventive aim of Article 3, this risk had to be assessed before the persons concerned actually suffered a penalty or treatment of a level of severity proscribed by this provision, which meant, in the present case, before Mr Trabelsi's possible conviction in the United States.

In the present case the Court considered that in view of the gravity of the terrorist offences with which Mr Trabelsi stood charged and the fact that a sentence could only be imposed after the trial court had taken into consideration all relevant mitigating and aggravating factors, a discretionary[4] life sentence would not be grossly disproportionate.

The Court held, however, that the US authorities had at no point provided any concrete assurance that Mr Trabelsi would be spared an irreducible life sentence. It also noted that, over and above the assurances provided, while US legislation provided various possibilities for reducing life sentences (including the Presidential pardon system), which gave Mr Trabelsi some "prospect of release", it did not lay down any procedure amounting to a mechanism for reviewing such sentences for the purposes of Article 3.

Therefore, the life imprisonment to which Mr Trabelsi might be sentenced could not be described as reducible, which meant that his extradition to the United States had amounted to a violation of Article 3.

Article 34

The Court mentioned the crucial importance of and the vital role played by interim measures under the Convention system.

It noted that by acting in breach of the interim measure indicated by the Court pursuant to Rule 39, the respondent State had deliberately and irreversibly lowered the level of protection of the rights set out in Article 3 of the Convention which Mr Trabelsi had endeavoured to uphold by lodging his application with the Court. The extradition had, at the very least, rendered any finding of a violation of the Convention otiose, as Mr Trabelsi had been removed to a country which was not a Party to

[2] *Kafkaris v. Cyprus*, no. 21906/04 (GC), § 98, 12 February 2008.
[3] *Vinter and Others v. the United Kingdom*, nos. 66069/09, 130/10 and 3896/10 (GC), § 122, 9 July 2013.
[4] "Discretionary" in the sense that the judge can impose a less severe sentence, ordering a set number of years' imprisonment.

that instrument, where he alleged that he would be exposed to treatment contrary to the Convention.

The Court also considered that the actions of the Belgian Government had made it more difficult for Mr Trabelsi, who was being held in solitary confinement with limited contact with the outside world, to exercise his right of petition.

Consequently, Belgium had failed to honour the obligations incumbent on it under Article 34.

Article 3 (as regards the applicant's conditions of detention in Belgium)

The Court dismissed the complaints under Article 3 concerning the applicant's conditions of detention in Belgium, on account of non-exhaustion of domestic remedies.

Other articles

The Court dismissed the complaint under Article 6 § 1 as being incompatible with the provisions of the Convention, as well as the complaints under Article 8 and Article 4 of Protocol No. 7 as being manifestly ill-founded.

Just satisfaction (Article 41)

The Court held that Belgium was to pay the applicant 60,000 euros (EUR) in respect of non-pecuniary damage and EUR 30,000 in respect of costs and expenses.

Separate opinion

Judge Yudkivska expressed a concurring opinion. This opinion is annexed to the judgment.

The judgment is available in English and French.

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Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe
James Q. Whitman

Print publication date: 2005
Print ISBN-13: 9780195182606
Published to Oxford Scholarship Online: March 2012
DOI: 10.1093/acprof:oso/9780195182606.001.0001

Introduction

James Q. Whitman

At the beginning of the twenty-first century, criminal punishment is harsh in America, and it has been getting harsher. In the year 2000, the incarcerated population reached the extraordinary level of 2 million, roughly quintupling since the mid-1970s.[1] America's per capita incarceration is now the highest in the world, approaching, and in some regions exceeding, ten times the rate in Western Europe. Large-scale incarceration is only part of the story, though. Juveniles have increasingly been tried "as adults"—something that Western Europeans find little less than shocking. New sorts of punishments have been invented over the last twenty-five years, from boot camps to electronic monitoring devices; and old sorts of punishments, from chain gangs to public shaming, have been revived. Some of the new harshness has involved matters almost everybody regards as momentous: in particular the death penalty, reintroduced in the United States at the very moment that it was definitively abolished in Western Europe. At the same time, some of the new harshness has involved almost

laughably trivial matters: "quality of life" policing has landed people in jail—if only for a night—for offenses like smoking cigarettes in the New York subway;[2] and the Supreme Court has declared that police may jail persons for something as minor as driving without a seatbelt.[3] All of these developments, whether trivial or momentous, have been surrounded by a jarringly punitive rhetoric in American politics, perhaps best exemplified by the Phoenix sheriff who proudly declares that he runs "a very bad jail."[4]

(p.4) None of this is news. Everyone who reads the newspapers knows that we have been in the midst of a kind of national get-tough movement, which has lasted for about the last twenty-five years. Still, Americans may not quite grasp how deeply isolated this period has left us in the Western world. Punishment in America is now, as Michael Tonry observes, "vastly harsher than in any other country to which the United States would ordinarily be compared."[5] There are certainly some parts of the world that have turned harsher over the last twenty-five years. This is true in particular of some Islamic countries.[6] But among Western nations, only England has followed our lead—and even England has followed us only up to certain point.[7] As for the countries of continental Western Europe, the contrast between their practices and ours has become stark indeed. The Western European media regularly runs pieces expressing shock at the extreme severity of American punishment.[8] Meanwhile, continental justice systems have come to treat America as something close to a rogue state, hesitating to extradite offenders to the United States.

To be sure, this era of American harshness will presumably not go on forever, and it may already have slowed.[9] Nevertheless, it is the disturbing truth that we now find ourselves in a strange place on the international scene. As a result of the last quarter century of deepening harshness, we are no longer clearly classified in the same categories as the other countries of the liberal West. Instead, by the measure of our punishment practices, we have edged into the company of troubled and violent places like Yemen and Nigeria (both of which, like many jurisdictions in the United States, execute people for crimes committed when they were minors—though Yemen has recently renounced the practice);[10] China and Russia (two societies that come close to rivaling our incarceration rates);[11] pre-2001 Afghanistan (where the Taliban, like American judges, reintroduced public shame sanctions);[12] and even Nazi Germany (which, like the contemporary United States, turned sharply toward retributivism and the permanent incapacitation of habitual offenders).[13]

What is going on in our country?

This is the question I want to approach in this book. This is a book about the cultural roots of harsh criminal punishment as it has emerged in contemporary America. Most especially, it is a book about the how harsh criminal punishment can develop in a society that belongs to the Western liberal tradition. America *is*, after all, a country that belongs to something it is fair to call the Western "liberal" tradition, elusive though the concept of liberalism may be. Certainly there are many aspects of American culture that seem manifestly to belong to a humane strain of liberalism. Ours, of all Western countries, is the one that is most consistently suspicious of state authority. Ours is the country with the inveterate attachment to the values of procedural fairness. Ours is the country that—unlike Germany or France—never succumbed to any variety of fascism or nazism. Why, then, is ours not the country with the mildest punishment practices? Certainly, in most respects, Americans define their values by opposition to *illiberal* societies—to the societies of places like China or the Afghanistan of the Taliban or Nazi Germany. **(p.5)** How could our patterns of punishment be bringing us closer to them than to the dominant polities of the contemporary European Union?

The answer this book will offer is drawn from history—a comparative history that reaches back to the eighteenth century, to a time before the French and American revolutions. In particular, it is drawn from a close comparative study of the United States, on the one hand, and the two dominant legal cultures of the European

continent, France and Germany, on the other. There are good reasons to choose France and Germany for such a study. Of all the continental countries, these are the two that cry out most for close comparison with our own, in this era of American harshness. They are large and powerful industrial nations that have been strongholds of humane and democratic Western values since 1945. They are countries that have set the tone for all of the continent for many generations, and that continue to set much of the tone for the human rights jurisprudence of the European Union. Not least, they are the countries that we have measured ourselves against since the time of the American Revolution. Indeed, they are countries that, once upon a time, seemed precisely to lack the humane and democratic values that *America* stood for. France and Germany, as they exist today, are the descendants of the "despotic," state-heavy, hierarchical societies against which we defined ourselves two and half centuries ago. They are also countries that have had recurrent episodes of authoritarian government, from the nineteenth century through the horrific 1930s and 1940s. Yet at the end of the millennium, they are countries that punish far more mildly than ours does. Why?

There is one sort of answer that must be rejected out of hand. This is the sort of answer given by the high-theoretical literature on the sociology of punishment in "modern" society. Sociologists of punishment and "modern" society, from Durkheim to Foucault and beyond, are among the best-known intellectual figures of the day. Their books are widely assigned in college courses, and the sociology of "modernity" is probably the first thing that most educated people think of when the topic is punishment. But theirs is a sociology precisely about punishment in "modern" society in general. The sociology of "modernity" simply does not grapple with the question of how punishment practices can vary—let alone how sharp differences can exist between the "modern" societies of places like the United States, France, or Germany. The sort of "modernity" that Foucault and his followers talk about seems especially beside the point, and especially frustrating to read in the face of recent American developments. Foucault, in his famous *Discipline and Punish*, described modern punishment as the product of an ominous shift from disciplining the body to disciplining the soul. This makes for a dramatic, and sometimes fitting, description of continental punishment; and it also makes for a fitting description of *some* aspects of American punishment. But it tells us nothing about how punishment practices could diverge on the two sides of the Atlantic, with America striking off alone on the road to intensifying harshness. Much the same objection applies even to the most sensitive recent work on "modernity."[14] Of course large industrial countries share some "modern" features. But what they share can hardly explain how **(p.6)** they have diverged; and these countries *have* diverged. How can any approach that starts by invoking "modernity" explain why?

This book will accordingly avoid talking much about "modernity." We cannot understand American punishment without understanding *America*; and the same goes for the rest of the "modern world." Sensible criminologists have always been ready to acknowledge that different cultures produce different forms of punishment—that, as one pre-Foucault textbook put it, "One learns to react punitively or in some other way just as learns to speak English, German or Japanese."[15] One does indeed. Like other wise scholars, I will accordingly focus on comparative culture:[16] there is something in the American idiom, something in American culture, that is driving us toward harsh punishment.

Of course, "American culture" is a vast topic, and I should emphasize from the outset that there are important aspects of American culture that I am not going to explore with any care. It is clear, for example, that American harshness has something to do with the strength of its religious tradition, and especially its Christian tradition. Part of what makes us harsher than continental Europeans is the presence of some distinctively fierce American Christian beliefs. It is also the case that American harshness has something to do with American racism—though, as we shall see, continental European race relations are not noticeably better than American. While I

will touch on both of these issues repeatedly, I will not discuss either in any detail. Perhaps most important, it is clear that the relative harshness of American punishment has a great deal to do with the prevalence of violence in American society—both because Americans have higher rates of violent crime, and because American patterns of violence also make themselves felt in prisons, policing, and elsewhere.[17] The difference in patterns of violence matters immensely, and it certainly deserves attention beyond what I will give it in this book. Nevertheless, American violence is another problem that I leave for another day.

Instead, leaving race, Christianity, and violence to one side, this book will focus on two quite different aspects of American culture: on American patterns of *egalitarian social status* and on American patterns of *resistance to state power*. American society has a deeply rooted tradition of status egalitarianism: a strong dislike for social hierarchy runs throughout through American history. American society also displays a recurrent suspiciousness in the face of state power. These are both features of American life that are integral to the American style of liberalism. They are also features of American life that differentiate us unmistakably from the countries of continental Europe. Countries like France and Germany show much more tolerance for traditions of social hierarchy than we do, and much more tolerance for state power as well. And, as I am going to try to show, these most characteristically "liberal" features of American culture have contributed to making American punishment uniquely harsh in the West.

The bulk of this book will be about the American style of status equality. The notion that the peculiarities of American culture have to do with peculiar **(p.7)** American traditions of status equality is nothing new. Toequeville, in particular, is famous for arguing that the forms of American culture grew out of our historic lack of social hierarchy—out of our lack of what he called the "aristocratic element." This has seemed critically important to many observers of American society ever since, from H. G. Wells to Louis Hartz and Seymour Martin Lipset,[18] and this book too is going to treat it as critically important.

But I am going to offer a very different argument from the kind that Toequeville offered. To Toequeville, the absence of an "aristocratic element" implied that America would have *mild* criminal punishment. "Societies become milder," he declared in his *Democracy in America*, "as conditions become more equal": after all, people who are equal can be expected to have more reciprocal empathy, and therefore to go easy on each another. America, he thus concluded in 1840, being the most egalitarian country, must inevitably have "the most benign criminal justice system."[19] Nor is Toequeville the only observer to offer this sort of argument. A kindred idea appeared, a half-century later, in the sociology of Durkheim. To Durkheim, the harshness of punishment in a given society had something to do with its degree of "contractualization." To the extent that market-oriented, contract-like relations governed societies, Durkheim hypothesized, they would tend to have "restituitive" rather than "penal" regulation—they would tend to rely on civil remedies rather than on harsh criminal punishment. This Durkheimian claim had nothing to do with social status as such. Nevertheless, to the extent we associate market forms of social organization with rejection of status hierarchy, we can see real resemblances between Durkheim's arguments and those of Toequeville.[20] Certainly Durkheim's arguments suggest the same conclusion about America as Tocqueville's: if Durkheim is right, we would expect to observe a link between American styles of market-oriented egalitarianism and mildness in criminal punishment.

Yet, of course, in America there is no such link. Americans display unmistakably deep-rooted patterns of status egalitarianism; Toequeville was right about that. Yet our punishment is unmistakably harsh. As for market-orientation: it would be hard to point to any society that is more "contractualized," more market-oriented, than ours. Yet ours is the society of harsh punishment.

The main purpose of this book is to explain why—why the American style of status equality should produce

results so thoroughly at odds with what these subtle and thoughtful French observers predicted.

The explanation I will offer involves a comparative legal history that reaches well back into the eighteenth century. The key to understanding how Toequeville and Durkheim went wrong lies, I am going to argue, in understanding the link between traditions of social hierarchy and the dynamic of *degradation* in punishment. Contemporary American criminal punishment is more *degrading* than punishment in continental Europe. The susceptibility to degradation lies at the core of what makes American punishment harsh. And our susceptibility to degradation has to do precisely with our lack of an "aristocratic element."

(p.8) The literal meaning of "to degrade" is to reduce another person in status, to treat another person as *inferior*; and it is that literal meaning that I will take as my point of departure. We all know intuitively that degradation, in this sense, often plays a significant role in punishment: part of what makes punishments effective is their power to degrade—their power to make the person punished feel diminished, lessened, lowered. Within the world of criminal punishment, such degradation is achieved in the widest variety of ways, from beatings to mutilation to day-glo orange prison uniforms.

Now, contemporary France and Germany are countries, I am going to show, with a deep commitment to the proposition that criminal offenders must not be degraded—that they must be accorded *respect* and *dignity*. The differences between continental and American practices can be little short of astonishing. Some of the most provocative examples come from continental prisons. Prison is a relatively rare sanction in continental Europe, by sharp contrast with the United States, and sentences are dramatically shorter. Nevertheless, there are continental prisons, and there are continental prisoners. But those comparatively few continental offenders who do wind up in prison are subjected to a regime markedly less degrading than that that prevails in the United States. Thus continental prisons are characterized by a large variety of practices intended to prevent the symbolic degradation of prison inmates. Prison uniforms have generally been abolished. Rules have been promulgated attempting to guarantee that inmates be addressed respectfully—as "Herr So-and-So" or "Monsieur So-and-So." Rules have also been promulgated protecting inmate privacy, through such measures as the elimination of barred doors. Most broadly, these measures include what in Germany is called "the principle of approximation" or "the principle of normalcy": the principle that life in prison should approximate life in the outside world as closely as possible. Like all ideals in the law of punishment, this one is sometimes realized only fitfully: to study norms of dignity in prison is often to study aspirations rather than realities. France in particular lags well behind Germany in implementing these practices, and life in French prisons can be very tough. Nevertheless, the "principle of approximation" does have real meaning, and indeed it has led to some practices that will seem astounding to Americans. German convicts, for example, are supposed to work at jobs that are *real* jobs, like jobs in the outside world. This means that they enjoy far-reaching protection against arbitrary discharge, and even four weeks per year of paid vacation (!). All of this is intended to dramatize a fact about their dignity. The lives of convicts are supposed to be, as far as possible, no different from the lives of ordinary German people. Convicts are not to be thought of as persons of a different and lower status than everybody else. As we shall see, these same ideas also pervade European political debate over prison policy. (These are also the continental ideas that most recently came to the fore in European protests over the treatment of the captured prisoners held in Guantanamo Bay after the American campaign in Afghanistan.)

Prisons are not the only places where this continental commitment to dignity shows itself. There are many examples that take us beyond life within **(p.9)** prison walls. Thus in America we are far less bothered by public exposure for criminal offenders than Europeans are—whether those inmates are being kept behind barred prison doors that expose them to the view of all, or being shown on internet broadcasts, or being subjected to public

shame sanctions, or having their records opened for public inspection. There are other examples, involving deprivation of civil and political rights. The oldest legal form of status degradation—automatic deprivation of rights of participation—still survives in America. Convicted American felons are frequently automatically deprived of civic rights—a practice of status degradation that has disenfranchised a substantial proportion of the African-American population in some regions. As we shall see, French and German prison systems, by contrast, have programs that encourage inmates to exercise their (almost always unimpaired) right to vote. On the deepest level, American criminal justice displays a resistance to considering the very personhood of offenders. This is a resistance that shows in the triumph of determinate sentencing in America, and it is a resistance that is absent in Western Europe.

These are differences of profound significance, I am going to argue, differences that take us a long way toward understanding how American punishment culture has come to differ so much from French and German. Cultures that systematically show respect for offenders are also cultures that are likely to punish with a mild hand; conversely, cultures (like our own) that have no commitment to respect for the offender are likely to show harshness. Where do these differences come from?

"Modernity" obviously has no answer to offer.

That does not mean that sociology has no answer to offer. On the contrary, these are differences we can only explain if we are grasp some deeply rooted differences in social values and social structure. But the sociology we need is a historical sociology. The continental commitment to "dignity" and "respect" in punishment is something that has grown very slowly since the eighteenth-century, and it is a commitment that offers striking evidence of a fundamental connection between degradation in punishment and traditions of social status. For at its core, as I want to demonstrate in this book, it is a commitment to *abolishing historically low-status treatment.*

To understand the differences that divide us from the French and the Germans, we must indeed begin in the eighteenth century. France and Germany are countries in which, two centuries or so ago, there were sharp distinctions between high-status people and low-status people. In particular, there were two classes of punishments: high-status punishments, and low-status punishments. Forms of execution are the most familiar example: nobles were traditionally beheaded; commoners were traditionally hanged. There are many other examples, too: low-status offenders were routinely mutilated, branded, flogged, and subjected to forced labor; all while being displayed before a raucous public, both before and after their deaths. High-status offenders were generally spared such treatment. Forms of imprisonment differed by status as well. Two and a half centuries ago, high-status continental convicts—who included such famous eighteenth-century prisoners as Voltaire or Mirabeau— **(p.10)** could expect certain kinds of privileged treatment. They were permitted a relatively normal and relatively comfortable existence, serving their time in "fortresses" rather than in prisons. Their "cells" were something like furnished apartments, where they received visitors and were supplied with books and writing materials. They were immune from forced labor and physical beatings. They were accorded easy and regular visitation privileges. They were permitted to wear their own clothing and to provide their own food; they were permitted to provide their own medical care as well. They were shielded from public exposure, and indeed from all forms of shame. Low-status prisoners by contrast were subjected to conditions of effective slavery, often resulting in horrifically high mortality.

The subsequent development of punishment in these countries can be captured, in its broadest outline, in a simple sociological formula: over the course of the last two centuries, in both Germany and France, and indeed throughout the continent of Europe, *the high-status punishments have slowly driven the low-status*

punishments out. Gradually, over the last two hundred years, Europeans have come to see historically low-status punishments as unacceptable survivals of the inegalitarian status-order of the past. More and more offenders have been subjected to the relatively respectful treatment that was the privilege of a tiny stratum of high-status persons in the eighteenth century. In particular, what used to be the privilege of relatively respectful imprisonment has slowly been extended to every inmate. This is a generalization that can only be made in broad outline: I speak of tendencies that, while always present, are never fully realized. What has happened, has happened only within the limits of the possible. There is no way that every ordinary inmate can really be accorded all the accommodations and comforts that an imprisoned Voltaire or an imprisoned Mirabeau once enjoyed. It has happened, in part, only recently: the full-scale abolition of low-status punishments has occurred only over the last twenty-five years, and is indeed still in the process of occurring. Nevertheless, it has happened. The old "honorable" forms of imprisonment have driven the "dishonorable" forms out: within the limits of the possible, everyone in a continental prison is now treated in the way only aristocrats and the like were once treated, and norms of dignified and respectful treatment have become generalized. This is a development that is, moreover, entirely typical of continental European law: as I have argued elsewhere, in almost every area of the law, we see the same drive toward a kind of high-status egalitarianism—of an egalitarianism that aims to lift everyone up in social standing. These countries are the scene of a *leveling-up* egalitarianism—an egalitarianism whose aim is to raise every member of society up in social status.[21]

High social status for everybody: this is the drive in continental Europe. This drive has caught the attention of continental observers from Rudolf von Jhering in the nineteenth century to Norbert Elias and Pierre Bourdieu in the twentieth.[22] All of these continental authors see the same deep desire among their countrymen to eliminate the vestiges of low status and bring everyone up in social rank. It is a desire that has profoundly affected the continental **(p.11)** approach to punishment. High social status for everybody has come to mean high social status even for criminal offenders.

Nothing of the kind has happened in the United States, by contrast; and this reflects the fact that the history of social status in the American world is very different. Our traditions of punishment do not begin the way continental traditions do: with an eighteenth-century practice of making sharp distinctions between high- and low-status punishment. The common-law world does not have the same long history of legally guaranteeing high-status treatment for some. In certain ways, in fact, English status-differentiation had already begun to break down in the later Middle Ages and sixteenth century. Certainly by the mid-eighteenth century the contrast between the continental and Anglo-American worlds was very striking: by around 1750, special high-status treatment had already begun to vanish in both the British colonies and in metropolitan England. Over the course of the nineteenth century, this historic tendency became consistently stronger in the United States, as special high-status treatment was regularly attacked. The consequence is that our large sociological tendency ran in a direction opposite from that of continental Europe. Where nineteenth-century continental Europeans slowly began to *generalize* high-status treatment, nineteenth-century Americans moved strongly to *abolish* high-status treatment. From a very early date, American showed instead, at least sporadically, a typical tendency to generalize norms of *low*-status treatment—to level down. The tale of this American development is, as we shall see, exceedingly complex. Most important, it is bound up with the history of American slavery in ways that have to be carefully traced and carefully weighed. What matters though, for my purposes in this book, is principally what did *not* happen. Americans never displayed the European tendency to maintain and generalize older high-status patterns of treatment.

In this, the law of punishment is, once again, simply typical of the law more broadly: Europeans live with the memory of an age of social hierarchy and feel a corresponding horror at historically low-status punishments. To

tolerate the infliction of degrading punishments, for Europeans, is to tolerate a return to the bad old world of the ancien regime, when ordinary people had to fear flogging, mutilation, and worse. We do not live with memories of that kind in the United States (despite our history of slavery), and the European urge to replace low-status punishments with high-status ones is an urge that we do not feel. We can revive old-style public shaming, for example, without feeling any European qualms: humiliating and degrading offenders, for us, does not smack of social hierarchy: We have not learned to think of humiliation and degradation, in the way that Europeans do, as inegalitarian practices.

The connection between traditions of social hierarchy and degradation is my main topic, but it is not my only one. I will also spend some time on another aspect of American liberalism: our traditions of resistance to state power.

Here too, there is a long tradition of interpretation that seems simply **(p.12)** wrong when tested against the American case. At least since Montesquieu, people have believed that harsh punishment is produced by strong states, with relatively unbridled power.[23] Durkheim stated it as nothing less than a "law": the intensity of punishment, he held, depended not only on the complexity of a society, but on the "absolute character" of its state power.[24] This is an idea that is still taken perfectly seriously by scholars,[25] and it is an idea that most ordinary Americans undoubtedly find completely congenial. Following this idea, one would imagine that the countries that punished harshly were what Montesquieu called the "despotic" ones. In particular, one would predict that America, home of a powerful antistatist tradition, would punish mildly. And indeed, most Americans assume that our traditions of resistance to state power, and especially our traditions of procedural protections against prosecution, make our country uniquely liberal in its criminal justice. Yet, despite our unmistakably libertarian traditions, ours, among Western countries, is the one with distinctively harsh punishment.

This too is a puzzle for any of us attached to the values of liberalism. Part of the solution to the puzzle is that Americans overestimate the distinctiveness of their traditions. Europeans have procedural protections too, as we shall see. Indeed, they have been actively extending their procedural protections over the last quarter century. (What is more, even the historical difference is not as sharp as Americans imagine: it has been argued, for example, that the privilege against self-incrimination, far from being an Anglo-American innovation, was borrowed from the continent.[26])

But the issue goes beyond procedural protections. It is my aim to show that traditions of state power can make for *mildness* in punishment, in ways that our scholarship has not fully grasped—ways that have to do primarily with two aspects of state power: the exercise of systematic mercy and the tendency toward bureaucratization.

Mercy is the most important of the aspects of state power that I will discuss. "Mercy" is complex concept. In part, it is concept that assumes, once again, relations of status hierarchy. Mercy comes de haut en bas: superiors accord it to inferiors. In this, mercy is akin to degradation: when we show a person mercy, we confirm his inferior status—more gently, but just as surely, as when we degrade him. A society with a strong tradition of acknowledging and enforcing status differences will thus often be a society with a tradition of mercy.

There is more to the concept of mercy than that, though. Mercy involves respecting individual differences. A merciful justice looks down on the offender, and asks: what is it that might entitle this offender to milder punishment than others who have committed the same offense? In this sense, mercy involves individualization of justice—a willingness to distinguish between more deserving and less deserving persons. The contrary of mercy, as understood in this sense, is formal equality: a system that operates by the principle of formal equality

is a system that aims to treat all persons exactly alike, extending no special mercy to anyone. Kant is the most famous advocate of a species of formal equality that excludes mercy, and his best-known passage **(p.13)** presents his view with a kind of Old Testament fury: "The law of punishment is a categorical imperative, and woe to him who creeps along the serpent paths of the theory of social welfare hoping to turn up some argument that makes it seem like good policy to release him from his punishment, or diminish it."[27] When we reject mercy, in the spirit of this slightly terrifying passage, we refuse to countenance any special treatment for any offender.

As we shall see, the values of mercy have shown themselves to be much stronger in French and German justice, over the last quarter-century, than in American justice. This is partly because practices of mercy that date back to the eighteenth century, and beyond, have never died in continental Europe: both France and Germany still dispense general amnesties, just as the royal and princely governments of the eighteenth century did. But it is not just a matter of the literal survival of ancien régime practices of mercy. It is also that a vaguer spirit of mercy pervades continental justice. Individualization of punishment, and a concern for individual deserts, run throughout both French and German law. American law, by contrast, is much more hesitant to individualize. To be sure, there is plenty of mercy in America, as we shall see. Nevertheless, the strong tendency of the last twenty-five years has been toward a formal equality of nearly Kantian severity, and there is no doubt that America differs dramatically from continental Europe by this measure. Unlike the French or the Germans, we display a powerful drive to hit every offender equally hard.

Why are the values of mercy so much stronger in continental Europe?

Part of the answer that I will give takes us back once more to the European history of status hierarchy. Mercy does indeed come de haut en bas; and a long continental tradition of condign grace can still be detected in the law of today. Moreover, traditions of status-oriented thinking have conditioned continental jurists to think in terms of distinctions between persons in a way that is relatively alien to American legal thought. Making distinctions between persons has been the stuff of continental law for centuries: French and German jurists have always resisted the idea that everybody is exactly alike. One consequence is that today both French and German justice are much readier than American justice to make individualizing distinctions among offenders. Formal equality is just not at home in continental Europe. Traditions of status are not the only source of the strength of the values of mercy in continental Europe, though. Those values have another taproot too, and one that is of fundamental importance for understanding the shape of continental criminal justice: France and Germany are countries with much stronger states than ours.

What we mean by a "strong" state is of course no simple matter; the proposition that France and Germany have stronger states calls for some real care in definition. For my purposes here, I will mean two things when I describe continental states as "strong": Germany and France have state apparatuses that are both relatively *powerful* and relatively *autonomous*. They are powerful in the sense that they are relatively free to intervene in civil society without losing political legitimacy. They are autonomous in the sense that **(p.14)** they are steered by bureaucracies that are relatively immune to the vagaries of public opinion. The relative power and autonomy of these continental states, I am going to argue, has done a great deal to keep the values of mercy alive in continental society and to promote other forms of mildness in criminal punishment as well.

The connection between state power and mercy is clearest in the survival of amnesties, and in the various ways in which the old practice of pardoning has persisted in modern practices of "individualization." The power of the continental states has also produced another, especially important, form of mildness: both Germany and France display a notable tendency to define many acts, not as *mala in se*, but as *mala prohibita*—not as acts

evil in themselves, but simply as acts the state may choose to prohibit through the exercise of its sovereign power. This capacity to define forbidden acts as merely forbidden, not evil, has been of great importance for the establishment of relatively mild orders of punishment in contemporary Europe. The contrast with the United States is stark: as I will try to show, contemporary American law has a strong tendency to define all offenses as inherently evil and consequently to punish them harshly. And as I will suggest, the capacity to define offenses merely as *mala prohibita* is a capacity that European states enjoy largely because the exercise of state power has much more untroubled legitimacy in continental Europe than it does in the United States.

State power, in short, has made for mildness, in continental punishment. This is a claim that will seem exceedingly paradoxical to Americans. We have a very long tradition of resisting state power, and many protections for offenders that involve guarantees of due process. (Indeed, in general Americans tend to have procedural protections where Europeans have substantive ones.) Moreover, it is certainly the case that state power does not always breed mildness in continental Europe. There are undeniably aspects of continental justice in which the application of state power comes down hard—most importantly in investigative custody, the preconviction form of imprisonment that is the focus of the worst problems in continental incarceration. But these differences do not alter the picture of the divergence of the last quarter century. If continental Europeans have a weaker tradition of procedural protections, it is nevertheless the case they have been working to improve their procedural protections over the last twenty-five years. In this too, the continental tale is a tale of a deep structural drive toward increased mildness. Indeed, even with the problems of investigative custody taken into account, the strength of continental states has, I am going to try to show, made the application of the power to punish far more sparing than it is here at home. State power has turned out, in northern continental Europe, to make for mild punishment.

Much mercy comes, in fact, from the *power* of continental states. Much mercy comes from their *autonomy* too. This is partly for a reason that is obvious—indeed, a reason that has captured the attention of every thoughtful commentator on the American punishment scene. American punishment practices are largely driven by a kind of mass politics that has not succeeded in capturing Western European state practices. We have, as many commentators **(p.15)** observe, "popular justice.' and indeed populist justice.[28] The harshness of American punishment is made in the volatile and often vicious currents of American democratic electioneering. Calling one's opponent "soft on crime" has become a staple of American campaigning—even in judgeship elections, whose candidates were longtime holdouts for norms of decorum; and this has had a powerful, often a spectacular, impact on the making of harsh criminal legislation in the United States. Even practices that have nothing directly to do with election campaigns are part of a momentous American pattern—a pattern in which public officials use garish punishments as a way of grabbing political publicity. Prosecutors in particular have been making political hay all over the country through actions such as leading Wall Street executives out of their offices in handcuffs or televising the names of the busted clients of prostitutes.

Politicians in continental Europe do sometimes try to play to the same public instincts that American politicians play to. For the most part, though, American-style politics has failed to exert an American-style influence on German or French criminal justice, as we shall see. Part of explaining why France and Germany are different involves explaining why this kind of politics has not made any headway in those countries; and that, in turn, involves exploring the relative autonomy of German and French state apparatuses. Manifestly, the weakness of the politics of harsh punishment in Germany and France reflects the autonomy of the state in both countries: what is at work in both countries is a basic tension identified long ago by Max Weber: the tension between democratic politics and bureaucratic control. In both Germany and France, bureaucrats have succeeded in keeping control of the punishment process, without becoming subject to decisive pressure from a stirred-up

public. The success of bureaucratic control also has some other consequences for continental punishment, as we shall see: consequences such as the careful effort to define and train prison guards as civil servants.

There is, in fact, an intimate nexus between the politics of mass mobilization, unchecked by bureaucracy, and the making of harshness in criminal punishment; and that is a fact that should raise some uncomfortable questions for any of us who like to think of ourselves as committed to the values of democracy. Part of what I want to do, in this book, is to weigh those questions, and to ask how uncomfortable they should make us.

As this summary suggests, my argument will take some complex turns. Nevertheless, at the end of the day, my claim will be a simple one, and one that I think ought to have special resonance in America. Criminal punishment is milder in continental Europe today largely because Europeans have been shaped by social and political traditions that we in the United States have vigorously rejected. The continental Europe of today is recognizably descended from the continental Europe of the eighteenth, and even the seventeenth, centuries. It is a world of strong, condescending states, with a close historical connection to norms of social hierarchy.

EQUALITY IN CRIMINAL LAW:

THE TWO DIVERGENT WESTERN ROADS

James Q. Whitman[1]

ABSTRACT

Every western society embraces the ideal of equality before the criminal law. However, as this article observes, that ideal is understood differently in the United States and Continental Europe. American law generally demands that all citizens face an equal threat of punishment, while continental European law generally demands that all citizens face an equal threat of investigation and prosecution. This contrast raises a sharp normative challenge: Is it better to think of equality before the criminal law as pre-conviction equality or post-conviction equality? The article makes the case that pre-conviction of the Continental kind is normatively superior. It then asks why American law has opted for what seems a normatively inferior solution, identifying a variety of factors in American culture and the common law tradition that have encouraged the belief that true equality lies in the equal threat of punishment rather than in the equal threat of prosecution.

1. INTRODUCTION

Every western democracy embraces some version of the ideal of equality before the law. In particular, every western society embraces some version of the ideal of equality before the criminal law. Who would disagree with the proposition that criminal justice should show no favoritism on account of wealth, social status, race, or any other individual characteristic? Yet the striking fact is that contemporary western societies interpret this great ideal differently. Where American law generally interprets "equality before the criminal law" as requiring that all citizens face an equal threat of *punishment*, the leading systems of Continental Europe generally interpret "equality before

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the criminal law" as requiring that all citizens face an equal threat of *investigation and prosecution.* This is a contrast that raises important, and sometimes troubling, questions for both comparative law and American public policy. It is my subject in this essay.

My aim is in part to improve our grasp of a fundamental, and underappreciated, problem in comparative criminal law. But it is also in part to raise American consciousness. Over the past thirty-five years or so, America has been the scene of a vigorous campaign to guarantee that all persons who commit the same offense should serve the same sentence, regardless of race or social status. This campaign has encountered many difficulties, both practical and constitutional. In particular, racial equality has proven elusive, and the centerpiece statute of the movement, the Federal Sentencing Guidelines,[2] has withered under Supreme Court scrutiny.[3] Nevertheless, the dedication to sentencing equality has retained a powerful grip on American debate, commanding something close to universal assent: Americans seem deeply committed to the proposition that all offenders who commit comparable offenses ought to suffer, to the extent possible, comparable punishments. Such, it seems, is the meaning of "equality before the criminal law" to American minds.

Yet a look at the criminal justice systems of our cousins in Continental Europe ought to raise serious doubts in American minds about whether this great campaign for equality in punishment represents the only way, or even the right way, to pursue equality before the criminal law. The Continental traditions too are strongly egalitarian in their orientation, as I shall argue. But they focus on equality *before* conviction *rather* than on equality after conviction. This has to do in part with a familiar fact about comparative law: Continental law makes a much greater effort to control prosecutorial discretion than American law does, in the hope of guaranteeing that all offenders will face an equal likelihood of prosecution. But as I will suggest, the difference extends beyond the familiar question of prosecutorial discretion. Continental law focuses quite broadly on threats to equal treatment throughout the pre-conviction phases of the criminal justice process, where American law focuses on threats to equal treatment in the post-conviction phases. To put it

2 Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch II, 98 Stat. 1837, 1987, codified as amended at 18 U.S.C. §3551 et seq. (2000) and 28 U.S.C. § 991 et seq. (2000).

3 *See now Kimbrough v. U.S.*, 552 U.S. ___, No. 06-6330 (2007).

a little differently, Continental law worries most that accused and suspected persons may suffer disparate treatment, while American law worries that convicted persons may suffer disparate treatment. This is a striking contrast indeed, which deserves more attention from comparative lawyers than it receives. It is also a contrast that raises an obvious normative challenge: Is it better to think of equality in the criminal law as equality before conviction or equality after conviction? In response to that challenge, I will argue that the Continental approach looks, by the measure of some standard forms of legal analysis, clearly superior to the American approach.

Nevertheless, I will not try to make the case that America can simply embrace pre-conviction equality in the Continental style. Like other comparatists who emphasize the importance of cultural differences, I think it is more than a little utopian to imagine that foreign solutions can easily be borrowed. No matter how attractive the Continental solution may seem in principle, there are distinctive features of the American institutional and cultural environment that help account for our attachment to the ideal of equality in punishment. The best kind of comparative law, in my view, is comparative law that is able to identify the institutions and constitutions that stand in the way of borrowings, and the last part of the essay undertakes that task. The final sections of the essay will point to several such distinctive features of American society, including the harshness of American punishment, the common law tradition of bifurcating trial into guilt and sentencing phases, the relative weakness of protections for the dignity of individual offenders, and the relatively weak legitimacy of state action. American law is unlikely to change, I will conclude, unless these features of American culture change with it.

2. EQUALITY BEFORE THE CRIMINAL LAW: THE DILEMMAS OF DISCRETION

To appreciate the contrast between American and Continental law, we must begin by remembering some rudimentary sociology of criminal justice. As all first year law students learn, criminal justice is best thought of as a lengthy process that starts with the initial legislative criminalization of certain acts, and continues through a series of stages that include investigation,

arrest, pre-trial, trial, sentencing, and service of sentence. We can describe this process as a chain of ten decision points:

1. Legislative criminalization
2. Investigation
3. Arrest
4. Detention
5. Charging
6. Pre-trial
7. Trial
8. Sentencing
9. Infliction of punishment
10. Termination of punishment

At each of these decision points, some official or group of officials exercises some measure of discretion that may decide the fate of an individual: Legislators may criminalize a given kind of behavior, or decline to criminalize it; investigators may investigate or decline to investigate an individual; arresting officers may arrest or decline to arrest; prosecutors may opt for either a harsh or a lenient charge; judges may or may not show favor to an accused person at trial, or impose a harsh or lenient sentence on that person once convicted; penitentiary officials may or may not go easy on an inmate; and parole officials may or may not release early.

It is obvious that this system poses many dangers to equal treatment. Any of these officials may exercise their discretion in a biased or inegalitarian manner. Legislators may produce statutes that, while facially neutral, have disparate impact; investigators may make biased decisions; arresting officers may make biased decisions; and so may prosecutors, judges, and on down the line. Punishment is not the only point at which inequalities may occur. Anywhere official discretion appears, there is a threat to equal treatment.

Moreover, it is a truism of criminology that efforts to control discretion at any one point in the criminal process may simply displace the exercise of discretion to another point. As specialists like to say, the process of criminal justice is a hydraulic system. It is like a water balloon: If you squeeze it at one decision point in the effort to control discretion, it will bulge at anoth-

er.[4] Thus if we try to limit the discretion of American judges at the point of sentencing, we may simply shift the exercise of discretion to an earlier point in the process—for example, to the point at which prosecutors make the charging decision. Indeed, it is one of commonest objections to the Federal Sentencing Guidelines that they simply shifted discretion from judges to prosecutors.[5] For example, prosecutors who are aware that an offender faces a long mandatory sentence may try to protect that offender by opting for a less severe charge. If we squeeze the balloon at the point of judicial sentencing, it bulges at the point of prosecutorial charging. It is for this reason that many critics have viewed the determinate sentencing movement as a thoroughly naive effort to guarantee equality in the criminal law.

Critics of the sentencing guidelines have indeed laid much emphasis on the danger that discretion may be shifted from judges to prosecutors. But it is important to observe that the problem of hydraulically shifting discretion is not limited to prosecutors. What is true of prosecutors may also be true, for example, of arresting officers. If the arresting officer knows that an offender faces severe mandatory treatment further on down the line, that officer may make the decision not to arrest in the first place, or to arrest for a lesser offense. Even efforts to eliminate the discretion of judges in sentencing will not necessarily eliminate all forms of judicial discretion. If a judge knows he will be obliged to impose a harsh mandatory sentence at the sentencing phase of a trial, he may show favor to a defendant during the guilt phase. For that matter, legislators may tinker with the definition of offenses in order to shield certain favored classes of offenders from harsh punishments—for example, by treating powder cocaine differently from crack cocaine.

The result, sociologists of the criminal law believe, is an insoluble problem: There will always be discretion somewhere in the system, which means that there will always be some lurking threat to equal treatment. It is simply a practical impossibility to police the discretion of all potentially biased

4 Terence D. Miethe (1987); Daniel Kessler & Anne Morrison Piehl (1998); Michael Tonry & John Coffee (1987). For a concise and compelling account, see William J. Stuntz (2006).

5 *E.g.*, Albert W. Alschuler (1991); Gerard E. Lynch (1998); Stuntz (2004); Stuntz (2001); Ronald F. Wright (2005).

officials at work at all the stages of the criminal law process.[6] There are so many snakes of potential bias that is impossible to scotch them all, let alone kill them, and when we track them down at one point they simply re-emerge at another.

But it is essential to emphasize that the problem of official discretion is not just the problem of possible racial animus or other negative bias. When officials exercise discretion, they will often be moved by a kind of positive bias—by the sense that some offenders are more deserving than others who have committed similar acts.

It may seem obvious that justice in the criminal law *must* mean equal treatment of offenses. Shouldn't a given offense receive the same punishment every time it is committed? This is the view that lies at the foundation of the determinate sentencing movement, and of contemporary American retributivism. It was the view of Cesare Beccaria and Immanuel Kant as well;[7] perhaps, for that matter, it was also the view of the ancient Athenians.[8] A system of criminal law, according to this venerable view, is only morally justifiable if it punishes blameworthy acts in the same way every time they are committed, without regard to individual differences—without regard to what Saint Paul called "prosopolepsia," "consideration of persons."[9] The claim is thus something like the familiar claim made by opponents of affirmative action: We should judge people for what they have done, not for who they are. I will call this classic view "offense egalitarianism."

And there is no doubt that offense egalitarianism has a deep intuitive appeal. Yet it will never be completely satisfying for all observers. Just as there are always supporters of affirmative action who believe that it is not enough to judge people strictly by their acts, there are always doubters about the doctrine of offense egalitarianism. Different offenders are the products of different life histories. Some, to take the simplest and most familiar contrast, are the children of privilege and some the children of deprivation.

6 It is, we should note, perhaps most difficult to police the police. Arresting officers in every society present an immense problem to anyone who wishes to control discretion. *See generally* Daniel Richman (2003).

7 Beccaria (1764, 57-59). Kant was more in favor of making adjustments to account for social standing than Beccaria, however. Kant (1972, 102-106).

8 Danielle Allen (2000, 225).

9 *E.g.*, Romans 2:11.

Some are more dangerous than others. These sorts of concerns have always led criminal justice officials to seek means of individualizing—means of taking into account the myriad differences that seem to distinguish one individual offender from another. Indeed the great modernist movements in penal philosophy that grew up in the late nineteenth century all insisted on the necessity of individualization.[10]

Now of course one could simply declare that any official who takes into account such individual differences has made a mistake. We can declare that murder is murder, without regard to whether the murderer has repented or reformed, whether the murderer is the product of unusual privilege or unusual deprivation, and so on. If we are Christians, for that matter, we may declare that a sin is a sin, no matter who commits it. We can simply choose to ignore differences in life circumstances. Kant, for one, insisted in a famous passage that we should do exactly that.[11] But it is a critical fact about criminal justice systems that most people are not dedicated Kantian philosophers, and most of them find offense egalitarianism too demanding an exercise to put into practice. This is especially true of officials operating in the day-to-day world of criminal justice.

After all, ignoring individual differences does not always come easily. It requires a deliberate act of the will, a deliberate shutting of the eyes. In point of fact, the appeal of offense egalitarianism depends on a kind of trick of perspective. We can indeed construct a picture of a perfectly egalitarian criminal justice system if we are determined to abstract from all individual differences, treating all persons who commit a given prohibited act alike. Yet the appeal of this form of egalitarianism lasts only as long as we maintain a bird's-eye view of human society. As soon as we approach more closely, differences between individuals multiply rapidly, and they are differences

10 The classic statement is Raymond Saleilles (1909).

11 Kant (1977) (§ 49 E): "Nur das Wiedervergeltungsrecht (ius talionis), aber, wohl zu verstehen, vor den Schranken des Gerichts (nicht in deinem Privaturteil), kann die Qualität und Quantität der Strafe bestimmt angeben; alle andere sind hin und her schwankend, und können, anderer sich einmischenden Rücksichten wegen, keine Angemessenheit mit dem Spruch der reinen und strengen Gerechtigkeit enthalten." ("Only the right of retribution (ius talionis)—to be sure, as determined in court, not in your private judgement—is capable of providing a certain measure for the quality and quantity of punishment. All other theories of punishment are unstable and variable. Since other theories must take other concerns into consideration, they are incapable of appropriately meeting the demands of a pure and strict justice.")

that often seem patently relevant to the question of just treatment.

Officials who do the everyday work of criminal justice are constantly confronted with these multiplicitous differences between individuals. They predictably sometimes feel obliged in conscience to take those differences into account—not because they are racist, not because they take some sort of pleasure in the arbitrary exercise of power, but precisely because they are committed to serving the needs of society in ways attentive to the demands of justice. Offense egalitarianism will always be at war with a felt need to individualize.

Much more needs to be said about individualization than I can say here, of course.[12] For purposes of this essay, I simply wish to emphasize that the felt need to individualize makes it impossible to eliminate all discretion—even, and indeed especially, among officials who are sincerely and conscientiously dedicated to achieving justice through the criminal law. If we wish to achieve equality before the criminal law, the question we must ask is thus not how to eliminate official discretion. Instead, we must ask which kind of discretion, as exercised by which officials, presents which kind of dangers. We must also ask which efforts to control which kind of discretion entail which consequences and costs.

3. THE AMERICAN CHOICE: POST-CONVICTION EQUALITY

The observations I have made up to this point are banal familiarities to specialists in criminal law. Their straightforward implication is that there is no such single thing as equality before the criminal law. The criminal justice system is too complex a contraption for that. It has multiple points of discretion, and when its officials exercise discretion, they do so for multiple reasons, some good, some bad. Accordingly, there are only choices among different possible means of pursuing the goal of equality. And here, it is a fundamental fact of comparative law that contemporary American law has

12 I do not explore one important avenue of argument here in particular, which is that individualization of punishment is perfectly consistent with the ideal of egalitarianism. Individualized punishment, on this argument, would simply represent a form of egalitarianism that takes into account a wider and more complex variety of circumstances than are considered by standard retributivism. Here I disagree strongly with Dan Markel (2004). The problem is too complex to explore here, though.

made different choices from those made by Continental law.

Contemporary American law has generally chosen to pursue equality by limiting discretion during the latter phases of the criminal justice process—especially at decision point (8) on my chart (sentencing), but also to some extent at decision points (9) (infliction of punishment) and (10) (termination of punishment). American law has opted primarily for equality in punishment. To return the familiar hydraulic metaphor, contemporary American law has generally opted to squeeze the water balloon at its end point, after conviction.

Above all, American law has chosen to distrust the discretion of the judge who imposes sentence. Indeed, equality in judicial sentencing has been one of the leading goals of American criminal law for a generation—perhaps *the* leading goal. It was not always so. Until the early 1970s, the United States, like other western democracies, generally used a system of indeterminate sentencing, which viewed the principal goals of punishment as rehabilitation and incapacitation. Criminal justice, so the prevailing theory went, was akin to social work or (to use a more sinister phrase) social hygiene. Its aim was to find ways to deal with individuals who were poorly socialized, working to make them well-adjusted members of society—or, if necessary, to incarcerate them to prevent them from doing harm. Since individual offenders underwent rehabilitation at different rates, and presented different degrees of dangerousness to society, the sentences of individuals convicted of the same offense could potentially vary widely. Accordingly, judges imposed relatively open-ended sentences, to be completed when parole boards determined that a given offender was ready for release.

But beginning in the early 1970s, there was a dramatic movement in favor of the introduction of determinate sentencing, sponsored by a number of leading judges, politicians, and scholars. In part, this reform movement was driven by a crisis of faith in the possibility of successful rehabilitation. But it was also driven by a belief that indeterminate sentencing violated norms of equal treatment. As Albert Alschuler summarizes it in an important article, the reformers who emerged in the early 1970s believed that indeterminate sentencing gave dangerous free play to judicial discretion. "An offender's punishment," they argued, "should not turn on the luck of the judicial draw or, worse, on a defense attorney's ability to maneuver the

offender's case before a favorable judge. The vices of unconstrained discretion go beyond idiosyncracy, caprice, and strategic behavior to invidious discrimination on the basis of race, class, gender, and the like."[13] Only a systematic effort to limit judicial discretion in sentencing could guarantee equality before the criminal law, eliminating in particular a nasty form of racial discrimination. The reformers accordingly called for a return to one of the classic programs of the Enlightenment: the imposition of the same punishment on every person who had committed the same crime.[14]

The movement in favor of determinate sentencing was also associated with a major shift in the American philosophy of criminal law, from an emphasis on rehabilitation to an emphasis on retribution. Criminal justice, so philosophers argued, was not properly a variety of social work. It was a system with moral meaning, dedicated to the punishment of blameworthy conduct. This retributivist conception was associated with a strong conception of the imperative of equality before the criminal law: Offenders who had committed equally blameworthy acts should suffer punishments of equal magnitude.[15] The conclusion that these various advocates of determinate sentencing reached was that judges should have minimal discretion in imposing sentence, and that the role of parole should be cut back, eliminating much or most of the possibility of early release.

These arguments have proven to be extraordinarily influential—so much so that they stimulated a revolution in both the theory and the practice of contemporary American criminal justice. The Federal Sentencing Guidelines, which took effect with broad political support in the mid-1980s, were the most important product of the sentencing revolution. The Guidelines developed a sentencing "grid," intended to eliminate inappropriate variations in sentencing and make equality in punishment the rule. The Guidelines have had a troubled history since their introduction. Judges protested vehemently at the limitations the Guidelines put on their discretion, and at the baroque complexities of the grid.[16] Coming up with a sentencing

13 Alschuler (1991).

14 Beccaria (1764, 57-59); Jeremy Bentham (1843, 86-91, 365).

15 For a leading statement, see Andrew von Hirsch (1976); Andrew von Hirsch & Andrew Ashworth (2005).

16 Kate Stith & José Cabranes (1998). For a good account of the rise of determinate sentencing,

system that makes adequate distinctions among different degrees of culpability is extraordinarily difficult, and the Guidelines were inevitably intricate.[17] Moreover, the Supreme Court, after first giving its imprimatur to the Guidelines, put their constitutionality sharply in question.[18] Meanwhile, many scholars have been critical of the Guidelines, arguing that the effort to limit judicial discretion has backfired, simply displacing the exercise of discretion to prosecutors.[19] Not least, studies show that, despite the introduction of the Guidelines, racial disparities in sentencing have persisted.[20]

Despite their travails, though, the Guidelines reveal much about American legal culture. They are evidence of a deep-seated American political will to guarantee equality in punishment to the extent feasible. Moreover the Federal Guidelines are not the only such expression of the American political will. There is also similar legislation in many states. Nor has the attack on discretion in the post-conviction phase been limited to judicial sentencing. There have also been major efforts to eliminate parole, or to cabin the discretion of parole boards. Legislation has been passed on both state and federal levels prohibiting early release for offenders.[21] At the same time, American political rhetoric has embraced the ideal of equality in punishment, notably in the statements of prosecutors in high-profile cases—both in cases of great public importance like those of Michael Milken and Scooter Libby, and in tabloid farces like the jailing of Paris Hilton.

Indeed, thirty years after the sentencing revolution commenced, and despite the travails of the Federal Guidelines, the campaign for equality in punishment has attained something like the status of political orthodoxy in

see Michael O'Hear (2006).

17 An anonymous referee of this article observes that nobody is in favor of the merely mechanical imposition of the same sentence on all offenders who have committed what is nominally the same offense. Instead, Americans in general, and the Guidelines in particular, aim to prevent inappropriate exercises of discretion. This is entirely true. Nevertheless it remains the case that America focuses on the moment of sentencing as the moment that presents dangers to equal treatment.

18 *See*, most recently, *Kimbrough v. U.S.*, 552 U.S. ____no. 06-6330 (2007); *United States v. Booker*, 543 U.S. 220 (2005).

19 *See* note 4.

20 *E.g.*, David B. Mustard (2001).

21 For a general survey, *see, e.g.*, Margaret Driessen & Cole Durham (2002).

the United States today. That does not mean that American law *succeeds* in achieving post-conviction equality. Studies show that it does not.[22] In particular, it is manifest that the American commitment to equality in punishment has not eliminated the disparate racial impact—the shockingly disparate racial impact—of the application of criminal justice. What we can say is, not that American law succeeds in achieving equality, but only that American law *perceives* the post-conviction phase as presenting the greatest threats to equality before the criminal law.

25 Yet while Americans have made immense efforts to limit discretion in the post-conviction phases of the criminal justice process, they have paid far less attention to the pre-conviction phases. Here we should begin with a topic to which comparative lawyers have long devoted considerable attention: prosecutorial discretion. Americans allow prosecutors degrees of discretion that are unparalleled in the advanced democratic world. American prosecutorial discretion takes two principal forms. First, American prosecutors have the discretion to drop or pursue charges, even in the most serious cases.[23] They also enjoy another form of "charging discretion," the discretion to decide which of many possible charges to bring against a given offender.[24] These two forms of discretion are fundamentally important items in the toolkit of the American prosecutor. In particular, prosecutors make use of their charging discretion to engage in "charge bargaining"—plea bargaining with the accused in which the prosecutor offers a lighter sentence in return for a plea of guilty to a lesser charge. The availability

22 *E.g.*, Tonry (2005).

23 *E.g.*, Kenneth Culp Davis (1969, 162). Stuntz (2006). This comparative difference is the topic of a classic debate: Abraham S. Goldstein & Martin Marcus (1977); John H. Langbein & Lloyd L. Weinreb (1978). Langbein certainly overstated the extent to which German law could succeed in maintaining compulsory prosecution (1979), but the basic comparative truth of his claim remains. The objections of Markus Dubber (1997) miss the mark, in my view, since they depend principally on the observation that German law does not define some offenses as major offenses that are so treated in American law. This is true, but it hardly undercuts the observation that German practice does insist on the trial of offenses that it regards as major. For a general survey of the role and duties of the prosecutor in Germany, *see* Julia Fionda (1995, 133-171).

24 *E.g.*, Mirjan Damaška (2004): "Not only are threatened penalties in American jurisdictions harsher than in Europe, but prosecutors have also more freedom to decide how many charges to derive from what many Continental systems would regard as a single criminal event." In theory, Justice Department Guidelines cabin this form of discretion. But in practice policies change with the electoral winds. *See* the discussion in Frank Bowman (2006, n.38).

of these unusual weapons gives American prosecutors a measure of power over accused persons that their counterparts elsewhere do not enjoy. That power is often only enhanced by the fact that American prosecutors are elected, or appointed through the political process. This means that they can often claim a kind of legitimacy as representatives of the popular will.

The extraordinary discretion, and political power, of American prosecutors has attracted a great deal of attention, not only in the literature of comparative law but also in the literature of criminal law, and it may be the single most important distinctive feature of the American approach.[25] But it is essential to recognize that prosecutorial discretion is only one aspect of a much wider American pattern of *pre-conviction* discretion. Throughout all the early stages on my chart, from decision points (1) through (7), American officials enjoy comparatively wide discretion. This is even true of decision point (1): Though the question of legislative discretion is too complex to be discussed here, it is important to observe at least that the European Human Rights jurisprudence places far more severe limits on the substantive power of legislatures to criminalize behavior than does American constitutional law. (The same contrast holds for Great Britain, where the introduction of European norms may require a complete rewriting of the criminal statute book.[26]) It is possibly also the case that Americans invest less money and energy in policing the police than do Europeans, though that again raises questions too complex to be discussed here.

There are other forms of the American pre-conviction discretion too. Some of them involve detention, and the peculiar American institution of bail. But perhaps the most important have to do with the peculiar form of the American criminal trial, and the peculiar way in which the common law tradition deals with individual differences between offenders. The very structure of the American trial poses serious dangers for equal treatment, in ways scholars have not recognized.

American law makes use of the so-called "concentrated" trial of the common law: It stages a kind of concentrated drama before jurors. As all Americans know, this dramatic trial is bifurcated into a "guilt phase" and a "sen-

25 For the criminal law literature, see Davis (2001); Robert Weisberg (1999). For comparative law, see, e.g., Richard Frase (1990).

26 See Andrew Ashforth (2005, 48-59).

tencing phase." The guilt phase is supposed to concern only the question of whether the accused has committed the offense charged—that is to say, the guilt phase is intended to focus only on the offense, and not on individual differences between offenders. In order to guarantee that the jury will judge only the offense charged, and not the individual, the guilt phase aims to exclude forms of evidence that may lead the jury to consider differences in life-circumstances, dangerousness, and so on. The sentencing phase, by contrast, is traditionally intended to focus, at least in part, on the individual characteristics of the offender.[27] In most American jurisdictions, sentencing is entrusted exclusively to the judge.

Now, in principle one might think that this traditional bifurcated common law trial, with its separate guilt and sentencing phases, was well designed to deal with the basic dilemma of criminal justice I described in the last section: the dilemma that grows out of the need to balance offense egalitarianism against the urge to take individual differences into account. It has its guilt phase, dedicated to consideration of the offense charged, which is followed by its sentencing phase, dedicated to consideration of individual differences. In practice, though, the common law system makes for an extremely messy business, which leaves much room for dangerous pre-conviction discretion. The dangers in question turn on a peculiar kind of law: the law of evidence.

There is no real parallel to the American law of evidence in Continental systems, which do not bifurcate their trials. The Continental systems have a law of *proofs*, which guides decision-makers in their effort to draw inferences. But the American law of evidence does not focus primarily on the logic of how to draw inferences. Instead, the American law of evidence is a law of the suppression and exclusion of evidence. It is a body of law that assumes that the task of the criminal justice system is to determine which of various possibly germane pieces of evidence will be presented to the criminal jury during the guilt phase. While Continental law occasionally permits

27 The text of the Federal Guidelines endorses this common law tradition. 18 U.S.C. A. §3553(a)(1) (main ed. and Supp. 2004) ("the nature and circumstances of the offense and the history and characteristics of the defendant"). Nevertheless, federal courts have often imported the pre-conviction norm of offense egalitarianism into their application of the Guidelines. *See* Alschuler (1991).

the suppression and exclusion of evidence, it does so only rarely. Instead, the Continental systems generally base convictions on a dossier that must include all the evidence collected in the investigation of the case.[28]

Of course, it is entirely necessary that the modern common law, with its bifurcated trials, should have its law of evidence.[29] If the first part of the trial is to consider only the offense, many facts about the individual offender must be kept hidden from the view of the jury. Yet the American system of the suppression and exclusion of evidence creates significant opportunities for the exercise of discretion, or indeed manipulation, by officials both before and during the guilt phase of the trial. Both arresting officers and prosecutors have significant opportunities to influence the creation of the evidentiary record. The system also creates significant opportunities for the exercise of discretion by judges in the guilt phase of the trial. Judges make numerous evidentiary rulings that may determine the outcome of a case—which means that judges in the guilt phase of the trial have considerable room for the exercise of discretion, even if their discretion during the sentencing phase has been reined in. 32

Judicial discretion in evidentiary rulings is particularly important because of the inherent manipulability of the rules of evidence—a manipulability that has to be seen, once again, against the background of the offense/offender distinction. The evidence presented during the guilt phase is theoretically supposed to touch only on the alleged offense committed, and not on the personal characteristics of the offender. Yet the rules of evidence permit various subterfuges by which the "credibility," and thus in particular the prior record, of the accused may be put in issue. The result is that defendants may face grave dangers if they choose to testify in their own defense.[30] Thus evidence about the individual characteristics of the offender may well come in—but in an unsystematic, unpredictable, and potentially damning way. Since no sys- 33

28 *See generally* the subtle treatment of Damaška (1997). While American-style suppression under the Fourth Amendment has had some influence on Continental practice, the broader evidentiary tradition of excluding evidence on the individual characteristics of the offender remains peculiar to the common law. *See* Damaška (1994).

29 This would of course have been less true before the development of the modern form of the bifurcation. For discussion of the gradual historical development of the law of evidence on this point, *see* section 7 infra.

30 For comparative observations on this point, *see* Renee Lettow Lerner (2001, 826).

tematic and holistic effort is made to consider the individual circumstances of the offender, the dangers of arbitrary treatment are magnified.

Right up until the end of the guilt phase of trial, the American system is thus exposed to the danger that official discretion will be exercised in an inegalitarian way in the creation of the evidentiary record. The resulting dangers are magnified by the traditions of American adversarial justice. Parties are largely in control of the American process, in ways that are a familiar subject of study for comparative law. This inevitably means that quality of party counsel can play an immensely significant role in the outcomes of particular cases. As Alschuler writes, the outcome of the case may depend on "a defense attorney's ability to maneuver the offender's case before a favorable judge,"[31] or for that matter before any other pre-conviction official.

The dangers posed by such a system to norms of equality are self-evident, and are exemplified by events like the acquittal of O.J. Simpson, at least in the eyes of the many observers who believed him guilty.[32] A system that leaves so much room for pre-conviction discretion inevitably creates opportunities for persons of wealth and influence to manipulate the process, and sometimes to escape judgment. It is in this truth indeed that we see the sharpest paradox of the American approach: American criminal justice insists proudly on equal punishment for those who have been convicted; but it leaves striking opportunities for the well-to-do to pull an O.J., as it were, avoiding conviction altogether. That does not mean that America lets high-status offenders go scot-free. As I have argued elsewhere, it certainly does not.[33] But it does mean that American law leaves plenty of room for the arbitrarily disparate treatment of at least some high-status offenders.

Moreover, arbitrariness in the treatment of high-status offenders is only a part of the story. The American approach also leaves open dramatic possibilities for prosecutorial discretion that has disparate impact on the disadvantaged. Ours is a system designed to insure equality after conviction, but it is one that tolerates inequalities, and sometimes glaring inequalities, before. It is a system of pre-conviction inequality and post-conviction equality.

31 Alschuler (1991).

32 For a witty comparative law approach to this case, see Myron Moskowitz (1995).

33 James Q. Whitman (2003, 38).

4. THE CONTINENTAL CHOICE: PRE-CONVICTION EQUALITY

Continental law looks different indeed. Continental criminal justice has never followed the American lead on sentencing equality. Despite some occasional expression of interest in American practices, American-style determinate sentencing has not conquered the Continent. Indeed, recent Continental reforms have given officials *increased* discretion to vary the punishment of individual offenders.[34] So, does that mean that Continental justice has failed to consider the problem of social equality? By no means. Not only do Continental systems aim to achieve equality, they do so in ways that appear, by the standards of some compelling forms of legal analysis, considerably more thoughtful than the American way.

Comparative law scholars have written extensively on Continental criminal procedure, especially with the aim of showing that the Continental approach is better at ascertaining the truth.[35] It is indeed undoubtedly the case that the Continental tradition has a more exacting attitude toward truth-determination—though the American adversarial approach to truth-determination does have its dogged defenders. But it deserves some emphasis that truth-seeking is not all that is at stake. Continental law is also strongly committed to its own ideal of equal treatment.

The Continental ideal, however, focuses on the pre-conviction phases. Modern Continental European law has generally chosen primarily to pursue equality by limiting discretion at decision points (5) (charging), (6) (pre-trial), and (7) (trial), but also to some extent at decision points (2)

34 Notably in the shape of the French Code Pénale of 1994. For the general statement of the purposes of punishment, *see* Code de Procédure Pénale, §707:

> L'exécution des peines favorise, dans le respect des intérêts de la société et des droits des victimes, l'insertion ou la réinsertion des condamnés ainsi que la prévention de la récidive.
>
> A cette fin, les peines peuvent être aménagées en cours d'exécution pour tenir compte de l'évolution de la personnalité et de la situation du condamné. L'individualisation des peines doit, chaque fois que cela est possible, permettre le retour progressif du condamné à la liberté et éviter une remise en liberté sans aucune forme de suivi judiciaire.

Unfortunately, current French Criminal Procedure reforms, which aim to Americanize French Law in some ways, were proposed too late to be discussed in this essay.

35 *E.g.*, William Pizzi (1999, 184).

(investigation), (3) (arrest), and (4) (detention). Continental law has generally opted to squeeze the balloon at the early stages, before conviction. Above all, Continental law has chosen to distrust the discretion of the prosecutor who makes the charging decision. This does not mean that Continental law *succeeds* in achieving pre-conviction equality. It does not—most notably, once again—with regard to race. It means only, once again, that Continental law *perceives* the pre-conviction phase as presenting the greatest threats to equality before the criminal law.

To be sure, Continental justice does insist on post-conviction equality in some ways. Continental statutes do sometimes declare that considerations of retributive justice should play some role, if not the determining role, in imposing punishment.[36] Bureaucratic pressures naturally tend to regularize sentencing as between different offenders.[37] Sentencing on the Continent is certainly not completely indeterminate: In particular, Continental systems have mandatory maxima.[38] Moreover, Continental justice pursues one form of equality in punishment essentially unknown in America: In imposing fines, Continental law takes account of the offender's ability to pay, in the effort to guarantee that the impact of a fine will be felt equally by both rich and poor.[39] (It was this that led to the famous Finnish case of a 116,000 Euro speeding ticket.[40]) Nevertheless, the assessment of the fines themselves is open to discretion, and Continental law has seen nothing like the politically potent American movement in favor of strictly determinate sentencing.

Indeed, the contemporary American notion that equality *must* mean the strictest possible equality in sentencing is hardly to be found in Continental traditions. Instead, the Continental tradition has evolved in such a way as to focus on limiting official discretion in the pre-conviction stages of the criminal process. Here again the role of the prosecutor has attracted the greatest attention from comparative lawyers.

36 §46 StGB: "Die Schuld des Täters ist Grundlage für die Zumessung der Strafe"; contrast Code de Procédure Pénale, §707, quoted *supra*.

37 I thank Mirjan Damaška for insisting forcefully on this point in conversation with me.

38 For the example of the limitation of time served even for notional life sentences, *see* §57a StGB (Germany); Code Pénale Art. 131-36-1 (France).

39 *E.g.*, §40a StGB.

40 BBC News Online (2002).

There are powerful prosecutorial figures on the Continent, who exercise real discretion. Investigating magistrates like Baltasar Garzón do make headlines by pursuing figures like Augusto Pinochet.[41] Indeed, the so-called "romance" traditions of the Latin-speaking civil law world have a long tradition of entrusting immense power to such investigating magistrates, who are technically a form of judge entrusted with tasks given to prosecutors in the United States.[42] To be an investigating magistrate or other investigative or prosecutorial official[43] is often to be a powerful official in Continental Europe, just as it is in the United States. But the striking difference is that the Continental law *perceives* the power of prosecutorial officials as presenting a threat to equal treatment. Consequently, while the contemporary Continental systems have evolved few measures intended to combat discretion in punishment, they have developed many measures intended to cabin prosecutorial discretion—though those measures differ from system to system.

Thus some systems, like that of German law, have experimented with various forms of compulsory prosecution, requiring prosecutors to pursue every case. These systems have not succeeded in establishing full-scale compulsory prosecution.[44] Modern criminal justice systems simply have to process too many cases for that. But they do have some success in guaranteeing that all major crimes will be prosecuted.[45] Other systems take other approaches. The French Penal Code takes more than one tack, for example. French prosecutors may not drop a case without leave of court.[46] Moreover, the French Code (like its German counterpart[47]) permits victims to appeal to higher authority every time a prosecutor declines to pursue their case—

41 *E.g.*, Marlise Simons (1998, A1).

42 *See, e.g.*, Frase (1990).

43 The investigating magistrate, historically the dominant figure on the Continent, has been slowly vanishing. This article is not the place to survey the state of affairs in its full complexity.

44 §§ 152-54a StPO; Code de Procédure Pénale, art. 40-1.

45 Here it is important to insist on the basic correctness of Langbein (1979), against the objections of Dubber (1997).

46 Michele-Laure Rassat (2001, 452-453).

47 §§ 172-177 StPO (Klagerzwingungsverfahren).

an important point too rarely mentioned by comparatists.[48] Indeed, the treatment of victims' rights offers a particularly revealing contrast with the United States. France, like the United States, has seen the rise of a politically potent victims' rights movement over the last thirty years or so. But the French legislative response has been different. The American victims' rights movement focuses on the post-conviction phases, allowing victims to testify in the sentencing phase of the trial and before parole boards. As it so often does, American law focuses on punishment. French legislation, by contrast, has allowed victims to intervene at the stage at which prosecutorial decisions are made, forcing prosecutors to bring charges. Here, as elsewhere, the French perceive the greatest danger of arbitrary decision-making as lying with the actions of prosecutors, not with the actions of judges.

In other ways, too, the Continental system is generally ordered in a way intended to keep the lid on prosecutorial power. France, for example, has a long history of efforts to limit the detention powers of investigating officers. The most widely studied aspect of this Continental tradition is the limitation of prosecutorial discretion through the Continental interpretation of the principle of legality. The principle of legality, whose intellectual roots reach back to the Enlightenment, holds that no person can be prosecuted for any act unless that act has been prohibited in advance by statute. Both the Anglo-American and the Continental traditions embrace this principle, but the two traditions draw different conclusions from it. For Continental lawyers the first practical implication of the principle of legality is that prosecutors must not have charging discretion—the discretion to choose among different characterizations, more and less severe, of the offender's offense. Offenses, the Continental tradition holds, must be clearly and unambiguously specified in the penal code. Such is the meaning of "legality." Yet this implies that there can be no ambiguity in the way in which prohibitions are applied.

Consequently, it cannot be the task of the Continental prosecutor to engage in American-style creative lawyering, imagining different possible ways of characterizing the offender's offense. Instead, it is the Continental prosecutor's task to identify the correct charge that can be laid against

48 Code de Procédure Pénale, art. 40-3. Rassat, *Traité de Procédure Pénale*, 456, minimizes the importance of this in practice, and may be right to do so. Nevertheless, the point remains that French law perceives the greater dangers to lie at the point of prosecutorial discretion.

the accused.[49] This means that the job of the Continental prosecutor takes a very different form from the job of his American counterpart. In seeking plea bargains, the Continental prosecutor does not engage in charge bargaining; and in proferring charges, he does not offer multiple possible counts covering the same conduct.[50]

There are also other institutional limits on prosecutorial power. As Mirjan Damaška has emphasized, Continental prosecutors work within hierarchical bureaucratic structures, whose forms of recruitment and discipline put limits on the freedom of prosecutors. Unlike American prosecutors, who are elected or appointed through the political process, Continental prosecutors are bureaucrats, recruited at a young age and specially trained. They advance in their careers by climbing the bureaucratic ladder, and this affects their behavior in office. Career advancement for Continental prosecutors depends on avoiding mistakes—which means that prosecutors in the field must be careful not to take actions that will be deemed inappropriate by their superiors.[51] This leads to real differences in the exercise of prosecutorial power. We may take the recent example of the French prosecutor Fabrice Burgaud, who brought false charges of child molestation against thirteen citizens of a French town. For a while, Burgaud succeeded in dominating the headlines, just as numerous American prosecutors have done in bringing similar charges. But after Burgaud's defendants were acquitted on appeal, he was aggressively disciplined by the hierarchy. As of the writing of this article, his career was in ruins.[52] Other French officials are more cautious. There are occasional parallel stories in the United States, like that of Mike Nifong, the Durham prosecutor who brought false charges against Duke University lacrosse players.[53] But when American prosecutors run aground, they do so for political reasons, not because they violate bureaucratic norms; and it is impossible to

49 That task is of course by no means simple. On the contrary, the Continental tradition treats the problem as one that presents extreme complexities in practice. For, most notably, German *Konkurrenzlehre, see, e.g.,* Claus Roxin (2003). The same observation is familiar in France, if less well developed in the literature. *See* Martine Herzog-Evans (2005/2006, 11).

50 *E.g.,* Damaška, *supra.* For the long history, reaching back to Antiquity, *see* Volker Krey (1983). For the American version of the principle of legality, *see* Paul H. Robinson (1997, 74-75).

51 This point is famously emphasized by Damaška (1986, 48-50 and *passim*).

52 *E.g., Le Figaro* (2006).

53 The story is recounted in a somewhat partisan way by Stuart Taylor & K.C. Johnson (2007).

resist the impression that rogue prosecution is a far more prevalent problem in the U.S. than in Continental Europe.

The United States/European contrast in the role of the prosecutor is particularly striking and important, and it has attracted particular attention. But once again it is important to emphasize that the contrast in treatment of prosecutors is not the only pre-conviction contrast that matters. The Continental system is also concerned with other pre-conviction dangers as well, notably in the role of judges. Continental law puts limits on the discretion of judges, just as American law does. But instead of limiting judicial discretion in sentencing, Continental law generally aims to limit judicial discretion in the management of the trial. It focuses on the judge's pre-conviction discretion, rather than on the judge's post-conviction discretion.

Here the principal measure taken by Continental law is the requirement that judges sit in panels. Continental law does not permit major criminal trials to be conducted by a single judge, who might be swayed by some bias against the defendant. French law gives the classic statement of the underlying concern: "juge unique, juge inique"—a single judge deciding criminal cases is an inherently inequitable judge.[54] That does not mean that Continental judges have no power. Like American judges, they are powerful figures indeed. This is particularly true of the presiding judge, who controls the course of the trial, with the other judges on the panel ordinarily sitting in silence. But the Continental tradition leaves judges comparatively less room for the exercise of unbridled discretion.

To take the full measure of the difference between American and Continental law, though, we must focus once again on the structure of the trial and the nature of the law of evidence or proofs. The Continental world does not make use of the American-style "concentrated" trial, with its peculiar law of "evidence." Nor, more broadly does modern Continental law make any sharp institutional provision for separating consideration of the offense charged from consideration of the individual characteristics of the offender. Instead, Continental justice engages in a long, "episodic" process, in which a dossier is created. (Indeed, the very word for "trial" in the Continental tradition is "process"—*procès* or *Prozess*—a word resonant with

54 For this phrase, *see, e.g.*, Mitchell Lasser (2005). For collegial trial of serious offenses in other Continental systems, *see* Art. 33 Codice de Procedura Penale (Italy); § 76 GVG (Germany), and the English-language presentation of Dubber (1997).

bureaucratic values.) The creation of this dossier does not make any distinction between consideration of the offense and consideration of the individual characteristics of the offender. From the moment of the first intake of the accused person, the dossier gathers reports by social workers and psychologists on his history, personality, and social situation.[55] The dossier grows slowly over the course of an investigation that collects witness testimony, documents, and reenactments. There are no hearsay rules that might prevent the presentation of all this evidence at the formal trial, and very few opportunities of any other kind for the exclusion of evidence. The dossier is periodically reviewed by committees of prosecutorial and judicial officials, who perform what is sometimes called an "auditing" function, checking to determine that the investigation has been conducted properly. The trial itself is also said to perform the same "auditing" function, as a panel of three judges and a larger number of lay jurors review the investigation.[56] The trial itself makes no distinction between guilt and sentencing, considering offense and offender simultaneously.

This Continental approach is likely to shock Americans somewhat, since it means that much evidence that Americans would consider "prejudicial" comes in without objection at trial. It is ordinarily no secret, for example, that the accused has had prior run-ins with the law. And indeed there is no doubt that open consideration of the entire life record of the accused may invite, not only appropriate efforts at individualization, but also inappropriate forms of prejudice, as European jurists themselves have long worried.[57] Nevertheless, the Continental approach does permit many fewer of the opportunities to manipulate the evidentiary record that we find in the American process. Essentially everything goes into the dossier. At trial, there is none of the gamesmanship so familiar to American trial lawyers seeking to slip in evidence on the "credibility" of the accused. Evidence on

55 *See generally,* Damaška (1994). This was not always the case. Nineteenth-century Continental law did adopt something like the common-law approach, only to drop it.

56 Damaška (1986); Antoine Garapon & Ioannis Papadopoulos (2003, 98); David Downes (1988, 94-97).

57 *E.g.,* Henri Donnedieu de Vabres (1929, 133), praising the jury's consideration of the defendant's personality while recognizing that there may sometimes be dangers. For a strong defense of the common law approach as necessary for giving meaning to the presumption of innocence, *see People v. Molineux,* 61 N.E. 286, 300 (N.Y. 1901).

the "personality" of the accused (as the French tradition calls it) is introduced systematically and considered in light of expert evaluations by psychologists and social workers. There is no evidentiary gamesmanship that might discourage the accused from testifying.

Moreover, Continental counsel have, famously, relatively little power. Accused persons are certainly represented at trial. But the presiding judge has full control of the process, asking most of the questions himself and ordinarily guiding matters with a firm hand.[58] At the end of the trial, judges and jurors together deliberate on guilt and sentence. But that sentence itself is, unlike a typical contemporary American sentence, indeterminate—that is, it specifies a maximum penalty, while permitting post-conviction officials to exercise discretion in determining the actual severity of treatment the offender faces. Once the pre-conviction "process" is over, the convicted person is turned over to Continental officials with relatively open discretion.[59]

5. POST-CONVICTION EQUALITY: A DUBIOUS CHOICE

What we see in all this is a great divergence in the western world. Both traditions are deeply dedicated to equality. We should make no mistake about that. But American law favors equality in punishment, and more broadly post-conviction equality, while Continental law favors equality in prosecution, and more broadly pre-conviction equality. What can explain this great divergence, and how should we evaluate it? Here we must begin by acknowledging that the American approach looks misguided, if not just plain wrong, when judged by the measure of some standard forms of legal analysis.

To begin with, the American approach looks positively benighted when judged by the familiar standards of the logic of deterrence. Contemporary American criminal justice is characterized by wide prosecutorial discretion, as we have seen. It is also characterized by penalties that are extraordinarily harsh by the standards of the advanced industrial world.[60] Yet scholars

58 For this familiar comparative law point, *see, e.g,* Garapon & Papadopoulos (2003, 150-152).

59 French practice is extensively described in Herzog-Evans (2005/2006). For German practice, *see, e.g.,* Rolf-Peter Calliess & Heinz Müller-Dietz (2005, 20-21).

60 For discussions by a number of leading scholars, *see* the Symposium Issue of Social Research: Punishment: The U.S. Record (Summer 2007).

of criminal law have almost uniformly drawn the conclusion that deterrence is badly undermined by any system that permits wide discretion to those officials who investigate, arrest, and prosecute, while simultaneously threatening harsh penalties. As Beccaria famously concluded in the mid-eighteenth century, the concerns of deterrence are much better served by certainty of prosecution and conviction than they are by severity of punishment.[61] If offenders are rational actors, they will likely respond in more desirable ways to the knowledge that they will certainly be prosecuted than to the possibility that they might potentially suffer harsh punishment.[62] It is obvious that American law fails the test of this familiar deterrence reasoning. American law does not look like a system well designed to achieve the goals of deterrence.

But deterrence is not my subject in this essay, and I want instead to focus on a different point. The American system does not look like a system well designed to achieve the goals of equal treatment in the criminal law, either. First and foremost, American law has made a very strange choice in identifying judges, rather than prosecutors, as the officials whose discretion most needs to be policed.

Let us, after all, contrast the figure of the American judge with the figure of the American prosecutor.[63] Prosecutors, in our adversarial system, are expected to play a partisan role. They are also deeply entangled in politics. On the state level they face frequent re-election; and on the federal level they are political appointees of the executive branch. (Recent scandals suggest, indeed, that federal prosecutors may face powerful political pressures

61 The standard formulation opposes certainty of *punishment* to severity of punishment. *E.g.*, Becker (1968). This is an unsatisfactory piece of terminology, since it shows little sensitivity to the mechanics of the criminal justice process. The key question has to be whether there is certainty of prosecution, and in addition whether prosecutors face inappropriate obstacles to conviction.

62 *See, e.g.*, John Kaplan, Robert Weisberg & Guyora Binder (2000) ("A consistent finding of empirical studies of deterrence is that increases in the certainty of punishment have a greater deterrent effect than increases in the severity of the punishment."); and the cautious conclusions of A. Mitchell Polinsky & Steven Shavell (1999). *But see* Daniel Nagin & Raymond Paternoster (1991).

63 It has been pointed out that American prosecutors, unlike Continental ones, receive little formal training in sentencing, which makes their plea bargaining decisions dubious. David Lynch (1994, 125-126); Robert Kagan (2001, 85).

emanating from Washington.[64]) Moreover, many American prosecutors use their position as a stepping-stone to higher office. This was as true of Tom Dewey as it is a half century later of Rudy Giuliani, and those two are only the most prominent such figures. American prosecutors are partisans by profession, and they are comparatively politicized. That does not mean that all prosecutors act like political hacks or party commissars, of course. Most of them are decent and honorable people. But it does mean that the risks of partisan or politicized decisions are comparatively greater among prosecutors than among judges.

To be sure, American judges are not entirely immune to political pressures. On the state level, they must face election—though not as frequently as prosecutors. Moreover political connections may be essential to obtaining appointment as a federal judge.[65] Nevertheless, they are by no means as deeply entangled in politics as prosecutors. It is rare that judges use their office as a stepping-stone in a political career. There are few temptations for a judge to make headlines in order to win election as, say, governor. As for federal judges: They are not executive branch officers, and are clearly far less subject to improper pressures from D.C. Most important of all, the judicial role is supposed to be non-partisan. Unlike prosecutors, judges are expected to cultivate an even-handed attitude—to learn to overcome whatever human bias they bring to the courtroom. This does not mean that no American judge ever acts like a political hack or a party commissar, of course. Bad things happen. But it does mean that the risks of partisan or politicized decisions are comparatively lesser among judges than among prosecutors.

To describe the contrast between these two classes of officials is to make the point. In its effort to guarantee equal treatment before the criminal law, American law faces the choice of policing the discretion of two classes of officials: first, a class of professionally partisan, highly politicized officials (prosecutors), and second, a class of professionally non-partisan, less highly politicized officials (judges). Given that choice, how can it be right to choose to police the second class rather than the first? Why would we perceive the threat to equality as lying more with judges than with prosecutors?

64 *E.g.*, Richard Schmitt (2007, A10).

65 *E.g.*, Judith Resnik (2005).

To be sure, it is not the case that there are no reasons whatsoever to favor giving prosecutors discretion: Prosecutorial charging discretion does give American prosecutors a useful tool for capturing some high-status offenders who may escape prosecution in Continental Europe.[66] Nevertheless, the broad threat that American prosecutors present to equal treatment is glaring and unsettling, as both Herbert Wechsler[67] and Kenneth Culp Davis[68] forcefully insisted long ago. Letting prosecutors run loose while corralling judges is a strange choice indeed.

There is a second reason, too, why the American approach is troubling. As I suggested above, the notion that we should punish all offenses equally is always at war with our sense that differences between individual offenders matter. On the one hand, we will always be drawn to some form of offense egalitarianism, believing that all offenses should be punished in the same way regardless of individual differences. On the other hand, when focusing directly upon the individual offender, we will always perceive myriad differences that seem to require differential, individualized treatment. Every modern criminal justice system must find some way to navigate between these two approaches to doing justice, which are in inevitable tension with each other.

In the effort to deal with this tension, American law has chosen an unsystematic, scattershot approach, especially in the pre-conviction phase. From sentencing onward, American law traditionally considers the individual characteristics of the offender without any particular evidentiary bar. But before that, all is different. Theoretically, the American pre-conviction phase is supposed to be about the offense and not the individual characteristics of the offender. But that does not mean that consideration of individual characteristics is excluded from the pre-conviction phase of American law. It most certainly is not. It means that pre-conviction consideration of persons comes in a wholly unregulated, ill-considered fashion. Rather than bringing in evidence of the offender's "personality" (to borrow

66 This is because when it comes to corporate criminality, prosecutors can use their charging discretion to "flip" lower level employees in order to acquire evidence against higher-level ones. For this important observation, see Mark West (2006, 36).

67 Herbert Wechsler (1952).

68 Davis (1969, 169).

the French term) in a thoughtful way, pre-conviction American law permits a free play of discretion and gamesmanship throughout the criminal justice process, right up until the end of the guilt phase. Arresting officers, booking officers, and prosecutors are permitted to make unpoliced spot judgments about the personality and true culpability of the accused. Character evidence is admitted at trial in an unsystematic manner, which is plagued by gamesmanship and which endangers the accused's right to testify in his own defense.

This makes for an ugly spectacle. Any such unpoliced, unpredictable system inevitably threatens equality of treatment. The risk of bias is immense when consideration of individual differences comes in the form of spot judgments and courtroom insinuations. The Continental approach, by contrast, makes a careful, systematic, and comprehensive effort to consider the personality of the offender throughout the criminal justice process. To say this is not to deny that the Continental approach runs the risk of prejudice. The choice is not an entirely easy one, and the question deserves more attention than I can give it in this article. Nevertheless, the case against the American approach is much stronger, and much more worrisome, than Americans are willing to acknowledge. The claim that American justice excludes evidence of individual differences is simply a fiction. Such evidence is considered throughout the criminal justice process, up to and including the guilt phase. The net result is an ugly and inevitably unfair form of organized hypocrisy.

We Americans have created a system, in short, that tolerates a high risk of arbitrary treatment in the processes of investigation, prosecution, and determination of guilt. At the same time, we have opted to impose theoretically uniform (and uncommonly harsh) punishment on those offenders who, for whatever arbitrary reason, fail to escape in the pre-conviction phase. We are like homeowners who, discovering swarms of roaches upon turning on the kitchen light, crush with impartial fury those that happen to come within our reach, while letting hundreds of others scurry away. This we call "equality."

And yet, despite the objections I have raised, I suspect that most Americans would argue heatedly that equality before the criminal law *must* mean equality in punishment. How can you possibly speak of equality before the criminal law if all persons do not suffer equally for having committed the

same offense? Isn't punishment the necessary punctuation point, the *meaning* of the conviction? Aren't we making a mockery of justice if we fail to treat all convicted persons alike? Most ordinary American observers would, I think, rebel in their very hearts at the idea that any system that fails to impose similar punishment for similar offenses could possibly be called egalitarian. And of course retributivist philosophers would say exactly the same thing. As Andrew von Hirsch, the dean of retributivist thinkers, puts it (1993, 11), punishment "expresses blame . . . conveys the message that the conduct is reprehensible, and should be eschewed." And what "message" are we "conveying" if we do not stand firmly by the principle of equality in punishment?

These intuitions are indeed strong. So is the temptation to conclude that offense egalitarianism, the punishment philosophy of Beccaria, Kant, and Andrew von Hirsch, is simply philosophically correct—that these philosophers have arrived at the right answer on the strength of incontestable intuitions. Yet it is only in America that these strong intuitions translate into a criminal justice system dedicated to equality in punishment. I now want to turn to the question of why this is so—why equality in punishment should have triumphed in America in the face of what seem compelling policy reasons against it.

To answer that question, we must move beyond the kinds of legal analysis we have been exploring. American-style equality in punishment may not make sense as a matter of the logic of deterrence, or of the logic of equal treatment. But it makes more sense when we view it against the background of a larger landscape of American institutions, values and history. The key to good comparative law analysis lies in getting the lay of that larger landscape. Propositions that seem intuitively correct in one society should often seem puzzling in others, and good comparative law can often show us why, by exploring the socio-cultural assumptions and traditions that underlie the law. It is to the task of exploring those assumptions and traditions—the truest calling of comparative law—that I now turn.

6. THE APPEAL OF EQUALITY IN PUNISHMENT IN AMERICA I: OF HARSH PUNISHMENTS AND CHRISTIAN REVIVALISM

Why does equality in punishment seem so compelling in America? Why has it come to seem so compelling over the last thirty years in particular?

The answers include a variety of factors involving American history, values, and institutions. These factors are indeed so various, as we shall see, that they may appear to be simply a grab bag. Nevertheless, taken together they belong to a single, familiar picture of American law: It is the picture of an American system whose common law institutions have changed remarkably little since the Middle Ages, in some ways. It is the picture of an American system that has grown increasingly dedicated to limited government, one that makes use of uncommonly harsh punishments, that shows the influence of a renascent popular Christian tradition, and that is strongly democratic. Finally it is the picture of a system that recognizes few of the protections for individual dignity that matter elsewhere in the advanced industrial world. All of these factors make for an America in which equality in punishment tends to seem intuitively natural and right.

First, it is of fundamental importance that American criminal punishment has become, over the last thirty years, uniquely harsh. The harshness of American criminal punishment is a major datum of comparative law, about which I and others have written extensively.[69] It has developed essentially during the same period that equality in punishment has become orthodox, the period since the mid-1970s. It deserves some emphasis that this American harshness does not have to do only with our use of the death penalty, the fact most obsessively mentioned by critics of the American system. It also has to do with the fact that we make use of imprisonment as our ordinary sanction, where fines and other lesser punishments have become the ordinary sanctions almost everywhere else in the advanced industrial world. Americans go to prison, where offenders elsewhere pay fines, do public service, or suffer some suspension of social privileges. Moreover, American prison conditions are tough, and American offenders are sentenced to extraordinarily long terms of imprisonment. Harshness is regarded in America as "part of the penalty that criminal offenders pay for their offenses against society," as our Supreme Court declared in 1981, toward the beginning of the contemporary revolution in American punishment.[70] Tough language of that sort has long since ceased to be heard from Continental courts.

It is not an accident, in my view, that the last thirty years of equality in

69 See most recently Symposium on Social Research: Punishment: The U.S. Record.

70 *Rhodes v. Chapman*, 452 U.S. 337.

punishment have also been the thirty years of the rise of this harsh approach to criminal punishment: Equality and harshness go hand in hand. First of all, the very project of offense egalitarianism encourages harshness. Offense egalitarianism demands that we give minimal weight to individual differences. Yet among individual differences are differences in dangerousness: It is much more urgent that some offenders be incapacitated than others. If legislators insist on setting the punishment at the same level for all persons who commit the same offense, they will inevitably feel the need, consciously or not, to set the level of punishment high enough to incapacitate those offenders who must be incapacitated.[71] For this reason, and perhaps for others, a system oriented toward equality in punishment may always tend to be a system that favors relatively lengthy terms of incarceration. If you try to insist that retribution is the only legitimate goal of the punishment, you invite incapacitation to come in through the back door—not just for dangerous offenders, but for all of them.

But it is not just that favoring equality in punishment tends to mean favoring harshness. More importantly, for my purposes here, it is that favoring harshness will tend to mean favoring equality. In a system that administers punishment as comparatively severe as that administered in contemporary America, it does indeed seem imperative that the pain of punishment should be administered without regard to differences of class, status, or race. How could you make the poor offender, or the black offender, suffer decades of miserable incarceration, while letting the rich offender or the white offender off? The egalitarian intuition is strong indeed. Yet we should recognize that the strength of this egalitarian intuition is largely parasitic on the very harshness of our punishments. If we moved to the milder forms of punishment that prevail elsewhere in the advanced world, we would feel less emotionally overcome by the injustice in differential punishment.

The harshness of our punishments is a factor that plays an obvious role in our attachment to equality in punishment. Another that plays an obvious role is the lasting strength of Christian belief. Christian belief is much

71 Of course the Federal Guidelines do offer some means of differentiating between offenders' degrees of dangerousness. *See* U.S. Sent'g Comm'n, Guidelines Manual 4, 5H (2007). My point is not that the Guidelines are completely misconceived, but that legislators setting sentences for abstractly defined offenses are likely to feel the urge to incapacitate more strongly than consideration of individual cases would routinely warrant.

stronger in the United States than it is in northern Continental Europe, and it has been undergoing a considerable revival over the last generation. It is impossible not to speculate that part of what we see in the American attachment to equality in punishment reflects this religious revival, and perhaps more broadly a kind of subterranean influence of a certain style of Christian retributivism. Sophisticated Christian theology is certainly not committed to any kind of primitive retributivism. (In fact, in a recent book I have tried to demonstrate that the drive toward mildness runs very deep indeed in the Christian tradition (Whitman 2008).) But ordinary American Christians often subscribe to a kind of unrelenting version of the talionic rule eye-for-an-eye, tooth-for-a-tooth. Where popular Christian traditions of this kind shape the perception of justice, whether consciously or unconsciously, we can expect retributivism, and with it equality in punishment, to enjoy a strong appeal—exactly the sort of strong appeal we see in the United States.

7. THE APPEAL OF EQUALITY IN PUNISHMENT IN AMERICA II: OF BIFURCATED TRIALS, WEAK STATE LEGITIMACY AND WEAK PROTECTIONS FOR INDIVIDUAL DIGNITY

America is a relatively tough country, and a relatively pious country. These are two reasons why equality in punishment seems so appealing here. Equality in punishment also appeals to America because of American institutions, including the bifurcated trial, a curious inheritance from the Middle Ages, and the relative weakness of the American state. Finally there are reasons that have to do with our relatively weak commitment to norms of individual dignity.

Consider first the bifurcated trial. The American attachment to equality in punishment is partly the product of a kind of institutional archaism—the archaism of the distinction between the guilt phase and the sentencing phase. The bifurcation of the criminal trial into guilt and sentencing phases is indeed fundamental to the story I have been telling. The ideal of equality in punishment seems perfectly intelligible, and perhaps indispensable, when viewed against the background of bifurcated common law trial. Isn't the guilt phase the phase during which the critical question is answered? Once the

defendant has been "found guilty" we have the crucial piece of information we need: We know that the defendant has been adjudicated a criminal. The sentencing phase that follows, we could say, ought to be a mere ministerial administrative afterthought. Or perhaps even better, we could say that the sentencing phase ought to be simply the logical conclusion that is compelled by the syllogism of the guilt phase: *(1) All guilty persons must be punished; (2) X has been found guilty;* ergo *(3) X must be punished.*

If we think of the criminal process this way, we have a natural tendency 72
to think of criminal justice that starts with an adjudication of "guilt" for the commission of an offense, and then moves on to the necessary conclusion, which is punishment. Moreover, if we think of the criminal process in this way, we are inevitably sensitive to the risk that the administrative work of the sentencing phase might be bungled, or that some sentencing judge might refuse, through incompetence or willfulness, to bow to the logic of the syllogism. Is there not a danger that the clarity of the initial determination of guilt might be muddied by subsequent consideration of supposititious individual differences?

Such thoughts do indeed come naturally to anybody who has been 73
trained in the common law, or who is simply accustomed to these common law institutions that separate guilt from punishment. But why is it that the common law distinguishes between a guilt phase and a sentencing phase in the first place? Here there is an important historical tale to be told, which has gone surprisingly unexamined by legal historians. The distinction did not originally take the form that it takes today. Instead, in its original form, it had to do with the structure of medieval royal power.

In brief form, the historical tale seems to run like this. In the early stages 74
of the development of the common law, from the twelfth through the fourteenth centuries, the King claimed the sole authority to inflict punishment. This was especially, but not exclusively, true of the death penalty. Both punishment and mercy were prerogatives of royal sovereignty, which were jealously guarded by English monarchs. Since the common law was royal law, this claim of royal power implied that decisions about punishment could not be entrusted either to the judge in a criminal trial, or to the jury. As a result, in the medieval criminal trial, the jury was simply charged with adjudicating the offender "guilty," which subjected the offender to poten-

tial—though only potential—royal punishment. After this initial adjudication of guilt, convicts were turned over to the King's officers for punishment, or as the case might be, for the exercise of mercy. Only toward the very end of the Middle Ages, in the mid-fifteenth century, did the monarchy begin to delegate the power of pronouncing punishment to trial judges.[72] The power of punishment remained a technically royal power, though, so that the sentencing by the judge had to take place during a separate phase, after the jury's initial adjudication of guilt.

Thus the common law separated guilt from sentencing from a very early date, but it did not do so for the reasons that we do now. It did so because medieval punishment was, in a technical sense, not a matter of law at all. Punishment was a matter of the arbitrary and condign will of the King, technically unrestricted by legal rules. Accordingly, common law criminal trial, at the beginning, consisted *only* of the guilt phase. Criminal trial was charged with doing the only thing that it was within the power of the law to do: to declare the accused subject to royal punishment. The sentencing phase did not begin to emerge until centuries after the beginning of the common law, when judges first began to exercise delegated royal power in court. Continental law developed differently. For reasons I do not explore here, Continental judges often had the power to impose punishment from an earlier date. Moreover, although there was certainly a practice of royal mercy on the Continent, much punishment was regarded from an early date as governed by rules of law developed by jurists.

Now, there is no King in the United States, and the medieval doctrine that only the King has the power to inflict punishment has long since become meaningless. Nevertheless, we still have a guilt phase, historically the province of the jury, to be followed by a separate sentencing phase, historically the province of the King—and historically the province of royal mercy. We have even retained what is really a kind of medieval attitude toward

72 It seems that 14 H. 6 c. 1 (1436) gave the justices of *assize* and *nisi prius* the authority for the first time to "award execution to be made by force of [the] judgments" given at trial. 2 Hale PC 403. However, the only discussions I have found are in the older authorities: Joseph Chitty (repr. 1978) (1816), and Matthew Hale (repr. 2003) (published 1736). Judicial ruminations on the impropriety of introducing character evidence date to the later seventeenth century, but the bulk of the authority emerges at the end of the eighteenth century and afterwards. *See* John Henry Wigmore (1904), and David P. Leonard (1998, 1167-1172). The introduction of evidence of prior convictions was first barred by statute in 1836, by 6 & 7 W. 4 c. 111.

the relationship between guilt and punishment. We think of the guilt phase as the realm of law—as the realm in which carefully crafted rules guide the decision-makers to a definitive adjudication. By contrast, we think of punishment as the realm of potential mercy—the realm in which the work of the law threatens to be undone on account of individual differences.

Continental law, by contrast, has long since moved to a system in which guilt and punishment are both equally regarded as the province of the legal profession. Guilt and sentencing both are subject to the rules of the law, on the Continent, and both the nature of the offense and the character of the offender are evaluated by professionals from the moment of the initial intake of the accused into the criminal justice system onward. There is much less room in the Continental tradition for the notion that punishment belongs to a qualitatively different realm of "mercy." There is nothing lawless about individualizing punishment on the Continent, since techniques of individualization are just as much the products of juristic reason as are techniques for the adjudication of guilt. The appeal of equality in punishment is thus in part the product of a kind of characteristic, and distinctive, institutional atavism in the common law.

The archaism of the bifurcated trial is one institutional factor whose role deserves emphasis. Another is the relative weakness of the American state. It is a commonplace of comparative law that Continental states are stronger, better financed, and more intrusive than the American state. It is also a commonplace that Continental law tends to be made through the exercise of bureaucratic authority where American law tends to be made more through the democratic process.[73] These are differences that have only grown over the last thirty years, and they too must play a role in explaining the American approach to criminal punishment.

To begin on the coarsest material level, the American prosecutorial corps looks underfinanced from the Continental point of view. The overall tax burden in America is relatively low, by comparative standards,[74] and American prosecution, like other forms of American governmental infrastructure, is relatively poorly financed.[75] Such a system cannot be committed to

73 Elegantly presented in Kagan (2001).

74 For 2005 statistics, *see* http://www.oecd.org/dataoecd/8/4/37504406.pdf.

75 For this commonplace of the criminal law literature, *see, e.g.,* Stephanos Bibas (2004).

any form of compulsory prosecution. American prosecutors simply lack the resources to pursue every case. (Indeed, these days they sometimes lack the resources to interview witnesses or even provide photocopies to indigent defendants.[76]) Most importantly, for my purposes in this essay, when they are faced with wealthy defendants they may find themselves badly overmatched. A system with a strong commitment to adversary values, an able defense bar, and a poorly financed prosecutorial corps will predictably produce unequal results in the pre-conviction phase.[77]

Equality of prosecution, in short, is more or less unattainable in a country with a poorly financed state and system of adversarial justice—and the American state has become less well financed over the last thirty years. This suggests a useful, if disheartening, conclusion. Maybe equality in punishment, whatever its flaws, is simply the best that America can afford. As long as we insist on keeping our tax base low, we will have to live with an unfair and uneven system of prosecution. But at least we can content ourselves with equal treatment for those offenders who are actually prosecuted and convicted. Equality in punishment, we could thus argue, is a second-best solution, embraced perforce by an underfinanced state, in which the will to equality is strong but the sinews of power are weak.

We can say similar things about the American attachment to democratic decision-making and its correspondingly weak bureaucratic norms. Unlike their Continental counterparts, American prosecutors are actors in the political system, subject to election, and much more broadly to electoral pressures. They must justify the decisions they make before the general public, and sometimes they must make their decisions in response to public pressure. (This is what William Stuntz has called "politically mandatory" prosecution.[78]) In all these respects, American prosecutors resemble other American state servants. American state servants are certainly often relatively independent bureaucratic officials. Nevertheless, compared to their Continental cousins, they are subject to much more powerful political pressures. They must live with American transparency norms that make it comparatively difficult to shield professional decision-making from public

76 Joe Mozingo (2006, A12).

77 For a survey of the literature, see Kagan (2001).

78 Stuntz (2004).

critique. Moreover, political appointees play a much larger role in American government than they do in Europe, and a growing one. American government is generally exposed to the blustering winds of democracy in a way that Continental government is generally not.[79]

Of course, most Americans would see nothing wrong in the power of democratic politics; and my purpose here is not to claim that there is anything necessarily wrong with it. My purpose is simply to observe that the democratization of justice helps explain America's otherwise puzzling attachment to equality in punishment rather than equality in prosecution. Bureaucratically minded prosecutors of the Continental type will find it predictably easier to process cases without an eye to the headlines or the next election. They can bring a kind of assembly-line form of equality to their work—not only because they are better financed, but also because their work will only be inspected by their hierarchical superiors, and not by the general public.

Most Americans would find that kind of bureaucratic insulation from public pressures obnoxious and wrong—evidence of a weak commitment to democracy. But the cost of American-style democratic pressure is a weakened commitment to equality in prosecution. Like juries, the general public can be prey to bias and prejudice. It is hard for laypeople to think straight when they are exposed to crime. To the extent that the decisions of prosecutors are driven by public opinion, they will be predictably inegalitarian. When Americans make the choice to select prosecutors democratically, they inevitably make the choice for comparatively uneven and unfair prosecution.

Here again, comparative law suggests the conclusion that equality in punishment is simply a second-best solution, adopted perforce in a strongly democratic society of the American type. Since we are unwilling to tolerate insulated bureaucratic decision-making by our prosecutorial corps, we cannot hope to achieve bureaucratic equality in prosecution. The best we can manage is equality in punishment for those who are selected for prosecution and conviction.[80]

79 Stuntz has made the point to me that more local forms of democracy may show less tendencies toward the sort of harsh inequality we see in the contemporary United States. This may well be so.

80 There is a third way, finally, in which the relative weakness of the American state may discourage any effort to achieve equality in prosecution. American law reflects a powerful attachment to the liberty of the individual vis-à-vis the state. State intrusions into the "private

There is one last and more elusive way, too, in which I suggest that we can see the American attitude toward punishment as the product of a relatively non-bureaucratic, weak-state legal culture. This has to do with the American attitude toward risk. Sociologists like Ulrich Beck have described Continental societies (1992), with their strong bureaucratic social welfare states, as devoted to minimizing risk in everyday life. Many institutions have developed whose aim is to shield ordinary people from financial risk, health risk, and many other forms of risk as well. This reflects a profound change from the culture of Europe before 1950 or so, when it was taken for granted that inexplicable, unavoidable, and sometimes ruinous risks were a part of life. By contrast with that pre-1950 past, modern Continental European states are supposed to provide a life in which outcomes are certain (Beck, Ritter, & Lash 1992).

There are scholars who believe that the arguments of Beck and sociologists like him apply comfortably to the United States as well, but I am not convinced.[81] Beck's sociology of the "risk society" describes America much more poorly than it does Continental Europe. Americans accept far more financial risk than Europeans do. They also accept far more health risk. The risk of ruin remains a part of everyday life in the United States, much more so than in a country like Germany. We simply do not share the social ambitions that have created the social welfare state systems of Europe.

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sphere," as American law conceives it, are sharply limited in ways that are not the case elsewhere in the advanced industrial world. With such a strong attachment to the value of liberty, we find it difficult to curb the right of persons who have been accused, but not yet convicted, to employ all the resources at their disposal to combat prosecution. This hardly matters, of course, for poor defendants, who have few such resources to employ. But it does mean that "liberty" makes it difficult (though not impossible—under forfeiture proceedings) to prevent the wealthy from enjoying advantages unavailable to the poor.

Thus we can perhaps say that the liberty interest of accused persons, and norms of "fairness," make it difficult, in America, to eliminate "opportunity" for unequal treatment. Here it is worth noting that, in the effort to capture the American sensibility, we could apply a familiar argument in the law and economics of contract to criminal law. That familiar argument is that the rules of contract law should not be engineered in the effort to foster equal treatment, since equality is better achieved through redistribution, which can leave contract law intact to pursue its own policy purposes. Louis Kaplow & Steven Shavell (1994). A similar argument could perhaps be made that we should refrain from monkeying with our evidentiary rules and liberty values just in order to counterbalance inequality of resources. If an egalitarian program is needed, it should instead involve redistribution—which is not the job of criminal law.

81 Jonathan Simon in particular has been an important advocate of using the sociology of risk for analyzing American law. He is well aware that approaches to risk differ in the United States and Europe. *See* Simon (2005). Nevertheless, I believe he understates the depth of the differences.

This is of course a key transatlantic difference in attitudes. I suggest that we can see this difference in attitudes at work in comparative criminal justice as well. Why does the Continent aim so much more at equality in prosecution than America does? The answer is that the Continental system is devoted to providing certainty of outcomes for criminal offenders. For those who commit a criminal offense, there should be no upside risk—no possibility of escaping prosecution and conviction. Just as the health care system is supposed to provide certainty of care, the criminal justice system is supposed to provide certainty of prosecution. Both belong to the same world of bureaucratic certainty. Americans do not see the world in such terms. They tolerate the idea that offenders can enjoy upside risk, just as other citizens face downside risk. Certainty of outcomes is simply not the goal of our strongly non-bureaucratic system.

Equality in punishment makes more sense in a society, like ours, with a comparatively weak state tradition. Let me finally close by highlighting one last comparative feature of American law before turning to the conclusion. The feature in question is the American attitude toward dignity and public exposure. American law includes many fewer protections for the public image of individuals than does Continental law.[82] American privacy law offers individuals comparatively few opportunities to prevent media disclosure of facts about their lives, for example. Similarly, the law of American criminal procedure permits much more public exposure for persons who have been accused, arrested, or convicted. This distinctive feature of American law (and more broadly American culture) also helps explain the comparative success of equality in punishment in American legal culture: Our comparative lack of concern for individual dignity makes it far easier for us to exploit the expressive possibilities of criminal punishment, and that is arguably critical for the embrace of equality in punishment in contemporary America.

The intuitive appeal of equality in punishment, after all, must have something to do with punishment's expressive possibilities.[83] As von Hirsch puts it, punishment "*expresses* blame." But why should we feel so strongly that mere convictions are meaningless unless they are followed by punishment? The answer, I suggest, is in large part that punishment has more

82 I have explored this question elsewhere. *See* Whitman (2004).

83 For a classic statement, *see* Dan Kahan (1996).

expressive punch than prosecution. To hear that someone has been indicted carries nothing like the vicarious horror of hearing that someone has been imprisoned. It is arguably that vicarious horror that gives equality in punishment much of its powerful symbolic appeal. The fact of pain, the glamour of public retribution, the headline excitement in seeing a high-status person—a Mike Milken, a Martha Stewart, or a Paris Hilton—jailed: These all make expressive statements that are difficult indeed to match. Indeed it is perhaps for this reason above all that we have a strong intuition that equality before the criminal law must mean equality in punishment.

Yet making those kinds of expressive statements is far easier in American law, and in American culture, than it is on the Continent. Continental norms of the protection of dignity make it quite difficult to exploit the public fascination with punishment. The practice of criminal punishment on the Continent is not only milder. It is also more sober and less open to media exploitation. Equality in punishment of the American kind could never work as well in the Continent, at least as long as current Continental dignitary law survives. On the Continent, it is far more difficult to use the punishment of high-status persons, or anyone else, to express social values.

Making expressive statements through punishment is thus much easier in America. Perhaps, to close this Section, it is also more necessary. As I observed at the opening of this essay, the triumph of equality in punishment has coincided with the decline of certain other dramatic forms of the pursuit of equality over the last few decades. Redistribution through taxation has fallen on ideological hard times, and so to some extent has affirmative action. These programs have certainly not collapsed entirely. But it would be hard to point to either of them as evidence of any kind of American consensus about the right way to pursue equality. The same is true of areas like gay rights, which can hardly be said to command ideological consensus. The area in which we do achieve consensus is criminal punishment.

Maybe, in the end, the failure of ideological consensus for these other forms of the pursuit of equality helps explain the appeal of equality in punishment over the last thirty years. It is profoundly important that an egalitarian society like ours make *some* great symbolic collective commitment to equality, and in the absence of any alternative, equality in punishment, with its immense expressive power, fits the bill. Americans want to be publicly

committed to some form of equality. But they have not achieved any agreement about the pursuit of government-sponsored equality in civil society, since the authority of the state to engineer equality among law-abiding citizens seems so weak to so many Americans. Convicted persons, by contrast, have no liberty interest under American law, and most Americans can see no objection to engineering equality as between them. There is, if you like, a paradox in this: It is precisely those persons who have lost their formal membership in society whom we find it easiest to make equal.

8. CONCLUSION

All of these observations aim, to return to my earlier metaphor, simply to get the lay of the American legal landscape—to explain what it is about the American context that makes equality in punishment seem an attractive goal. It is certainly not my aim to justify equality in punishment. I think the ideal of equality in punishment is simple-minded and wrong, and I would prefer to condemn it out of hand. But comparative law is not a particularly good tool for either justification or condemnation. Comparative law can certainly raise our consciousness, by showing that alternatives to our institutions are thinkable. Good comparative law shows us that our approaches are neither necessary nor inevitable. But it is rare indeed that a good study in comparative law leaves the impression that change will be easy. Good comparative law aims to show that differences in law are rooted in larger differences in values and institutions. Its typical implication is that the law can only be successfully changed if we can succeed in the much more daunting business of changing the values and institutions that underlie it. Such are the implications of this essay. There is nothing necessary or inevitable about equality in punishment. It is perfectly possible to cherish egalitarian ideals while maintaining individualization in punishment. Other systems do it. Indeed, the northern Continental way of pursuing equality—pursuing pre-conviction equality—makes significantly better policy sense than our way of pursuing equality—pursuing post-conviction equality.

Nevertheless, our commitment to equality in punishment fits within the larger landscape of American values and institutions, as that landscape has taken shape over the last thirty years, and to some extent over the last

six hundred years. In a country with relatively harsh criminal punishment, relatively weak state legitimacy, relatively strong patterns of Christian piety, a deeply rooted institutional tradition of bifurcating guilt and sentencing, and few protections for the individual dignity of offenders, equality in punishment seems like a natural goal. It may not seem like a natural goal forever. As recently as forty years ago it did not seem like a natural goal. But it is unlikely that we can overcome equality in punishment unless we are willing to undertake the much more challenging task of remaking that larger social, cultural, and institutional landscape.

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Harvard Law Review
November, 2013

The Supreme Court 2012 Term
Leading Cases

SIXTH AMENDMENT -- RIGHT TO JURY TRIAL -- MANDATORY MINIMUM SENTENCES -- ALLEYNE V. UNITED STATES

Under the Sixth Amendment, a criminal conviction must "rest upon a jury determination that the defendant is guilty of every element of the crime" in question beyond a reasonable doubt.[1] Since McMillan v. Pennsylvania,[2] however, judges have been able to find so-called "sentencing factors" at postconviction hearings without running afoul of the jury-trial guarantee.[3] Originally, legislatures were free to draw the line between elements and sentencing factors in drafting criminal codes.[4] However, in Apprendi v. New Jersey,[5] the Supreme Court held that any fact that increases a defendant's sentence "beyond the prescribed statutory maximum" is an element for the jury, regardless of the legislature's designation.[6] By contrast, in Harris v. United States,[7] the Court reaffirmed McMillan's conclusion that a fact that increases only a mandatory minimum sentence may constitute a sentencing factor.[8] Last Term, in Alleyne v. United States,[9] the Court overruled Harris and determined that "Apprendi applies with equal force to facts increasing [a] mandatory minimum."[10] Alleyne continues the judiciary's recent trend of reining in the expansive sentencing authority asserted by legislatures over the past several decades. More specifically, Alleyne is the next major chapter in the rollback of structured sentencing regimes and legislative designation of sentencing factors that began thirteen years ago in Apprendi.

* * *

Alleyne represents the next major chapter in Apprendi's sentencing revolution. During the late twentieth century, legislatures asserted and enjoyed a high degree of authority over criminal sentencing, including the denomination of sentencing factors and the regulation of judges' sentencing discretion.[71] However, in a series of landmark sentencing decisions comprising Apprendi and its progeny, the Court significantly curtailed this authority.[72] Throughout these cases, the Justices disagreed sharply over the proper scope of the Sixth Amendment, leading the Court to vacillate between three competing understandings of the jury-trial guarantee.[73] Despite continuing this underlying doctrinal disagreement,[74] Alleyne is a significant development in the Apprendi line of cases. In particular, it continues the judiciary's trend of scaling back so-called structured sentencing reforms and reining in legislative authority over sentencing factors.

Before Apprendi, legislative control of sentencing manifested itself in two related and interdependent ways. First, in writing criminal codes, legislatures were almost completely free to decide whether a particular fact would constitute an element of a crime (decided by a jury) or a sentencing factor (decided by a judge).[75] Accordingly, legislatures could "remov[[e] decisions that strongly affect[ed] criminal defendants from the jury" for resolution "by a standard of less than proof beyond a reasonable doubt."[76] The New Jersey statute at issue in Apprendi is a prime example of such a transfer of decisionmaking authority. Under this law, a judge could enhance a convicted defendant's sentence upon finding, as a sentencing factor, that the crime in question had been committed in order to intimidate someone on the

basis of race, sex, or another protected characteristic.[77]

Second, legislatures cabined judicial discretion through various structured sentencing regimes. For much of the twentieth century, judges possessed "virtually unlimited" sentencing discretion[78]: once a jury convicted a defendant, a judge was free to impose any sentence within the legislatively established range for the defendant's crime.[79] However, in the 1960s and 1970s, various social forces "coalesced into a general movement toward 'structured sentencing,"' through which legislatures regulated this discretion.[80] One particularly salient example of structured sentencing was the proliferation of various state and federal sentencing guidelines.[81] Other reforms included "determinate sentencing systems," "mandatory minimums," and "the abolition of parole."[82] In part, legislators turned to structured sentencing in an effort to realize the benefits of both individualized punishment and determinate sentencing at the same time.[83]

Thus, by the late twentieth century, legislatures had come to play an active role in the sentencing process. However, Alleyne was not decided against this backdrop. Instead, the Court has limited these two legislative roles (determination of sentencing factors and implementation of structured sentencing reforms) through a recent series of cases.[84] The first blow landed in Apprendi. There, the Court determined that only a jury can make a factual finding that increases a defendant's maximum statutory sentence: any such facts are necessarily elements of the crime under the Sixth Amendment.[85] On the one hand, some of Apprendi's language sounded quite expansive: the Court thought it "unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."[86] On the other hand, Apprendi's narrow holding made its effect on structured sentencing reforms like guidelines and minimums unclear,[87] particularly in light of Harris.[88]

The Court's landmark decisions in Blakely v. Washington[89] and United States v. Booker[90] ultimately reaffirmed and expanded Apprendi, further revolutionizing the sentencing landscape. In Blakely, the Court considered the constitutionality of Washington's state sentencing guidelines in a prosecution for second-degree kidnapping, a "class B felony."[91] Under Washington law, any class B felony carried a general sentence range of zero to ten years.[92] However, Washington's guidelines statute further constrained the sentence by creating a narrower "standard range" for each particular offense from which the judge could deviate only by making additional factual findings at sentencing.[93] The Court held that allowing upward departures from the standard range based on such factfinding violated the Sixth Amendment in light of Apprendi.[94] Less than a year later, the Court extended this reasoning to cover the Federal Guidelines in Booker.[95] The Court held that those guidelines, which mirrored the Washington guidelines in all material respects,[96] similarly violated the Sixth Amendment.[97]

As the next major development in the Apprendi line, Alleyne followed in the footsteps of these cases in a number of important ways. First, like each of these cases, Alleyne placed hard limits on the legislature's ability to shift facts back and forth between the "elements" and "sentencing factors" categories.[98] Second, like Blakely and Booker, Alleyne affected a touchstone of structured sentencing: whereas the former two cases reined in guidelines, the latter cabined mandatory minimums. Alleyne thus paralleled Blakely and Booker in terms of its effect on judicial discretion: all three left judges with greater flexibility at sentencing.[99] Finally, like these prior cases, Alleyne took a defendant-friendly view of exactly what constitutes the penalty for a crime.[100] In Blakely, the Court indicated that the Washington guidelines' narrower standard range constituted the relevant penalty, despite arguments that

the Court should construe the ten-year maximum for all class B felonies as such.[101] Similarly, in Booker, the Court looked to the Guidelines' "'base' sentence" rather than the offense statute's maximum penalty.[102] Alleyne followed suit, concluding that a penalty includes both a maximum and minimum sentence, despite arguments that only the maximum matters under the Sixth Amendment.

On the one hand, Alleyne likely could have a significant impact on sentencing practice, as defendants are often sentenced to the exact amount of the applicable minimum--at least for firearms offenses under § 924.[103] On the other hand, the history in this area cautions against overestimating the degree to which this decision will impact defendants' outcomes. For example, in the years following Booker, judges still largely sentenced within the advisory Guidelines range.[104] Similarly, in § 924 cases where juries fail to find brandishing, judges may still tend to impose seven-year sentences if they find brandishing by a preponderance of the evidence (even though such sentences are no longer mandatory). Nevertheless, Alleyne represents a significant development in the tug-of-war between the judiciary and the legislature over control of the sentencing process: it is thus the next major chapter in the rollback of structured sentencing reforms and legislative authority over sentencing factors that began in Apprendi. Indeed, given the Court's near-total elimination of binding sentencing factors, Alleyne may even be the last such chapter.

Footnotes

1 United States v. Gaudin, 515 U.S. 506, 510 (1995).

2 477 U.S. 79 (1986).

3 See id. at 81, 85-86, 93. Judges may find these facts, which impact the severity of defendants' sentences, see Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000), by a preponderance of the evidence. See United States v. O'Brien, 130 S. Ct. 2169, 2174 (2010). The statute at issue in McMillan imposed a mandatory minimum sentence of five years' imprisonment if a judge found, as a sentencing factor, that a defendant had "visibly possessed a firearm" while committing certain felonies. See 477 U.S. at 81 (quoting 42 Pa. Cons. Stat. §9712(a) (2007)).

4 See Benjamin E. Rosenberg, Criminal Acts and Sentencing Facts: Two Constitutional Limits on Criminal Sentencing, 23 Seton Hall L. Rev. 459, 477 (1993).

5 530 U.S. 466 (2000).

6 Id. at 490.

7 536 U.S. 545 (2002).

8 See id. at 568-69; McMillan, 477 U.S. at 85-86.

[9] 133 S. Ct. 2151 (2013).

[71] See Frank O. Bowman, III, Debacle: How the Supreme Court Has Mangled American Sentencing Law and How It Might Yet Be Mended, 77 U. Chi. L. Rev. 367, 368 (2010); Rosenberg, supra note 4, at 477.

[72] See Kate Stith, Feature, The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion, 117 Yale L.J. 1420, 1477 (2008).

[73] See Benjamin J. Priester, Structuring Sentencing: Apprendi, the Offense of Conviction, and the Limited Role of Constitutional Law, 79 Ind. L.J. 863, 884 (2004) (describing the Justices' "interpretive impasse"). Under the first understanding, the jury-trial right reaches any fact that raises a defendant's expected punishment by increasing either end of the sentencing range. See, e.g., Alleyne, 133 S. Ct. at 2155; Harris v. United States, 536 U.S. 545, 577-78 (2002) (Thomas, J., dissenting). Under the second, a jury must find only those facts without which a judge could not have imposed an equivalent sentence. See, e.g., Blakely v. Washington, 542 U.S. 296, 304 (2004); Harris, 536 U.S. at 560-62 (plurality opinion). Under the third, the Sixth Amendment permits a legislature to designate almost any fact that alters a mandatory sentencing range as a sentencing factor, which a judge may find by a preponderance of the evidence. See, e.g., Blakely, 542 U.S. at 328-29 (Breyer, J., dissenting); Apprendi v. New Jersey, 530 U.S. 466, 562-63 (2000) (Breyer, J., dissenting).

[74] As reflected in Alleyne's 4-1-4 decision, the three competing understandings remain in tension. Compare Alleyne, 133 S. Ct. at 2155, with id. at 2166-67 (Breyer, J., concurring in part and concurring in the judgment), and id. at 2168-69 (Roberts, C.J., dissenting).

[75] See Rosenberg, supra note 4, at 477.

[76] Id.

[77] See Apprendi, 530 U.S. at 468-69.

[78] Priester, supra note 73, at 869; see also Apprendi, 530 U.S. at 481 (noting the nineteenth-century transition "from statutes providing fixed-term sentences to those providing judges discretion within a permissible range").

[79] See Apprendi, 530 U.S. at 481 ("[J]udges in this country have long exercised discretion of this nature in imposing sentence within statutory limits in the individual case."); Priester, supra note

73, at 869 ("[S]o long as the judge imposed a lawful sentence in compliance with the statute, appellate review ordinarily was unavailable."). This grant of discretion was consistent with the "rehabilitative model of criminal punishment" prevailing at the time, Priester, supra note 73, at 869, which emphasized "individualized sentences," Bowman, supra note 71, at 370.

[80] Bowman, supra note 71, at 375. In part, such regulation reflected growing doubts regarding "the ability of the rehabilitative sentencing model to rehabilitate" and concerns over "unjustifiable [sentencing] disparities" produced by unlimited discretion. Id. at 374-75. In the words of one prominent proponent of sentencing reform, judges' "almost wholly unchecked and sweeping" discretion was "terrifying and intolerable for a society that professes devotion to the rule of law." Marvin E. Frankel, Criminal Sentences 5 (1973).

[81] See John F. Pfaff, The Continued Vitality of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines, 54 UCLA L. Rev. 235, 242 (2006). Under the Federal Guidelines, for example, a judge would sentence a defendant within a relatively narrow range that was calculated based on the severity of the crime (the "offense level") and the defendant's criminal history. See M.K.B. Darmer, The Federal Sentencing Guidelines After Blakely and Booker: The Limits of Congressional Tolerance and a Greater Role for Juries, 56 S.C. L. Rev. 533, 540-42 (2005). The former depended on the specific facts of the defendant's crime--some of which were elements for the jury and others of which the judge could find. See Deborah Young, Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules, 79 Cornell L. Rev. 299, 324-25 (1994). Although judges had some ability to depart from the sentencing range that resulted from plotting a defendant's offense level and criminal history on the Guidelines grid, this discretion was highly limited. See Douglas A. Berman, Balanced and Purposeful Departures: Fixing a Jurisprudence That Undermines the Federal Sentencing Guidelines, 76 Notre Dame L. Rev. 21, 40 (2000).

[82] Pfaff, supra note 81, at 242. Not all commentators agree on whether each of these reforms should be labeled a part of the "structured sentencing" movement. Compare, e.g., Bowman, supra note 71, at 376 (arguing that mandatory minimums are "commonly, but erroneously, lumped into the category of structured sentencing"), with, e.g., Robert P. Mosteller, New Dimensions in Sentencing Reform in the Twenty-First Century, 82 Or. L. Rev. 1, 17 (2003) ("Another form of structured sentencing is the mandatory minimum....").

[83] Priester, supra note 73, at 898.

[84] See Stith, supra note 72, at 1477 (noting that this series "reset the balance of authority in federal sentencing").

[85] See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Accordingly, the New Jersey hate crimes statute discussed above was unconstitutional. See id. at 491-92.

[86] Id. at 490 (emphasis added) (quoting Jones v. United States, 526 U.S. 227, 252 (1999) (Stevens, J., concurring)).

[87] See Priester, supra note 73, at 878-79. As Professor Frank Bowman notes, "[o]ne of the peculiarities of the McMillan-Harris sequence is that much of the debate in these cases was plainly driven by their potential effect on guidelines and other structured sentencing systems, yet none of these cases involved such systems." Bowman, supra note 71, at 407 (footnote omitted).

[88] See Priester, supra note 73, at 884. As discussed, shortly after Apprendi, the Harris Court declined to overrule McMillan and extend Apprendi to mandatory minimums. See id. at 865.

[89] 542 U.S. 296 (2004).

[90] 543 U.S. 220 (2005).

[91] 542 U.S. at 299.

[92] See id.

[93] See id.; Bowman, supra note 71, at 408-09. The standard range for second-degree kidnapping with a firearm was forty-nine to fifty-three months. Blakely, 542 U.S. at 299.

[94] See Blakely, 542 U.S. at 303-05. In doing so, the Court considered the relevant maximum penalty to be that which could be imposed solely based on a jury verdict or guilty plea--in other words, the guidelines' standard range. See id. at 303-04.

[95] See 543 U.S. at 233.

[96] See id. Like Washington's guidelines, the Federal Guidelines narrowed a judge's discretion within the larger statutory sentencing range. See id. at 227. For example, the drug statute under which Booker was charged authorized a maximum sentence of life in prison, while the Guidelines base range in his case called for 210 to 262 months. Id.

[97] See id. at 226-27. To remedy this unconstitutionality, Booker rendered the Guidelines advisory. See id. at 245. Because advisory guidelines permit a judge to "exercise[] his discretion to select a specific sentence within a defined range," they do "not implicate the Sixth Amendment." Id. at 233.

[98] Apprendi prohibited legislatures from authorizing judges to increase a defendant's sentence beyond a statutory maximum. See Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Blakely and Booker removed legislatures' ability to create statutory maximums-within-maximums from which a judge could deviate by finding additional facts. See Booker, 543 U.S. at 231-33; Blakely, 542 U.S. at 304. And before Alleyne, even if a jury did not make a factual finding as an element of the crime, a judge could examine the same fact at sentencing and adjust a mandatory minimum accordingly. See Alleyne, 133 S. Ct. at 2155-56.

[99] Each of these cases eliminated legislative constraints on judges' sentencing power, see Stith, supra note 72, at 1477, while simultaneously reaffirming judges' "broad" ability to exercise discretion at sentencing, Booker, 543 U.S. at 233. In particular, after Alleyne, a judge will still be bound by a jury's mandatory minimum-enhancing factual findings. See Alleyne, 133 S. Ct. at 2167 (Breyer, J., concurring). But in cases where a jury has not made such findings, a judge is no longer bound by her own factual findings. See id. at 2170-71 (Roberts, C.J., dissenting).

[100] Given the Court's language in Apprendi, the definition of "penalty" is critical: it determines Apprendi's ultimate reach. See Apprendi, 530 U.S. at 490.

[101] See 542 U.S at 303-04.

[102] 543 U.S. at 227. Some commentators have argued that Blakely and Booker's definition of the relevant maximum penalty conflicted with prior understandings of the concept. See, e.g., Bowman, supra note 71, at 412-13; Kevin R. Reitz, The New Sentencing Conundrum: Policy and Constitutional Law at Cross-Purposes, 105 Colum. L. Rev. 1082, 1091-92 (2005).

[103] See Harris v. United States, 536 U.S. 545, 578 (2002) (Thomas, J., dissenting).

[104] See Pfaff, supra note 81, at 239-40.

132 S. Ct. 2455

Evan MILLER, Petitioner
v.
ALABAMA.
Kuntrell Jackson, Petitioner
v.
Ray Hobbs, Director, Arkansas Department of Correction.

Decided June 25, 2012.

Justice KAGAN delivered the opinion of the Court.

The two 14–year–old offenders in these cases were convicted of murder and sentenced to life imprisonment without the possibility of parole. In neither case did the sentencing authority have any discretion to impose a different punishment. State law mandated that each juvenile die in prison even if a judge or jury would have thought that his youth and its attendant characteristics, along with the nature of his crime, made a lesser sentence (for example, life *with* the possibility of parole) more appropriate. Such a scheme prevents those meting out punishment from considering a juvenile's "lessened culpability" and greater "capacity for change," *Graham v. Florida* (2010), and runs afoul of our cases' requirement of individualized sentencing for defendants facing the most serious penalties. We therefore hold that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on "cruel and unusual punishments."

I-A

In November 1999, petitioner Kuntrell Jackson, then 14 years old, and two other boys decided to rob a video store. En route to the store, Jackson learned that one of the boys, Derrick Shields, was carrying a sawed-off shotgun in his coat sleeve. Jackson decided to stay outside when the two other boys entered the store. Inside, Shields pointed the gun at the store clerk, Laurie Troup, and demanded that she "give up the money." Troup refused. A few moments later, Jackson went into the store to find Shields continuing to demand money. At trial, the parties disputed whether Jackson warned Troup that "[w]e ain't playin'," or instead told his friends, "I thought you all was playin'." When Troup threatened to call the police, Shields shot and killed her. The three boys fled empty-handed.

Arkansas law gives prosecutors discretion to charge 14–year–olds as adults when they are alleged to have committed certain serious offenses. The prosecutor here exercised that authority by charging Jackson with capital felony murder and aggravated robbery. Jackson moved to transfer the case to juvenile court, but after considering the alleged facts of the crime, a psychiatrist's examination, and Jackson's juvenile arrest history (shoplifting and several incidents of car theft), the trial court denied the motion, and an appellate court affirmed. A jury later convicted Jackson of both crimes. Noting that "in view of [the] verdict, there's only one possible punishment," the judge sentenced Jackson to life without parole. Jackson did not challenge the sentence on appeal, and the Arkansas Supreme Court affirmed the convictions.

Following *Roper v. Simmons*, in which this Court invalidated the death penalty for all juvenile offenders under the age of 18, Jackson filed a state petition for habeas corpus. He argued, based on *Roper*'s reasoning, that a mandatory sentence of life without parole for a 14–year–old also violates the Eighth Amendment. The circuit court rejected that argument and granted

the State's motion to dismiss. While that ruling was on appeal, this Court held in *Graham v. Florida* that life without parole violates the Eighth Amendment when imposed on juvenile nonhomicide offenders.

* * *

B

Like Jackson, petitioner Evan Miller was 14 years old at the time of his crime. Miller had by then been in and out of foster care because his mother suffered from alcoholism and drug addiction and his stepfather abused him. Miller, too, regularly used drugs and alcohol; and he had attempted suicide four times, the first when he was six years old.

One night in 2003, Miller was at home with a friend, Colby Smith, when a neighbor, Cole Cannon, came to make a drug deal with Miller's mother. The two boys followed Cannon back to his trailer, where all three smoked marijuana and played drinking games. When Cannon passed out, Miller stole his wallet, splitting about $300 with Smith. Miller then tried to put the wallet back in Cannon's pocket, but Cannon awoke and grabbed Miller by the throat. Smith hit Cannon with a nearby baseball bat, and once released, Miller grabbed the bat and repeatedly struck Cannon with it. Miller placed a sheet over Cannon's head, told him "'I am God, I've come to take your life,'" and delivered one more blow. The boys then retreated to Miller's trailer, but soon decided to return to Cannon's to cover up evidence of their crime. Once there, they lit two fires. Cannon eventually died from his injuries and smoke inhalation.

Alabama law required that Miller initially be charged as a juvenile, but allowed the District Attorney to seek removal of the case to adult court. The D.A. did so, and the juvenile court agreed to the transfer after a hearing. Citing the nature of the crime, Miller's "mental maturity," and his prior juvenile offenses (truancy and "criminal mischief"), the Alabama Court of Criminal Appeals affirmed. The State accordingly charged Miller as an adult with murder in the course of arson. That crime (like capital murder in Arkansas) carries a mandatory minimum punishment of life without parole.

* * *

We granted certiorari in both cases, . . . and now reverse.

II

The Eighth Amendment's prohibition of cruel and unusual punishment "guarantees individuals the right not to be subjected to excessive sanctions." *Roper*. That right, we have explained, "flows from the basic 'precept of justice that punishment for crime should be graduated and proportioned' " to both the offender and the offense. As we noted the last time we considered life-without-parole sentences imposed on juveniles, "[t]he concept of proportionality is central to the Eighth Amendment." *Graham*. And we view that concept less through a historical prism than according to " 'the evolving standards of decency that mark the progress of a maturing society.'" *Estelle v. Gamble*.

The cases before us implicate two strands of precedent reflecting our concern with proportionate punishment. The first has adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty. See *Graham*. So, for example, we have held that imposing the death penalty for nonhomicide crimes against individuals, or imposing it on mentally retarded defendants, violates the

Eighth Amendment. . . . Several of the cases in this group have specially focused on juvenile offenders, because of their lesser culpability. Thus, *Roper* held that the Eighth Amendment bars capital punishment for children, and *Graham* concluded that the Amendment also prohibits a sentence of life without the possibility of parole for a child who committed a nonhomicide offense. *Graham* further likened life without parole for juveniles to the death penalty itself, thereby evoking a second line of our precedents. In those cases, we have prohibited mandatory imposition of capital punishment, requiring that sentencing authorities consider the characteristics of a defendant and the details of his offense before sentencing him to death. . . . Here, the confluence of these two lines of precedent leads to the conclusion that mandatory life-without-parole sentences for juveniles violate the Eighth Amendment.

To start with the first set of cases: *Roper* and *Graham* establish that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, we explained, "they are less deserving of the most severe punishments." *Graham*. Those cases relied on three significant gaps between juveniles and adults. First, children have a " 'lack of maturity and an underdeveloped sense of responsibility,' " leading to recklessness, impulsivity, and heedless risk-taking. *Roper*. Second, children "are more vulnerable ... to negative influences and outside pressures," including from their family and peers; they have limited "contro[l] over their own environment" and lack the ability to extricate themselves from horrific, crime-producing settings. And third, a child's character is not as "well formed" as an adult's; his traits are "less fixed" and his actions less likely to be "evidence of irretrievabl[e] deprav[ity]."

Our decisions rested not only on common sense—on what "any parent knows"—but on science and social science as well. In *Roper*, we cited studies showing that " '[o]nly a relatively small proportion of adolescents' " who engage in illegal activity " 'develop entrenched patterns of problem behavior.'" And in *Graham*, we noted that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds"—for example, in "parts of the brain involved in behavior control." We reasoned that those findings— of transient rashness, proclivity for risk, and inability to assess consequences—both lessened a child's "moral culpability" and enhanced the prospect that, as the years go by and neurological development occurs, his " 'deficiencies will be reformed.'"

Roper and *Graham* emphasized that the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes. Because "'[t]he heart of the retribution rationale'" relates to an offender's blameworthiness, "'the case for retribution is not as strong with a minor as with an adult.'" . . . Nor can deterrence do the work in this context, because "'the same characteristics that render juveniles less culpable than adults' "—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment. *Graham*. Similarly, incapacitation could not support the life-without-parole sentence in *Graham* : Deciding that a "juvenile offender forever will be a danger to society" would require "mak[ing] a judgment that [he] is incorrigible"—but "'incorrigibility is inconsistent with youth.'" And for the same reason, rehabilitation could not justify that

sentence. Life without parole "forswears altogether the rehabilitative ideal." *Graham*. It reflects "an irrevocable judgment about [an offender's] value and place in society," at odds with a child's capacity for change.

Graham concluded from this analysis that life-without-parole sentences, like capital punishment, may violate the Eighth Amendment when imposed on children. To be sure, *Graham* 's flat ban on life without parole applied only to nonhomicide crimes, and the Court took care to distinguish those offenses from murder, based on both moral culpability and consequential harm. But none of what it said about children—about their distinctive (and transitory) mental traits and environmental vulnerabilities—is crime-specific. Those features are evident in the same way, and to the same degree, when (as in both cases here) a botched robbery turns into a killing. So *Graham* 's reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.

Most fundamentally, *Graham* insists that youth matters in determining the appropriateness of a lifetime of incarceration without the possibility of parole. In the circumstances there, juvenile status precluded a life-without-parole sentence, even though an adult could receive it for a similar crime. And in other contexts as well, the characteristics of youth, and the way they weaken rationales for punishment, can render a life-without-parole sentence disproportionate. "An offender's age," we made clear in *Graham*, "is relevant to the Eighth Amendment," and so "criminal procedure laws that fail to take defendants' youthfulness into account at all would be flawed."

* * *

But the mandatory penalty schemes at issue here prevent the sentencer from taking account of these central considerations. By removing youth from the balance—by subjecting a juvenile to the same life-without-parole sentence applicable to an adult—these laws prohibit a sentencing authority from assessing whether the law's harshest term of imprisonment proportionately punishes a juvenile offender. That contravenes *Graham* 's (and also *Roper* 's) foundational principle: that imposition of a State's most severe penalties on juvenile offenders cannot proceed as though they were not children.

And *Graham* makes plain these mandatory schemes' defects in another way: by likening life-without-parole sentences imposed on juveniles to the death penalty itself. Life-without-parole terms, the Court wrote, "share some characteristics with death sentences that are shared by no other sentences." Imprisoning an offender until he dies alters the remainder of his life "by a forfeiture that is irrevocable." And this lengthiest possible incarceration is an "especially harsh punishment for a juvenile," because he will almost inevitably serve "more years and a greater percentage of his life in prison than an adult offender." *Graham*. The penalty when imposed on a teenager, as compared with an older person, is therefore "the same ... in name only." All of that suggested a distinctive set of legal rules: In part because we viewed this ultimate penalty for juveniles as akin to the death penalty, we treated it similarly to that most severe punishment. We imposed a categorical ban on the sentence's use, in a way unprecedented for a term of imprisonment. . . . And the bar we adopted mirrored a proscription first established in the death penalty context—that the punishment cannot be imposed for any

nonhomicide crimes against individuals.

That correspondence - *Graham*'s "[t]reat[ment] [of] juvenile life sentences as analogous to capital punishment," - makes relevant here a second line of our precedents, demanding individualized sentencing when imposing the death penalty. In *Woodson*, we held that a statute mandating a death sentence for first-degree murder violated the Eighth Amendment. We thought the mandatory scheme flawed because it gave no significance to "the character and record of the individual offender or the circumstances" of the offense, and "exclud[ed] from consideration ... the possibility of compassionate or mitigating factors." Subsequent decisions have elaborated on the requirement that capital defendants have an opportunity to advance, and the judge or jury a chance to assess, any mitigating factors, so that the death penalty is reserved only for the most culpable defendants committing the most serious offenses. . . .

Of special pertinence here, we insisted in these rulings that a sentencer have the ability to consider the "mitigating qualities of youth." *Johnson v. Texas.* Everything we said in *Roper* and *Graham* about that stage of life also appears in these decisions. . . . We held: "[J]ust as the chronological age of a minor is itself a relevant mitigating factor of great weight, so must the background and mental and emotional development of a youthful defendant be duly considered" in assessing his culpability.

In light of *Graham* 's reasoning, these decisions too show the flaws of imposing mandatory life-without-parole sentences on juvenile homicide offenders. Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it. Under these schemes, every juvenile will receive the same sentence as every other—the 17–year–old and the 14–year–old, the shooter and the accomplice, the child from a stable household and the child from a chaotic and abusive one. And still worse, each juvenile (including these two 14–year–olds) will receive the same sentence as the vast majority of adults committing similar homicide offenses—but really, as *Graham* noted, a *greater* sentence than those adults will serve. In meting out the death penalty, the elision of all these differences would be strictly forbidden. And once again, *Graham* indicates that a similar rule should apply when a juvenile confronts a sentence of life (and death) in prison.

So *Graham* and *Roper* and our individualized sentencing cases alike teach that in imposing a State's harshest penalties, a sentencer misses too much if he treats every child as an adult. To recap: Mandatory life without parole for a juvenile precludes consideration of his chronological age and its hallmark features—among them, immaturity, impetuosity, and failure to appreciate risks and consequences. It prevents taking into account the family and home environment that surrounds him—and from which he cannot usually extricate himself—no matter how brutal or dysfunctional. It neglects the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressures may have affected him. Indeed, it ignores that he might have been charged and convicted of a lesser offense if not for incompetencies associated with youth—for example, his inability to deal with police officers or prosecutors (including on a plea agreement) or his incapacity to assist his own attorneys. . . . And finally, this mandatory punishment disregards the possibility of rehabilitation even when the

circumstances most suggest it.

* * *

We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. . . . Because that holding is sufficient to decide these cases, we do not consider Jackson's and Miller's alternative argument that the Eighth Amendment requires a categorical bar on life without parole for juveniles, or at least for those 14 and younger. But given all we have said in *Roper*, *Graham*, and this decision about children's diminished culpability and heightened capacity for change, we think appropriate occasions for sentencing juveniles to this harshest possible penalty will be uncommon. That is especially so because of the great difficulty we noted in *Roper* and *Graham* of distinguishing at this early age between "the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." *Roper*. Although we do not foreclose a sentencer's ability to make that judgment in homicide cases, we require it to take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.

III

Alabama and Arkansas offer two kinds of arguments against requiring individualized consideration before sentencing a juvenile to life imprisonment without possibility of parole. The States (along with the dissents) first contend that the rule we adopt conflicts with aspects of our Eighth Amendment caselaw. And they next assert that the rule is unnecessary because individualized circumstances come into play in deciding whether to try a juvenile offender as an adult. We think the States are wrong on both counts.

A

The States (along with Justice THOMAS) first claim that *Harmelin v. Michigan*, precludes our holding. . . . .

We think that argument myopic. *Harmelin* had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders. We have by now held on multiple occasions that a sentencing rule permissible for adults may not be so for children. . . . .

Alabama and Arkansas (along with THE CHIEF JUSTICE and Justice ALITO) next contend that because many States impose mandatory life-without-parole sentences on juveniles, we may not hold the practice unconstitutional. In considering categorical bars to the death penalty and life without parole, we ask as part of the analysis whether " 'objective indicia of society's standards, as expressed in legislative enactments and state practice,' " show a "national consensus" against a sentence for a particular class of offenders. *Graham*. By our count, 29 jurisdictions (28 States and the Federal Government) make a life-without-parole term mandatory for some juveniles convicted of murder in adult court. The States argue that this number precludes our holding.

We do not agree; indeed, we think the States' argument on this score *weaker* than the one we rejected in *Graham*. For starters, the cases here are different from the typical one in which we have tallied legislative enactments. Our decision does not categorically bar a penalty for a class of offenders or type of crime—as, for example, we did in *Roper* or *Graham*. Instead, it mandates only that a sentencer follow a certain process—considering an offender's

youth and attendant characteristics—before imposing a particular penalty. And in so requiring, our decision flows straightforwardly from our precedents: specifically, the principle of *Roper*, *Graham*, and our individualized sentencing cases that youth matters for purposes of meting out the law's most serious punishments. When both of those circumstances have obtained in the past, we have not scrutinized or relied in the same way on legislative enactments. . . .

In any event, the "objective indicia" that the States offer do not distinguish these cases from others holding that a sentencing practice violates the Eighth Amendment. In *Graham*, we prohibited life-without-parole terms for juveniles committing nonhomicide offenses even though That is 10 *more* than impose life without parole on juveniles on a mandatory basis. And in *Atkins*, *Roper*, and *Thompson*, we similarly banned the death penalty in circumstances in which "less than half" of the "States that permit [ted] capital punishment (for whom the issue exist[ed])" had previously chosen to do so. . . . So we are breaking no new ground in these cases.

* * *

IV

Graham, *Roper*, and our individualized sentencing decisions make clear that a judge or jury must have the opportunity to consider mitigating circumstances before imposing the harshest possible penalty for juveniles. By requiring that all children convicted of homicide receive lifetime incarceration without possibility of parole, regardless of their age and age-related characteristics and the nature of their crimes, the mandatory sentencing schemes before us violate this principle of proportionality, and so the Eighth Amendment's ban on cruel and unusual punishment. We accordingly reverse the judgments of the Arkansas Supreme Court and Alabama Court of Criminal Appeals and remand the cases for further proceedings not inconsistent with this opinion.

It is so ordered.

Article

The Death Penalty and Mass Incarceration: Convergences and Divergences

Carol S. Steiker* & Jordan M. Steiker**

American penal policy over the past forty years is striking in its departure both from the policies of our own recent past and from those of our peer nations. With regard to capital punishment, despite a steep downward trajectory in executions nationwide during the 1960s, falling to zero in the five years leading up to the temporary abolition of *Furman v. Georgia*[1] in 1972, the death penalty came back with a vengeance in the years following its reinstatement in *Gregg v. Georgia*[2] and accompanying cases in 1976. By the late 1990s, death sentencing rates and execution rates reached highs that the United States had not seen in fifty years, while every other Western democracy converged on abolition as a reflection of a growing consensus that the death penalty constitutes a violation of international human rights.[3] With regard to incarceration practices, the American imprisonment rate increased five-fold in the decades between 1970 and the early 2000s, yielding a total current incarceration (prison and jail) rate of over 700 per 100,000 of population—the highest rate in our own history and in the world.[4]

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1. 408 U.S. 238 (1972).

2. 428 U.S. 153 (1976).

3. *See* Carol S. Steiker, *Capital Punishment and American Exceptionalism*, 81 OR. L. REV. 97, 127 (2002) [hereinafter *American Exceptionalism*].

4. *See* MARC MAUER, RACE TO INCARCERATE 9 (rev. ed. 2006) (noting that the increased incarceration rates were nearly seven times higher than the historic rates of the United States, as well as

A cursory survey of these parallel trends yields the plausible observation that the continued retention of the death penalty and the huge increase in the incarceration rate are joint indications of the hearty American appetite for punitiveness. Under this view, super-sized sentences and the embrace of the ultimate sanction of death are linked phenomena, reflecting a common underlying political and social reality and tracing a common trajectory. As with many simple, broad-brush observations, there is much truth in this account. But there is also reason to question and complicate this assessment. Although the stories of the American death penalty and what has come to be called our policy of "mass incarceration" have many commonalities, they also have significant divergences—not least of which is the noticeably much more massive decline in capital practices over the past dozen years, as compared to the far more modest and recent declines in incarceration. Moreover, the two phenomena are not independent of each other; rather, arguments, policies, and law relating to the death penalty have had complicated, multidirectional spillover effects in the context of incarceration, and *vice versa*.

Our goal is to explore in more fine-grained detail the convergences, divergences, and interactions of the death penalty and mass incarceration over the past several decades. We first address the convergences, identifying the common political background conditions and mutually reinforcing policies that promoted both the enthusiastic retention of the death penalty and the surge of the incarceration rate from the 1970s onward. We then discuss the divergences, both as a matter of practices on the ground and at the conceptual and constitutional levels. Finally, we turn our attention to the future, imagining possible routes to nationwide abolition of the death penalty and the likely impact on incarceration and the broader criminal justice system.

I. Common Political Background Conditions

In the early 1970s, the Supreme Court's decision in *Furman* constitutionally invalidating the practice of capital punishment through the country was greeted with consternation and even outrage, despite the dramatic declines in executions of the previous decade.[5] In the first few years following *Furman*, thirty-five states passed new capital statutes, leading the Court to acknowledge that it had misjudged the level of public support for the death penalty and to validate a new generation of state capital schemes in 1976.[6] The massive response to *Furman* reflected a political reality on the ground: the emergence of a new politics of crime and

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those of its international peers).

5. Corinna Barrett Lain, *Furman Fundamentals*, 82 WASH. L. REV. 1, 46–47 (2007).

6. *See Gregg*, 428 U.S. at 179 ("[D]evelopments during the four years since *Furman* have undercut substantially the assumptions upon which [the abolitionists' argument] rested .... The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*.").

punishment that prompted both the reinvigoration of the American death penalty and new policies that would cause the American incarceration rate to begin its long, steep, upward trajectory.

This new political reality of crime and punishment arose in response to several crucial, interrelated circumstances. First, the United States saw a long period of rising crime rates, starting in the early 1960s and continuing without any substantial relief until the 1990s.[7] During this decades-long crime wave, homicides and serious violent crimes were among the offenses that rose the fastest, and urban centers went from being relatively safe to being notoriously crime-ridden.[8] The high-profile acquittal of Bernard Goetz for the 1984 shooting of four young black men whom Goetz claimed were about to rob him on a New York City subway train reflected the degree of public fear and anger about violent crime in New York and elsewhere that had accumulated over the preceding two decades.[9] The introduction of "crack" cocaine to American markets in the 1980s helped to push the already high crime rate even higher, as addicts turned to crime to support their habits and dealers engaged in violent turf wars.[10] Both the legislative response to *Furman* that led to the Court's reinstatement of capital punishment in 1976 and the growing support for "tough on crime" policies and the "war on drugs" that spurred the incarceration boom were fueled by the ever-rising crime rate and its visible destructive force across the country.[11]

Second, the strong emotions of fear and anger that rising crime rates evoked from the public led politicians to seek to capitalize on these developments through self-consciously crime-driven campaign strategies. Starting in the 1960s, politicians like then-California Governor Ronald Reagan and President Richard Nixon pushed the issue of crime to the forefront of their successful campaigns in state and national politics.[12] In a more coordinated fashion, the Republican Party pursued its "Southern Strategy" to separate socially conservative, white Southerners from their historic affiliation with the Democratic Party by using crime as a racially-coded issue.[13] Political strategists had no trouble attracting media attention

7. *See* State-by-state and national crime estimates by year(s), BUREAU OF JUSTICE STATISTICS, http://www.bjs.gov/ucrdata/Search/Crime/State/RunCrimeStatebyState.cfm (setting parameters to "United States-Total," "Number of violent crimes," and "1960 to 2012").

8. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 2 (2011).

9. *See* GEORGE P. FLETCHER, A CRIME OF SELF DEFENSE: BERNARD GOETZ AND THE LAW ON TRIAL (1990) (describing and analyzing legal proceedings that led to Goetz's acquittal); MALCOLM GLADWELL, THE TIPPING POINT: HOW LITTLE THINGS CAN MAKE A BIG DIFFERENCE 137 (2002) (describing New York in the 1980s as "a city in the grip of one of the worst crime epidemics in its history").

10. *See* Craig Reinarman & Harry G. Levine, *Crack in the Rearview Mirror: Deconstructing Drug War Mythology*, 31 SOC. JUST. 182, 182 (2004) ("The new laws against crack helped to drive the most massive wave of imprisonment in the history of the United States.").

11. *See generally* MAUER, *supra* note 4, at chs. 3, 4, 10 (describing the "tough on crime" and "war on drugs" movements as well as related policies).

12. MICHELLE ALEXANDER, THE NEW JIM CROW 46–48 (2010).

13. *Id.* at 43–44.

to constant, replenishing crises of criminal victimization, given that the same things that win elections also sell newspapers—as the old media adage goes, "If it bleeds, it leads."[14] The combination of campaign and media attention to the intrinsically gripping problem of violent crime ensured the ongoing high salience of crime in the public mind and the steady popularity of "tough on crime" policies. In this atmosphere, the death penalty became a particularly potent symbol, offering politicians a way to signal in powerful shorthand their claims of toughness. For example, many state and national politicians sought to broadcast their support for and direct participation in capital punishment as a centerpiece of their campaigns.[15] Similarly, politicians rallied around the popular policies that drove mass incarceration in part because of their symbolic rhetoric. "Three strikes and you're out" and the "war on drugs" were shibboleths that won many backers for life sentences for recidivists (even for some nonviolent ones) and mandatory minimum drug sentences (even for some fairly low-level offenders).[16]

In addition to producing new political incentives, rising crime rates also produced a new and soon politicized community—the growing body of crime victims. As the criminal justice system changed to adjust to growing numbers of defendants and cases, it also had to adjust to the needs of more victims, who increasingly sought greater power in the criminal justice process. Just as the "women's movement" advocated (unsuccessfully) for a constitutional amendment to ensure equal rights for women, the "victims' rights movement" sought constitutional amendments and legislation at both the federal and state levels to promote the interests of victims in the criminal process, including provisions for greater consultation, input, privacy, counseling, and restitution, among other things.[17] Although unsuccessful in attaining a federal constitutional amendment, the victims' rights movement achieved many state successes in terms of both constitutional amendments and legislation.[18] The organization of such a sympathetic constituency both played a substantial role in supporting legislation that increased the incarceration rate, and served as an important counterweight to capital defendants' constitutional right to present mitigating evidence in the post-*Gregg* world of capital sentencing by insisting on the introduction of "victim impact evidence."[19]

The new political reality also received support from an unexpected place—the hallowed and usually liberal halls of academic criminology. In

14. *See id.* at 46–47.

15. *See American Exceptionalism*, *supra* note 3, at 112–13.

16. *See id.* at 115 n.58.

17. *See generally* Douglas E. Beloof, *The Third Wave of Crime Victims' Rights: Standing, Remedy, and Review*, 2005 BYU L. REV. 255 (2005) (describing successes of the victims' rights movement and arguing for further expansions).

18. *See id.* at 257–58.

19. *See* Payne v. Tennessee, 505 U.S. 808, 825 (1991) (overturning the constitutional ban on the use of victim impact evidence in capital sentencing proceedings).

1974, researcher Robert Martinson published an article reviewing the literature on effective rehabilitative strategies and proposing the disheartening hypothesis that "nothing works."[20] Martinson's suggestion hit a nerve with both left- and right-wing critics of rehabilitation-oriented criminal justice policies. The left feared repressive paternalism from the willingness of the state to intervene more broadly and more intrusively into individual liberty in the name of good intentions; the success of the 1971 film *A Clockwork Orange*, in which a dystopic state used invasive psychological conditioning to "treat" a criminal offender, aptly reflected these fears.[21] The right objected to coddling criminals by offering them services unavailable to the non-offending poor. This convergence of views from both sides of the political spectrum ensured that Martinson's "nothing works" conclusion "became synonymous with a way of characterising [sic] the treatment/rehabilitation approach for a generation."[22] Into the void left by the discredited rehabilitative theory of criminal justice naturally flowed deterrent and retributive theories—purposes that supported many of the new, harsher criminal statutes of the 1970s and 1980s and that were explicitly invoked by the Supreme Court to justify its reauthorization of capital punishment in 1976.[23]

Finally, mass incarceration and capital punishment were promoted by parallel movements away from discretionary post-sentence interventions, which led to deep declines in both parole for those incarcerated and clemency for those under sentence of death. One of the primary targets of the victims' rights movement was back-end discretion that shortened the public sentences imposed in the courtroom. This cause was cleverly and successfully pursued with calls for "truth in sentencing" that ultimately led to drastic cutbacks in the availability of parole and had the intended effect of increasing sentence lengths.[24] At the same time, the post-*Gregg* era saw a tremendous decline in the use of gubernatorial clemency to set aside death sentences.[25] The more structured capital sentencing process offered by the new generation of capital statutes approved by the Supreme Court led governors to increasingly defer to the outcomes produced by the judicial process.[26] Thus, the public's increased

20. Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 THE PUBLIC INTEREST 22, 48–49 (1974).

21. A CLOCKWORK ORANGE (Warner Bros., Hawk Films 1971).

22. GWEN ROBINSON & IAIN D. CROW, OFFENDER REHABILITATION: THEORY, RESEARCH, AND PRACTICE 28 (2009).

23. *See* Gregg v. Georgia, 428 U.S. 153, 183–86 (1976).

24. *See* WILLIAM J. SABOL ET AL., THE INFLUENCES OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES' SENTENCING PRACTICES AND PRISON POPULATIONS (2002), *available at* http://www.urban.org/publications/410470.html.

25. Elizabeth Rapaport, *Straight is the Gate: Capital Clemency in the United States from* Gregg *to* Atkins, 33 NEW MEX. L. REV. 350, 353 (2003). *See generally* Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255 (1990–1991).

26. *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 435 (1995)

suspicion of discretionary mercy led to similar institutional changes in the capital and noncapital contexts that supported both the growing prison populations and the burgeoning death rows of the post-*Furman* era.

II. Mutually Reinforcing Policies

In addition to their common origins in the new political reality around crime and punishment that emerged in the 1960s and 1970s, the parallel rise of mass incarceration and capital punishment also owe a debt to one another. Legal and policy developments regarding incarceration often helped to reinforce commitment to capital punishment in both theoretical and practical ways, and *vice versa*. Thus, America's carceral and capital policies shared a doubly-linked fate, both in prevailing politics and in mutually supportive policies.

Several polices central to the rise of mass incarceration have helped to promote the retention of capital punishment at the abstract level of theory and discourse. The spread of "three strikes and you're out laws"[27] that impose lengthy and often mandatory sentences on repeat offenders, the sharply increased prosecution of juvenile offenders as adults,[28] and the stringent registration and community notification requirements imposed on sex offenders (as well as the growth of indefinite civil commitment for those deemed to be "sexually violent predators")[29] together constructed a public narrative of the "irredeemable" violent offender. This narrative dovetailed with the decline of rehabilitation as a plausible penological goal to promote a view of many criminal offenders as being beyond hope and posing an ongoing, even lifelong, threat to society.[30] This construction of "monstrous offenders"[31] created a feedback loop with "tough on crime" politics and the "nothing works" rejection of effective rehabilitation, entrenching and deepening calls for effective tools against such offenders. Given that the death of an offender is the only perfect prevention of future offending, it is not surprising that penal discourse and policies addressing "irredeemable" or "monstrous" offenders would create favorable conditions for the retention and use of the death penalty.

[hereinafter *Sober Second Thoughts*].

27. *See generally* THREE STRIKES AND YOU'RE OUT: VENGEANCE AS PUBLIC POLICY (David Shichor & Dale K. Sechrest eds., 1996) (collection of essays examining a broad range of issues surrounding three strikes laws, including local and national variations of habitual offender, career criminal, and recidivist statutes).

28. *See* Donna Bishop, *Juvenile Offenders in the Adult Criminal Justice System*, 27 CRIME & JUST. 81, 83–84 (2000) (describing and evaluating effects of state policies substantially increasing the number of juvenile offenders prosecuted and convicted in state criminal courts in response to rising juvenile offense rates).

29. *See generally* ERIC S. JANUS, FAILURE TO PROTECT: AMERICA'S SEXUAL PREDATOR LAWS AND THE RISE OF THE PREVENTIVE STATE (2006) (describing and critiquing civil commitment and community notification laws regarding sex offenders).

30. *See* Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 852–53 (2000).

31. *See id.* at 833.

Another major policy in the rise of mass incarceration that supported the death penalty was the "war on drugs." The rhetoric of war supported capital punishment at the level of theory and discourse because wars by their very nature presuppose a fight to the death against a lethal enemy. But the war on drugs also supported the death penalty in several more concrete ways. First, most directly, Congress passed a federal death penalty provision in 1988 authorizing capital prosecutions for murder in the course of a "drug kingpin" conspiracy. Six people were sentenced to death under this provision in the next few years.[32] Moreover, in 1994 Congress passed a more substantial extension of the federal death penalty, authorizing capital prosecutions for "drug kingpins" running large drug conspiracies, even in the absence of a homicide.[33] This latter provision, however, has not yielded any death sentences and is now potentially unconstitutional under the Supreme Court's recent constitutional proportionality decision prohibiting the death penalty as applied to ordinary non-homicidal offenses.[34] In addition, the war on drugs, by promoting a strongly punitive, rather than a therapeutic, approach to the problem of the widespread distribution and use of controlled substances, undercut the force of mitigation arguments in individual capital sentencing proceedings based on the common capital defendant's experience of substance abuse.[35] A scholar who has studied what capital jurors find to be mitigating observed that a capital defendant's drug addiction is very unlikely to be considered as mitigating in the sentencing decision and, indeed, that a small number of jurors report considering it as aggravating evidence.[36] This discounting of the potential mitigating force of substance abuse is a product of larger social attitudes toward drug use, which were shaped in part by the long-running war on drugs.

Finally, and most concretely, the prison-building boom that accompanied the massive run-up in incarceration also contributed to arguments that supported the retention of capital punishment. As the number of prisons grew, so did the number of correctional officers, and these employees and their unions have become a potent political force in many jurisdictions. Public comments by prison guards or their representatives are now a staple of the death penalty debate in the media and at hearings on the possible repeal (or reinstatement) of capital punishment in state legislatures. The prison guards argue that the death penalty is necessary in order to protect prison personnel and other inmates from violence by lifers or those serving long sentences, who supposedly

32. *See Recent Summaries of the Results of Federal Capital Prosecutions*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/federal-death-penalty (last visited Feb. 8, 2014).

33. *Id.*

34. *See* Kennedy v. Louisiana, 554 U.S. 407, 413 (2008) (holding that a death sentence for rape of a child violated the Eighth Amendment).

35. *See* Stephen P. Garvey, *Aggravation and Mitigation in Captial Cases: What do Jurors Think?*, 98 COLUM. L. REV. 1538, 1571, Table 8 (1998).

36. *See id.* at 1571, Table 7.

have little left to lose, despite a dearth of supporting empirical evidence on this point.[37] One might think that economic incentives would lead prison officials to support incarceration, which generates their employment, over execution. However, the staffing of specialized, high-security death rows, where capital inmates spend on average more than a decade awaiting execution,[38] also creates a financial incentive for such employment to be maintained. This may explain why California's powerful prison guard union, which oversees the largest death row in the nation, has traditionally supported both prison expansion and the death penalty.[39]

Conversely, developments in capital punishment law also supported the incarceration boom. At the level of abstraction, the Supreme Court's short-lived abolition of the death penalty in 1972, followed by the commencement of its ongoing project of procedural regulation with the validation of the new generation of "guided discretion" statutes in 1976,[40] reinforced the popular backlash that had greeted the Warren Court's more general "criminal procedure" revolution of the 1960s.[41] The "law and order" political campaigns of the 1960s and 1970s directed much of their ire toward the Supreme Court's perceived coddling of criminals and handcuffing of law enforcement, with only half-facetious calls to "[I]mpeach Earl Warren."[42] The post-Warren Court's capital punishment decisions helped to tend the embers and fan the flames of this still-smoldering backlash. Moreover, the Court's death penalty jurisprudence, by taking an ongoing regulatory role in the administration of capital punishment, prompted not merely anger from ardent death penalty supporters, but also greater comfort with capital punishment from death penalty skeptics. Qualms about the fairness and reliability of the capital punishment process could be assuaged by the seemingly intensive—though actually fairly undemanding—constitutional regulation of the capital process. What we have called the "legitimating" effect of the constitutional regulation of capital punishment[43] may well have helped to legitimate not merely the death penalty, but also the larger criminal justice system. The public could view the entire system as an intensively regulated—indeed, *over*-regulated—domain in which the balance of power needed to shift to

37. Dawinder S. Sidhu, *On Appeal: Reviewing the Case against the Death Penalty*, 111 W. VA. L. REV. 453, 491 (2009).

38. *See, e.g.*, Arthur L. Alarcon, *Remedies for California's Death Row Deadlock*, 80 S. CAL. L. REV. 667, 700 (2007) (noting that the average length of time between sentence and execution in California now exceeds seventeen years).

39. *See, e.g.*, *California's Prison-Guards' Union: Fading Are the Peacemakers*, THE ECONOMIST, Feb. 25, 2010, *available at* http://www.economist.com/node/15580530 (noting that the prison guards' association supported laws facilitating filling prisons to double capacity).

40. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

41. *See* Carol S. Steiker, *Introduction* to CRIMINAL PROCEDURE STORIES i, x (Carol S. Steiker ed., 2006).

42. *Id.*

43. *See Sober Second Thoughts*, *supra* note 26, at 426–38.

law-enforcement.

At a more concrete level, the introduction and near-universal spread of the sentence of life-without-possibility-of-parole (LWOP), starting in the 1970s, directly promoted the phenomenon of mass incarceration. While the extent of the influence of death penalty law on the widespread embrace of LWOP remains debatable, it is nonetheless clear that in some states the adoption of LWOP was driven primarily, if not exclusively, by death penalty politics. For example, Alabama, Illinois, and Louisiana each adopted LWOP statutes for the first time in response to *Furman*, fearing that the abolition of the death penalty would leave no other means of protecting the community from violent murderers.[44] In Texas, the adoption of LWOP also came about as a result of the Supreme Court's regulation of capital punishment.[45] Death penalty supporters in Texas had long opposed LWOP as an alternative to the death penalty for the same reason that death penalty opponents supported it—the shared belief that the availability of LWOP as an alternative would make Texas sentencing juries less likely to return death verdicts.[46] Only after the Supreme Court invalidated the death penalty for juvenile offenders did death penalty supporters agree to make LWOP a sentencing alternative for murder—because without the death penalty as an option for juveniles, the introduction of LWOP had the effect of increasing, rather than decreasing, the maximum punishment available for juvenile murderers.[47] The Texas LWOP story suggests that the speed and ease of the spread of such a new and extreme penalty as LWOP was facilitated in part by the muting of left-wing opposition as a result of the left's opposition to the burgeoning use of the death penalty.

III. Recent Divergences

The influence of death penalty politics on the spread of LWOP is a good place to begin when considering the divergences between the paths of mass incarceration and capital punishment. Although mass incarceration was promoted by the spread of LWOP, and LWOP was promoted by the politics of capital punishment, it is important to note that LWOP's success was not buoyed by the death penalty itself. Rather, LWOP was fueled by *opposition* to the death penalty, which made LWOP appear to be a lesser evil. The relationship of mass incarceration and the death penalty is thus not always one of linked fate, but at least sometimes one of hydraulic interaction. The extent to which incarceration and capital punishment are not entirely on the same trajectory becomes even clearer when one looks at the events of last decade or so. Since the turn of the millennium, the practice of capital punishment has essentially been in free-fall: executions

44. *See* Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1841 (2006).

45. *Id.* at 1843.

46. *Id.*

47. *See id.* at 1843–44.

are down by more than half from their annual high of nearly 100 in the late 1990s, and death sentences are down by two-thirds from an annual high of around 300 in the late 1990s.[48] Six states have legislatively abolished capital punishment since 2005, while no abolitionist state has reinstated the penalty since New York in 1995 (though New York abolished it in 2005 without carrying out any executions in the interim).[49] Although mass incarceration, too, began to decrease, with the incarceration rate falling each year since 2009,[50] the drop in incarceration began later than the drop in capital punishment, and the decrease has been far less substantial—incremental rather than radical.[51]

What accounts for the newly diverging paths of mass incarceration and capital punishment? One answer lies in the disparate effects in the two contexts surrounding the "innocence revolution"—the spate of high-profile DNA exonerations that began in the late 1990s and that shook the public's faith in the reliability of the criminal justice system. In the capital context, new concerns about innocence have increased skepticism about the wisdom of retaining capital punishment, and such concerns were highly influential in six recently successful legislative campaigns to abolish the death penalty.[52] Fear of executing the innocent proved to be a powerful enabler of Republican cross-over on capital punishment, long an issue of the Democratic leftist fringe, as illustrated by Republican Governor George Ryan's granting of mass clemency to Illinois's entire death row in 2003, citing the wrongful conviction of seventeen death-sentenced inmates in the state.[53] In contrast, concerns about innocence with regard to noncapital

48. *See The Death Penalty in 2013: Year End Report*, DEATH PENALTY INFORMATION CENTER (2013), *available at* http://deathpenaltyinfo.org/documents/YearEnd2013.pdf.

49. *See* Michael Powell, *In N.Y., Lawmakers Vote Not to Reinstate Capital Punishment*, WASH. POST, Apr. 13, 2005, at A3, *available at* http://www.washingtonpost.com/wp-dyn/articles/A47871-2005Apr12.html.

50. *See generally* David Cole, *Turning the Corner on Mass Incarceration*, 9 OHIO ST. J. CRIM. L. 27 (2011) (documenting causes for the drop in the incarceration rate); Erica Goode, *U.S. Prison Populations Decline, Reflecting New Approach to Crime*, N.Y. TIMES, July 25, 2013, at A11, *available at* http://www.nytimes.com/2013/07/26/us/us-prison-populations-decline-reflecting-new-approach-to-crime.html?_r=0 (noting a fall in federal and state prison populations for three consecutive years between 2010 and 2012).

51. *See* Goode, *supra* note 50.

52. *See NY's Death Penalty: Did you know?*, NEW YORKERS FOR ALTERNATIVES TO THE DEATH PENALTY, http://www.nyadp.org/content/nys-death-penalty-did-you-know (last visited May 12, 2014); *New Jersey's Death Penalty: Innocence*, NEW JERSEYANS FOR ALTERNATIVES TO THE DEATH PENALTY, http://www.njadp.org/gdabout&what=innocence (last visited May 12, 2014); *Why New Mexico Repealed the Death Penalty*, THE NEW MEXICO COALITION TO REPEAL THE DEATH PENALTY, http://www.nmrepeal.org/ (last visited May 12, 2014); *Why Repeal the Death Penalty?*, ILLINOIS COALITION AGAINST THE DEATH PENALTY, http://www.icadp.org/content/why-repeal-death-penalty (last visited May 12, 2014); *Innocence*, CONNECTICUT NETWORK TO ABOLISH THE DEATH PENALTY, http://cnadp.org/resources/issues/innocence/ (last visited May 12, 2014); *The Death Penalty in Maryland*, MARYLAND CITIZENS AGAINST STATE EXECUTIONS, http://www.mdcase.org/node/92 (last visited May 12, 2014).

53. *See In Ryan's Words: 'I Must Act,'* N.Y.TIMES (Jan. 11, 2003), *available at* http://www.nytimes.com/2003/01/11/national/11CND-RTEX.html.

convictions have had more muted effects, since abolition of criminal sanctions is not a realistic reform option. Rather, on the noncapital side, the innocence revolution spurred procedural reforms regarding, for example, the procedures for eliciting eyewitness identifications and for collecting, storing, and testing DNA material.[54] Such reforms, even if many of them are adopted, may help ensure the reliability of future convictions, but they will not make a substantial dent in the incarceration rate. What is required to address the phenomenon of mass incarceration is a movement not for more procedural justice, but rather for moderation or proportionality in punishment. Concerns about innocence, however, do not obviously bear upon the latter issue.

A second cause of the divergence between mass incarceration and the death penalty is the rising relative cost of the death penalty and the distribution of that cost within jurisdictions. The Supreme Court's constitutional regulation of capital punishment has driven up the costs of capital trials and appeals, so that they now far outstrip the costs of noncapital cases—even when the cost of lifetime incarceration is included on the noncapital side.[55] The lion's share of these capital costs lies in trial-level expenses, with the investigation of mitigating evidence and accompanying expert services that attend most competent capital sentencing presentations. Unlike the cost of incarceration, which is borne at the state level in state corrections budgets, the cost of capital trials is borne at the local, county level.[56] Thus, in times of fiscal crisis, local prosecutors may come to see capital trials as unaffordable luxuries, even as they do not moderate their advocacy for lengthy sentences whose costs are spread across the state.[57] Moreover, at the state level, corrections budgets are less responsive to fiscal crises, both because running prisons entails fixed costs and because prisons create jobs (and those jobs create politically powerful unions).

Finally, the divergence between the enormous decline in capital practice and the very modest decline in imprisonment is facilitated by yet another difference between the two contexts: capital punishment offers the possibility of symbolic use for which there is no analog on the noncapital side.[58] A significant proportion of states make merely symbolic use of the

54. *See* BRANDON L. GARRETT, CONVICTING THE INNOCENT 241–74 (2001).

55. *See generally* Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117 (2010) [hereinafter *Cost and Capital Punishment*] (addressing the effect of cost arguments in recent death penalty debates and policies).

56. *See* Katherine Baicker, *The Budgetary Repercussions of Capital Convictions*, 4 ADVANCES IN ECON. ANALYSIS & POL., no. 1, 2004, at 1, *available at* http://www.dartmouth.edu/~kbaicker/BaickerCapital.pdf.

57. Ian Urbina, *Citing Costs, States Consider End to Death Penalty*, N.Y. TIMES, Feb. 24, 2009, at A1, *available at* http://www.nytimes.com/2009/02/25/us/25death.html?pagewanted=all&_r=0.

58. *See generally* Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States*, 84 TEX. L. REV. 1869 (2006) [hereinafter *A Tale of Two Nations*] (describing and explaining "symbolic" use of the death penalty).

death penalty, either by retaining it on their books but returning few if any death sentences (like New Hampshire and Wyoming), or by vigorously sentencing defendants to death but executing very few of the condemned (like California and Pennsylvania).[59] Thus, the political appetite for capital punishment can be fed in a variety of ways, some of which are far less fiscally costly and will promote the substantial decline (or disappearance) of death sentences, executions, or both. The only rough equivalent on the noncapital side is the symbolic raising of the maximum sentence for existing crimes. Legislative votes for such increases do not necessarily translate into either higher costs or higher sentences, but they generate political points for being tough on crime. Such symbolic moves on the noncapital side, though they will not necessarily increase sentence lengths, will certainly not *decrease* incarceration rates.

IV. "Death is Different" as a Double-Edged Sword

Perhaps the most dramatic divergence between the capital and noncapital spheres over the past four decades has occurred in the judicial realm. For most of our history, the American death penalty was essentially immune from constitutional regulation, as both the state and federal courts imposed few restrictions on capital practices.[60] But when the Supreme Court entered the fray in the late 1960s and early 1970s, and embarked on a course of continuing constitutional regulation, it grounded its efforts on the principle that "death is different."[61] The mantra of "death is different" justified *Furman*'s invalidation of prevailing capital statutes, as the Court found intolerable the risk of arbitrary administration that was presumably lamentable, but not constitutionally objectionable, on the noncapital side.[62] When the Court subsequently upheld several of the new post-*Furman* statutes, the death-is-different principle accounted for a new and growing body of intricate doctrines applicable to the administration of capital punishment.[63]

The path of judicial regulation of the death penalty has taken

59. Simon Rogers, *Death Penalty Statistics from the US: Which State Executes the Most People?*, GUARDIAN (Sept. 21, 2011), http://www.theguardian.com/news/datablog/2011/sep/21/death-penalty-statistics-us.

60. *See Part 1: History of the Death Penalty*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/part-i-history-death-penalty (last visited May 13, 2014) ("The 1960s brought challenges to the fundamental legality of the death penalty. Before then, the Fifth, Eighth, and Fourteenth Amendments were interpreted as permitting the death penalty.").

61. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 286 (1972) (Brennan, J., concurring) (stating that "[d]eath is a unique punishment"); *id.* at 306 (Stewart, J., concurring) (stating that "[t]he penalty of death differs from all other forms of criminal punishment not in degree but in kind").

62. *See* Lindsey S. Vann, *History Repeats Itself: The Post-Furman Return to Arbitrariness in Capital Punishment*, 45 U. RICH. L. REV. 1255, 1260–61 (2011) (pointing out arbitrariness of administration as the common thread in the five separately written opinions constituting *Furman*'s majority).

63. *See* William J. Bowers, *The Pervasiveness of Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067, 1068 (1983) (noting the complexities of the formulaic statutes of Florida, Georgia, and Texas that were upheld in *Gregg v. Georgia*).

surprising turns. In its first two decades, judicial regulation led to a stunning number of reversals as the Court elaborated the central doctrines of its capital jurisprudence: the requirement that state schemes "narrow" the class of death-eligible offenders via aggravating circumstances; the seemingly contrary requirement that states permit open-ended consideration of "individualizing" evidence supporting a sentence less than death; the amorphous insistence on "heightened reliability" in capital proceedings; and the newly-emerging doctrine of "proportionality," setting outer limits on the types of offenders and offenses within the death penalty's reach.[64] As noted above, the actual demands of the Court's death penalty jurisprudence during this period were quite minimal, and many of the reversals were attributable to faulty lines of communication between courts and state actors.[65] Nonetheless, judicial regulation—and the death-is-different principle—gave the appearance of intensive regulation, and the Supreme Court's intervention seemed to entrench and stabilize capital punishment. Indeed, as the number of death sentences and executions climbed to their modern-era highs in the mid-to-late 1990s,[66] it was a fair question whether American capital punishment had become increasingly robust in spite of, or because of, judicial regulation.

Over the past two decades, the Court's regulatory approach has become more demanding, particularly in its approach to proportionality. After initially rejecting categorical bars against executing juvenile and intellectually disabled offenders,[67] the Court reversed course and declared both practices excessively cruel.[68] Importantly, the Court shifted its Eighth Amendment methodology, focusing less on the sheer number of states prohibiting the practice (in both cases, only eighteen states had prohibitions in place)[69] than on other indicia of prevailing societal standards, including the frequency of death-sentencing and executions of those offenders, elite and professional opinions, international practices, as well as the Court's own proportionality judgment. Applying the newly-emerging methodology, the Court also rejected states' emerging efforts to punish child rape with death, announcing what amounts to a flat ban on punishing

64. *See Sober Second Thoughts*, *supra* note 26, at 372–403 (discussing each of these central doctrines in detail).

65. *Id.* at 402–03.

66. *See* Warren Richey, *Death Penalty Less Common in US Now than in 1990s, Report Finds*, THE CHRISTIAN SCIENCE MONITOR (Dec. 21, 2010), http://www.csmonitor.com/USA/Justice/2010/1221/Death-penalty-less-common-in-US-now-than-in-1990s-report-finds (noting that the number of death sentences and executions have both declined after reaching peaks in the late 1990s). *See also Executions by Year*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/executions-year (last visited May 12, 2014).

67. Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (rejecting the proportionality challenge to the execution of juveniles); Penry v. Lynaugh, 492 U.S. 302, 334 (1989) (rejecting the proportionality challenge to the execution of persons with intellectual disabilities).

68. Atkins v. Virginia, 536 U.S. 304 (2002); Roper v. Simmons, 543 U.S. 551 (2005).

69. *See Simmons*, 543 U.S. at 559 (noting that, at that time, eighteen states barred the execution of juveniles).

non-homicidal, ordinary crime with death.[70]

The Court's death penalty proportionality jurisprudence stands in stark contrast to its approach in noncapital cases, where the Court has shown remarkable reluctance to review the severity of noncapital sanctions. In the few noncapital proportionality claims that have reached the Court, the message has been unmistakable: states have essentially unfettered discretion to impose lengthy terms of imprisonment, even as applied to nonviolent offenders.[71] In the context of drugs, the Court summarily reversed a lower court decision that had found a forty-year sentence disproportionate as applied to an offender convicted of possessing nine ounces of marijuana with the intent to distribute.[72] The Court subsequently upheld an LWOP sentence as applied to an offender convicted of possessing a large quantity of cocaine.[73] In the recidivist context, the Court upheld a twenty-five year-to-life sentence as applied to an offender who had attempted to steal three golf clubs.[74]

The Court's proportionality jurisprudence reflects the implicit message of "death is different": imprisonment is *not* different and, thus, not worthy of close judicial scrutiny. Indeed, Justice Scalia, joined by then-Chief Justice Rehnquist, explicitly called for a wholesale rejection of proportionality review on the noncapital side, though he would preserve a narrow proportionality principle in capital cases.[75] This position reflects the risk of a robust death-is-different approach: the potential for heightened review of capital cases to normalize noncapital sanctions and insulate them from review. Over the past four decades, the Court's sustained focus on American capital punishment has contributed to its relative indifference to the unprecedented harshness of prevailing incarceration policies, including the increased length of prison terms; the imposition of mandatory, severe terms even as applied to non-violent offenders; the withdrawal of discretionary outlets such as probation, parole, and good time; and the curtailment of rehabilitative programs. Thus, though the death-is-different principle has enabled capital reforms by supplying a built-in limiting principle, it has also stabilized noncapital practices by confirming that their "ordinariness" renders them less worthy of constitutional scrutiny.

At the same time, capital reforms potentially can provide a blueprint for reforms on the noncapital side. The Court's recent proportionality decisions involving juvenile offenders illustrate this possibility, as the Court borrowed heavily from its capital jurisprudence in limiting the application of LWOP to juvenile offenders. The Court invalidated LWOP as an available punishment for non-homicidal juvenile

70. Kennedy v. Louisiana, 554 U.S. 407, 447 (2008) (declaring the death penalty should be reserved for ordinary crimes "that take the life of the victim").

71. *See infra* text accompanying notes 72–74.

72. Hutto v. Davis, 454 U.S. 370, 374–75 (1982).

73. Harmelin v. Michigan, 501 U.S. 957, 995–96 (1991).

74. Ewing v. California, 538 U.S. 11, 30 (2003).

75. *Harmelin*, 501 U.S. at 995–96.

offenders[76] and ruled that mandatory LWOP sentences cannot be imposed against juveniles convicted of homicide.[77] The Court emphasized the reduced culpability attributable to juveniles, invoking the same scientific evidence that supported its decision in *Simmons* exempting juveniles from the death penalty.[78] The Court also likened LWOP to the death penalty in its assertion of the "irreparable corruption" of the offender and the "irrevocable" forfeiture it imposes.[79] Perhaps more surprisingly, the Court for the first time imported its requirement of "individualized sentencing" to the noncapital side by holding that juveniles facing LWOP for homicide must be afforded an opportunity to argue for a non-LWOP sentence.[80] Although the contours of the individualization right in this context remain murky, it is undoubtedly an important event for the Court to breach the capital/noncapital line by holding that at least some noncapital sentences may not be imposed in a mandatory fashion.

The question remains, however, whether the Court's increasingly robust proportionality approach holds much promise for alleviating the punitiveness of our noncapital system. On the capital side, proportionality review not only exempts a significant number of offenders from the death penalty, including juveniles, persons with intellectual disabilities, and non-homicidal offenders, but it also provides a roadmap for the eventual constitutional abolition of the death penalty. Many of the same considerations that supported particularized exemptions (declining death sentencing, declining executions, expert and professional opinion, international practices), support the proposition that the death penalty itself has become inconsistent with prevailing societal values.[81]

But excessive punitiveness on the noncapital side, particularly the phenomenon of "mass incarceration," is the product of numerous intersecting policies, including law enforcement strategies, prosecutorial charging decisions, legislative practices (including sentencing ranges and mandatory minimums), and executive practices (limited parole, probation, and clemency). The proportionality argument, which carries so much potential with respect to the death penalty, is unlikely to do much more than permit limited attacks against discrete noncapital punishments, such as LWOP.

Ultimately, the difference between the death penalty and large-scale incarceration is similar to the difference between smoking and obesity. The constitutional attack against the death penalty is premised on the assertion that the death penalty is unnecessary and our society would be best served

76. Graham v. Florida, 560 U.S. 48, 82 (2010).

77. Miller v. Alabama, 132 S. Ct. 2455, 2474 (2012).

78. *Id.* at 2463.

79. *Id.* at 2466.

80. *Id.* at 2473–74.

81. Carol S. Steiker & Jordan M. Steiker, *Entrenchment and/or Destabilization? Reflections on (Another) Two Decades of Constitutional Regulation of Capital Punishment*, 30 LAW & INEQ. 211, 242–43 (2012) [hereinafter *Entrenchment*].

by abolishing it altogether. As with smoking, we can just kick the habit. But incarceration is more like food, with every society needing some level of imprisonment to deter crime and incapacitate dangerous offenders. Moreover, there remains wide disagreement about what a healthy diet of incarceration looks like. Is the proper baseline found in the relatively low rates of incarceration prevailing in places like the Netherlands and Switzerland—approximately 80 per 100,000—or in the relatively high rates found in places like Russia, Cuba, and the United States—ranging from 500 to 700 per 100,000?[82] Even if the various jurisdictions within the United States committed themselves to reducing their incarceration rates, the path toward that end is not obvious; at least with obesity, we know that exercise and reduced calories will likely produce results. The perception that the United States currently has too much incarceration calls for complicated interventions. The unavailability of a full-scale proportionality attack on incarceration renders judicial remedies unlikely, leaving the problem in the generally unresponsive political arena.

What makes death different, then, is not simply its severity or irrevocability. The death penalty is also different because of its amenability to meaningful judicial restriction, either in the form of robust proportionality limitation or abolition. Mass incarceration, on the other hand, calls for legislative and executive intervention. The worrisome possibility is that such intervention is less likely precisely because of judicial deference and inaction. The highly visible role of the Supreme Court in addressing capital punishment fuels the (mis)perception that all areas of criminal justice worthy of regulation are in fact subject to regulation through the courts. "Death is different" becomes not simply a reason for courts to defer to the other branches regarding incarceration policies; it also becomes a reason for those branches to abdicate their own responsibilities to police excessiveness.

V. Life After Death

As the prospect of death penalty abolition becomes stronger, it is worth considering the potential effects of abolition on the noncapital system. Would the end of the death penalty exert pressure to reform punitive noncapital policies? Or would abolition fuel a demand for more punitive noncapital sanctions? Of course, we have a natural experiment in the eighteen states that already abolished the death penalty. One striking but unsurprising fact is that jurisdictions without the death penalty tend to have much lower rates of incarceration compared to those with the death penalty. Seventeen of the eighteen noncapital states are among the lowest in terms of per capita incarceration,[83] and virtually all of the death penalty

82. Roy Walmsley, *Core Publications, World Prison Population List*, INT'L CENTRE FOR PRISON STUDIES (Nov. 23, 2013), http://www.prisonstudies.org/sites/prisonstudies.org/files/resources/downloads/wppl_10.pdf.

83. Michigan is the exception.

jurisdictions in the low-incarcerating group[84] are extremely marginal in their use of the death penalty and are reasonable candidates for repeal or abolition in the near future.[85] North Carolina is the only significant capital jurisdiction with a relatively low per capita incarceration rate.[86] But that simply tells us that the jurisdictions which have *chosen* to withdraw the death penalty tend to be less prone toward high incarceration rates than jurisdictions that have retained it.

National abolition, however, is likely to be "involuntary"—the product of a Supreme Court decision invalidating the punishment on Eighth Amendment grounds. The risk of backlash to such a decision might turn in part on the framing of the decision. If the Court were to invalidate the death penalty based on its diminished social utility in light of its infrequent use,[87] the decision would resonate with pragmatic, smart-on-crime strategies that have led to the scaling back of incarceration in a number of states, including in active death penalty, high-incarcerating jurisdictions. Indeed, such a decision would mirror many of the recent successful "repeal" efforts, which have tended to focus on the disutility, rather than the immorality or excessive harshness, of the death penalty.[88] Along these lines, Maryland's Governor O'Malley, in signing the State Assembly's repeal bill, emphasized that the repeal sought to "eliminate[e] a policy that is proven not to work," rather than suggest that the Assembly had abolished an immoral practice.[89] If the Court, on the other hand, declared the death penalty inconsistent with prevailing standards of decency and a violation of human dignity, the risk of backlash would be greater and death penalty states might seek to preserve or enhance their punitive noncapital sanctions—similar to the rush to LWOP as an alternative punishment following *Furman*.

Would judicial abolition necessarily stabilize LWOP? In jurisdictions that recently repealed the death penalty, the presence of LWOP strongly contributed to the repeal efforts, as reformers pointed to the declining need for capital punishment in light of the LWOP's incapacitating function with respect to dangerous offenders.[90] On the other hand, when the death penalty is no longer a penal option, political and legal challenges

84. Kansas, Washington, Nebraska, Utah, New Hampshire, Oregon, and Wyoming are the death penalty jurisdictions in this low-incarceration group.

85. *See Prisoners in 2011*, BUREAU OF JUSTICE STATISTICS 23 (2012), *available at* http://www.bjs.gov/content/pub/pdf/p11.pdf (providing imprisonment rates of sentenced prisoners by state).

86. *Id.*

87. *See* Furman v. Georgia, 408 U.S. 238, 312–13 (1972) (White, J., concurring) (proposing a similar argument that the lack of regular administration of the death penalty may be a reason in itself for abolition).

88. *Cost and Capital Punishment*, *supra* note 55, at 155.

89. Governor Martin O'Malley, *Statement on the Passage of Death Penalty Repeal in Maryland* (Mar. 15, 2013), *available at* http://www.governor.maryland.gov/blog/?p=8492.

90. *See A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1841–43 (2006) (discussing the relationship between abolition of the death penalty and the creation of LWOP sentences).

to LWOP would likely be invigorated. On the legal side, defense lawyers would likely argue for increased safeguards in the administration of what would then become the "uniquely severe" punishment.[91] The Court's language in the recent juvenile cases likening LWOP to the death penalty would certainly support further litigation efforts to impose restrictions on LWOP,[92] similar to the sort of regulations currently imposed on the capital side (narrowing the reach of LWOP to certain offenses and offenders; individualized sentencing prior to the imposition of LWOP; and heightened requirements for representation in LWOP cases).

The abolition of the death penalty would likely have important consequences not just for discrete punishments such as LWOP, but for the wider criminal justice system. Much of the current salience of American criminal justice comes from the presence of capital punishment. The media gravitates toward cases in which death sentences are imposed and executions are scheduled. These cases often highlight issues relevant to the much larger but less dramatic pool of criminal cases, such as quality of counsel, the risk of punishing the innocent, prosecutorial misconduct, race discrimination, and so on. Moreover, capital cases serve disproportionately as vehicles for the legal treatment of such issues in the federal and state courts. Although all state prisoners are nominally afforded the right to litigate constitutional claims in federal habeas corpus, only death-sentenced inmates are statutorily afforded counsel in cases of indigency.[93] The same is true in most states regarding representation in state post-conviction proceedings.[94] And in many states, only death-sentenced inmates enjoy an appeal-as-of-right to the highest state court following conviction at trial.[95] Capital adjudication thus serves something of an audit function in American criminal law by providing a small but important pool of cases raising not simply capital-specific issues but also drawing judicial attention to foundational, noncapital issues. Along these lines, the Court selected capital cases as the occasion for announcing its landmark decisions regarding the Sixth Amendment's requirements for effective representation[96] and the disclosure responsibilities of prosecutors.[97]

The disappearance of the death penalty from the American landscape could thus influence the visibility of American criminal justice practices more broadly. The symbolic and practical consequences could be significant, with the possibility that political and prudential discourse might fill the void caused by the erosion of constitutional discourse. With no cases on the brink of execution and fewer criminal cases before the highest

91. *Furman*, 408 U.S. at 305 (Brennan J., concurring) (noting that "death is a uniquely and unusually severe punishment").

92. *See supra* text accompanying notes 76–80.

93. 18 U.S.C.A. § 3599(a)(2) (West 2014).

94. *See, e.g.*, TEX. CODE CRIM. PROC. ANN. art. 11.071 § 2 (West 2013).

95. *See, e.g.*, IN. CODE ANN. § 35-50-2-9 (j) (West 2014) (discussing the State Supreme Court's reviews of death sentence cases); ARIZ. REV. STAT. ANN. § 13-755 (West 2009) (same).

96. Strickland v. Washington, 466 U.S. 668, 687–88 (1984).

97. Brady v. Maryland, 373 U.S. 83, 86–87 (1963).

American courts, particularly the United States Supreme Court, the focal point of American criminal justice would shift to non-judicial policymakers —legislatures, prosecutors, police, and other executive officials. Perhaps the debate about current levels of incarceration would become more vigorous, with the shadow of capital punishment and constitutional regulation removed from view.

VI. Conclusion

The United States is currently an outlier in its retention of the death penalty and in its unprecedented high rates of incarceration. Many observers see in these practices some defining aspect of American character —its populism, its rugged individualism, or its frontier mentality. What is often missed in the conversation about American criminal justice, however, is the relative newness of both of these phenomena. The United States did not become an outlier with respect to the death penalty until the latter half of the 20th century. Throughout most of our history, the United States was at the forefront of capital reform and moderation, and, indeed, it would have been at the forefront again if judicial abolition of the death penalty had "stuck" in 1972 with *Furman*. Similarly, the United States was not strikingly punitive in its noncapital practices until the modern era. As with the death penalty, the United States was in some respects a leader in progressive reform—at times enthusiastically embracing rehabilitative and non-punitive approaches to criminal offenders—though our history is too complex and varied to permit broad or general characterizations. The point, though, is that our present moment of punitiveness in both capital and noncapital practices seems both contingent and fragile. The death penalty appears vulnerable to both political and judicial reform—even abolition. There is also a growing, though more muted, discontent with our noncapital system, particularly our high rates of incarceration. In some respects, similar political and social forces caused both the growth of the American death penalty and the expansion of our prisons. And as our crime rates fall and the politics of punishment no longer support costly punitive policies, we might expect a retreat along both dimensions. However, divergences between the death penalty and incarceration—in terms of costs, policy, political pressures, and legal doctrines—might ultimately produce different outcomes in the movement toward reform. Moreover, although similar forces influence both American incarceration and the American death penalty, these two practices interact in complicated ways with each other, which might place their futures on divergent tracks.

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Playbook for Change?
States Reconsider Mandatory Sentences

POLICY REPORT / FEBRUARY 2014

Ram Subramanian • Ruth Delaney

FROM THE CENTER DIRECTOR

Mandatory minimum sentences and related policies, like three strikes and truth-in-sentencing laws, are the offspring of an era in which violent crime rates were high, crack cocaine was emerging, gang graffiti covered buildings and public places, and well-publicized random acts of violence (e.g., the infamous 1989 rape of a female jogger in Central Park) contributed to the sense that our society was out of control. In addition, states retained indeterminate sentencing and relied upon paroling authorities who often made decisions behind closed doors and seemed to release prisoners arbitrarily, with little to no input from victims.

Decades of research and innovation, however, have shown us that sentencing laws and corrections practices can do more than simply incapacitate offenders until they "age out" of their most crime-prone years. We now have the ability to create sentences that both punish and rehabilitate and use the occasion to address problems that affect the individual and the community. Unfortunately, 30 years of mandatory minimums and related policies have left a lasting legacy that continues to hamper the efforts of states, counties, judges, and prosecutors who attempt to fashion individualized sentences.

States in particular are also saddled with the enormous costs of policy choices made by previous administrations. Mandatory minimums for drug crimes and the "85 percent rule" (requiring an offender incarcerated for certain crimes to serve 85 percent of his or her sentence) have resulted in overwhelming costs, both in outright expenditures and in opportunities lost. Another, perhaps more important cost is far less visible in the halls of state government: the loss of generations of young men, particularly young men of color, to long prison terms. Not only are they lost to their families, children, and communities for those years, but their own lack of education and skills combined with a range of post-release restrictions and collateral consequences can deeply impair their ability to live productive and healthy lives long after release. The families forever damaged, the talent wasted, and the countless communities left to pick up the pieces demand action against these draconian policies that have already cost us far too much.

Peggy McGarry
Director, Center on Sentencing and Corrections

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Introduction

In a speech to the American Bar Association in August 2013, Attorney General Eric Holder instructed U.S. Attorneys to refrain from using "draconian mandatory minimum sentences" in response to certain low-level, nonviolent drug offenses.[1] While the instructions are advisory and it is unknown yet whether individual prosecutors will alter their charging practices, Attorney General Holder's directive nonetheless represents an evolving shift in attitude away from mandatory penalties—the centerpiece of federal crime control policy in the United States for the last four decades. Of note, Attorney General Holder's rationale for change relies not only on concerns that emphasize efficiency and effectiveness in the administration of justice, but also on issues of fairness and justice. Indeed, in making his announcement, the Attorney General echoed the conclusions of a 2011 report by the United States Sentencing Commission (USSC) that found that certain mandatory minimum provisions apply too broadly and are set too high; lead to arbitrary, unduly harsh, and disproportionate sentences; can bring about unwarranted sentencing disparities between similarly situated offenders; have a discriminatory impact on racial minorities; and are one of the leading drivers of prison population and costs.[2]

Significantly, this policy shift comes at a time when support for curbing mandatory sentencing has been growing at the federal level. In 2010, Congress passed the Fair Sentencing Act—a historic piece of legislation that reduced the controversial weight ratio of the amount of crack and powder cocaine needed to trigger mandatory sentencing from 100:1 to 18:1 and eliminated the five-year mandatory minimum for first-time possession of crack.[3] Under the previous sentencing structure, for example, defendants with five grams of crack cocaine were subject to the same penalty as those with 500 grams of powder cocaine.

In the current legislative session, Congress is considering two additional reform bills—the Justice Safety Valve Act and the Smarter Sentencing Act—that would permit more judicial discretion at sentencing when certain mandatory minimums apply, expand retroactive application of previously revised sentencing guidelines, and increase the number of offenses eligible for "safety-valve" provisions—provisions that keep a mandatory minimum penalty in place, but allow judges to sentence offenders below that minimum if certain factors apply.[4] President Barack Obama recently signaled his support for these reforms in a statement urging lawmakers to "act on the kinds of bipartisan sentencing reform measures already working their way through Congress."[5]

While Attorney General Holder's announcement focused on federal sentencing reforms, mandatory sentencing policies have been under scrutiny and revision at the state level for some years. Fueled by a concern about the growth in prison populations and associated costs, and supported by advocacy groups, practitioners, researchers, policy analysts, and legal organizations, a growing

number of state legislatures from Texas to New York have successfully passed laws limiting the use of mandatory penalties, mostly in relation to nonviolent offenses, and primarily around drug or drug-related offenses.[6] Notably, these efforts were endorsed by Democratic and Republican governors alike and supported by liberal and conservative advocacy groups, suggesting an emerging consensus that mandatory penalties may not be appropriate for certain types of offenders.

As the federal government and more states follow suit, there is much to be learned from examining current reforms. This policy report summarizes state-level mandatory sentencing reforms since 2000, raises some questions regarding their impact, and offers recommendations to jurisdictions that are considering similar efforts in the future.

Over the last 20 years, a growing body of research has cast doubt on the efficacy of mandatory penalties, particularly for nonviolent drug offenders.

Background

Mandatory penalties—such as mandatory minimum sentences, automatic sentence enhancements, or habitual offender laws—require sentencing courts to impose fixed terms of incarceration for certain federal or state crimes or when certain statutory criteria are satisfied. These criteria may include the type or level of offense, the number of previous felony convictions, the use of a firearm, the proximity to a school, and in the cases of drug offenses, the quantity (as calculated by weight) and type of drug. If a prosecutor charges under such laws and a defendant is found guilty, judges are usually barred from considering a defendant's circumstances or mitigating facts in the case when imposing the sentence, creating rigid, "one size fits all" sentences for certain types of offenses and offenders. In the 1980s and 1990s, policymakers viewed mandatory sentences as one of their most effective weapons in combating crime—particularly in the "war on drugs."[7] These policies encapsulated the then prevailing belief that longer, more severe sentences would maximize the deterrent, retributive, and incapacitative goals of incarceration.

Over the last 20 years, a growing body of research has cast doubt on the efficacy of mandatory penalties, particularly for nonviolent drug offenders.[8] Research indicates that incarceration has had only a limited impact on crime rates and that future crime reduction as a result of additional prison expansion will be smaller and more expensive to achieve.[9] In addition, there is little evidence that longer sentences have more than a marginal effect in reducing recidivism—a key performance indicator of a state's correctional system.[10] More than four out of 10 adult offenders still return to prison within three years of release, and in some states that number is six in 10.[11] Moreover, according to a 2011 USSC study, federal drug offenders released pursuant to the retroactive application of a 2007 change in the sentencing guidelines (though not a change in mandatory minimum penalties) were no more likely to recidivate

MANDATORY SENTENCES: HOW WE GOT HERE

Mandatory penalties have not always been a central feature of the U.S. criminal justice system. Until the 1970s, sentencing in the United States was largely characterized by indeterminate sentencing. Judges (subject only to statutory maximums) had unfettered discretionary authority in fashioning sentences on a case-by-case basis.[12] Informed by the then prevailing belief that sentencing's chief purpose was rehabilitation, judges were free to set the length and type of punishment to best suit an offender's predisposition or ability to rehabilitate.[13]

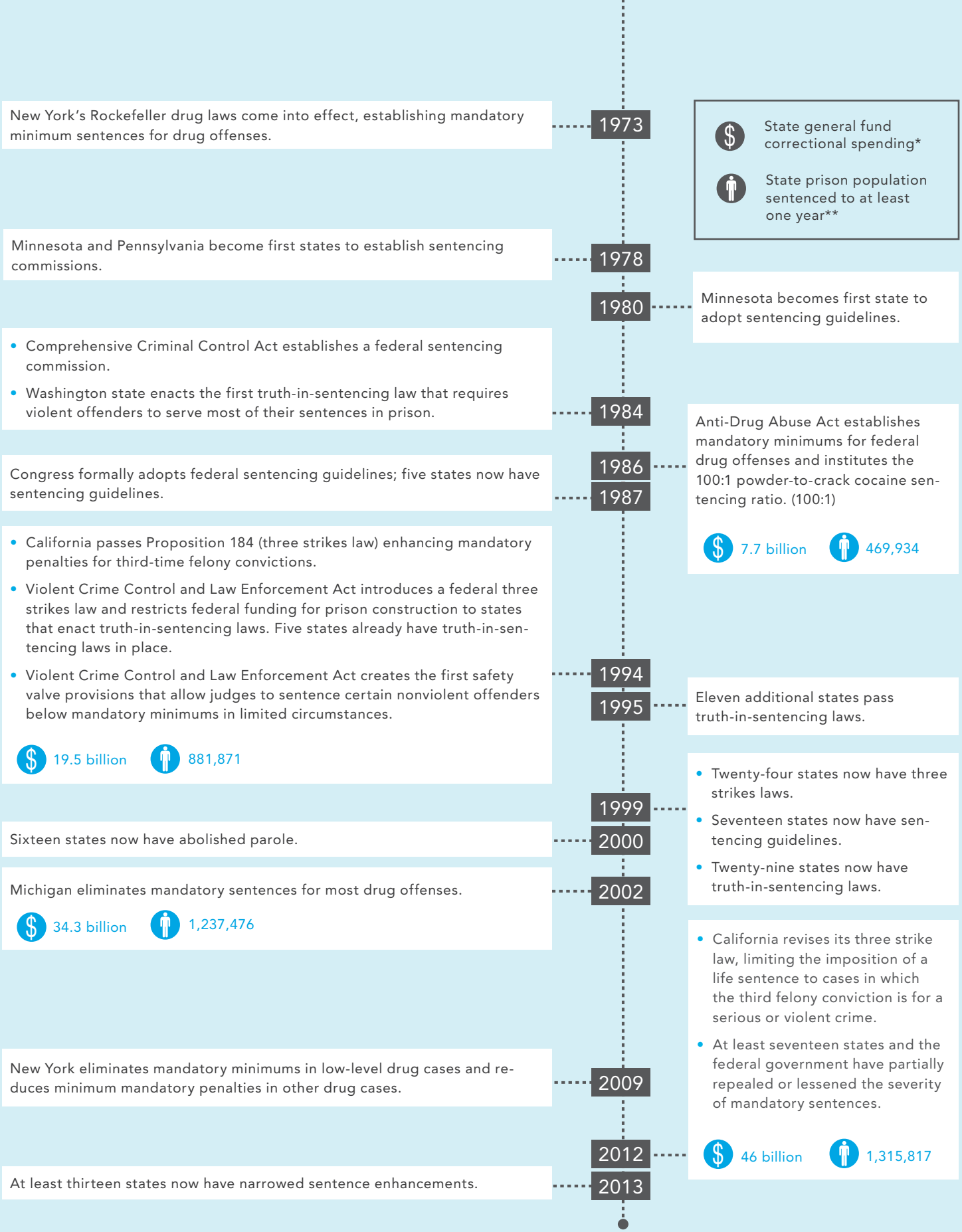
Forecasting sentences under this system was an uncertain and inexact science. Even when a judge ordered a range of permissible punishment, early release mechanisms at the disposal of prison wardens or parole boards could substantially alter judicially imposed sentences.[14] These decisions were rarely subject to appellate or administrative review since there were no rules or guidelines against which to examine them.[15] The result was an opaque sentencing process with little predictability.

As unwarranted sentencing disparities (between imposed sentences and actual time served or between similarly-situated offenders) became apparent, indeterminate sentencing came under attack for being unjustifiably unbounded, unstructured, and arbitrary.[16] Consequently, demands grew for more uniformity and transparency in punishment.[17] Moreover, violent crime rates rose through the 1970s and 1980s, which led to increasing skepticism of the rehabilitative approach and calls for harsher sentences.[18]

As public anxiety grew—particularly in response to the crack epidemic and rising gang violence—sentencing and corrections policy entered the domain of ideology and partisan politics with calls for law and order, "broken windows" policing tactics, the "war against crime" and the "war on drugs."[19] In response, the federal government and many states enacted legislation to curb the apparatus of discretionary indeterminate sentencing.[20] By adopting determinate sentences (e.g., fixed prison terms and the abolition of discretionary parole) or more structured sentencing systems (e.g., the promulgation of sentencing guidelines), they hoped to make the sentencing process more consistent and understandable.[21] These changes also mitigated the risk that judges could rely on improper factors such as race, gender, geography, or personal beliefs when sentencing offenders.

At the same time, galvanized by a growing belief that tougher penalties can reduce crime, mandatory minimum sentences and recidivist statutes, such as California's 1994 three strikes law, became popular as a means of ensuring that offenders deemed dangerous would receive a sufficiently severe custodial sentence.[22] As reforms gathered momentum, a broad consensus emerged that violent and habitual offenders were "dangerous," as were crimes involving a weapon or narcotics, and mandatory penalties proliferated in relation to these offenses.[23] In relation to drug offenses, however, jurisdictions disagreed about the type and quantity of drug needed to trigger severe mandatory sentences.[24]

Although the development of punitive sanctioning policies continued apace during the 1990s—most significantly through the enactment of truth-in-sentencing statutes—concerns arose about the effects of mandatory penalties and whether they serve their intended purposes of just punishment and effective deterrence.[25] As a result, efforts were made to slowly chip away at the growing edifice of mandatory penalties, notably with the creation of judicial safety valves which allow judges to sentence certain offenders below mandatory minimums in limited circumstances.[26]



* National Association of State Budget Officers, *The State Expenditure Report* (Washington, DC: 1986–2012).

** Patrick A. Langan, John V. Fundis, and Lawrence A. Greenfield, *Historical Statistics on Prisoners in State and Federal Institutions, Yearend 1925-86* (Washington, DC: Bureau of Justice Statistics, 1988), 11-13; George Hill and Paige Harrison, *Sentenced Prisoners in Custody of State or Federal Correctional Authorities, 1977–98* (Washington, DC: Bureau of Justice Statistics, 2000); E. Ann Carson and Daniela Golinelli, *Prisoners in 2012—Advance Counts* (Washington, DC: Bureau of Justice Statistics, 2013), 6; and E. Ann Carson and William J. Sabol, *Prisoners in 2011* (Washington, DC: Bureau of Justice Statistics, 2012), 6.

than if they had served their full sentences, suggesting that shorter sentence lengths do not have a significant impact on public safety.[27]

Prompted by the recent economic crisis, informed by decades of research demonstrating that certain offenders can be safely and effectively supervised in the community rather than housed in prison, and encouraged by public opinion polls that show that most Americans support alternatives to incarceration for nonviolent offenses, a number of states have embarked on broad-based sentencing and corrections reform in the last five years.[28] As part of these efforts, states have included reconsideration of the use of mandatory penalties.[29]

New approaches to mandatory sentences

All told, at least 29 states have taken steps to roll back mandatory sentences since 2000.

All told, at least 29 states have taken steps to roll back mandatory sentences since 2000. (A comprehensive list of legislation passed since 2000 can be found in the appendices.) Much of this legislative activity has taken place in the last five years and most changes affect nonviolent offenses, the vast majority of which are drug-related. In the legislation that has been passed, there are three different approaches to reforming mandatory penalties. One method is to enhance judicial discretion by creating so-called "safety valve" provisions that keep the mandatory minimum penalty in place but allow a judge to bypass the sentence if he or she deems it not appropriate and if certain factual criteria are satisfied. A second approach is to narrow the scope of automatic sentence enhancements—laws that trigger sentence increases in specified circumstances, such as an offense occurring within a certain distance from a school or whether an offender has previous felony convictions. A third course is the repeal of mandatory minimum laws or their downward revision for specified offenses, particularly in relation to drug offenses or first- or second-time offenders.

EXPANDING JUDICIAL DISCRETION

Many of the laws enacted in recent years restore discretion to judges at sentencing in cases where a mandatory sentence would normally apply. Through this newfound discretion, judges are now able to depart from statutorily prescribed mandatory penalties if certain conditions are met or certain facts and circumstances warrant such a departure. The facts or circumstances that judges may consider include those related to the nature of the crime or the prior criminal history of the defendant. A condition that some laws require is for the prosecutor to agree to a sentence below a mandatory minimum. Vera's research has found at least 18 states that have passed legislation enhancing

judicial discretion since 2000, including:

- **Connecticut SB 1160 (2001):** This law allows judges to depart from mandatory minimum sentences for certain nonviolent drug offenses in cases where the defendant did not attempt or threaten to use physical force; was unarmed; and did not use, threaten to use, or suggest that he or she had a deadly weapon or other instrument that could cause death or serious injury. Judges must state at sentencing hearings their reasons for imposing the sentence and departing from the mandatory minimum. The act covers 1) manufacture or sale of drugs and related crimes by a person who is not drug-dependent; 2) manufacture or sale of drugs within 1,500 feet of schools, public housing, or day care centers; 3) use, possession, or delivery of drug paraphernalia within 1,500 feet of a school by a non-student; and 4) drug possession within 1,500 feet of a school.
- **New Jersey SB 1866 (2009):** This law permits judges to waive or reduce the minimum term of parole ineligibility when sentencing a person for committing certain drug distribution crimes within 1,000 feet of a school. Judges may also now place a person on probation, so long as the person first serves a term of imprisonment of not more than one year. Judges are still required to consider certain enumerated factors, such as prior criminal record or whether the school was in session or children were in the vicinity when the offense took place, before waiving or reducing a parole ineligibility period or imposing a term of probation.
- **Louisiana HB 1068 (2012):** This law allows for departures from mandatory minimum sentences at two points in the criminal justice process. Judges may depart from a mandatory minimum sentence if the prosecutor and defendant agree to a guilty plea with a sentence below the mandatory minimum term. Judges may also depart from a mandatory minimum sentence post-conviction if the prosecutor and defendant agree to the modified sentence below the mandatory minimum. The law provides for three types of departures. First, judges may reduce a mandatory minimum sentence by lowering the term of imprisonment. Second, judges may lower the dollar amount of a fine that may be imposed. Finally, judges may reduce a sentence by including as part of it a term of parole, probation or sentence suspension. Violent and sex offenses are excluded from consideration.
- **Georgia HB 349 (2013):** This law allows judges to depart from mandatory minimum sentences for some drug offenses if the defendant was not a ringleader, did not possess a weapon during the crime, did not cause a death or serious bodily injury to an innocent bystander, had no prior felony conviction, and if the interests of justice would otherwise be served by a departure. The offenses that are covered by the new law include trafficking and manufacturing of cocaine, ecstasy, marijuana, or methampheta-

mine; and sale or cultivation of large quantities of marijuana. Judges must specify the reasons for the departure. Alternatively, a judge may sentence below a mandatory minimum sentence if the prosecutor and the defendant have both agreed to a modified sentence.

> **Hawaii SB 68 (2013):** This law grants judges the discretion to depart from a mandatory minimum in favor of an indeterminate sentence when the defendant is convicted of a Class B or Class C felony drug offense and the judge finds a departure "appropriate to the defendant's particular offense and underlying circumstances." Previously, Class B and Class C drug felonies had mandatory sentences of 10 and five years respectively. Under the new law, judges may impose a term of between five and ten years for a Class B felony, and between one and five years for a Class C felony. Exceptions apply for some offenses, including promoting use of a dangerous drug, drug offenses involving children, and habitual offenders.

LIMITING AUTOMATIC SENTENCE ENHANCEMENTS

Automatic sentence enhancements typically trigger longer sentences if certain statutory conditions or thresholds are met, such as speeding in a construction zone, selling drugs within a certain distance from a school, committing a crime in the presence of a minor, using a handgun in the commission of a crime, or having a certain number of previous criminal convictions. Since 2000, at least 13 states have passed laws adjusting or limiting sentence enhancements, including:

> **Nevada HB 239 (2009):** HB 239 narrows the definition of habitual criminal status, which carries a five-year mandatory minimum sentence for a third conviction and a 10-year mandatory minimum for a fourth conviction. Previously, petit larceny convictions or misdemeanor convictions involving fraud could serve as a basis for habitual criminal status. Now, only prior felony convictions can trigger these enhancements.

> **Louisiana HB 191 (2010):** Under this law, juvenile delinquency adjudications for a violent crime or high-level drug crime can no longer be used to enhance adult felony convictions. An adult felony conviction can only be enhanced by a prior adult felony conviction.

> **Kentucky HB 463 (2011):** HB 463 reduces the size of the statutory drug-free school zone, within which a drug trafficking offense is a Class D felony that triggers a mandatory sentence of one to five years, from 1,000 yards around the school to 1,000 feet.[30]

> **Colorado S 96 (2011):** This law excludes Class 6 felony drug possession from offenses that trigger the habitual offender sentencing enhancement, which previously would have quadrupled the base sentence for offenders.

> **Indiana HB 1006 (2013):** HB 1006 reduces the size of the school zone for all drug offenses from 1,000 to 500 feet from the school and limits the application of the enhancement to when children are reasonably expected to be present. The new law also removes family housing complexes and youth program centers from the definition of sites protected under the school zone enhancement.

REPEALING OR REVISING MANDATORY MINIMUM SENTENCES

Mandatory minimum laws paint with a broad brush, ignoring salient differences between cases or offenders, often with the effect of rendering low-level, nonviolent offenders indistinguishable from serious, violent offenders in terms of a punishment response. Nowhere is this more evident than in their application to drug offenses, in which drug type and quantity alone typically determine culpability and sentence. An individual's actual role in the crime is irrelevant; drug mule and kingpin can be, and often are, treated the same.[31] Since 2000, at least 17 states and the federal government have passed laws repealing mandatory minimums or revising them downward for certain offenses, mostly in relation to drug offenses. Five of those states are:

> **North Dakota HB 1364 (2001):** This law repeals mandatory minimums for first-time offenders convicted of manufacture, delivery, or possession with intent to manufacture or deliver a Schedule I, II, or III controlled substance, including methamphetamine, heroin, cocaine, and marijuana. Now, first-time offenders are sentenced according to the ranges specified for the class of felony they committed, either a Class A felony (zero to 20 years) or a Class B felony (zero to 10 years) depending on the type and amount of substance at issue.

> **Rhode Island SB 39aa (2009):** This law eliminates mandatory minimums for the manufacture, sale, or possession with intent to manufacture or sell a Schedule I or II controlled substance. For example, offenses involving less than one kilogram of heroin or cocaine, or less than five kilograms of marijuana, previously carried a mandatory minimum sentence of 10 years and a maximum of 50 years. Now, there is no mandatory minimum and the judge may assign a sentence anywhere from zero to 50 years. For offenses involving at least one kilogram of heroin or cocaine or at least five kilograms of marijuana, the previous mandatory minimum of 20 years has been eliminated; the maximum remains life.

> **South Carolina S 1154 (2010):** S 1154 eliminates mandatory minimum sentences for first-time offenders convicted of simple drug possession.

> **Delaware HB 19 (2011):** HB 19 brought about a broad overhaul of Delaware's drug laws by creating three main drug crimes, each with varying

Mandatory minimum laws paint with a broad brush, ignoring salient differences between cases or offenders.

levels of seriousness: Drug Dealing, Aggravated Possession, and Possession. The law eliminates mandatory minimum sentences for some first-time offenders, including those convicted of trafficking relatively low quantities of drugs if no aggravating circumstances are present.

> **Ohio HB 86 (2011):** HB 86 decreases mandatory minimum sentences for some crack cocaine offenses by eliminating the difference between crack cocaine and powder cocaine. The law also raises the amount of marijuana needed to trigger an eight-year mandatory sentence for trafficking or possession from 20 kilograms to 40 kilograms.

The impact of reforms

There is surprisingly little research on the impact of recent state reforms on incarceration numbers, recidivism rates, or cost.

Though the federal government and at least 29 states have shifted away from mandatory penalties for certain offenses, there is surprisingly little research on the impact of recent state reforms on incarceration numbers, recidivism rates, or cost.[32] It is largely unknown how these reforms are being used by judges and prosecutors on the ground and whether they are achieving their intended outcomes. However, there is some evidence that states that have revised or eliminated mandatory minimums, and applied these changes retroactively to those already serving mandatory minimum sentences, have seen immediate and observable reductions in prison population and costs. (See "Retroactive Reforms" on page 14.) Since most reforms reduce sentence lengths prospectively, it is important to note that impacts may not be seen (and research not possible) for several years, as those convicted prior to the reforms must still serve out their full sentences.

While prospective reductions in sentence length may delay system impacts, the restrictive scope and application of recent reforms—including narrow criteria for eligibility and the discretionary nature of some revised sentencing policies—suggest that the impact of reform may nevertheless be limited. For example, some reforms apply only to first- or second-time, low-level drug offenders. Typically excluded are defendants with lengthy criminal histories or who are concurrently charged with ineligible offenses—often violent and sex offenses. Indeed, if prosecutors were to apply Attorney General Holder's new charging directive to the 15,509 people incarcerated in FY2012 under federal mandatory minimum drug statues, given its exclusionary criteria (i.e., aggravating role, use or threat of violence, ties to or organizer of a criminal enterprise, and significant criminal history), only 530 of these offenders might have received a lower sentence.[33]

In addition to the potentially small pool of eligible defendants, the discretionary nature of many of the new laws may also restrict the number of people they affect. It is unknown how often, where required, prosecutors will

agree with a proposed departure from a mandatory sentence;[34] or with what frequency judges, when permitted, will exercise judicial discretion, even in circumstances where all prerequisites or eligibility requirements are objectively satisfied.[35] Indeed, recent research into the impact of New York's 2009 Rockefeller drug law reforms found that the use of newly acquired judicial discretion to divert drug offenders from prison to treatment programs varied significantly across judicial districts in 2010, suggesting that the local judiciary were divided on when diversion was necessary or appropriate.[36]

Furthermore, some reforms were accompanied by an increase in mandatory penalties for certain offenses—again most often for sex offenses or offenses considered "violent"—suggesting that reform efforts may be undercut by parallel changes that risk increasing the number of offenders serving long sentences in prison. For example, while Massachusetts H 3818 (2012) reduces mandatory minimum sentences for some drug offenses, increases drug amounts that trigger mandatory minimum sentences, and shrinks the size of school zones within which drug offenders receive mandatory sentences, the law also expands the class of offenders who are exposed to an automatic sentence enhancement under its habitual offender statute. In addition, it creates a new "violent" habitual offender category attached to more than 50 qualifying felonies that renders those convicted of them ineligible for parole, sentence reductions for good time, or work release.[37] Though the law mitigates certain mandatory penalties, the widened scope of its revised habitual offender provision may lead to a significant increase in the number of defendants subject to maximum state prison sentences.[38]

Research and policy considerations

Because many recent reforms to mandatory sentences have narrow eligibility requirements or are invoked at the discretion of one or more system actors, the impact that was sought from the changes may ultimately be limited. Policymakers looking to institute similar reforms in order to have a predictable impact on sentence lengths, prison populations, and corrections costs without compromising public safety would do well to ask a number of key questions during the development of new policies. These can serve as an important guide to drafters and implementers in maximizing the desired effect of the policy. In addition, there is a paucity of studies that rigorously examine the effect of recent reforms on the criminal justice system, and thus a need for ongoing data-gathering and analysis to understand the impacts in order to report the results to concerned policymakers. As states increasingly look to each other for sentencing reform strategies, deliberate, data-driven policy development and research into outcomes are ever more critical. Moving forward, there

RETROACTIVE REFORMS

Sentencing reform that is given retroactive effect can yield results in a short time frame, as has been seen in recent years in California, Michigan, and New York.

In 2012, California voters passed Proposition 36, which revised the state's 1994 Three Strikes law (Proposition 184).[39] The law imposed a mandatory life sentence on offenders convicted of their third felony offense, regardless of its seriousness. Proposition 36 revised this by limiting the imposition of a life sentence to when the third felony conviction is serious or violent.[40] It also authorized courts to resentence those serving life sentences under the old law.[41] Since the law took effect in November 2012, judges have granted 95 percent of the petitions for resentencing; 1,011 people have been resentenced and released from prison and more than 2,000 resentencing cases are pending.[42] Thus far, recidivism rates for this group are low; fewer than 2 percent in 4.4 months were reincarcerated compared to California's overall recidivism rate of 16 percent in the first 90 days and 27 percent in the first six months.[43] California also saw an immediate impact in terms of costs; in the first nine months of implementation, the state estimates that Proposition 36 has saved more than $10 million.[44]

Once the home of some of the toughest mandatory drug laws in the country, Michigan enacted Public Acts 665, 666, and 670 in 2002, which eliminated mandatory sentences for most drug offenses and placed these drug offenses within the state's sentencing guidelines. Applied retroactively, nearly 1,200 inmates became eligible for release.[45] Due to these and many other reforms in the areas of reentry and parole, Michigan is a well known success story among states seeking to reduce their reliance on incarceration. Between 2002 and 2010, the state closed 20 prison facilities and lowered spending on corrections by 8.9 percent.[46] Between 2003 and 2012, serious violent and property crimes dropped by 13 and 24 percent, respectively.[47]

After a series of incremental reforms to its Rockefeller drug laws in the early 2000s, New York passed S 56-B in 2009, eliminating mandatory minimums in low-level drug cases and reducing minimum mandatory penalties in other cases. Since 2008, the number of drug offenders under the custody of the Department of Corrections has decreased by more than 5,100, or 43 percent.[48] The law applies retroactively and, as of May 1, 2013, 746 people have been approved for resentencing, 539 have been released, 171 were already in the community when resentenced, and 36 are awaiting release.[49] Citing significant drops in prison populations and crime, New York Governor Andrew Cuomo proposed four more prison closures in July 2013 at a savings of $30 million,[50] bringing the total number of prisons closed since 2009 to 15.[51]

are a number of steps policymakers can take to ensure reform efforts fulfill their promise and are sustainable:

> **Link proposed policies to research.** Balancing the concerns of justice, public safety, and costs in revising sentencing schemes and policies is a challenging undertaking. States need to take a methodical, research-driven approach that includes the analysis of all relevant state and local data to identify key population subgroups and policies driving prison or jail populations and the gaps in service capacity and quality in relation to demonstrated prevention and recidivism reduction needs. This approach should also include the use of evidence-based or best practices when crafting solutions. By tying the development and shape of new policies to the results of these kinds of analyses, policymakers increase their chances of achieving better criminal justice resource allocation and fairer, more consistent sentencing practices.

- In reviewing data, some questions policymakers may want to ask include: Can populations be identified—by offense or status (e.g., habitual drug or property offenders)—that are driving the intake population, causing more people to enter the prison system? Has length of stay changed for any of these subgroups? If so, can policies or practices be identified which cause this increase (e.g., sentence enhancements for second- or third-time offenders)?
- What have been the costs associated with either the increasing intake or length of stay? For example, automatically increasing the time for some offenses or offenders could mean a significant increase in the number of older and sicker inmates and in the costs for inmate care over time. On the other hand, policies that require automatic incarceration for low-level offenses or parole violators may mean an increase in the volume of shorter-term prison stays and the costs of doing more diagnostic assessments.
- Can approaches be identified that have been demonstrated to be safe and effective to handle these cases differently? Are policymakers considering policies and practices that both reduce the intake and the length of stay (e.g., increase eligibility for a community sentence, roll back enhancements for certain offenses, or remove mandatory minimum sentences)?
- Have the cost implications of the proposed changes for counties, taxpayers, and victims been analyzed? Have policymakers factored in the cost of new services and interventions that might be called for either in prison or the community?
- What are the anticipated benefits—as demonstrated by past research—for offenders and the community due to shorter custodial

As states increasingly look to each other for sentencing reform strategies, deliberate, data-driven policy development and research into outcomes are ever more critical.

sentences or community-based interventions?

- **Include stakeholders in policy development.** Have key constituencies and stakeholders been informed of the results of these analyses and invited to provide their ideas, opinions, and concerns? Given the discretionary nature of recent reforms, it is essential to involve the system actors most affected by proposed changes—district attorneys, judges, and defense attorneys—and whose everyday decisions will play an important role in whether new policies have their intended impact. By providing these and other affected stakeholders (e.g., victim advocates, county sheriffs, and commissioners) with opportunities to express their opinions and concerns, vet policy proposals, and make recommendations for implementation, education, and training, they are less likely to feel marginalized by the deliberations and oppose the reforms. In addition, mutual understanding of the goals of an intended reform can increase its potential impact.

- **Match proposed policies with available resources in the community.** If policymakers propose new sentencing options that divert certain offenders away from prison and into community supervision or treatment, receiving systems or programs must have the capacity and resources necessary to manage larger populations. For new policies to succeed in making communities safer, policymakers must ensure that newly available community sentencing options have the necessary staff, training, and program space to handle the influx of new offenders. Without these vital prerequisites, policymakers risk the long-term sustainability and limit the impact of a new effort.

- **Define eligibility requirements clearly and match these to the policy goal.** Safety, justice, and cost reduction should guide policymakers when crafting the specific eligibility criteria or classifications of offenses or offenders in new policies. For example, when aiming to reduce the number of offenders who are incarcerated or their lengths of stay, the criteria should link eligibility to an identified driver of a state's prison population. The objective of a proposed reform may be undermined, for example, if eligibility is unnecessarily limited to the lowest risk offenders, particularly if such offenders do not constitute a significant proportion of the incarcerated population. In addition, eligibility criteria should be defined as clearly as possible in order to minimize the potential for confusion among the system actors responsible for implementing a new sentencing policy. Clearly defined eligibility requirements will eliminate the potential for disparities in application and prevent system actors from subjectively deciding which offenders will benefit from a policy change.

- **Consider whether a proposed reform should apply retroactively.** If prison population reduction is the main goal, retroactive application of reforms is a predictable way to produce immediate results. Especially for prison

systems operating over capacity, applying a new sentencing policy to offenders sentenced prior to the reform can help ease population pressures immediately as well as manage growth over time. This consideration is especially pertinent if the proposed reform will affect a significant proportion of the current incarcerated population. In many cases, reforms are being made to correct overly harsh or ineffective policies. Here too, with goals of justice and fairness, retroactivity may be called for.

If prison population reduction is the main goal, retroactive application of reforms is a predictable way to produce immediate results.

> **Track and analyze the impact on system outcomes.** Despite many reforms to mandatory sentences in the last 13 years, there is a dearth of research examining their impact on a state's criminal justice system. To better understand whether new policies are achieving their intended outcome, policymakers should track and analyze how new policies work in practice. To assist in this effort, policymakers should ensure that systems are in place that can collect the necessary data on sentencing outcomes once reforms are passed into law. While some research requests may be easily answered from existing data sources, some may require updates to agency data systems or other adjustments to enable reporting. Policymakers should collaborate with agency leadership to determine reporting parameters in the early stages of implementation to ensure all data is accurately captured and reported. Depending on the effective date of a given piece of legislation, results may be identified within a few months or may take a year or more to surface.

Some questions policymakers may want to consider asking include:

- How are the changes to the law reflected in sentencing practices?
- How many offenders have been affected by the new law, and how does this compare against the number that was originally projected?
- What are the rates of reoffending under the new law and how does that compare to the previous law?
- Are prison populations trending in the desired direction?

> **Examine the impact on system dynamics.** When a new policy grants enhanced discretion to judges at sentencing or requires the agreement of other system actors, understanding how institutional and system dynamics play out in its implementation will be critical in understanding whether it is effective in achieving the desired goals. If system actors misunderstand a new law or disagree about the offenders to which it should apply, then sentencing reform may not succeed. By identifying these issues throughout a policy's implementation, policymakers can institute solutions early in the process to overcome these potential barriers, such as providing additional training, or improving key stakeholder partnerships.

Some questions policymakers may want to ask include:

- To what extent are judges and prosecutors using their new-found discretion to reduce or avoid mandatory sentences?
- What factors do judges, prosecutors and defense attorneys consider when deciding whether to modify a sentence or utilize a newly created non-prison sanction?
- What are the reasons for declining their new-found discretion?

Future directions

While many of the recent mandatory sentencing reforms have been driven by fiscal concerns, there is a growing discussion that rationalizes change for reasons of fairness and justice.

While many of the recent mandatory sentencing reforms have been driven by fiscal concerns, there is a growing discussion that rationalizes change for reasons of fairness and justice. This is reflected in the attorney general's August 2013 announcement and the statement President Obama made in December 2013 when he commuted the sentences of eight people convicted of drug offenses. Attorney General Holder unambiguously stated that mandatory minimums have an "outsized impact on racial minorities and the economically disadvantaged"—suggesting that the costs of mandatory sentences, whether human, social, or fiscal, may be altogether too high.[52] The federal bench has also invoked moral arguments in this way, most recently in arguing for the retroactive application of the Fair Sentencing Act of 2010.[53] Senators Patrick Leahy (D-VT) and Rand Paul (R-KY)—original sponsors of the Senate Justice Safety Valve Act of 2013—have also weighed in. In his recent testimony to the Senate Judiciary Committee, Senator Paul discussed the disproportionate impact of sentencing on African Americans, asserting that, "Mandatory minimum sentencing has done little to address the very real problem of drug abuse while also doing great damage by destroying so many lives…"[54] Senator Leahy pointed to fiscal and moral reasons in arguing, "We must reevaluate how many people we send to prison and for how long. Fiscal responsibility demands it. Justice demands it."[55] Given that mandatory penalties have long been a central crime control strategy in the United States, this development is significant and represents a substantial departure from past discourse and practice.

Shifts away from mandatory penalties on the state level over the last 13 years suggest that attitudes are evolving about appropriate responses to different types of offenses and offenders. In particular, there appears to be an emerging consensus that treatment or other community-based sentences may be more effective than prison, principally for low-level drug and other specified nonviolent offenses. Although these developments augur significant future change, much remains to be done. Research is urgently required to examine how state reforms to mandatory sentences have played out in practice and is

particularly important as more states and the federal government reassess their use of mandatory sentences. By approaching policymaking in an evidence and data-informed way, states will collectively be able to make smarter, more strategic decisions about how best to revise or roll back their mandatory sentencing schemes going forward.

Appendix A

ALL BILLS, BY STATE AND YEAR

STATE	2000	2001	2002	2003	2004	2005	2007	2009	2010	2011	2012	2013	TOTAL
ARKANSAS										1			1
CALIFORNIA											1		1
COLORADO				1					2	1		1	5
CONNECTICUT		1				1							2
DELAWARE				1					1	1			3
GEORGIA											1	1	2
HAWAII											1	1	2
ILLINOIS												1	1
INDIANA		2								1			3
KENTUCKY										1			1
LOUISIANA		1							1		1		3
MAINE				1									1
MASSACHUSETTS											1		1
MICHIGAN			3										3
MINNESOTA								1					1
MISSOURI											1		1
NEVADA								1					1
NEW JERSEY									1				1
NEW MEXICO			1										1
NEW YORK					1	1		1					3
NORTH DAKOTA		1											1
OHIO										1			1
OREGON		1										1	2
OKLAHOMA											1		1
PENNSYLVANIA										1	1		2
RHODE ISLAND								1					1
SOUTH CAROLINA									1				1
TEXAS							1			1			2
VIRGINIA	1												1
FEDERAL									1				1
TOTAL	1	6	4	3	1	2	1	4	7	7	8	6	50

Appendix B

ALL BILLS, ALPHABETIZED BY STATE

STATE	BILL	YEAR
ARKANSAS	SB 750	2011
CALIFORNIA	PROP 36	2012
COLORADO	SB 318	2003
COLORADO	HB 1338	2010
COLORADO	HB 1352	2010
COLORADO	SB 96	2011
COLORADO	SB 250	2013
CONNECTICUT	SB 1160	2001
CONNECTICUT	HB 6975	2005
DELAWARE	HB 210	2003
DELAWARE	HB 338	2010
DELAWARE	HB 19	2011
GEORGIA	HB 1176	2012
GEORGIA	HB 349	2013
HAWAII	HB 2515	2012
HAWAII	SB 68	2013
ILLINOIS	SB 1872	2013
INDIANA	HB 1892	2001
INDIANA	SB 358	2001
INDIANA	HB 1006	2013
KENTUCKY	HB 463	2011
LOUISIANA	SB 239	2001
LOUISIANA	HB 191	2010
LOUISIANA	HB 1068	2012
MAINE	LD 856	2003

STATE	BILL	YEAR
MASSACHUSETTS	H 3818	2012
MICHIGAN	PA 665	2002
MICHIGAN	PA 666	2002
MICHIGAN	PA 670	2002
MINNESOTA	SF 802	2009
MISSOURI	SB 628	2012
NEVADA	AB 239	2009
NEW JERSEY	SB 1866/ A 2762	2010
NEW MEXICO	HB 26	2002
NEW YORK	AB 11895	2004
NEW YORK	SB 5880	2005
NEW YORK	S 56-B	2009
NORTH DAKOTA	HB 1364	2001
OHIO	HB 86	2011
OKLAHOMA	HB 3052	2012
OREGON	HB 2379	2001
OREGON*	HB 3194	2013
PENNSYLVANIA	HB 396	2011
PENNSYLVANIA	SB 100	2012
RHODE ISLAND	SB 39AA	2009
SOUTH CAROLINA	S 1154	2010
TEXAS	HB 1610	2007
TEXAS	HB 3384	2011
VIRGINIA	SB 153	2000
FEDERAL	S 1789	2010

* HB 3194 repeals a ban introduced by Ballot Measure 57 (2008) on downward departures from sentencing guidelines for certain repeat drug and property offenders. Though the previous ban was not technically considered a mandatory minimum sentence, since defendants could still earn up to a 20 percent sentence reduction for good behavior, it may be considered so in its effect since it barred judges from deviating from the sentencing guideline range in those specified cases.

Appendix C

ALL BILLS, BY STATE AND REFORM TYPE

STATE	Expansion of judicial discretion or safety valve created	Repeal/revision of mandatory minimum sentences	Revision of automatic sentence enhancements	Repeal/revision of mandatory minimum sentences & expansion of judicial discretion	Repeal/revision of mandatory minimum sentences & revision of automatic sentence enhancements	Revision of automatic sentence enhancements & expansion of judicial discretion	Repeal/revision of mandatory minimum sentences, revision of automatic sentence enhancements, & expansion of judicial discretion	TOTAL
ARKANSAS		SB 750 (2011)						1
CALIFORNIA			PROP 36 (2012)					1
COLORADO	HB 1338 (2010)		SB 318 (2003) HB 1352 (2010) SB 96 (2011) SB 250 (2013)					5
CONNECTICUT	SB 1160 (2001)	HB 6975 (2005)						2
DELAWARE	HB 338 (2010)	HB 210 (2003)			HB 19 (2011)			3
GEORGIA	HB 349 (2013)				HB 1176 (2012)			2
HAWAII	HB 2515 (2012) SB 68 (2013)							2
ILLINOIS			SB 1872 (2013)					1
INDIANA						HB 1006 (2013) SB 358 (2001)	HB 1892 (2001)	3
KENTUCKY			HB 463 (2011)					1
LOUISIANA	HB 1068 (2012)		HB 191 (2010)		SB 239 (2001)			3
MAINE				LD 856 (2003)				1
MASSACHUSETTS					H 3818 (2012)			1
MICHIGAN		PA 665 (2002) PA 670 (2002)		PA 666 (2002)				3
MINNESOTA	SF 802 (2009)							1
MISSOURI		SB 628 (2012)						1

NEVADA			AB 239 (2009)					1
NEW JERSEY	SB 1866/ A 2762 (2010)							1
NEW MEXICO	HB 26 (2002)							1
NEW YORK		AB 11895 (2004) SB 5880 (2005)		S 56-B (2009)				3
NORTH DAKOTA		HB 1364 (2001)						1
OHIO					HB 86 (2011)			1
OKLAHOMA		HB 3052 (2012)						1
OREGON	HB 3194 (2013) HB 2379 (2001)							2
PENNSYLVANIA	SB 100 (2012)	HB 396 (2011)						2
RHODE ISLAND		SB 39AA (2009)						1
SOUTH CAROLINA							S 1154 (2010)	1
TEXAS	HB 1610 (2007)		HB 3384 (2011)					2
VIRGINIA	SB 153 (2000)							1
FEDERAL		S 1789 (2010)						1
TOTAL	15	13	10	3	5	2	2	50

ENDNOTES

1 Eric Holder, *Remarks at the Annual Meeting of the American Bar Association's House of Delegates* (speech delivered Monday, August 12, 2013 in San Francisco, CA), http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html (accessed October 1, 2013).

2 Ibid. Also *see*, United States Sentencing Commission, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Washington, DC: United States Sentencing Commission, 2011), 345-347.

3 *Fair Sentencing Act of 2010,* Pub. L. 111-220, 124 Stat. 2372.

4 *Smarter Sentencing Act of 2013,* S. 1410, H.R. 3382, 113th Cong., 1st sess.; *Justice Safety Valve Act of 2013,* S. 619, H.R. 1695, 113th Cong., 1st sess.

5 The White House, "Statement by the President on Clemency," statement (Washington, DC: The White House, Office of the Press Secretary, December 19, 2013) at www.whitehouse.gov/the-press-office/2013/12/19/statement-president-clemency (accessed January 31, 2014).

6 *See* for example, *Adrienne Austin, Criminal Justice Trends: Key Legislative Changes in Sentencing Policy, 2001-2010* (New York: Vera Institute of Justice, 2010) and Lauren-Brooke Eisen and Juliene James, *Reallocating Justice Resources: A Review of State 2011 Sentencing Trends* (New York: Vera Institute of Justice, 2012).

7 *United States Sentencing Commission, Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Washington, DC: United States Sentencing Commission, 2011) 23-28, 85-89; Don Stemen, *Of Fragmentation and Ferment: The Impact of State Sentencing Policies on Incarceration Rates, 1975-2002* (New York: Vera Institute of Justice, 2005); *See* Stanley Sporkin & Asa Hutchinson, "Debate: Mandatory Minimums in Drug Sentencing: A Valuable Weapon in the War on Drugs or a Handcuff on Judicial Discretion?," 36 *American Criminal Law Review* 36 (1999), 1279, 1282, 1295. Statement of Rep. Hutchinson: "There are very few families that would have escaped the impact of drugs in some capacity. And so, families feel it and they compel their elected representatives to do something about it…..you have to send the right signals, you have to express the public outrage. And so I think the retribution theory is supported. I believe the deterrence theory is supported…[Y]ou have to have a sentencing pattern that has uniformity across it, that sends the right signals, that becomes tough in the area of drugs...".

8 For a review of evaluations on the crime-deterrent effect of mandatory penalties, *see* Michael Tonry, "The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings," *38 Crime & Justice* (2009) 94-96. Also *see*, Marc A. Levin & Vikrant P. Reddy, *The Verdict on Federal Prison Reform: State Successes Offer Keys to Reducing Crime & Costs* (Austin, TX: Texas Public Policy Foundation, July 2013); Alison Lawrence and Donna Lyons, *Principles of Effective State Sentencing and Corrections Policy* (Denver: National Conference of State Legislatures Sentencing and Corrections Work Group, 2011); Cheryl Davidson, *Outcomes of Mandatory Minimum Sentences for Drug Traffickers* (Des Moines, IA: Iowa State Advisory Board, Division of Criminal and Juvenile Justice Planning, Iowa Department of Human Rights, 2011); Marc Mauer, *The Impact of Mandatory Minimum Penalties in Federal Sentencing* (Nashville, TN: Judicature, 2010, Volume 94, Number 1); Nicole D. Porter, *The State of Sentencing 2012* (Washington, DC: The Sentencing Project, 2012).

9 The Pew Center on the States, *State of Recidivism: The Revolving Door of America's Prisons* (Washington, D.C.: Pew Charitable Trusts, 2011); Don Stemen, *Reconsidering Incarceration: New Directions for Reducing Crime* (New York: Vera Institute of Justice, 2007).

10 The Pew Center on the States, *State of Recidivism: The Revolving Door of America's Prisons.*

11 Ibid.

12 *See* for example, Michael Tonry, *Sentencing Matters 6* (New York, NY: Oxford University Press, 1996). Minimum penalties existed in a few states and were generally on the lower range of one- or two-year minimums. The exception was mandatory life sentences for particularly egregious crimes, such as murder.

13 Kevin R. Reitz, "The Disassembly and Reassembly of U.S. Sentencing Practices," in *Sentencing and Sanctions in Western Countries* edited by Michael Tonry and Richard Frase (New York: Oxford University Press, 2001) 223.

14 Michael Tonry, *Sentencing Matters,* 6. Also *see* Marvin E Frankel, "Lawlessness in Sentencing," *University of Cincinnati Law Review* 41 (1972) 1, 15-16.

15 Ibid.

16 *See* for example, Michael Tonry, *Sentencing Matters,* 9. Also *see* Steven L. Chanenson, "The Next Era of Sentencing Reform" 54 *Emory Law Journal* 44, no.1 (2005) 377, 392-395.

17 *See* for example, *Twentieth Century Fund Task Force on Criminal Sentencing, Fair and Certain Punishment* (New York: McGraw-Hill Publishing Company, 1976) 3-4. Also *see* Marvin E Frankel, "Lawlessness in Sentencing," *University of Cincinnati Law Review* 41 (1972) 1, 15.

18 *See* for example, Robert Martinson, "What Works? Questions and Answers About Prison Reform" *The Public Interest* 35 (1974) 22, 22-23; Also *see* Francis Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* (New Haven CT: Yale University Press, 1981); Bureau of Justice Assistance, *National Assessment of Structured Sentencing* (Washington DC: BJA, 1996) 5-18.

19 Kevin R. Reitz, "The Disassembly and Reassembly of U.S. Sentencing Practices," 238-244; Cecelia Klingele, "Changing The Sentence Without Hiding The Truth: Judicial Sentence Modification as a Promising Method of Early Release" *William and Mary Law Review* 52 (2010) 465, 476-7.

20 Although many states retained indeterminate sentencing systems, this did not prevent many of these states from adopting mandatory penalties as means of producing a "zone of hyper determinacy" for specified offenses. *See* Kevin R. Reitz, "The Disassembly and Reassembly of U.S. Sentencing Practices," 229 and 231. Also *see*, Bureau of Justice Assistance, *National Assessment of Structured Sentencing.*

21 For example, Minnesota and Pennsylvania adopted sentencing guidelines in 1980 and 1982, respectively, with many more states following suit. Currently, there are 20 states and the District of Columbia with sentencing guidelines in force. *See* National Center for State Courts, *State Sentencing Guidelines: Profiles and Continuum* (Williamsburg, VA: NSSC, 2008).

22 On the federal level, *see* for example *Comprehensive Crime Control Act of 1984,* Public Law 98-473, 98 Stat. 1976; *Anti-Drug Abuse Act of 1986*, Public Law 99-570, 100 Stat. 3207; *Violent Crime Control and Law Enforcement Act of 1994*, Public Law 103-322, 108 Stat. 1796; On the state level, *see* for example Cal. Penal Code § 667 (West Supp. 1998); *See* also, Kevin R. Reitz, "The Disassembly and Reassembly of U.S. Sentencing Practices," 229.

23 Bureau of Justice Assistance, *National Assessment of Structured Sentencing* 44-5. Also *see*, Urban Institute, "Did Getting Tough on Crime Pay?" *Crime Policy Report* No. 1 (Washington DC; Urban Institute 1997).

24 Michael Tonry, "Mandatory Penalties" in *Crime and Justice: A Review of*

Research edited by Michael Tonry (Chicago, IL: University of Chicago, 1992) 243-274

25 For information on truth-in-sentencing, *see*, Bureau of Justice Statistics, *Truth in Sentencing in State Prisons* (Washington DC: BJS, 1999). For information regarding the abolition of parole, *see* Bureau of Justice Statistics, *Trends in State Parole 1990-2000* (Washington DC: BJS, 2001); For growing concerns about the effects of mandatory penalties, *see* United States Sentencing Commission, *Special Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* (Washington DC: 1991).

26 On the federal level, *see* for example, *Violent Crime Control and Law Enforcement Act of 1994*, Public Law 103-322, 108 Stat. 1796 sec 80001(a). *See* also, Philip Olis, "Mandatory Minimum Sentencing: Discretion, The Safety Valve, And The Sentencing Guidelines," *University of Cincinnati Law Review* 63 (1995).

27 United States Sentencing Commission, *Recidivism among Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment* (Washington, DC: United States Sentencing Commission, 2011) at http://www.ussc.gov/Research_and_Statistics/Research_Projects/Miscellaneous/20110527_Recidivism_2007_Crack_Cocaine_Amendment.pdf (accessed on December 9, 2013).

28 For research about effective correctional strategies in the community, *see* Peggy McGarry et al., *The Potential of Community Corrections to Improve Safety and Reduce Incarceration* (New York: Vera Institute of Justice, 2013); Also *see* National Institute of Corrections and Crime and Justice Institute, *Implementing Evidence-Based Practice in Community Corrections The Principles of Effective Intervention* (Washington, DC: Department of Justice, National Institute of Corrections, 2004); Christopher T. Lowenkamp and Edward J. Latessa, "Understanding the Risk Principle: How and Why Correctional Interventions Harm Low-Risk Offenders," *Topics in Community Corrections* (Washington, DC: National Institute of Corrections, 2004). For information about the impact of the fiscal crisis on sentencing and corrections, *see* Ram Subramanian and Rebecca Tublitz, *Realigning Justice Resources: A Review of Population and Spending Shifts in Prison and Community Corrections* (New York: Vera Institute of Justice, 2012); For results of recent public opinion polls, *see* Pew Center on the States, *The High Cost of Corrections in America: InfoGraphic* (Washinton, D.C.: The Pew Charitible Trusts, January 2012); For examples of recent broad-based efforts at sentencing and corrections reform, *see* Juliene James, Lauren-Brooke Eisen and Ram Subramanian, "A View from the States: Evidence-Based Public Safety," *Journal of Criminal Law & Criminology* 102, No.3 (2012) 821-849. Also *see*, The Urban Institute, *The Justice Reinvestment Initiative: Experiences from the States* (Washington, DC: The Urban Institute, 2013). Indeed, in several states this has been done under the aegis of the Justice Reinvestment Initiative, a grant program initiated by the U.S. Department of Justice's Bureau of Justice Assistance that aims to improve public safety, reduce corrections and related criminal justice spending, and reinvest savings in strategies that can decrease crime and strengthen neighborhoods.

29 *See* for example, Adrienne Austin, *Criminal Justice Trends: Key Legislative Changes in Sentencing Policy, 2001-2010* (New York: Vera Institute of Justice, 2010) and Lauren-Brooke Eisen and Juliene James, *Reallocating Justice Resources: A Review of State 2011 Sentencing Trends* (New York: Vera Institute of Justice, 2012).

30 HB 463, also known as *The Public Safety and Offender Accountability Act*, also made significant revisions to drug statutes, establishing a tiered approach to sentencing that distinguishes between traffickers, peddlers, and users. The bill makes other changes to sentencing, correctional, and community-supervision practices designed to re-center the justice system around evidence-based practices. HB 463 was developed following an analysis of Kentucky's criminal justice population drivers via the Justice Reinvestment Initiative.

31 *See* for example, *United States v. Dossie*, 851 F. Supp. 2d 478 (EDNY March 30, 2012, Gleeson J).

32 A National Institute of Justice-funded study, conducted by the Vera Institute of Justice and researchers from John Jay College and Rutgers University, is investigating the impact of New York's 2009 rockefeller drug law reforms. The findings are expected to be released in 2014. For both pending and passed Federal laws, *see* *Fair Sentencing Act of 2010*, Pub. L. 111-220, 124 Stat. 2372; *Smarter Sentencing Act of 2013*, S. 1410; *Justice Safety Valve Act of 2013*, H.R. 1695.

33 Paul J. Hofer, "Memorandum Regarding Estimate of Sentencing Effects of Holder Memo on Drug Mandatory Minimums," Federal Public and Community Defenders, September 9, 2013, revised September 17, 2013, http://www.fd.org/docs/latest-news/memo-on-holder-memo-impact-final.pdf?sfvrsn=2 (accessed December 17, 2013). (On the study's methodology: "To estimate the number of defendants likely to benefit from these new policies, the U.S. Sentencing Commission's Monitoring Datafile for FY2012 was queried to determine how many of last year's drug defendants appear to fit the memo's major criteria, and how many of these did not already receive relief from any applicable mandatory penalty through the current 'safety valve' or government motions to reduce sentences to reward defendants' substantial assistance. To ensure comparability with analyses of other proposed legislation and policy changes, only cases in which the Commission received full documentation were included. Alternative analysis showed that including cases with missing documentation would increase the estimate of the number of offenders affected by only six defendants.")

34 *See* for example, Georgia HB 349 (2013), Louisiana HB 1068 (2012), and Minnesota SF 802 (2009)

35 *See* for example, Hawaii SB 68 (2013) and Texas HB 1610 (2007).

36 Center for Court Innovation, *Testing the Cost Savings of Judicial Diversion* (New York: Center for Court Innovation, 2013). For instance, the greatest increase in use of diversion occurred in the New York City suburban areas—primarily in Suffolk and Nassau counties. In six upstate counties, however, there was little or no change in sentencing outcomes.

37 Previously, the statute required an offender to have twice served time in state prison for all 688 existing felonies. Offenders were also eligible for parole after having served 50 percent of their maximum sentence on the third felony. Under the new law, an offender now only has to have twice served time in state prison for one day or more and is required to serve two-thirds of the maximum sentence. It also makes such offenders ineligible for parole. The new law also creates a new violent habitual offender class attached to more than 50 qualifying felonies. Violent habitual offenders under the new law are ineligible for parole.

38 Institute for Race & Justice, *Three Strikes: The Wrong Way to Justice —A Report on Massachusetts' Proposed Habitual Offender Legislation* (Cambridge, MA: Harvard Law School, 2013).

39 California Secretary of State, "California General Election, Tuesday, November 6, 2012: Official Voter Information Guide," http://voterguide.sos.ca.gov/propositions/36/title-summary.htm (accessed September 9, 2013).

40 California Proposition 36 (2012) includes two exceptions: 1) When a third felony conviction is non-serious, but prior felony convictions were for rape, murder, or child molestation; and 2) When third felony conviction is for certain non-serious sex, drug, or firearm offenses.

41 Under California Proposition 36 (2012) resentencing is authorized if the third-strike conviction was not serious or violent and the judge determines the sentence does not pose unreasonable risk to public safety.

42 Stanford Law School Three Strikes Project and NAACP Legal Defense and Education Fund, *Progress Report: Three Strikes Reform (Proposition 36) 1,000 Prisoners Released* (Stanford, CA: Stanford Law School and the NAACP Legal Defense and Education Fund, 2013).

43 California defines recidivism as return to prison within a given number of months or years.

44 Stanford Law School Three Strikes Project and NAACP Legal Defense and Education Fund, *Progress Report: Three Strikes Reform (Proposition 36) 1,000 Prisoners Released*; To estimate the savings from Prop. 36, the total number of days the 1,000 released inmates had been out of prison was multiplied by the figure the state uses for per-inmate savings when a prisoner is released ($25K/yr).

45 J. Greene and M. Mauer, *Downscaling prisons: Lessons from four states* (Washington D.C.: The Sentencing Project, 2010).

46 Ram Subramanian and Rebecca Tublitz, *Realigning Justice Resources: A Review of Population and Spending Shifts in Prison and Community Corrections.* (New York, NY: Vera Institute of Justice, 2012).

47 According to FBI Uniform Crime Report data, Michigan police reported 44,922 violent crimes and 250,101 property crimes in 2012 compared to 51,524 violent crimes and 330,356 property crimes in 2002. FBI, "Crime in the United States." (Washington, DC: FBI, 2012), years 2003, 2012.

48 New York State Division of Criminal Justice Services, Office of Justice Research and Performance, *2009 Drug Law Reform Update.* (New York: DCJS, 2013).

49 Ibid. DCJS does not collect or retain information on those not approved for resentencing.

50 The New York Department of Corrections and Community Supervision (DOCCS) reports in a press release a 15 percent decrease in state crime over the last 10 years and a 13 percent reduction in violent crime. New York's prison population has decreased by 24 percent from 71,600 to 54,600 since 1999. (Albany, NY: DOCCS, July 26, 2013).

51 Tiffany Brooks, "Upstate lawmakers question prison closures," *Legislative Gazette,* August 6, 2013.

52 Eric Holder, *see* note 1.

53 *See* for example, *United States v. Blewett,* 719 F.3d 482 (May 17, 2013 Merritt and Martin JJ). Also see, United States v Blewett (December, 3, 2013, see separate dissenting opinions of Merritt, Cole and Clay JJ). Federal judge John Gleeson has also invoked moral arguments to advocate for applying mandatory minimums based on a person's role in a crime rather than drug quantity and also against using prior crimes to escalate mandatory minimums. *See United States v. Dossie,* 851 F. Supp. 2d 478 (EDNY Mar. 30, 2012); *United States v. Kupa,* 11-CR-345 (JG) (EDNY Oct. 9, 2013).

54 *Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences: Hearing Before the Committee on the Judiciary, United States Senate,* 113th Cong. (2013) (statement of Senator Rand Paul, State of Kentucky).

55 *Reevaluating the Effectiveness of Federal Mandatory Minimum Sentences: Hearing Before the Committee on the Judiciary, United States Senate,* 113th Cong. (2013) (statement of Senator Patrick Leahy, State of Vermont).

Acknowledgments

The authors would like to thank Sharyn Broomhead, Rebecka Over, and Sean Addie for their valuable legal research into the bills featured in this report. Thank you to Kaitlin Kall who assisted in designing the charts. We would especially like to thank Patricia Connelly, Mary Crowley, and Chris Munzing for their invaluable assistance in the editing process and Peggy McGarry for her insight and guidance throughout the drafting process.

An electronic version of this report is posted on Vera's website at www.vera.org/mandatory-sentences-policy-report

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THIS YEAR MARKS THE 20TH ANNIVERSARY OF THE 1994 CRIME BILL. To examine the legacy of this landmark legislation, the lessons learned, and the path ahead, Vera is convening a series of conversations with experts and policymakers in Washington, DC, throughout the year, as well as issuing a series of reports on sentencing trends—where the states stand on mandatory minimums and other sentencing practices and the resulting collateral consequences. This report is the first in that series.

Vera will also release a comprehensive study of the impact of the 2009 reforms to the Rockefeller drug laws in New York State, examining whether they have improved offender outcomes, reduced racial disparities, and saved money. Look for updates on our website at www.vera.org.

Suggested Citation

Ram Subramanian and Ruth Delaney. *Playbook for Change? States Reconsider Mandatory Sentences.* New York, NY: Vera Institute of Justice, 2014.

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