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DECENCY, DIGNITY, AND DESERT: RESTORING IDEALS OF HUMANE PUNISHMENT TO CONSTITUTIONAL DISCOURSE

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Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse

Eva S. Nilsen *

American punishment today is degrading, indecent, and harsher than deserved despite a Constitution designed to protect people from cruel and unusual punishment. Unfortunately, the U.S. Supreme Court's response to the increasing inhumanity of contemporary punishment has been to reduce its Eighth Amendment jurisprudence to tidy categories, legal fictions, and hollow phrases. Absent from the discourse is any acknowledgement of the actual day-to-day experience facing the convicted person, or any suggestion that, although punishments can be degrading, they need not be. The case for treating a convicted person with respect for his human dignity, and for constitutional scrutiny of punishment as it is actually experienced, is rarely made.

This Article seeks to present that case. Part I demonstrates that sentences are longer and meaner, prison conditions are more degrading and dangerous, and post-release reintegration is severely hobbled by numerous barriers that guarantee a permanent underclass. The second part explains how the Court's narrow and formalistic reading of the Eighth Amendment has produced a profound legal and moral blindness to the constitutional infirmities these punishments present. In the third part,

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the Article suggests avenues to more robust conceptions of human dignity and decent treatment that may still be found in the Constitution and in emerging global norms.

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The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.

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

INTRODUCTION

In 1990 a young man named Ronald Harmelin was convicted for possession of a large quantity of cocaine and sentenced by a Michigan court to a mandatory life sentence without the possibility of parole. He argued on appeal to the U.S. Supreme Court that his sentence was excessive under the Eighth Amendment. He argued he had a right to have his sentence determined on the individual facts of his crime and his background rather than the one-size-fits-all mandatory life sentence. The Court upheld the sentence against both claims.¹ Prior to *Harmelin v. Michigan*, mandatory minimum sentences were rare and life without parole for any crime but murder was unusual. Since *Harmelin*, these sentences have become commonplace.²

During the last quarter century, American punishment has become degrading, indecent, and undeservedly harsher despite a Constitution designed to protect people from infliction of excessive punishment.³ It is indecent to deprive hundreds of thousands of individuals their liberty for decades, and sometimes for life, for drug related crimes.⁴ The indecency of punishment is compounded when individuals are sentenced to live in institutions where they suffer substantial physical and psychological harm. It is further compounded when prisoners are released into an unwelcoming society with laws that deny them access to jobs, housing, voting, and other ordinary incidents of citizenship.⁵

¹ *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991). Harmelin was sentenced under a recently enacted Michigan law that based the sentence on the amount of cocaine in the defendant's possession. *Id.* at 961; see also MICH. COMP. LAWS ANN. § 333.7403(2)(a)(1) (West Supp. 2007).

² See MARC MAUER, RACE TO INCARCERATE 30 (2d ed. 2006).

³ See U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

⁴ There are more than two million people serving sentences in the United States. It is difficult to obtain a precise number because the population changes every day and people serve sentences in a variety of jurisdictions and institutions that are hard to tally, i.e. town, city, and county jails; state houses of correction and prisons; and federal prisons. The prison population has risen from 503,586 in 1980 to approximately 2,193,798 in 2005. Bureau of Justice Statistics, Key Facts at a Glance: Correctional Populations, <http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm> (last visited Sept. 21, 2007).

⁵ See Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, in

Today's prisoners pay a price well beyond their jail sentence and beyond what any humane society should allow.

Whether one looks at the language of courts issuing and justifying sentences, or of legislators deciding what to punish and for how long, one finds little reference to the human costs exacted by these punishments. Only in the death penalty context do courts explicitly confront the magnitude of their punishment decisions and the specific circumstances of the individuals suffering from those punishments.⁶ In other contexts, the system treats offenders not charged with capital crimes more like objects than individuals, for example, when offenders receive mandatory sentences rather than sentences based on individualized considerations of desert.

Judges rarely express concern for the inhumane treatment that the person being sentenced is likely to face from fellow prisoners and prison officials, or that time in prison provides poor preparation for a productive life afterwards. Courts rarely consider tragic personal pasts that may be partly responsible for criminal behavior,⁷ or how the communities and families of a defendant will suffer during and long after his imprisonment. Instead, America, through its courts, has "gotten tough" on crime, blindly increasing sentences regardless of whether the crime is violent or the criminal dangerous.⁸ America is now the world's leader in per capita imprisonment, with disastrous results.⁹ Offenders, their families, and minority communities have paid an enormous toll. For society at large, the exorbitant economic cost of prison building, overcrowded prisons, and longer sentences¹⁰

INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15, 18-22 (Marc Mauer & Meda Chesney Lind eds., 2002).

⁶ *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (noting fundamental respect for humanity underlying Eighth Amendment requires consideration of "compassionate or mitigating factors stemming from the diverse frailties of humankind").

⁷ See JAMES GILLIGAN, *VIOLENCE: OUR DEADLY EPIDEMIC AND ITS CAUSES* 6 (1996); RICHARD RHODES, *WHY THEY KILL: THE DISCOVERIES OF A MAVERICK CRIMINOLOGIST* 112-24 (1999) (citing LONNIE ATHENS, *THE CREATION OF DANGEROUS VIOLENT CRIMINALS* (1999)).

⁸ See MAUER, *supra* note 2, at 31-35.

⁹ MARC MAUER, *THE SENTENCING PROJECT, COMPARATIVE INTERNATIONAL RATES OF INCARCERATION: AN EXAMINATION OF CAUSES AND TRENDS* 2 (2003).

¹⁰ One study shows \$60 billion for 2006, up from \$9 billion 20 years ago. JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, *CONFRONTING CONFINEMENT: A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS* 84 (2006), available at <http://www.prisoncommission.org/report.asp>. Increasing prison violence and degrading conditions led the Vera Institute of Justice, Princeton Survey Research Associates International, and the Open Society Institute to establish the Commission

has correlated with skyrocketing recidivism rates for prisoners who are ultimately released without skills, opportunities, or hopes.¹¹

The Supreme Court's response to the mass imprisonment crisis has been to narrow its Eighth Amendment jurisprudence to tidy categories, legal fictions, and hollow phrases such as: "death is different"; "grossly disproportionate"; "deference to the legislature"; and "rational basis."¹² Absent from this discourse is humility and a recognition of the gravity in the task of taking away someone's liberty. Additionally, this discourse is devoid of any official acknowledgement of the actual day-to-day experience facing the convicted person, or any suggestion that punishment need not be degrading. The case for treating a convicted person as a human being with innate dignity and value, and for seeing punishment as it is actually experienced, is rarely found in discourse about punishment.¹³ This Article seeks to present that case.

Part I shows how imprisonment has changed from three decades ago when the Court began developing its current Eighth Amendment doctrine. These changes — including wholesale changes in sentence

on Safety and Abuse in America's Prisons to investigate and recommend ways to address problems of safety, management, and accountability. The Commission released its final report in June 2006. Among the problems mentioned in the Commission Report as routinely afflicting today's prisoners were the use of restraint chairs, prolonged isolation, and other extreme forms of control, especially with mentally ill prisoners; severe overcrowding and its consequences for the health and safety of prisoners; deliberate humiliation and degradation of prisoners; violence against corrections officers; insufficient training and support for corrections officers; and lack of meaningful oversight. *Id.* at 11, 12, 31-32, 58, 60, 70, 78, 110. Commission Chairs were Nicholas de B. Katzenbach and Hon. John Gibbons, former Chief Judge of the Third Circuit Court of Appeals. Commission members included representatives from research institutions, prison administration, academics, and prisons.

¹¹ An Urban Institute study showed a recidivism rate of more than 60%. AMY SOLOMON, VERA KACHNOWSKI & AVINASH BHATI, URBAN INST., DOES PAROLE WORK? 8 (2005), available at http://www.urban.org/uploadedPDF/311156_Does_Parole_Work.pdf.

¹² See, e.g., *Ewing v. California*, 538 U.S. 11, 16-18 (2003) (finding California's three strikes law imposing life sentence without parole not cruel and unusual when applied to recidivist convicted of theft); *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (allowing sentence to be overturned on proportionality grounds only if sentence is grossly disproportional to crime); *Gregg v. Georgia*, 428 U.S. 153, 187-88 (1976) (holding that death penalty is not per se unconstitutional but that sentence of death demanded special procedural safeguards).

¹³ Indeed, as one noted forensic psychiatrist has said, "[T]he conventions of professional discourse leave little room for the articulation of the tragic point of view, even for those who see the phenomenon itself most clearly." GILLIGAN, *supra* note 7, at 6.

length and conditions, post-release barriers to productive citizenship, large racial disparities, and greater prosecutorial sentencing powers — are of both constitutional and humanitarian importance. Part II explains how the Court’s recent narrow and formalistic reading of the Eighth Amendment has produced a profound legal and moral blindness to the problems of imprisonment. The “death is different” doctrine has become a convenient barrier to the review of prison terms, leading to routine life terms for crimes that under a just desert theory warrant only a few years in jail. Sentences for terms of years do not get adequate scrutiny under current Eighth Amendment law; and the Court’s excessive deference to legislatures leaves no room for conscience or moral compunction in its decisions. In Part III, I suggest that it is possible to achieve relief from this judicial straightjacket by looking to the more robust conceptions of human dignity and decent treatment that can be found in the Constitution and emerging global norms.¹⁴ If pursued, this path will produce shorter sentences, safe and useful prisons, and eliminate legal barriers to full citizenship for former prisoners. Only then will we realize the constitutional promise of a rational and humane system of justice.

I. DOING HARD TIME

“We should be astonished by the size of the prisoner population, troubled by the disproportionate incarceration of African-Americans and Latinos, and saddened by the waste of human potential.”¹⁵

A recurring theme in this Article is that the prison experience is, in many ways, harsher than it has ever been. Prisons are crowded, with double- and triple-celling being the norm. The number of mentally ill prisoners has soared dramatically as mental institutions have closed around the country. New technology has led to increased use of isolation cells and centralized monitoring. Rule violators needn’t be tolerated or persuaded to conform when they can be sent to supermax facilities where they will be locked up for twenty-three hours a day

¹⁴ Professor Judith Resnik has written extensively about the global absorption of dignity norms. See, e.g., Judith Resnik & Julie Chi-hye Suk, *Adding Insult to Injury: Questioning the Role of Dignity in Conceptions of Sovereignty*, 55 STAN. L. REV. 1921 (2003) (addressing impact of foreign concepts of dignity on United States’s norms); Judith Resnik, *Law’s Migration: American Exceptionalism, Silent Dialogues, and Federalism’s Multiple Ports of Entry*, 115 YALE L.J. 1564 (2006) (examining interaction between American law and foreign human rights movements).

¹⁵ GIBBONS & KATZENBACH, *supra* note 10, at 8.

and deprived of all human contact.¹⁶ The following section explores some of the causes of harsher prison sentences.

A. *The Expanding Prison Net*

America's embrace of mass imprisonment arose during a widespread drive for sentencing equality, which gave rise to determinate sentencing schemes such as mandatory minimums and sentencing guidelines.¹⁷ This is only a small part of the story, however. A crime wave beginning in the 1960s, and the drug war in the 1970s have yet to end, and have fueled ever longer and harsher sentences. This has reached the point where the rate of imprisonment in the United States for drug crimes alone is higher than that of most European countries for all crimes.¹⁸ As more states and the federal government adopted mandatory sentencing schemes, the power of sentencing shifted from judges to prosecutors, who determined which crimes to charge. With deinstitutionalization of the mentally ill and the decline of social services, we turned to prisons to warehouse society's undesirables. The combined effect of these developments has multiplied the U.S. prison population seven-fold, from 300,000 in 1970 to 2.2 million in 2005.¹⁹ Add in probationers, parolees, and other non-prisoners under

¹⁶ Supermax prisons incorporate high-tech security features, a smaller guard-to-prisoner ratio, and minimal interruptions of the prisoner's solitary status. Craig Haney, *Mental Health Issues in Long-Term Solitary and "Supermax" Confinement*, 49 CRIME AND DELINQ. 124, 125-27 (2003).

¹⁷ The U.S. Sentencing Guidelines were created to provide "reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders." U.S. SENTENCING COMM'N, GUIDELINES MANUAL ch. 1, pt. A, at 2 (2002).

¹⁸ ROBERT J. MACCOUN & PETER REUTER, DRUG WAR HERESIES: LEARNING FROM OTHER VICES, TIMES, AND PLACES 24 (2001). New and revised drug laws eliminated rehabilitation as a punishment goal, added increasingly draconian mandatory sentences for possession and sale of drugs, eliminated judicial discretion or consideration of a defendant's background in all federal sentencing, added broad conspiracy laws, and established sentencing enhancements for many common circumstances incident to criminal activity. See generally Omnibus Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (codified as amended in scattered titles of U.S.C.); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of 18 U.S.C., 21 U.S.C., and 31 U.S.C.); Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

¹⁹ See Bureau of Justice Statistics, *supra* note 4 (finding 2.2 million people are incarcerated in prisons or jails); Vincent Schiraldi & Jason Ziedenberg, Justice Policy Inst., *The Punishing Decade: Prison and Jail Estimates at the Millennium I* (2000), available at http://www.justicepolicy.org/images/upload/00-05_REP_PunishingDecade_

the criminal justice system's control, and the number is an astonishing seven million.²⁰ If incarceration rates remain constant, 6.6% of Americans born in any given year will go to prison for some of their life.²¹

Our justice system has relied on incarceration to deal with criminals, virtually to the exclusion of any alternative. As Allen Beck, the chief statistician of the Bureau of Justice Statistics, rightly observed, "[T]he growth in the prison population is not about crime; it's about how we have chosen to respond to crime . . . [and our] sanctioning policies that have had profound impacts on the size and composition of the nation's prison population."²² These policies include budgets that starve non-prison options, increasingly severe sentences for particular crimes, and laws abolishing parole or facilitating parole revocation. For example, the California Supreme Court held parole can be denied based on the seriousness of the convicted offense despite a prisoner's rehabilitation, community support, and number of years served.²³ The safeguard of mercy, which has historically kept hope alive for many of those facing punishment, has largely disappeared.²⁴ The ultimate non-capital sentence, life without parole, is no longer reserved for killers. It may also be prescribed for thieves, drug dealers, gun carriers, kidnappers,

AC.pdf (finding that 300,00 people were incarcerated in 1970); *see also* MAUER, *supra* note 2 (noting risk of receiving prison sentence following drug arrest rose 447% between 1980 and 1982). Mauer attributes most of this increase to changes in prosecution and sentencing policies with respect to nonviolent drug and property offenses. *Id.* at 30-34.

²⁰ Bureau of Justice Statistics, *supra* note 4.

²¹ THOMAS P. BONCZAR, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974-2001, at 2 (2003), available at www.ojp.usdoj.gov/bjs/pub/pdf/piusp01.pdf.

²² GIBBONS & KATZENBACH, *supra* note 10, at 109.

²³ David Feige, *A Prison Without Hope Is a Dangerous Place*, L.A. TIMES, Feb. 1, 2005, at B11.

²⁴ President George W. Bush has used this power less frequently than his predecessors have. He brought to the presidency his custom as governor of Texas to pardon or grant clemency only where there was solid proof of innocence. His June 2007 clemency toward White House aide I. Lewis "Scooter" Libby stands in stark contrast to all of the President's previous practice. His grounds for clemency raise the considerations cited in this Article as relevant to sentencing: the punishment should fit the crime, and considerations of family and economic loss are also important. *See* Adam Liptak, *For Libby, Bush Seemed to Alter His Texas Strategy*, N.Y. TIMES, July 8, 2007, at A1 (discussing President Bush's act of clemency).

hijackers, traitors, unsuccessful terrorists, and recidivists of all stripes.²⁵

There may be as many as 132,000 prisoners sentenced to life imprisonment in the United States, 28% of whom have life sentences with no chance of parole.²⁶ Many more prisoners have the equivalent of life without parole because their sentences are so long that they will not outlive them. As Adam Liptak reported, “[I]n just the last 30 years, the United States has created something never before seen in its history and unheard of around the globe: a booming population of prisoners whose only way out of prison is likely to be inside a coffin.”²⁷ While life without parole is degrading and inhumane for adults, it is even more so for children.²⁸ The 1993 *New York Times* study of life imprisonment, cited by Liptak, reported that about 9,700 people are serving life sentences for crimes they committed as juveniles; a fifth of those have no chance of parole.²⁹

Along with this exponential change in punishment policy came a very different inmate population. Statistics characterizing today’s prisoners include findings that:

²⁵ See Adam Liptak, *To More Inmates, Life Term Means Dying Behind Bars*, N.Y. TIMES, Oct. 2, 2005, at A1.

²⁶ *Id.*

²⁷ *Id.*; see also Adam Liptak, *Serving Life, With No Chance of Redemption*, N.Y. TIMES, Oct. 5, 2005, at A1. Liptak noted:

[T]he United States is now housing a large and permanent population of prisoners who will die of old age behind bars. At the Louisiana State Penitentiary in Angola, for instance, more than 3,000 of the 5,100 prisoners are serving life without parole, and most of the rest are serving sentences so long that they cannot be completed in a typical lifetime.

About 150 inmates have died there in the last five years, and the prison recently opened a second cemetery

Liptak, *supra* note 25, at A1.

²⁸ Adam Liptak, *Locked Away Forever After Crimes as Teenagers*, N.Y. TIMES, Oct. 3, 2005, at A1. “Forty-two states and the federal government allow offenders under 18 to be incarcerated forever. Ten states set no minimum age, and 13 set a minimum age of 10 to 13. Seven states, including Florida and Michigan, have more than 100 juvenile offenders serving such sentences Those sending the largest percentage of their youths to prison for life without parole are Virginia and Louisiana.” *Id.* “Juvenile lifers are overwhelmingly male and mostly black. Ninety-five percent of those admitted in 2001 were male and 55 percent were black.” *Id.*

²⁹ *Id.*

- Drug convictions account for the imprisonment of a quarter of all prisoners and 60% of federal prisoners.³⁰ As of 2003, there were more than ten times as many third strikers serving life sentences for drug possession as for second-degree murder in California.³¹ In part, this has caused California's inmate population to grow from 20,000 to 160,000 in twenty years.³²
- In mid-2005 over half of all prison and jail inmates had mental health problems — over a million people.³³
- Minorities are incarcerated in overwhelming numbers. In 2005, 40% of prison inmates were black and 20% were Hispanic.³⁴ As

³⁰ Between 1996 and 2002, more than 94,000 people were sentenced under the federal mandatory minimum drug laws. Gary Field, *Imperfect Measure: In Drug Sentences, Guesswork Often Plays Heavy Role*, WALL ST. J., Dec. 2, 2004, at A1. In 2002, 76% of those sentenced to state prison were convicted of a nonviolent crime. The Sentencing Project, *Facts About Prisons and Prisoners*, http://www.sentencingproject.org/Admin/Documents/publications/inc_factsaboutprison.pdf (last visited Sept. 12, 2007) (citing Bureau of Justice Statistics); see also JOHN IRWIN, VINCENT SCHIRALDI & JASON ZIEDENBERG, JUSTICE POLICY INST., *AMERICA'S ONE MILLION NONVIOLENT PRISONERS 4* (1999), available at <http://www.justicepolicy.org/reports/onemillionnonviolentoffenders.pdf>.

This is a 38% increase from 1986 when mandatory sentencing laws were passed. Families Against Mandatory Minimums, *Quick Facts*, <http://www.famm.org/PressRoom/PressKit/QuickFacts.aspx> (last visited Sept. 6, 2007).

³¹ SCOTT EHLERS, VINCENT SCHIRALDI & JASON ZIEDENBERG, JUSTICE POLICY INST., *STILL STRIKING OUT: TEN YEARS OF CALIFORNIA'S THREE STRIKES 9* (2004), available at http://www.soros.org/initiatives/justice/articles_publications/publications/still_striking_20040305/threestrikes_press.pdf. Schiraldi reports between March 1994 and September 2003, California's three strikes policy cost taxpayers \$8.1 billion in prison and jail expenditures. *Id.* at 25.

³² JEREMY TRAVIS & SARAH LAWRENCE, URBAN INST. JUSTICE POLICY CTR., *CALIFORNIA'S PAROLE EXPERIMENT 4* (2002), available at urban.org/UploadedPDF/CA_parole_exp.pdf.

³³ DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, *MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 1* (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf>. Seventy-five percent of those incarcerated in state prisons and local jails had substance abuse problems. *Id.*

³⁴ The Sentencing Project, *supra* note 30; see also TUSHAR KANSAL, *RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE 1* (Marc Mauer ed., 2005), available at <http://www.sentencingproject.org/PublicationDetails.aspx?PublicationID=378> (stating that "while racial dynamics have changed over time, race still exerts an undeniable presence in the sentencing process").

"At yearend 2005 there were 3,145 black male sentenced prison inmates per 100,000 black males in the United States, compared to 1,244 Hispanic male inmates per 100,000 Hispanic males and 471 white male inmates per 100,000 white males." Bureau of Justice Statistics, U.S. Dep't of Justice, *Prison Statistics*,

one commentator explained, for young black men, “finishing high school is the exception, legal work is scarcer than ever and prison is almost routine, with incarceration rates climbing for blacks even as urban crime rates have declined”³⁵ Nearly one in eight black men between the ages of twenty and twenty-nine are in prison,³⁶ compared to one in fifty-nine white men within the same age group.³⁷ These rates are quite disproportionate to the commission of crimes within each group. For example, a statistical study in the mid-1990s found that African Americans comprise 13% of all monthly drug users, but 55% of those convicted of drug possession, and 74% of those sentenced to prison for drug possession.³⁸ A similar disparity is evident in the disproportionate numbers of black juvenile drug offenders adjudicated as adults.³⁹ A study of 700,000 criminal cases conducted by the *San Jose Mercury News* concluded that “at

<http://www.ojp.usdoj.gov/bjs/prisons.htm> (last visited Sept. 21, 2007).

³⁵ Erik Eckholm, *Plight Deepens for Black Men, Studies Warn*, N.Y. TIMES, Mar. 20, 2006, at A1 (citing numerous recent studies of black men being left behind); see also Tony Favro, *Black American Men Hardest Hit by Dysfunctional U.S. Inner Cities*, CITY MAYOR'S SOC'Y, Apr. 25, 2006, http://www.citymayors.com/society/us_blackmen.html. Favro states, “In 1995, 16 percent of Black men in their 20s who did not attend college were in jail or prison; by 2004, 21 percent were incarcerated. By their mid-30s, 30 percent of Black men who graduated from high school and 60% of those who didn't had spent time in prison. . . . In the inner cities, more than half of all black men do not finish high (secondary) school.” *Id.* Others warn of the normalization of the prison experience, especially among young people. See Brent Staples, *Growing Up in the Visiting Room*, N.Y. TIMES, Mar. 21, 2004, § 7, at 7 (warning of normalization of prison experience, especially among young people).

³⁶ The Sentencing Project, *supra* note 30.

³⁷ *Id.*

³⁸ MARC MAUER & TRACY HULING, *YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER* 11 (1995) (compiling statistics from 1992 and 1993). The number of black (non-Hispanic) women incarcerated in state prisons for drug offenses multiplied more than eightfold from 1986 to 1991. *Id.* at 20. The net effect is that by 1993 blacks and Hispanics accounted for almost 89.7% of those sentenced to state prisons for drug possession. *Id.* at 1-2, 13.

³⁹ Black juvenile drug offenders are two and a half times more likely than their white classmates to be adjudicated as adults and end up with a drug conviction. EILEEN POE-YAMAGATA & MICHAEL A. JONES, NAT'L COUNCIL ON CRIME AND DELINQ., AND JUSTICE FOR SOME 2 (2000). An Illinois study found African Americans comprise 15% of the state's juvenile population, but 85.5% of the juveniles transferred to adult court. JASON ZIEDENBERG, CTR. ON JUVENILE AND CRIMINAL JUSTICE ET AL., *DRUGS AND DISPARITY: THE RACIAL IMPACT OF ILLINOIS' PRACTICE OF TRANSFERRING YOUNG DRUG OFFENDERS TO ADULT COURT* (2001), available at <http://www.buildingblocksfor youth.org/illinois/illinois.html>.

virtually every stage of pretrial negotiation, whites are more successful than non-whites.”⁴⁰

Harsh sentencing laws, particularly for drug offenses, “have functioned as a kind of giant vacuum cleaner hovering over the nation’s inner cities, sucking young black men off the street and into prison.”⁴¹ One researcher reported that in Washington, D.C., 75% of black males can expect to go to prison or jail in their lifetime.⁴² This fact reinforces the suspicion that the laws are discriminatory, replaying, as did segregation, the infamy of slavery and black codes.⁴³ This occurs as a result of punishing those convicted of crack cocaine offenses with significantly harsher sentences than those convicted of powder cocaine offenses. Powder cocaine is more likely to be used by white offenders, whereas crack cocaine is more closely identified with black offenders. Thus, sentencing laws send a powerful and negative racial message.

Furthermore, laws that disenfranchise and otherwise penalize convicted felons perpetuate economic and social stagnation for minorities.⁴⁴ Disproportionate prison sentences of African Americans and Latinos effectively punish many more individuals than the

⁴⁰ A substantially greater number of whites than blacks or Hispanics had their charges reduced to misdemeanors. MAUER, *supra* note 2, at 153 (citing Christopher Schmitt, *Plea Bargaining Favors Whites as Blacks, Hispanics Pay Price*, SAN JOSE MERCURY NEWS, Dec. 8, 1991, at 1A).

⁴¹ It is relatively easy for law enforcement to make arrests in urban or inner city areas where drug use and selling is out in the open. This is much less the case in suburban and middle class neighborhoods. *Id.* at 163. According to a report released by the Justice Policy Institute, our country’s “drug free zones” do not effectively keep children away from drugs. The authors suggest that the “war on drugs” has led to strong racial disparities in the justice system. JUDITH GREENE, KEVIN PRANIS & JASON ZIEDENBERG, JUSTICE POLICY INST., *DISPARITY BY DESIGN: HOW DRUG-FREE ZONE LAWS IMPACT RACIAL DISPARITY — AND FAIL TO PROTECT YOUTH* 4 (2006), available at http://www.justicepolicy.org/images/upload/06-03_REP_DisparitybyDesign_DP-JJ-RD.pdf.

⁴² Donald Braman, *Families and Incarceration*, in *INVISIBLE PUNISHMENT* *supra* note 5, at 117.

⁴³ See Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 *YALE L.J.* 421, 425 (1960). Professor Black notes, “[S]egregation is the pattern of law in communities where the extralegal patterns of discrimination against Negroes are the tightest, where Negroes are subjected to the strictest codes of ‘unwritten law’ as to job opportunities, social intercourse, patterns of housing, going to the back door, being called by the first name, saying ‘sir,’ and all the rest of the whole sorry business. Of course these things, in themselves, need not and usually do not involve ‘state action,’ and hence the fourteenth amendment cannot apply to them. But they can assist us in understanding the meaning and assessing the impact of state action.” *Id.*

⁴⁴ Travis, *INVISIBLE PUNISHMENT*, *supra* note 5, at 15, 22-23.

convicted defendants. They change the demographics and economy of inner city communities, leave children without fathers, parents without sons, and women without men of marriageable age.⁴⁵

The remainder of this section focuses on the individual prisoner and the cruelty and hopelessness that confront him in and after prison. It is important to understand that the prisoner's fate that I describe is neither an aberration that afflicts the unlucky, nor an unintended consequence of productive policies. It is rather part and parcel of this radically new sentencing regime, deliberately constructed over the past decades.⁴⁶

B. Inhumane Conditions of Incarceration

One reason society has chosen to punish by imprisonment is because liberty is highly valued; the threat of losing personal liberty is a powerful deterrent, albeit an imperfect one. But lost liberty and its intrinsic privations only begin to define today's prison experience. Sensational reports of prison neglect or violence hint at a bigger picture that many would rather not know.

Today's prisoner enters a world marked by racial unrest, gang warfare, and abusive guards. Whatever happens, fear will be a prisoner's constant companion from the beginning to end of his prison sentence.⁴⁷ He will live with the ever-present risks of being assaulted,

⁴⁵ In this section I discuss only the collateral consequences, or "invisible punishments," that directly apply to ex-offenders. There is a growing literature about the dire consequences to prisoners' families and communities that are attributable to incarceration and post-incarceration punishment. See *Increased Incarceration of African Americans May Reduce the Health and Well-Being of Their Communities*, DRUG POL'Y RES. CENTER INSIGHTS (RAND Org., Santa Monica, Cal.), 2006, at 1, available at http://www.rand.org/multi/dprc/newsletter/2006_issue1.html; see also Braman, *supra* note 42, at 117-35 (discussing intangible toll on families and friends of offenders); Bruce Western, Becky Pettit & Josh Guetzkow, *Black Economic Progress in an Era of Mass Imprisonment*, in *INVISIBLE PUNISHMENT*, *supra* note 5, at 165, 165 (examining increased racial inequality as repercussion of incarceration).

⁴⁶ Professor Charles Fried has criticized two aspects of our penal system that have contributed to the degradation of modern punishment: first, our disposition to use imprisonment in all cases, violent and nonviolent, and second, our imposition of inordinately long sentences. In both respects the United States exceeds the policies of other Western democracies. Charles Fried, *Reflections on Crime and Punishment*, 3 *SUFFOLK U. L. REV.* 681, 688 (1997).

⁴⁷ Prison violence affects even those who have not yet been victimized. Inmates report fear and anxiety about their physical safety from the moment they enter jail or prison. VICTOR HASSINE, *LIFE WITHOUT PAROLE: LIVING IN PRISON TODAY* 11 (Thomas Bernard & Robert Johnson eds., 3d ed. 2004).

raped, or even turned into a gang sex slave;⁴⁸ contracting HIV, tuberculosis, or other diseases;⁴⁹ being put into isolated confinement, or twenty-three hour a day lockdown; and being thrown into a cell with a severely mentally disturbed and potentially violent inmate. If the prisoner is homosexual, he knows his time in prison is likely to be a living hell.

These fears are not irrational or paranoid. The conditions the Court addressed three decades ago in *Hutto v. Finney* — the nature of solitary confinement, inmate safety and health, crowded sleeping arrangements, and increased violence⁵⁰ — have only worsened, and by a large margin.⁵¹ In the years after *Hutto*, many judges, legislators, and prisons abandoned the goal of rehabilitation in favor of the more punitive goals of retribution and incapacitation.⁵² The use of isolated confinement increased as part of the tougher “confine and control” approach.⁵³ Prisons continually outgrew their capacity.⁵⁴ With too few jobs or classes to occupy inmates, large numbers of prisoners had

⁴⁸ In 2000 there were 34,555 reported assaults among prisoners and 17,952 assaults by prisoners against staff. GIBBONS & KATZENBACH, *supra* note 10, at 24.

⁴⁹ The Commission Report states that 1.5 million prisoners are released with life threatening diseases. *Id.* at 13. Furthermore, 1.3 to 1.4 million prisoners have Hepatitis C; 98,000 to 145,000 have HIV; 39,000 have AIDS; 566,000 have latent tuberculosis; and 12,000 have active tuberculosis. *Id.* at 47.

⁵⁰ *Hutto v. Finney*, 437 U.S. 678, 683 (1978) (criticizing, among other conditions, use of isolation as punishment for inmate misconduct, but failing to find Eighth Amendment violation). *Hutto* was decided at the beginning of a period of judicial activism that brought dramatic changes in prison conditions. Malcolm Feeley and Edward Rubin have described courts’ actions of the past 30 years as the most striking example of judicial policy making in modern times. MALCOLM L. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA’S PRISONS 13 (2000); *see also* Thelton E. Henderson, U.S. Dist. Ct. Judge, Remarks at the Annual Dinner of the American Law Institute 3 (May 16, 2006) (transcript available at <http://clearinghouse.wustl.edu/chDocs/public/PC-CA-0018-0011.pdf>). Judge Henderson stated, “By 1984, roughly half of the nation’s largest prisons were operating under the constraint of court orders. On the whole, these cases spurred significant improvement in many prisons Judicial intervention eliminated the routine authorized use of torture in prisons and led to the abandonment of inmate trustees, which involved the practice of allowing some inmates to supervise and usually abuse other inmates with official acquiescence.” Henderson, *supra*, at 3.

⁵¹ *See* GIBBONS & KATZENBACH, *supra* note 10, at 11-15.

⁵² *Id.* at 106. Over the past 25 years, the rate of incarceration has increased three and a half times. *Id.* at 109.

⁵³ *Id.* at 14.

⁵⁴ In 2004, prisons were at 115% of their design capacity. *Id.* at 104.

too much unproductive time on their hands.⁵⁵ The result is that today's prison conditions are harsher, more violent, and more degrading than anyone might have imagined in that earlier era.⁵⁶ Consider the evidence.

1. Extreme Violence

In 1995, the New York City Department of Corrections reported that it had 1100 slashings and stabbings.⁵⁷ In Massachusetts a priest convicted of child molestation was killed by a fellow inmate after serving only months of his sentence.⁵⁸ Prison rape is endemic, so much so that Professor James Robertson calls it "an oppressive gender system that functions largely apart from the rule of law."⁵⁹ In 2003 Congress passed the Prison Rape Elimination Act after finding that over a twenty-year period more than a million people had been sexually assaulted in prison.⁶⁰ Another study of four Midwestern

⁵⁵ Program cutbacks occurred in state and county prisons due to budgetary constraints. A small percentage of the prison population is in federal prison, which has not been as affected by budgetary cuts and overcrowding. For example, in the Florence Federal Correctional Complex ("FCC") in Florence, Colorado, all prisoners must either work or be in a rehabilitation program. See JONATHAN FRANZEN, HOW TO BE ALONE: ESSAYS 219 (2002).

⁵⁶ Donald Specter, director of the Prison Law Office in California, stated to the Prison Abuse Commission, "If you put poor, underprivileged young men together in a large institution without anything meaningful to do all day, there will be violence. If that institution is overcrowded, there will be more violence. If that institution is badly managed . . . [including] poor mental health care, there will be more violence." GIBBONS & KATZENBACH, *supra* note 10, at 22. In a survey of 1502 randomly selected adults living in the continental United States in March and April 2006, when asked if someone known to them was to be incarcerated, 84% said they would be concerned about the person's physical safety and 76% said they would be concerned about that person's health. *Id.* at 29.

⁵⁷ One witness before the Commission on Safety and Abuse in America's Prisons testified that her son died after being stabbed nine times by another inmate. *Id.* at 34. The numbers vary widely from institution to institution partly because data is not uniformly reported. *Id.* at 17. Much of the violence in prison is by prisoners toward guards. *Id.* at 24.

⁵⁸ *Id.*

⁵⁹ James E. Robertson, *A Punk's Song About Prison Reform*, 24 PACE L. REV. 527, 528 (2004) (discussing autobiographical essay of Stephen Donaldson, who describes being raped on his first night in jail in 1973 and being 'made' into girl for purposes of sex for other inmates; he worked for prison reform after his release and died of AIDS in 1996). See generally HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001), available at <http://www.hrw.org/reports/2001/prison/report.html> (analyzing male prisoner on prisoner sexual abuse in United States).

⁶⁰ Prison Rape Elimination Act of 2003 § 4, 42 U.S.C. § 15603 (Supp. IV 2004).

states found that one in five inmates reported forced or pressured sex.⁶¹ Apart from the likelihood of long-lasting trauma,⁶² prison rape also dramatically increases risks of sexually transmitted diseases, with HIV being referred to by some commentators as an “unadjudicated death sentence.”⁶³

Roderick Johnson’s case was one of the first to publicly raise the issue of sexual slavery in prison.⁶⁴ Johnson, a gay black man, was forced by a prison gang leader to become a sexual slave — to have sex daily, to assume a female name, and to be sold for sexual services to other prisoners. According to his lawyers, Mr. Johnson’s pleas for help and safekeeping were ignored by the prison guards, who, instead of coming to his aid, seemed to take pleasure from his plight.⁶⁵

In practice, prison guards are sometimes a source of danger rather than protection. Prisoners and their keepers are afraid of one another, but the keepers have the weapons.⁶⁶ TASER guns are sometimes used as a “first strike” option, according to one former prison official who

The Act mandates (1) annual surveys to determine prevalence of rape; (2) public hearings; (3) a clearinghouse to aid state and local correctional staff in their efforts to counter prison rape; (4) grants; and (5) a commission to study prison rape and issue voluntary standards on prevention, treatment, and prosecution. *Id.* at §§ 4-7, 42 U.S.C. §§ 15603-15606 (Supp. IV 2004).

⁶¹ See Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Reported by Women in Three Midwestern Prisons*, 39 J. SEX RES. 217, 222 (2002), available at www.spr.org/pdf/Struckman021.pdf (finding in one facility 27% of women reported pressured or forced sexual incidents).

⁶² There is evidence of long lasting trauma from sexual assaults that may lead to other types of violence and interfere with resocialization after release from prison. See 149 CONG. REC. H7764, H7764-71 (2003).

⁶³ Stop Prisoner Rape, *Breaking the Silence on Prison Rape and AIDS*, <http://www.spr.org/pdf/break.pdf> (last visited Sept. 6, 2007).

⁶⁴ Adam Liptak, *Ex-Inmate’s Suit Offers View into Sexual Slavery in Prisons*, N.Y. TIMES, Oct. 16, 2004, at A1.

⁶⁵ *Id.* Similarly, Garrett Cunningham filed a civil rights lawsuit against the Texas prison system alleging that a prison correctional officer had raped him and that authorities dismissed his complaint. GIBBONS & KATZENBACH, *supra* note 10, at 7. Human Rights Watch also depicts officials as standing by while sexual predators raped fellow inmates and sometimes sold them as sex slaves. See HUMAN RIGHTS WATCH, *supra* note 59 (follow “Deliberate Indifference: State Authorities’ Response to Prisoner on Prisoner Sexual Abuse” hyperlink); see also *Johnson v. Phelan*, 69 F.3d 144, 152 (7th Cir. 1995) (Posner, J., dissenting) (noting few people have thought about cross-sex prison surveillance because they are not prisoners).

⁶⁶ GIBBONS & KATZENBACH, *supra* note 10, at 31-32 (stating, “[O]fficers feel they work under the constant threat of spontaneous violent outbursts; they literally feel under siege. That feeling can lead officers, especially new and inexperienced ones, to overreact and use force when talking would be more effective, or to use more force than necessary to resolve a situation.”).

reported an incident where such a weapon was used on a small, unarmed prisoner who refused to hand over his dinner tray.⁶⁷ There have been reports of at least twenty prisoner deaths in the past seven years in Texas alone due to guards using restraint chairs, restraint boards, or four- or five-point restraints.⁶⁸ A federal judge described one Virginia prisoner as having been stripped to his underwear and held by restraints around his hands, feet, and chest for forty-eight hours during which time he was in great pain, hallucinating, vomiting, and urinating on himself.⁶⁹ As the above examples show, prison is much more than a term of years spent in a cell away from family, work, and friends. It breeds violence that is ignored by officials; and it fosters pervasive fear and despair.

2. Long-Term Isolation

The mushrooming reliance on isolation, sometimes called administrative segregation,⁷⁰ and the rising numbers of maximum security “supermax” facilities designed specifically for isolating prisoners, are blamed by some experts for the rise in both prison violence and prisoner suicide.⁷¹ In 2005 forty-four California prisoners killed themselves with 70% of these suicides occurring in disciplinary segregation units.⁷² The following description of conditions of isolation in a New York prison illustrates why some prisoners are driven to such lengths:

⁶⁷ He stated that “before even entering the cell, an ‘extraction team’ of five officers and a sergeant discharged two multiple baton rounds, hitting the prisoner in the groin, dispensed two bursts of mace, and fired two TASER cartridges.” GIBBONS & KATZENBACH, *supra* note 10, at 32; *see also* Hope v. Pelzer, 536 U.S. 730, 738 (2002) (noting long after safety concerns abated, guards continued to inflict pain and cruel conditions on prisoner).

⁶⁸ GIBBONS & KATZENBACH, *supra* note 10, at 32.

⁶⁹ *Id.* at 32 (citing Sadler v. Young, 325 F. Supp. 2d 689 (W.D. Va. 2004)).

⁷⁰ The Bureau of Justice Statistics shows that in the year 2000 there were approximately 80,000 people confined to segregation. *Id.* at 52-53. This number is believed to be fewer than the actual number due to problems in data collection. *Id.* The Prison Abuse Commission concluded the increase in segregation outpaced the growth in prison population. *Id.* at 56. Between 1995 and 2000, the prison population increased 28%, whereas the total number of inmates in segregation increased 40%. *Id.*

⁷¹ *Id.* at 14, 52.

⁷² *Id.* at 59; *see also* Pam Belluck, *Mentally Ill Inmates at Risk in Isolation*, *Lawsuit Says*, N.Y. TIMES, Mar. 9, 2007, at A12 (citing lawsuit filed by Massachusetts Correctional Legal Services alleging increased use of isolation responsible for mental illness and suicide).

Iron bars at the back face a corridor, across from which are tall windows that allow filtered rays to penetrate your cell — your only source of natural light. A few feet from the metal bed, a stainless steel toilet and sink are affixed to the floor. . . . Until a book cart comes by — maybe the next day, maybe not — all you have to read is the Special Housing Unit manual telling you what to expect while you are there: no phone calls, no programs, no group interaction with other inmates and no out-of-cell movement except an hour a day of legally-mandated recreation. If you decide to go to recreation, you will be “mechanically restrained” with handcuffs and a waist chain as you are escorted to an empty outdoor cage. If you have a history of violence, you will remain shackled during recreation. Even if the temperature outside is below freezing, you will not be allowed to wear gloves or a hat. There is no equipment in the rec pen, not even a ball

[Y]ou wonder what time it is but have no way of knowing since watches are not allowed and no clocks are in sight. Your surroundings have been reduced to shadows and steel, your life to a nightmarish monotony.⁷³

Twenty years ago there were no supermax facilities.⁷⁴ Today there are over forty, holding 2% of state and federal prisoners.⁷⁵ In supermax prisons, inmates are typically confined to their cells twenty-three hours a day. Psychologist Craig Haney writes that “[b]ecause supermax units typically meld sophisticated modern technology with the age-old practice of solitary confinement, prisoners experience levels of isolation and behavioral control that are more total and complete and literally dehumanized than has been possible in the past. [It constitutes an] extreme form of imprisonment unique in the modern history of corrections.”⁷⁶

⁷³ CORR. ASS’N OF N.Y., LOCKDOWN NEW YORK: DISCIPLINARY CONFINEMENT IN NEW YORK STATE PRISONS 6 (2003), available at http://correctionalassociation.org/PVP/publications/lockdown-new-york_report.pdf.

⁷⁴ Daniel P. Mears & Jamie Watson, *Towards a Fair and Balanced Assessment of Supermax Prisons*, 23 JUST. Q. 232, 234 (2006) (discussing supermax facilities). The closest thing to a supermax facility was the federal prison in Marion, Illinois, which reportedly housed the worst prisoners in America in lockdown 23 hours a day. *Id.* at 232-33.

⁷⁵ *Id.*

⁷⁶ Haney, *supra* note 16, at 127.

Some corrections officials insist that they use isolation only as a last resort,⁷⁷ but James Bruton, a former Minnesota prison warden, once testified that “there are states in this country that [segregate] prisoners simply because they have a gang affiliation, whether or not they have done anything in the prison.”⁷⁸ Often they are African American and Latino prisoners who are being improperly labeled as gang members.⁷⁹ Isolation is also used as an ill-conceived means of controlling the unruly mentally ill.⁸⁰

The risks of isolation are well documented.⁸¹ The data shows that after release, some isolated prisoners treat others the way they themselves were treated.⁸² Many will experience mental deterioration as the result of long-term isolation with severely limited exposure to sensory stimuli or other activity as well as victimization by staff. This mental deterioration is extremely dangerous given the large numbers who are already mentally ill when they arrive in prison.⁸³ A Canadian research project found isolation could lead to paranoid psychosis or uncontrolled rage, including an increase in homicidal and suicidal impulses.⁸⁴ French researchers concluded that prisoners placed in solitary confinement often become schizophrenic instead of receptive to social rehabilitation.⁸⁵ Haney found that segregated prisoners are “utterly dysfunctional when they get out” and that the family members of recently released prisoners often seek his assistance.⁸⁶ A forty-five-

⁷⁷ See, e.g., GIBBONS & KATZENBACH, *supra* note 10, at 53-54 (finding prisons vary in use of segregation).

⁷⁸ *Id.* at 54.

⁷⁹ *Id.* at 54-55. As sociologist and former prisoner Douglas Thompkins says, race is often a “proxy for dangerousness” used by those who staff the prisons to identify gang members. *Id.* at 33.

⁸⁰ See *id.* at 59-61.

⁸¹ *Id.*; see also Haney, *supra* note 76, at 132.

⁸² GIBBONS & KATZENBACH, *supra* note 10, at 55 (citing Hang Toch, *The Future of Supermax Confinement*, 81 PRISON J. 376, 381 (2001)).

⁸³ *Id.* at 52-61; Mears & Watson, *supra* note 74, at 250. One study of New York prisons reported that more than half of prison suicides occurred in 23 hour lockdown units. Many more prisoners had attempted suicide. Jennifer R. Wynn & Alisa Szatrowski, *Hidden Prisons: Twenty-Three-Hour Lockdown Units in New York State Correctional Facilities*, 24 PACE L. REV. 497, 526 (2004).

⁸⁴ See Bruno M. Cormier & Paul J. Williams, *Excessive Deprivation of Liberty*, 11 CAN. PSYCHIATRIC ASS'N J. 470, 470-84 (1966).

⁸⁵ Henri N. Barte, *L'Isolement Carcéral*, 28 PERSP. PSYCHIATRIQUES 252, 252 (1989).

⁸⁶ GIBBONS & KATZENBACH, *supra* note 10, at 52. Recommendations of the Commission on Safety and Abuse in America's Prisons include: (1) make segregation a last resort; (2) make it more productive; (3) end isolation; (4) protect mentally ill prisoners. *Id.* at 61.

year-old mother of three who was housed in the segregation unit of a New Jersey prison described her experience of isolation this way:

I never seen the sky, or felt the warmth of the sun, or a breeze pass by me, the trees and grass or a rain drop. I had a small narrow window which does not open, but all I could see was brick walls and nothing more. . . . Then one day I could not stand it and I so desperately need to feel real air, so I started to scrape the seal from the window with my finger tips. . . . For three months . . . I scraped and scraped where my fingers bled, but I managed . . . to inhale a very small amount of air but it was all I needed in order to survive.⁸⁷

3. Dehumanization

Isolation is one extreme form of dehumanization, but prisoners in the general population suffer other forms. One former inmate recalls that he was told by the guards that their purpose upon a prisoner's entry was to "break the spirit and resolve" of the men.⁸⁸ To do this, guards would throw the handcuffed and chained prisoners' belongings into a pile, and order them to clean up the mess, laughing and smirking all the while.⁸⁹ Complaints about particular cellmates resulted in the complainant being assigned more violent cellmates.⁹⁰ The inmate testified that he believes the inhumanity and degradation he and others suffered in U.S. prisons is comparable to that suffered by foreign prisoners in Abu Ghraib.⁹¹

Certainly there are constant opportunities for methods of degradation during the frequent searches of bodies and cells,⁹² the daily series of orders about eating, showering and moving about, and the administrative determinations on conditions of confinement, which are substantially left to the discretion of prison officials. Prisons may place more than one prisoner in a single cell,⁹³ and they

⁸⁷ *Id.* at 57.

⁸⁸ Letter from Jeffrey Scott Hornoff to Comm. on Safety & Abuse, Vera Inst. of Justice 3 (Apr. 9, 2005), available at http://prisoncommission.org/statements/hornoff_scott.pdf.

⁸⁹ *Id.* at 2-3.

⁹⁰ *Id.* at 7.

⁹¹ *Id.* at 9.

⁹² See *Hudson v. Palmer*, 468 U.S. 517, 526 (1984) (stating there is no Fourth Amendment right "within the confines of a prison cell").

⁹³ *Rhodes v. Chapman*, 452 U.S. 337, 352 (1981).

may transfer an inmate, without cause and without a hearing, to a remote part of the state or even to another state, far from family and friends.⁹⁴ Prison officials may prevent a prisoner from seeing his child,⁹⁵ and may deny visitors altogether if the inmate has broken a rule.⁹⁶

Significantly, it is often a mentally ill prisoner who violates a prison rule, thereby risking segregation and exacerbation of mental illness.⁹⁷ Jamie Fellner, the Director of Human Rights Watch, said recently, “Prisons are woefully ill-equipped for their current role as the nation’s primary mental health facilities.”⁹⁸ The U.S. Department of Justice estimates that 16% of all jail admissions are people suffering from mental illness, and that 47% of these are nonviolent offenders.⁹⁹ Various reports have estimated the number of mentally ill inmates in U.S. prisons at 350,000 to 500,000.¹⁰⁰ A former warden reported that

⁹⁴ See *Meachum v. Fano*, 427 U.S. 215, 225 (1976), in which the Court stated that transfer or placement of a prisoner falls within the “wide spectrum of discretionary actions that traditionally have been the business of prison administrators rather than of the federal courts.” The Court also held that due process does not create a liberty interest in prisoners being free from intrastate prison transfers or transfers to maximum security facilities, even with more burdensome conditions, because such transfers are “within the normal limits or range of custody which the conviction has authorized the State to impose.” *Id.* For a discussion on due process limits, see *infra* Part III.

⁹⁵ A prisoner’s history and convictions will be considered in determining whether visitation rights with a child should be restricted. See *Cassady v. Moore*, 737 So. 2d 1174, 1177 (Fla. Dist. Ct. App. 1999); *R.J. v. D.K.* 508 N.Y.S.2d 838, 884 (Fam. Ct. 1986).

⁹⁶ Restrictions on prison visitation may be imposed by prison officials so long as such restrictions are necessary to serve legitimate penological objectives, including maintaining discipline. See *White v. Keller*, 438 F. Supp. 110, 118 (D. Md. 1977).

⁹⁷ See Haney, *supra* note 76, at 142 (noting overrepresentation of mentally ill prisoners in supermax segregation units, and that mentally ill prisoners experience greater difficulty conforming to “rigidly enforced rules and highly regimented procedures” of prison). According to the Commission on Safety and Abuse in America’s Prisons, “[t]he most conservative estimate of prevalence — 16 percent — means that there are at least 350,000 mentally ill people in jail and prison on any given day. Other estimates of prevalence have yielded much higher rates, even of ‘serious’ mental disorders — as high as 36.5 percent or 54 percent when anxiety disorders are included.” GIBBONS & KATZENBACH, *supra* note 10, at 43.

⁹⁸ Press Release, Human Rights Watch, Number of Mentally Ill in Prisons Quadrupled (Sept. 6, 2006), available at <http://hrw.org/english/docs/2006/09/06/usdom14137.htm>.

⁹⁹ PAULA DUTTON, DEP’T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: MENTAL HEALTH AND TREATMENT OF INMATES AND PROBATIONERS 1 (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/mhtip.pdf>.

¹⁰⁰ *Id.*

in Oregon it was not unusual to have half the segregation beds occupied by mentally ill prisoners.¹⁰¹

In the 1990s a few prisons went so far as to revive the use of chain gangs. In Arizona, women and children work, chained to one another, as they did when the practice was condemned forty years ago.¹⁰² Other states, such as Florida, also institute chain gangs but try to inoculate the term by calling it “restricted labour gangs.”¹⁰³ Prisoners are chained at the ankle, made to work eight-hour days, five days a week cleaning outside the prison. They are supervised by guards carrying shotguns and mace who are ordered to fire one warning shot and then shoot those who attempt to escape.¹⁰⁴ Alabama, however, abandoned a similar practice in 1996 because the practice was both inefficient and unsafe.¹⁰⁵

Everyone suffers in prison, but women prisoners suffer disproportionately. Women comprise 7% of the total prison population.¹⁰⁶ Most are mothers separated from their children.¹⁰⁷ Many have been sexually or psychologically abused prior to their incarceration, which leaves them especially vulnerable to the deprivations of prison life. Their mental and physical health tends to

¹⁰¹ See GIBBONS & KATZENBACH, *supra* note 10, at 43.

¹⁰² *Sheriff Runs Female Chain Gang*, CNN.COM, Oct. 29, 2003, <http://www.cnn.com/2003/US/Southwest/10/29/chain.gang.reut/>; Transcript of CNN Live Today (Mar. 11, 2004), <http://transcripts.cnn.com/TRANSCRIPTS/0403/11/t.01.html>.

¹⁰³ Amnesty Int'l, *Florida Reintroduces Chain Gangs*, AI Index AFR 51/02/96, Jan. 1, 1996, available at <http://web.amnesty.org> (follow “library” hyperlink; then enter “AMR 51/002/1996” in “search by AI Index” field); see also Alexander Lichtenstein, *Good Roads and Chain Gangs in the Progressive South: “The Negro Convict Is a Slave,”* 59 J. S. HIST. 85, 87 (1993) (noting historical use of term “conscripted labor”). It scarcely bears reminding that it is poor and minority citizens who are serving prison sentences, and our nation’s history of slavery and Jim Crow Laws ought to make claims of racial injustice in prison deserving of special scrutiny by the courts.

¹⁰⁴ See *Recent Legislation: Criminal Law — Prison Labor — Florida Reintroduces Chain Gangs*, 109 HARV. L. REV. 876, 876 (1996); Amnesty Int'l, *supra* note 103; see also 1995 Fla. Sess. Law Serv. 95-283 (West).

¹⁰⁵ *Chain Gangs Are Halted in Alabama*, N.Y. TIMES, June 21, 1996, at A14 (noting statement of Attorney Richard Cohen of Southern Poverty Law Center).

¹⁰⁶ See The Sentencing Project, *supra* note 30.

¹⁰⁷ In 1991, the U.S. Department of Justice Bureau of Justice Statistics conducted the most comprehensive survey to date of women confined in prisons. The study estimated that 75% of women in prison are mothers. TRACY L. SNELL, U.S. DEPT OF JUSTICE, *WOMEN IN PRISON 6* (1991), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/wopris.pdf>. Further, two-thirds of those mothers have children under age 18. *Id.* at 1.

be worse than that of male prisoners.¹⁰⁸ Finally, while in prison their children may be taken from them by the state.¹⁰⁹

In many respects, the current prison experience can be traced to the massive growth in the prison population with which we began this discussion. Prisons today may hold two to three times their designated capacity, and such overcrowding severely affects all other prison conditions. It drains resources and forces prisoners into closer contact than is tolerable or healthy. Greater numbers force institutions to double- and triple-cell inmates, thereby creating a host of health and security problems.¹¹⁰ It generates neglect of individual needs, which correspondingly leads to a need for greater control of the inmates, including long-term isolation.¹¹¹

The mushrooming costs of prisons have left few resources. Prior to the 1990s most prisoners could choose from a variety of educational programs, including grammar and high school courses, vocational training, and college courses, many offered by local community, state, and private institutions. When inmates couldn't pay for the courses, they received federal financial aid in the form of Pell Grants. In 1994 Congress eliminated the availability of Pell Grants for prisoners¹¹² and rising costs led some states to outsource their prison systems or services to for-profit private companies.¹¹³ One prisoner noted that as the numbers of prisoners multiplied in the 1980s, gangs formed, disease and violence became more prevalent, and a lockdown mentality replaced the more reasonable approach to prisoner care that preceded it.¹¹⁴ The same prisoner stated, "Fear and violence had changed Graterford [Prison] as profoundly as it had changed me. . . .

¹⁰⁸ JAMES & GLAZE, *supra* note 33, at 3.

¹⁰⁹ HUMAN RIGHTS WATCH, *COLLATERAL CASUALTIES: CHILDREN OF INCARCERATED DRUG OFFENDERS IN NEW YORK* 7 (2002), available at hrw.org/reports/2002/usany/USA0602.pdf.

¹¹⁰ The Commission Report criticizes official data that concludes there is a decline in prison crowding, stating that one reason for the misleading data is the double- and triple-celling of prisoners. GIBBONS & KATZENBACH, *supra* note 10, at 104.

¹¹¹ See, e.g., *id.* at 11-17 (highlighting alarming prevalence of neglect concerning prisoners' medical, educational, and emotional needs).

¹¹² See Eric D. Blumenson & Eva S. Nilsen, *How to Construct an Underclass, or How the War on Drugs Became a War on Education*, 6 J. GENDER, RACE & JUST. 61, 74 (2002).

¹¹³ PAIGE M. HARRISON, U.S. DEP'T OF JUSTICE BUREAU OF JUSTICE STATISTICS, *PRISON AND JAIL INMATES AT MIDYEAR 2002*, at 1 (2003). Harrison reports 86,626 inmates are held in privately operated prisons, with the largest number of private facility inmates held in Texas, Oklahoma, and federal prisons. *Id.* at 4; see also Editorial, *Death Behind Bars*, N.Y. TIMES, Mar. 10, 2005, at A26 (reporting Prison Health Services is largest private prison health provider, responsible for 10% of prisoners in United States).

¹¹⁴ HASSINE, *supra* note 47, at 35-36.

All the evils of the decaying American inner city were being compressed into one overcrowded prison.”¹¹⁵

C. *Everlasting Punishment: “Collateral Consequences” After Release*

More than 600,000 people will be released from prison this year.¹¹⁶ Most will be given a few dollars and the clothes on their back, and told to begin new crime-free lives. These men and women will return to communities economically weakened by crime and the absence of male providers. There they will join a substantial felon underclass of twelve million Americans with felony convictions, which is 8% of the working-age population.¹¹⁷ In the words of one prison official, they are “the collateral damage of the prison-building boom.”¹¹⁸ In certain neighborhoods, everyone has at least one friend or relative who has been in prison. Half of all teenagers in juvenile prisons have parents who have been incarcerated.¹¹⁹

These newly released prisoners are far less likely than their counterparts of twenty years ago to find jobs, maintain stable family lives, and stay out of the kind of trouble that leads back to prison.¹²⁰ Even when paroled individuals find jobs, they earn only half as much as similarly situated people who have not been incarcerated. This results from a combination of factors. The large number of ex-prisoners creates intense competition for low-skilled jobs.¹²¹ The

¹¹⁵ *Id.* at 39. The author recounts the proliferation of prison gangs, saying “violence escalated, and gang leadership emerged; the administration gradually ceded control of the institution to independent gang tribes. During this period of gang expansion, there was no method to the madness.” *Id.* at 45.

¹¹⁶ Joan Petersilia reports that in 2002 approximately 635,000 prisoners reentered society. JOAN PETERSILIA, *WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY*, at v (2003).

¹¹⁷ Nationally, an estimated 5.3 million Americans are denied the right to vote as a result of laws that prohibit voting by felons or ex-felons. The Sentencing Project, *Felony Disenfranchisement*, <http://www.sentencingproject.org/IssueAreaHome.aspx?IssueID=4> (last visited Sept. 6, 2007).

¹¹⁸ Fox Butterfield, *Getting Out: Often, Parole Is One Stop on the Way Back to Prison*, N.Y. TIMES, Nov. 29, 2000, at A1.

¹¹⁹ Fox Butterfield, *Parents in Prison: As Inmate Population Grows, So Does a Focus on Children*, N.Y. TIMES, Apr. 7, 1999, at A1.

¹²⁰ PETERSILIA, *supra* note 116, at 4. Petersilia reports that “one year after release, as many as 60% of former inmates are not employed in the legitimate labor market.” JOAN PETERSILIA, *When Prisoners Return to the Community: Political, Economic, and Social Consequences*, SENT’G AND CORR. (U.S. Dep’t of Justice, Washington, D.C.), Nov. 2000, at 3.

¹²¹ See Western et. al., *supra* note 45, at 165, 176.

stigma of a criminal record severely narrows opportunities,¹²² especially since the promulgation of laws guaranteeing public access to criminal records, and requiring sex offender registration which, in effect, brands ex-offenders.¹²³

The gutting of rehabilitation programs perpetuates the disadvantages of incarcerated persons. For example, “85% of released prisoners in California are drug or alcohol abusers, 70% to 80% are still jobless after a year, 50% are illiterate and 10% are homeless.”¹²⁴ Only 2% of addicts in California’s prisons received treatment for their addictions while in prison;¹²⁵ and many of them will find themselves back in prison because they test positive for drugs, a technical parole violation. In fact, this type of recidivism is so common that prisoners have developed a slang term calling this cycle “doing life on the installment plan.”¹²⁶

¹²² Until recently, stigma and shame long after imprisonment were viewed as counterproductive to rehabilitation so there were restrictions on the use of criminal records. Now the public’s right to know trumps the right to privacy, and the stigma of a criminal record is generally viewed as deserved punishment. In the law of defamation, it is accepted that a defamed person’s reputation cannot be cured. *Cf.* *United Ins. Co. of Am. v. Murphy*, 961 S.W.2d 752, 760 (Ark. 1998) (Corbin, J., dissenting) (“The reason for distinguishing certain types of defamation is based upon the gravity of the words said; to call someone a criminal or to say that he or she is crooked in his or her business dealings, trade, or profession is so injurious to that person that damage to his or her reputation can clearly be presumed.”).

¹²³ Limited protections against public access also create a significant safety risk. *See* Gitika Ahuja, *Sex Offender Registries Putting Lives at Risk?*, ABC NEWS, Apr. 18, 2006, <http://abcnews.go.com/US/story?id=1855771&page=1>.

¹²⁴ Joan Petersilia, *Behind Bars, Prisons Can Be Cages or Schools*, L.A. TIMES, Oct. 16, 2005, at 1 (describing how California’s 165,000 prisoners are ill-prepared for reentry with “the vast majority of them having serious social, physical, and mental health problems”). Nationwide, the figures are similar. The Re-Entry Policy Council reports that 75% of prisoners are drug or alcohol abusers, 66% have not completed high school, 50% earned less than \$600 per month at the time of incarceration, and more than 10% are homeless. *See* RE-ENTRY POLICY COUNCIL, COUNCIL OF STATE GOV’TS, REPORT OF THE RE-ENTRY POLICY COUNCIL: CHARTING THE SAFE AND SUCCESSFUL RETURN OF PRISONERS TO THE COMMUNITY 49 (2005), *available at* <http://www.reentrypolicy.org> (follow “The Report” hyperlink; then follow “Downloads” hyperlink; then follow “Chapter One, Part B: Addressing Core Challenges” hyperlink).

¹²⁵ Joan Petersilia & Robert Weisberg, *Parole in California: It’s a Crime*, L.A. TIMES, Apr. 23, 2006, at M2; *see also* U.S. SENTENCING COMM’N, COCAINE AND FEDERAL SENTENCING POLICY 172, tbl.18 (1995) (finding only 14.7% of all incarcerated federal drug defendants are classified as “high level dealers,” while 31.2% are considered low level offenders, or “street dealers”).

¹²⁶ Petersilia & Weisberg, *supra* note 125, at M2.

All these problems help explain the extremely high recidivism rate of released prisoners — 60% according to one study.¹²⁷ But there is another contributor to this high rate of ex-offender social struggles. What prisoners sometimes call “the mark of Cain” remains with them long after their sentence is completed, in the form of numerous and permanent disabilities that attach simply by virtue of their status as ex-felons or ex-convicts.¹²⁸ Marc La Cloche learned this after his release from prison.

Mr. La Cloche served 11 years in New York prisons for first-degree robbery. While behind bars, he turned his life around. He learned a trade, barbering. He even had the image of a barber’s clippers and comb tattooed on his right arm. In 2000, as he prepared to be freed, he applied for a required state license. He was denied it. But that decision was reversed when reviewed by a hearing officer. For a while after his release, Mr. La Cloche worked in a Midtown barber shop. That job did not last long. New York’s secretary of state, who has jurisdiction in these matters, appealed the granting of the license and won. Mr. La Cloche’s “criminal history,” an administrative law judge ruled, “indicates a lack of good moral character and trustworthiness required for licensure.” In plain language, the fact that Mr. La Cloche had been in prison proved that he was unworthy for the trade that the state itself taught him in prison. . . . He is now on public assistance¹²⁹

As George Fletcher has observed, “[T]he idea that you would pay the debt and be treated as a debtor (felon) forever verges on the macabre.”¹³⁰ But the punishment continues for all former prisoners as they discover their obstacles to law-abiding citizenship. The “civil disabilities” faced by ex-offenders differ depending on state and federal law, the nature of the crime, whether the conviction was a felony or

¹²⁷ SOLOMON ET AL., *supra* note 11, at 8 (showing recidivism rate of more than 60%); see Butterfield, *supra* note 118, at A1 (“In 1977, only 788 inmates who had been released on parole were returned to prison in California, compared with 90,000 in 1999.”). The Massachusetts Department of Corrections reports a 40% recidivism rate. See Davis Bushnell, *Out of Jail, in the Job Market, and Behind the Eight Ball*, BOSTON GLOBE, Nov. 7, 2004, at G6.

¹²⁸ Webb Hubbell, *The Mark of Cain*, S.F. CHRON., June 10, 2001, at D1.

¹²⁹ Clyde Haberman, *He Did Time, So He’s Unfit to Do Hair*, N.Y. TIMES, Mar. 4, 2005, at B1.

¹³⁰ George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1897 (1999).

misdeemeanor, the time elapsed since conviction or imprisonment, and whether the person is adult or juvenile, citizen or alien. These civil disabilities are sometimes triggered by the conviction and other times by actual imprisonment. While some disabilities can be removed through a state or federal reinstatement or renewal procedure, others are permanent.¹³¹

In recent years, post-conviction disabilities have multiplied in number and complexity.¹³² Here I list only some of the common disabilities, also known as “collateral consequences”:¹³³ (a) ineligibility for state and federal licenses for certain professions;¹³⁴ (b) ineligibility for certain government jobs;¹³⁵ (c) ineligibility to vote in state or federal elections;¹³⁶ (d) ineligibility for public office;¹³⁷ (e) ineligibility for jury service;¹³⁸ (g) ineligibility for public housing and other public welfare benefits;¹³⁹ (f) ineligibility for some educational loan or grant benefits;¹⁴⁰ (h) ineligibility for a driver’s license;¹⁴¹ (j) sex

¹³¹ For an excellent discussion of the public’s attitude toward collateral consequences and a comprehensive account of various state and federal bars for ex-felons, see Milton Heumann, Brian K. Pinaire & Thomas Clark, *Beyond the Sentence: Public Perceptions of Collateral Consequences for Felony Offenders*, CRIM. L. BULL., Jan.-Feb. 2005, at 2.

¹³² Travis, *supra* note 5, at 18.

¹³³ For more detailed discussions of the particular disabilities noted here, see *id.*; Gabriel Chin & Richard W. Holmes, Jr., *Effective Assistance of Counsel and the Consequences of Guilty Pleas*, 87 CORNELL L. REV. 697, 705-06 (2002).

¹³⁴ See 18 U.S.C. §§ 3563(b)(6), 3583(d) (2000); 21 U.S.C. § 862(d) (2000); U.S. SENTENCING GUIDELINES MANUAL §§ 5F1.5(a), 5F1.6 (2002) (setting forth limitations on federal licenses to drug offenders).

¹³⁵ See 29 U.S.C. §§ 504, 1111 (2000) (listing positions in labor unions or employee benefit plans for which convicts are ineligible).

¹³⁶ As of 2003, 36 states permitted all felons to vote after prison release or sentence completion; another seven states permitted some felons to vote after sentence completion; and in the remaining seven states the right to vote can be restored only after executive or legislative clemency. AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 37 n.47 (3d ed. 2004) (citing SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 3 (2004), available at <http://www.sentencingproject.org/publicationdetails.aspx?publicationID=335>).

¹³⁷ See Kathleen M. Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION 10, 13 (1996) (noting 25 states restrict felons from public office).

¹³⁸ See *id.* at 13.

¹³⁹ See 21 U.S.C. § 862a (authorizing lifetime ban on food stamps and federally funded public assistance for drug felons unless state elects otherwise).

¹⁴⁰ See Higher Education Reauthorization Act of 1998, 20 U.S.C. § 1091(r) (2000).

¹⁴¹ See, e.g., 23 U.S.C. § 159 (2000) (providing for revocation or suspension of driver’s license upon conviction for any drug offense); FLA. STAT. ANN. § 322.055(2)

offender registration laws that limit where offender can live, in some cases subjecting him to jail because he can't find a place to live.¹⁴²

These disabilities ensure further stigma, deprivation, and despair to people affected by incarceration. As Debbie Mukamal, director of the Prisoner Reentry Institute at John Jay College of Criminal Justice, states, "One barrier may not be that big a deal. . . . You can't get housing, . . . you can't get ID and no one will hire you. Cumulatively, that sends a signal: You're not wanted."¹⁴³ Perhaps these disabilities are manifestations of what has been called the "persistent exclusionary impulse," that is, the tendency to permanently brand wrongdoers.¹⁴⁴

These collateral criminal punishments have the biggest impact on minorities. While most former prisoners have difficulty finding jobs, black ex-convicts have the hardest time, especially those with drug convictions.¹⁴⁵ Young minority men have an additional marital disadvantage as well. "In a sense, they take their bars with them because their prior criminal record reduces their chance of finding gainful employment, and it makes them less attractive as marriage partners and less able to provide for their children."¹⁴⁶ As for their

(West Supp. 2007) (creating two-year ineligibility after conviction of controlled substance offense).

¹⁴² See Corinne A. Carey, *Banishment Is Not the Answer*, S.F. CHRON., Jan. 31, 2005, at B5; Regina B. Schofield, U.S. Dep't of Justice, *The National Sex Offender Public Registry*, <http://www.nicic.org/downloads/pdf/misc/nsoprarticle1.pdf> (last visited Sept. 7, 2007).

¹⁴³ Gary Fields, *Arrested Development: After Prison Boom, a Focus on Hurdles Faced by Ex-Cons*, WALL ST. J., May 24, 2005, at A1.

¹⁴⁴ See Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 560 (2004). Professor Dubber cautions that "the more permanent the label, the greater the incompatibility of the punishment with the autonomy of the punished. There was a time, of course, when offenders were regularly branded with markers identifying their crime of conviction." *Id.* (citing THOMAS JEFFERSON, BILL FOR PROPORTIONING CRIMES AND PUNISHMENTS (Julian P. Bond et al. eds., Princeton Univ. Press 1950) (1778) (discussing disfigurement as penalty for branding)). He further cautioned, "These markers became identifying features that defined the person bearing them and denied the possibility of behavior inconsistent with them. . . . [T]he capacity for autonomous choice was denied, and so was the opportunity to exercise it." *Id.* at 560-61.

¹⁴⁵ Paul von Zielbauer, *Study Shows More Job Offers for Ex Convicts Who are White*, N.Y. TIMES, June 17, 2005, at B1 (citing Devah Pager and Bruce Western study finding black ex-offenders waited three times as long as white ex-offenders to get callbacks or job offers).

¹⁴⁶ David T. Courtwright, *The Drug War's Perverse Toll*, ISSUES IN SCI. & TECH. ONLINE, Winter 1996, <http://www.issues.org/13.2/courtwh.htm>. A report on the effect of incarceration found that in 1986 the number of adults entering prison on drug offenses increased more than sevenfold and that the vast majority were African

political rights, in the 1996 election it was estimated that 1.4 million black men were disenfranchised.¹⁴⁷

Bans on voting and other attributes of citizenship constitute far more than a denial of the chance to participate in the community. The removal of the franchise also carries with it great symbolic meaning — being excluded from the body politic. Judith Skhlar has argued that earning and voting are the mainstays of American citizenship.¹⁴⁸ Her point is that voting and social participation do not matter nearly so much as being excluded from doing so.¹⁴⁹ She argues that denial of these attributes of citizenship are denials of dignity that make those affected feel dishonored as well as powerless and poor. To the Court, however, disenfranchisement is simply part of the state's regulatory powers, notwithstanding that the franchise is the essence of democratic participation, and that laws depriving citizens of this fundamental right must promote a compelling state interest.¹⁵⁰ There has been a great deal of scholarly criticism of voter disenfranchisement, but courts have been steadfast in finding no violation under Section 2 of the Fourteenth Amendment, which allows states to deny voting privileges to felons.¹⁵¹

American. Restrictions in access to jobs, health benefits, housing, and education exacerbated health disparities already evident in the community and had adverse effects on offender, family, and community. *Increased Incarceration of African Americans May Reduce the Health and Well-Being of Their Communities*, *supra* note 45, at 1.

¹⁴⁷ THE SENTENCING PROJECT, FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES 1 (2007), http://sentencingproject.org/Admin/Documents/publications/fd_bs_fdlawsinus.pdf.

¹⁴⁸ JUDITH SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 26 (1991).

¹⁴⁹ *Id.* at 38.

¹⁵⁰ See *Richardson v. Ramirez*, 418 U.S. 24, 54-55 (1974) (stating no violation due to affirmative sanction in section 2 of Fourteenth Amendment); see also *Romer v. Evans*, 517 U.S. 620, 634 (1996) (stating no denial of equal protection when felons denied right to vote).

Just what the compelling state interest is in denying so many former prisoners the franchise is hard to discern. Is it that to allow felons to vote taints the ballot process because of their bad character? Are former prisoners likely to engage in corrupt voting practices as suggested by the Ninth Circuit? See *Dillenburg v. Kramer*, 469 F.2d 1222, 1224 (9th Cir. 1972). Or is this simply more punishment due them because they broke the law and don't deserve full citizenship?

¹⁵¹ See, e.g., Gabriel J. Chin, *Reconstruction, Felon Disenfranchisement, and the Right to Vote: Did the Fifteenth Amendment Repeal Section 2 of the Fourteenth Amendment?*, 92 GEO. L.J. 259 (2004) (discussing interaction of Fifteenth and Fourteenth Amendments); Nora V. Demleitner, *Preventing Internal Exile: The Need For Restrictions on Collateral Sentencing Consequences*, 11 STAN. L. & POL'Y REV. 153 (1999) (discussing collateral consequences and Fourteenth Amendment); Marc Mauer, *Mass*

II. THE VANISHING EIGHTH AMENDMENT

Present day punishments are often undeserved, too long, and served under inhumane and violent conditions. We might have come much closer to a humane and effective criminal justice system had the Supreme Court developed its initial understanding of the Eighth Amendment as begun in *Weems v. United States*,¹⁵² *Trop v. Dulles*,¹⁵³ and, in important respects, *Estelle v. Gamble*¹⁵⁴ and *Hutto v. Finney*.¹⁵⁵ Instead, the Supreme Court reversed course in the 1980s and all but eviscerated Eighth Amendment protections.

Weems and *Trop* represent the view that the Eighth Amendment guarantees every citizen a right of human dignity against which all sentences should be assessed. In *Weems* the Court found that the sentence of hard labor, carrying an ankle chain, and post-release deprivations was disproportionate to the crime of falsifying an official document. Its harshness violated the Eighth Amendment because it destroyed the offender's humanity.¹⁵⁶ In *Trop*, loss of citizenship for the crime of wartime desertion was too severe a punishment to fit any crime.¹⁵⁷ Even though the punishment did not involve physical mistreatment or primitive torture, it destroyed the individual's identity and his place in the community, thereby denying him the crowning protection of the Eighth Amendment — human dignity.¹⁵⁸ In these cases the Supreme Court viewed the Eighth Amendment as a moral bulwark to guide future generations, and not merely language to be applied formalistically.

The *Weems* and *Trop* cases concerned criminal sentences as issued by a trial court. In *Estelle*, the Court began to explore the Eighth Amendment's application to sentences as they were actually experienced.¹⁵⁹ An important impetus in this direction was a 1968 Menninger Foundation study that was a searing indictment of the American prison system.¹⁶⁰ The study lent support to Eighth

Imprisonment and Disappearing Voters, in *INVISIBLE PUNISHMENT*, *supra* note 5, at 50, 51 (same).

¹⁵² *Weems v. United States*, 217 U.S. 349, 368-77 (1910).

¹⁵³ *Trop v. Dulles*, 356 U.S. 86, 99-103 (1958).

¹⁵⁴ *Estelle v. Gamble*, 429 U.S. 97, 101-06 (1976).

¹⁵⁵ *Hutto v. Finney*, 437 U.S. 678, 685-87 (1978).

¹⁵⁶ *Weems*, 217 U.S. at 412-13 (White, J., dissenting).

¹⁵⁷ *Trop*, 356 U.S. at 102.

¹⁵⁸ *Id.* at 100. The Court also noted that nearly all civilized nations agreed that statelessness could not be imposed as punishment. *Id.* at 102.

¹⁵⁹ *Estelle*, 429 U.S. at 103-07.

¹⁶⁰ KARL MENNINGER, *THE CRIME OF PUNISHMENT* (Viking Press 1968).

Amendment challenges of prison sentences and offered protections against the reasonably foreseeable and inhumane consequences of that sentence. Prisoners necessarily depended on prison officials to protect them from violence, and to tend to their health, diet, sleep, bathing, and exercise needs. A prison's failure to address these needs drastically worsened the nature of the imposed punishment triggering Eighth Amendment protections.¹⁶¹

In *Estelle*, the Supreme Court held deliberate indifference to the serious medical needs of prisoners constituted "unnecessary and wanton infliction of pain" forbidden by the Eighth Amendment.¹⁶² Finding the Eighth Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency," the Court concluded that the challenged conditions were inconsistent with contemporary standards of decency.¹⁶³ The Court was unwilling to allow prison officials to take cover behind claims of unintentional conduct, finding that a series of abortive responses to complaints or, perhaps, even a single act if it shows deliberate indifference to a prisoner's serious medical needs could be actionable.¹⁶⁴ Prison officials had a duty to protect prisoners' lives and health, and the Court compelled states to raise their prisons to acceptable, civilized standards.

According to *Weems*, *Trop*, and *Estelle*, the Eighth Amendment rules out punishments that inflict unnecessary pain,¹⁶⁵ are torturous,¹⁶⁶ or are imposed without penological justification.¹⁶⁷ Today, however, such punishments may well survive Eighth Amendment review because the substance of the Amendment has been diminished and because of procedural hoops imposed by the recent Supreme Court. Indeed, it is as if there are two entirely different punishments at issue in contemporary cases — the punishment as experienced by the prisoner, and the punishment as described by the courts. Under

¹⁶¹ *Estelle*, 429 U.S. at 103.

¹⁶² *Id.* (citing *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (finding extra process was necessary to ensure that state only executed those who truly deserved to die)).

¹⁶³ *Id.* at 102 (quoting *Jackson v. Bishop*, 404 F.2d 571, 579 (8th Cir. 1968)).

¹⁶⁴ *Id.* at 105. The Court remanded *Estelle* due to insufficient evidence against medical personnel but asked the Court of Appeals to consider whether claim existed against Department of Corrections. *Id.* at 108.

¹⁶⁵ *Weems v. United States*, 217 U.S. 349, 372 (1910); *see also Coker v. Georgia*, 433 U.S. 584, 592 (1977) (finding crime of rape was not deserving of death penalty).

¹⁶⁶ *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Weems*, 217 U.S. at 368.

¹⁶⁷ *Gregg v. Georgia*, 428 U.S. 153, 182-83 (1976); *Trop*, 356 U.S. at 111-12; *Weems*, 217 U.S. at 380-81.

current Eighth Amendment jurisprudence, a challenged punishment will never be considered holistically. Instead, the Court will divide it up into parts, each to be analyzed separately without regard to the punishment's cumulative, spirit-crushing impact.¹⁶⁸ Separating the various strands of punishment eliminates consideration of the full extent of the punishment and its effects on the prisoner, and greatly facilitates rejection of an Eighth Amendment challenge.¹⁶⁹ Extremely lenient tests applied to each isolated aspect of the punishment exacerbate this failure to see the big picture, to which I now turn.

A. *Post-Release Roadblocks and Exclusions*

From civic and economic life, the challenges released prisoners face are the punishment that never ends. Many of these challenges do not count in Eighth Amendment review. As devastating to one's life prospects, spirit, and self-esteem as these "civil disabilities" may be, under the law they are not punishment at all, so long as the court finds a regulatory, remedial, or other "non-punitive" purpose for them.¹⁷⁰ And courts usually find this purpose.¹⁷¹ Indeed, even defense

¹⁶⁸ In one particularly absurd and cruel example, on February 26, 2007, the Supreme Court rejected a certiorari petition from an Arizona defendant who was sentenced to 200 years for possession of 20 pornographic pictures of children — 10 years for each picture, to be served consecutively. See *Berger v. Arizona*, 127 S. Ct. 1370, 1370 (2007); *State v. Berger*, 134 P.2d 378, 379 (Ariz. 2006). The Arizona court never considered whether that punishment was disproportionate, choosing instead to treat each 10-year sentence in isolation from the others. See *id.* at 393.

¹⁶⁹ Canada requires the punishment in its totality, including the conditions under which it is served, to be considered under its "cruel and unusual" prohibition. See *infra* note 278 and accompanying text. See also *Laaman v. Helgemoe*, 437 F. Supp. 269, 323 (D.N.H. 1977), where the court said, "[T]he touchstone is the effect upon the imprisoned. Where the cumulative impact of the conditions of incarceration threatens the physical, mental, and emotional health and well-being of the inmates and/or creates a probability of recidivism and future incarceration, a federal court must conclude that imprisonment under such conditions does violence to our societal notions of the intrinsic worth and dignity of human beings and, therefore, contravenes the Eighth Amendment's proscription against cruel and unusual punishment."

¹⁷⁰ Courts have distinguished between disabilities that are punitive and those that are regulatory or remedial when applying Sixth Amendment protections. See Melanie D. Wilson, *In Booker's Shadow: Restitution Forces a Second Debate on Honesty in Sentencing*, 39 IND. L. REV. 379, 402 (2006). Professor Carol Steiker discerns a cacophony of doctrines associated with different constitutional provisions affecting punishment and observes that "[o]n the rare occasion when the Court has attempted to define punishment more globally, it has resorted to a list of 'factors' . . . for which it has been unable to offer an underlying rationale." Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 781 (1997). Occasionally the Supreme Court has looked beyond the legislature's

lawyers are unlikely to mention these stigmas to their clients. Most of these challenges are unknown by the offender until after prison.

Courts afford an extreme form of deference to legislators by easily accepting legislative claims that post-sentence collateral consequences are “civil” or “remedial.” Some cases have come close to making a legislative label self-justifying and exempt from scrutiny. For example, a recent Seventh Circuit case found that when Congress authorizes an agency rather than a court to impose a sanction, that sanction “is presumptively civil . . . because agency enforcement mechanisms do not contain the same procedural safeguards that criminal proceedings do.”¹⁷²

What has been called a civil death can hardly be remedial only.¹⁷³ Felon disenfranchisement and the denial of government services eliminate the most basic citizenship rights that under *Trop* were deemed unconstitutional.¹⁷⁴ State-created obstacles to education,

characterization of a penalty as civil, finding it punitive and therefore requiring some criminal procedural protections. See *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) (holding amount of forfeiture violated Eighth Amendment bar on excessive fines); see also *Chin & Holmes*, *supra* note 133, at 723-35. For further discussion, see *Blumenson & Nilsen*, *supra* note 112, at 83-108. Regardless of how these disabilities are categorized, they are experienced as additional punishment by former prisoners and ex-felons, and commentators have recommended that they be expressly included alongside other sentences in criminal statutes. The American Bar Association has recommended retaining only those disabilities that are related to the crime of conviction and that others should be abolished. Notice of such disabilities and their duration should be part of the sentencing procedure. The defendant should be advised of procedures for removal of disabilities that are part of his sentence. See AM. BAR ASS'N, *supra* note 136, at 1, ch. 19.

¹⁷¹ Generally, legal challenges to collateral consequences or post-conviction disabilities have been unsuccessful, except when the consequence of a conviction is deportation. See, e.g., *State v. Yanez*, 782 N.E.2d 146, 149 (Ohio Ct. App. 2002) (noting 18 states require advisement about potential consequences). Some challenges have been based on due process or equal protection grounds, and others on Sixth and Eighth Amendment grounds. See, e.g., *United States v. Littlejohn*, 224 F.3d 960, 965 (2000) (denying relief to defendant claiming insufficient notice that conviction made him ineligible for welfare benefits, but saying he had right to such notice at time of plea colloquy).

¹⁷² *Turner v. Glickman*, 207 F.3d 419, 429 (7th Cir. 2000) (citing *Helvering v. Mitchell*, 303 U.S. 391, 402 (1938)).

¹⁷³ See Alec C. Ewald, “Civil Death”: *The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1059-63. See generally RE-ENTRY POLICY COUNCIL, *supra* note 124 (containing recommendations for policymakers to assist ex-offenders in reentry).

¹⁷⁴ *Trop v. Dulles*, 356 U.S. 86, 103 (1958). In *Trop*, the Court said states could lawfully deprive criminals of the franchise in an effort to govern voter eligibility. *Id.* at 97. See generally *SHKLAR*, *supra* note 148 (exploring significance of voting).

employment, housing, voting, jury service, and other participation in politics are roadblocks to rehabilitation and assaults on human dignity that could be understood as cruel and unusual punishment.¹⁷⁵ Yet, under the Court's current view, no constitutional weight is given to the multifold assaults on dignity that arise when ex-prisoners are continuously prevented from becoming fully participating members of their families and their communities.

B. *Torturous, Unsafe, or Substandard Conditions in Prison*

While prison conditions are subject to the Eighth Amendment in theory, they often are not in practice. In part this is due to the 1995 Prison Litigation Reform Act ("PLRA"),¹⁷⁶ ostensibly designed to eliminate frivolous lawsuits, or, in the Supreme Court's description, "to reduce the quantity and improve the quality of prisoner suits."¹⁷⁷ With its provisions mandating court prescreening of prisoner suits, its new filing fees, its ban on mental or emotional injury claims unaccompanied by physical injury, and its restrictions on attorneys fees and special master appointments, the Act has led to a substantial reduction in prison conditions litigation.¹⁷⁸

It is not accidental that despite the mushrooming of supermax prisons and isolation practices, the Supreme Court has never considered the constitutionality of solitary confinement under the Eighth Amendment.¹⁷⁹ Those claims still cognizable by courts are

¹⁷⁵ See discussion *infra* Part III (discussing human rights critique); see also Blumenson & Nilsen, *supra* note 112, at 107 (discussing effects of denial of educational benefits).

¹⁷⁶ 42 U.S.C. § 1997e(a) (2000).

¹⁷⁷ Porter v. Nussle, 534 U.S. 516, 516 (2002).

¹⁷⁸ "[L]itigation has probably been the single most important source of change in prisons and jails during the past forty years." GIBBONS & KATZENBACH, *supra* note 10, at 84 (quoting Malcolm M. Feeley & Van Swearingen, *The Prison Conditions Cases and the Bureaucratization of American Corrections: Influences, Impacts, and Implications*, 24 PACE L. REV. 433, 442 (2004)). After Congress passed the 1996 Act, however, litigation declined, and court monitoring of prisons diminished. Brian J. Ostrom, Roger A. Hanson & Fred L. Cheesman II, *Congress, Courts and Corrections: An Empirical Perspective on the Prison Litigation Reform Act*, 78 NOTRE DAME L. REV. 1525, 1534, 1543 (2003).

¹⁷⁹ The Court addressed the issue of punitive detention in *Hutto v. Finney*, but did not expressly prohibit this form of punishment on Eighth Amendment grounds. 437 U.S. 678, 685-86 (1978) (finding Eighth Amendment violation because isolation cells were overcrowded and unsanitary, and segregated inmates received inadequate food and unprofessional treatment from correctional officials). The Court did say, however, that the length of time an inmate is confined to isolation and the conditions he experiences while confined would be relevant in an Eighth Amendment claim. *Id.*

extremely difficult to litigate because the Court has narrowed the basis for Eighth Amendment claims using *Estelle's* standard of deliberate indifference, making the prisoner's burden nearly impossible.¹⁸⁰ Even inhumane prison conditions may be beyond the reach of the Eighth Amendment unless it can be shown that the prison officials intentionally failed to remedy them after notice.¹⁸¹ Thus, the official's state of mind may be more important to the Court's analysis than the nature of the punishment. A recent example of this difficult standard can be seen in *Farmer v. Brennan*, where the Court found that an Eighth Amendment violation occurs only if the prison official "knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it."¹⁸²

This approach to the deliberate indifference standard takes the Court far from its earlier concern for human dignity. To the *Trop* Court, the Eighth Amendment prohibited punishment that offended "the evolving standards of decency that mark the progress of a maturing society."¹⁸³ If the Eighth Amendment still means what it did in *Trop*, then whether there is a violation should turn on the nature of the punishment, not a prison official's state of mind.¹⁸⁴ While an intent requirement may be reasonable when a prisoner claims deliberate indifference to medical problems, it makes no sense when applied to general conditions claims, which can be cumulative and not attributable to a particular person or persons. By forcing the prisoner to prove intent, the Court has backed away from its view that "the conditions are themselves part of the punishment, even though not specifically 'meted out' by a statute or judge."¹⁸⁵ The intent-based test

at 678.

¹⁸⁰ *Farmer v. Brennan*, 511 U.S. 825 (1994) (rejecting claim that objective conditions unaccompanied by reckless indifference constituted punishment under Eighth Amendment.) Furthermore, the Court concluded that an Eighth Amendment violation occurs only if a prison official "knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Id.* at 847.

¹⁸¹ *Id.*

¹⁸² *Id.*; see *Wilson v. Seiter*, 501 U.S. 294, 311 (1991) (White, J., concurring) (citing *DeShaney v. Winnebago*, 489 U.S. 189, 198 (1989)). In *Farmer*, the Court addressed the standard stating, "the failure to alleviate a significant risk that an official should have perceived but did not, while no cause for commendation, cannot be condemned as the infliction of punishment." *Farmer*, 511 U.S. at 826.

¹⁸³ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

¹⁸⁴ *Wilson*, 501 U.S. at 301-03 (citing *Estelle v. Gamble*, 429 U.S. 97 (1976)).

¹⁸⁵ *Id.* at 306 (White, J., concurring) (emphasis removed). The Court endeavored to define the relevant standards as follows: "In prison-conditions cases that state of mind [to constitute an Eighth Amendment violation] is one of 'deliberate indifference'

allows courts to entirely ignore the realities of prison life. The test is also incoherent, because even if some level of intent is required to constitute punishment, the Constitution does not restrict the intent inquiry to prison officials alone. A judge who sentences a defendant to a particular prison system should know the conditions under which the defendant will serve his sentence, so the intentional infliction of punishment is surely present even at the sentencing stage.

By refusing to examine prison conditions that do not derive from a particular official's deliberate or reckless indifference, the Court has effectively removed much of prison life from Eighth Amendment protection.¹⁸⁶ Courts like to say that they are not suited to regulate the "day-to-day management" of prisons, and that they should not pretend to be "specialists" in prison administration.¹⁸⁷ But these statements

to inmate health or safety, a standard the parties agree governs the claim in this case. The parties disagree, however, on the proper test for deliberate indifference, which we must therefore undertake to define. . . . This standard of purposeful or knowing conduct is not, however, necessary to satisfy the *mens rea* requirement of deliberate indifference for claims challenging conditions of confinement; 'the very high state of mind prescribed by *Whitley* does not apply to prisoner conditions cases.'" *Farmer*, 511 U.S. at 834-36 (citations omitted).

¹⁸⁶ *But see* (Stevens, J., dissenting) *Turner v. Safley*, 482 U.S. 78, 100 (1987) (finding prison regulation burdened right to marry but no First Amendment violation in mail restriction). Stevens commented:

There would not appear to be much difference between the question whether a prison regulation that burdens fundamental rights in the quest for security is "needlessly broad" . . . and this Court's requirement that the regulation must be "reasonably related to legitimate penological interests," and may not represent "an exaggerated response to those concerns." But if the standard can be satisfied by nothing more than a "logical connection" between the regulation and any legitimate penological concern perceived by a cautious warden, it is virtually meaningless. Application of the standard would seem to permit disregard for inmates' constitutional rights whenever the imagination of the warden produces a plausible security concern and a deferential trial court is able to discern a logical connection between that concern and the challenged regulation. Indeed, there is a logical connection between prison discipline and the use of bullwhips on prisoners; and security is logically furthered by a total ban on inmate communication, not only with other inmates but also with outsiders who conceivably might be interested in arranging an attack within the prison or an escape from it.

Id. at 100-01 (emphasis and citations omitted).

¹⁸⁷ Courts provided five reasons why they refused to question prison policies: "(1) separation of powers; (2) federalism; (3) judicial incompetence in prison administration; (4) fear of undermining prison disciplinary schemes; and (5) desire to avoid a flood of litigation." Robert A. Surrutte, Note, *Drawing the Iron Curtain: Prisoners' Rights from Morrissey [sic] v. Brewer to Sandin v. Conner*, 72 CHI.-KENT. L. REV. 923, 924 (1997). See also the discussion of the Court's hands-off doctrine in

believe the fact that in recent decades prison life has changed utterly. Prisons increasingly rely on isolation as a security measure and continue to be overcrowded. Violence and rape are constant threats in most prisons. These conditions largely have been ignored in Eighth Amendment jurisprudence. The upshot of the current Eighth Amendment doctrine as expressed by one court is that “[a]s the law stands today, the standards permit inhumane treatment of inmates. In this court’s opinion, inhumane treatment should be found to be unconstitutional treatment.”¹⁸⁸

C. *The Formal Sentence Issued by a Court*

Historically, the Supreme Court has read a proportionality requirement into the Eighth Amendment, stating a sentence must be proportional to the seriousness of the crime and the culpability of the offender.¹⁸⁹ Some punishments are clearly disproportional, such as the death penalty for rape,¹⁹⁰ a life sentence for a parking meter violation,¹⁹¹ and any punishment for status or propensity, such as punishment for drug addiction or alcoholism.¹⁹² But apart from such obvious violations of the barest concept of proportional sentencing, the Supreme Court has forsaken this basic requirement of the Eighth Amendment by placing impossible burdens on the defendant. If

MICHAEL MUSHLIN, RIGHTS OF PRISONERS §1.02, at 3 (2d ed. rev. Supp. 2001) and *Woodford v. Ngo*, 126 S. Ct. 2378, 2387 (2006) (“The PLRA attempts to eliminate unwarranted federal court interference with the administration of prisons.”). However, Supreme Court justices often seem to have two different definitions of human dignity: an impoverished one for their official decisions and a robust one for their unofficial pronouncements. Although his opinions say that neglect of prisoners’ basic needs does not raise any Eighth Amendment issue, Justice Kennedy told the ABA in 2003 that “it is no defense if our current prison system is more the product of neglect than of purpose. Out of sight, out of mind is an unacceptable excuse for a prison system that incarcerates over two million human beings in the United States.” Anthony M. Kennedy, U.S. Supreme Court Justice, Address at the American Bar Association Annual Meeting (Aug. 9, 2003), in JUSTICE KENNEDY COMM’N, AM. BAR ASS’N, REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES 2 (2004). He also stated that we must “bridge the gap between proper skepticism about rehabilitation on the one hand and improper refusal to acknowledge that the more than two million inmates in the United States are human beings whose minds and spirits we must try to reach.” *Id.* at 4.

¹⁸⁸ *Ruiz v. Johnson*, 37 F. Supp. 2d 855, 907 (S.D. Tex. 1999), *rev’d*, 243 F.3d 941 (5th Cir. 2001).

¹⁸⁹ See *Solem v. Helm*, 463 U.S. 277, 290 (1983).

¹⁹⁰ *Coker v. Georgia*, 433 U.S. 584, 600 (1977).

¹⁹¹ *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980).

¹⁹² *Robinson v. California*, 370 U.S. 660, 666-67 (1962).

proportional punishment means anything, it means that the worst punishments should be reserved for the most culpable individuals who commit the worst crimes. This is such a basic principle that it should not need to be argued, but this principle is not now the law.

Since 1983, the Court has never reversed a non-death sentence on the ground that it was too severe for the crime of conviction.¹⁹³ In *Solem v. Helm*, the Supreme Court enunciated an Eighth Amendment test of “gross[] disproportion[ality].”¹⁹⁴ It listed three factors, any of which might have a sufficient role in a sentence to invalidate it: “the gravity of the offense and the harshness of the penalty[;] . . . the sentences imposed on other criminals in the same jurisdiction[; and] . . . the sentences imposed for commission of the same crime in other jurisdictions.”¹⁹⁵ But in 1991, in *Harmelin v. Michigan*, the Court reconstituted the test in a very troubling way. Rather than examining all three factors to see if any alone or in combination might reveal an Eighth Amendment violation, the plurality interpreted the factors as each by themselves sufficient to save a sentence, regardless of the weight a court might attach to the other two.¹⁹⁶ As now applied, this test is an invitation to overlook cruel and unusual punishments, and makes little logical sense.

Under this revised test a court must first decide whether the punishment seems to be “grossly disproportionate” to the crime. Only if the answer to that threshold inquiry is yes must the court then compare the sentence with punishments of other crimes in the same jurisdiction and with punishments for the same crime in other jurisdictions. Very few, if any, cases have passed that threshold test, which means that in virtually all cases a disproportionality claim has been rejected solely on the subjective determination of the judge without any need to compare the sentence to those in other cases.

The Court applied the test again in *Ewing v. California*, the “three strikes” case. As Justice Breyer warned in his *Ewing* dissent, “[A] threshold test that blocked every ultimately invalid constitutional claim — even strong ones — would not be a threshold test but a

¹⁹³ See *Solem*, 463 U.S. at 303.

¹⁹⁴ *Id.* at 288.

¹⁹⁵ *Id.* at 290-91.

¹⁹⁶ *Harmelin v. Michigan*, 501 U.S. 957, 1004-05 (1991) (Kennedy, J., concurring). But see *id.* at 1018-21 (White, J., dissenting).

determinative test.”¹⁹⁷ Unfortunately, it seems that the proportionality test has become such a determinative test.¹⁹⁸

In the rare case that passes the threshold because a judge believes the sentence is grossly disproportionate, the second stage comparisons with other states may save the sentence. This gives legislators, not the Constitution, the last word. Similarly, a wave of legislation demanding extreme punishments would leave punishment immune to Eighth Amendment review under this test, despite the trial judge’s conviction that the sentence was cruel and unusual. Both instances immunize sentences that should be subject to the most scrutiny.

What the Supreme Court has created with *Harmelin* and *Ewing* is a process prohibiting judges from giving the full consideration mandated in *Solem v. Helm*. This revised test appears to be the current law, despite Justice Scalia’s complaint that the Eighth Amendment contains no proportionality requirement except in death cases, and the view of Justices White, Stevens, and Blackmun that the revised test eviscerates the Eighth Amendment.¹⁹⁹ To see how destructive this revised test can be, one need only attend to the facts of the two cases themselves.

The *Harmelin* opinion approved a life sentence without parole for a first time offender convicted of possessing a large quantity of cocaine, despite the defendant’s clean record and the conspicuous absence of intent to distribute or sell charges.²⁰⁰ Because life was a mandatory sentence under the Michigan statute, the sentence was imposed without considering the particular circumstances of the crime or the defendant’s background, prospects, and drug history.²⁰¹

¹⁹⁷ *Ewing v. California*, 538 U.S. 11, 43 (2003) (Breyer, J., dissenting) (emphasis omitted).

¹⁹⁸ See *Harmelin*, 501 U.S. at 1016 n.2 (White, J., dissenting) (“[T]he parties have cited only four cases decided in the years since *Solem* in which sentences have been reversed on the basis of a proportionality analysis.”).

¹⁹⁹ While Justice Kennedy’s test in *Harmelin* only had the support of a plurality, courts have continued to apply it. The test was invoked in *Ewing v. California*, both by justices who agreed with it and by justices who did not. See *Ewing*, 538 U.S. at 22-23; *id.* at 35-38 (Breyer, J., dissenting).

²⁰⁰ *Harmelin*, 501 U.S. at 1009.

²⁰¹ As Professor Franklin Zimring has noted, “the legislature’s disregard of the important difference between symbolic and actual sanctions” has led to sentences that ignore “all offender and case-specific mitigating factors.” FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA 194-200 (2001). Offender characteristics are relevant to both proportionality and process. James Gilligan, a psychiatrist and member of the Commission on Safety and Abuse in America’s Prisons, has described the terrible deprivations experienced by many of those who commit crimes. Gilligan discusses the lives of certain prisoners (e.g.,

In *Ewing*, the Court found no disproportional punishment in Gary Ewing's twenty-five-years-to-life sentence for stealing three golf clubs, his "third strike" under California's recidivist law.²⁰² The Court accepted California's claim that repeat offenders must be isolated from society in order to protect the public safety,²⁰³ without requiring any showing either that such draconian punishment deterred such criminals or that Ewing needed to be imprisoned for twenty-five years as opposed to a typical maximum sentence for grand theft of ten years or less.²⁰⁴ Even under a bare rationality test, the Court should have looked behind the stated goal to see if the policy or law actually served the goal or any other accepted sentencing rationale.²⁰⁵ But in place of a fair consideration of the punishment's rationality, the Court simply assumed that the state had acted rationally to promote legitimate goals.

As a final illustration of the evisceration of the Eighth Amendment's protections, consider the case of Weldon Angelos, a twenty-five-year-old man convicted of selling marijuana, possessing firearms, and money laundering.²⁰⁶ Angelos sold eight one-ounce bags of marijuana to a government informant on three occasions. A gun was visible during two of these drug sales, but no one claimed Angelos used or

rapists, murderers, etc.) who have been subjected to severe child abuse. "As children, these men were shot, axed, scalded, beaten, strangled, tortured, drugged, starved, suffocated, set on fire, thrown out of windows, raped, or prostituted by mothers who were their 'pimps;' their bones have been broken; they have been locked in closets or attics for extended periods; and one man I know was deliberately locked by his parents in an empty icebox until he suffered brain damage from oxygen deprivation before he was let out." GILLIGAN, *supra* note 7, at 45-46. *Harmelin* also rejected the claim that individualized sentencing was required by the Constitution. *Harmelin*, 501 U.S. at 996 ("draw[ing] the line of required individualized sentencing at capital cases, and see[ing] no basis for extending it further").

²⁰² *Ewing*, 538 U.S. at 29-31.

²⁰³ *Id.* at 25.

²⁰⁴ *Id.* at 36, 53-57 app. A (Breyer, J., dissenting).

²⁰⁵ Under rational basis, a law must serve some *conceivable* legitimate government interest, which the Court asserted was, in this case, protection of public safety. The substance of the law (here, the policy of incarcerating repeat offenders) must be shown to be rationally related to that purpose, but the Court will give substantial deference to the legislature in making this determination. Although the Court did find a *purpose* for the law, it did not further examine whether the dramatically increased sentences actually *served* that purpose of protecting the public safety, or any other conceivable purpose. Rather, the Court showed absolute deference to the legislative decision. See also discussion *infra* Part III.B (discussing due process considerations).

²⁰⁶ *United States v. Angelos*, 345 F. Supp. 2d 1227, 1232 (D. Utah 2004), *aff'd*, 433 F.3d 738 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 723, 723 (2006).

threatened to use the weapon.²⁰⁷ Had Angelos been prosecuted in Utah state court, his sentence would most likely have been between four and seven years.²⁰⁸ But he was prosecuted in federal court, where the judge was statutorily required to impose a sentence of fifty-five years without the possibility of parole.²⁰⁹ If Angelos survives, he will be eighty years old when he is released.

Judge Cassell issued that sentence with great reluctance. Before he did so, he surveyed the jury as to its view of an appropriate sentence, and sought expert amicus briefs, all of which supported his view that imposing the statutory sentence in this case would badly exceed contemporary standards of decency.²¹⁰ But in the end, he imposed the sentence because he felt legally bound. Judge Cassell stated, “While the sentence appears to be cruel, unjust, and irrational, in our system of separated powers Congress makes the final decisions as to appropriate criminal penalties.”²¹¹ Judge Cassell reasoned that he could not act on his own finding that the sentence appeared cruel and unusual because a previous sentence — a forty-year prison sentence for possession of nine ounces of marijuana with intent to sell it — upheld in the Supreme Court case *Hutto v. Davis*, bound him. So despite the Eighth Amendment, and despite his own strong convictions, Judge Cassell imposed a sentence he referred to as an example of how the system malfunctioned.²¹² Like the sentences imposed on Ewing, Harmelin, and countless others, Angelos’s sentence discards a human life, effectively forever, despite the well-known probability that most young criminals age out of their lives of crime.²¹³

The enfeeblement of the Eighth Amendment’s proportionality requirement has been compounded by the Supreme Court’s death penalty jurisprudence. Supreme Court cases in the 1970s interpreted the Eighth Amendment to forbid death sentences issued without extra

²⁰⁷ *Id.* at 1231.

²⁰⁸ *See id.* at 1242-43, 1259; Pamela Manson, *Utah Federal Judge Takes Closer Look at Stiff Minimum Mandatory Terms*, SALT LAKE TRIB., Sept.15, 2004, at A1.

²⁰⁹ *See* 18 U.S.C. § 924(c) (2000).

²¹⁰ Brief of Amici Curiae Addressing the Constitutionality of Mandatory Minimum Sentences Under Federal Law, *Angelos*, 345 F. Supp. 2d 1227 (2:02-CR-00708PGC), available at <http://pracdl.typepad.com/pracdl/files/AngelosBrief.doc>.

²¹¹ *Angelos*, 345 F. Supp. 2d at 1230.

²¹² *Id.* at 1261.

²¹³ HOWARD N. SNYDER & MELISSA SICKMUND, NAT’L CTR. FOR JUVENILE JUSTICE, JUVENILE OFFENDERS AND VICTIMS: 2006 NATIONAL REPORT 71 (2006), available at <http://ojjdp.ncjrs.org/ojstatbb/nr2006/downloads/NR2006.pdf>.

layers of process, including appellate proportionality review, and an individualized consideration of the defendant's character and the circumstances of the crime.²¹⁴ These requirements were intended to select for execution only those who truly deserved to die, assuming such people exist.²¹⁵ But by justifying these additional safeguards on the basis that death is different, the Court has short-circuited the review of non-death cases.²¹⁶ Chief Justice Earl Warren warned that "the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination."²¹⁷ Fifty years later, it is conceivable that no legislatively enacted punishment for a term of years, no matter how harsh, will ever again be found to violate the Eighth Amendment.

Death sentences may well demand "super due process," but other sentences surely demand much more than the virtual blank check issued by the Supreme Court to the legislatures. Imprisonments may be just as cruel and painful as an execution, and, in fact, may contain most of the burdens of a death sentence.²¹⁸ The high rate of suicide is evidence that some prisoners would rather die than spend another day in prison.²¹⁹ Lost years are irremediable.

²¹⁴ See *Gregg v. Georgia*, 428 U.S. 153, 194-95 (1976) (validating death penalty as long as procedures were in place to ensure fairness and to ensure only worst offenders received it). In 1972, the Court found the death penalty unconstitutional as then applied because it was unpredictably imposed in a way unrelated to culpability (but often correlated to race). *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972).

²¹⁵ See *Gregg*, 428 U.S. at 195. Many commentators have argued that the procedures adopted by *Gregg* and its companion cases fail at the task of selecting the worst killers, that these procedures continue the process of arbitrary killings, and they offer procedural cover for the Court by "generating an appearance of intensive judicial scrutiny and regulation despite its virtual absence." Carol Steiker, *Things Fall Apart, But the Center Holds*, 77 N.Y.U. L. REV. 1475, 1485 (2002); see also Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305 (critiquing Court's attempt to create constitutionally proper death penalty doctrine by use of guided discretion).

²¹⁶ The Court in *Furman* stated that "[t]he penalty of death differs . . . 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*, 408 U.S. at 306 (Stewart, J., concurring).

²¹⁷ *Trop v. Dulles*, 356 U.S. 86, 99 (1958).

²¹⁸ See Justice Stewart's comment *supra* note 217; see also DIRK VAN ZYL SMIT, TAKING LIFE IMPRISONMENT SERIOUSLY IN NATIONAL AND INTERNATIONAL LAW 5 (2002) (citing CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (1764), reprinted in ALESSANDRO MANZONI, THE COLUMN OF INFAMY 47 (Kenelm Foster & Jane Grigson trans., 1964)) (speaking of calm with which some face death who would cower at prospect of substantial prison sentence).

²¹⁹ In 2002, the Department of Justice concluded that the suicide rate for state

Despite the death is different doctrine's implication that all non-death sentences are the same, they are not: minimum security is far different from segregation in a supermax facility, and imprisonment for a term of years is not the same as imprisonment for life without the possibility of parole. Each sentence contains particular hardships, pain, and loss, thus each should be subject to meaningful Eighth Amendment scrutiny considering both circumstances of the offender and the crime.

Like the tests applied to collateral consequences and prison conditions, the Court's toothless disproportionality doctrine in non-death penalty cases amounts to a "hands off" doctrine giving an extreme deference to legislators and sentencing judges. The "heavy burden . . . on those who would attack the judgment of the representatives of the people" in promulgating punishments has become an impossible one.²²⁰ This is surely not what the Framers envisioned when they placed constitutional limits on punishment and established independent courts to police those limits.²²¹

The Court's recent approach comes during an era when legislators have been caught up in the political winds of the war on drugs, the war on crime, and now the war on terror. In this atmosphere of fear and politicization, many of those charged with insuring the criminal justice system's fairness and rationality have abdicated this

prisoners was 14 per 100,000. Press Release, U.S. Dep't of Justice, State Prison Homicide Rates Down 93 Percent, Jail Suicide Rates 64 Percent Lower than in Early 1980s (Aug. 21, 2005), available at <http://www.ojp.usdoj.gov/bjs/pub/press/shspljpr.htm>.

²²⁰ *Gregg*, 428 U.S. at 175.

²²¹ For those who complain about judicial overreaching, Justice Black had an apt response: "[W]hen a court strikes down a popular statute or practice as unconstitutional, it may always reply to the resulting public outcry: 'We didn't do it — you did.' The people have chosen the principle that the statute or practice violated, have designated it as fundamental, and have written it down in the text of the Constitution for the judges to interpret and apply." Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703, 705 (1975).

"Under the federal mandatory minimum statutes a sentence can be mitigated by a prosecutorial decision not to charge certain counts. . . . The policy . . . gives the decision to an assistant prosecutor not trained in the exercise of discretion and takes discretion from the trial judge. The trial judge is the one actor in the system most experienced with exercising discretion in a transparent, open, and reasoned way. Most of the sentencing discretion should be with the judge, not the prosecutors."

Kennedy, *supra* note 187, at 3.

responsibility.²²² It is also an era in which the prosecutor has accrued unprecedented power to set sentences: draconian sentences have greatly heightened the prosecution's plea negotiation position, and determinate sentences mean huge sentencing differences turn almost entirely on prosecutorial charging decisions.²²³ Most decisions of the prosecutor are off the record and hidden from public view.²²⁴ Disabling proportionality review thus eliminates one of the few checks on racially or politically contaminated prosecutorial decisions.

²²² Professor Richard Frase explains that “[c]riminal defendants are precisely the sort of powerless and despised subgroup who will not be adequately protected through the democratic processes. Moreover, there is a well-established tradition of overly severe criminal penalties being hurriedly enacted in response to a few high profile cases, generating a ‘moral panic’ of media and political frenzy in which politicians dread . . . appearing to be ‘soft’ on crime and unsympathetic to actual and potential victims.” Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571, 648 (2005).

²²³ The prosecutor has always had the power to charge or drop charges, but in the course of passing new sentencing laws Congress has enhanced the prosecutor's power. As Professor William Stuntz has written, “[C]riminal law's codifiers did not see how their work would change character when combined with the parallel growth in prosecutors' power. The move from common law to criminal statutes appeared to (and did) shift power from judges to legislators. But its larger and more lasting effect was to shift power from judges to prosecutors.” William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 577 (2001).

The prosecutor plays a central role in determining the sentence by choosing whether to bring a charge with a mandatory minimum sentence, to invoke a recidivist or enhancement provision, to seek the death penalty in capital crimes, to accept a plea bargain, or to forego prosecution in favor of another forum. In drug offenses where the weight of the drug determines the sentence, a prosecutor may charge the weight of the drug found on the arrestee, the weight of all the drugs seized from his companions, or the weight of the drugs the defendants might have produced had their plans been successful. See Field, *supra* note 30, at A1.

²²⁴ In *Bordenkircher v. Hayes*, the Court gave its imprimatur to this unreviewable power. 434 U.S. 357, 357 (1978). For example, a prosecutor may charge one crime and then add additional charges if the accused fails to accept a plea offer. *Id.* at 360. “In 2000 there were 1,279 offenders subject to the career offender provisions, which resulted in some of the most severe penalties imposed under the guidelines. Although Black offenders constituted just 26 percent of the offenders sentenced under the guidelines in 2000, they were 58 percent of the offenders subject to the severe penalties required by the career offender guideline.” NAT'L ASS'N OF CRIM. DEF. LAW., TRUTH IN SENTENCING? THE GONZALES CASES 12 (2005) (citing U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 133-34 (2004)) (emphasis omitted).

D. Racially Disparate Punishment

The Court's refusal to subject punishment to meaningful constitutional scrutiny is matched by its refusal to consider clear cases of racial bias in the criminal justice system. As we have seen, minorities are grossly overrepresented throughout the criminal justice system, and it cannot be explained by the fact that a higher percentage of minorities than whites commit crime.²²⁵ But the Supreme Court has repeatedly ignored this evidence by placing an impossible burden on its proponents. Substantively, the Court finds no constitutional infirmity in discriminatory effect, only in intentional discrimination. Procedurally, the Court rejects statistical showings of systemic bias as proof of discriminatory intent, on the grounds that such statistics cannot show that discriminatory intent afflicted the particular case before it. Hence, when confronted with a study showing racially disparate death penalty sentencing in *McClesky v. Kemp*, the Court denied relief because, even if the statistics that showed sentencing disparity were accurate, there was no way of telling whether there was intentional discrimination in that particular case.²²⁶ In *United States v. Armstrong*, the Court denied discovery of disproportionate prosecutions of minorities for crack cocaine as opposed to powder cocaine²²⁷ because the petitioners could not show, in the absence of discovery, that there was discrimination against the particular defendant in the case.²²⁸

The Court's hands off doctrines have assured that the law presently provides no realistic remedy even when a sentence is based wholly or partly on the race of the defendant. Perhaps racially disparate sentences are the reason review is so inadequate — it is far easier to ignore the harsh extremes of punishment when we can distance

²²⁵ See discussion *supra* Part I (discussing racial disproportionality).

²²⁶ *McClesky v. Kemp*, 481 U.S. 279, 297 (1987) (rejecting statistical evidence that race significantly affects death penalty charges and convictions in Georgia).

²²⁷ See 21 U.S.C. § 841 (2000 & Supp. IV 2004); *id.* § 846 (2000). Powder cocaine is chemically equivalent to crack cocaine but punished at 1% of the severity. The disparity is illustrated by the case of Willie Mays Aiken, a former Kansas City Royals first baseman, who was charged with multiple counts of trafficking crack cocaine and received a 20-year mandatory minimum sentence. In his case, selling 2.2 ounces of crack was the equivalent of selling 15 pounds of powder cocaine. Margaret Colgate Love, *Harsh Sentencing Penalty Affects Baseball Star*, SENT'G TIMES, Fall 2006, <http://www.sentencingproject.org/tmp/File/Fall%2006%20TSP%20FINAL.pdf>.

²²⁸ *United States v. Armstrong*, 517 U.S. 456, 470-71 (1996) (denying motion for discovery of prosecution data necessary to state equal protection claim that black defendants were singled out for federal prosecution for crack offenses due to insufficient grounds).

ourselves from its victims. One study suggests that the mental image of drug dealer and criminal has become that of a minority male, and lawmakers have aimed their policies accordingly.²²⁹ Judge Richard Posner of the Seventh Circuit noted the dehumanization of prisoners in his dissent in *Johnson v. Phelan*:

There are different ways to look upon the inmates of prisons and jails in the United States in 1995. One way is to look upon them as members of a different species, indeed as a type of vermin, devoid of human dignity and entitled to no respect; and then no issue concerning the degrading or brutalizing treatment of prisoners would arise. . . . We must not exaggerate the distance between “us,” the lawful ones, the respectable ones, and the prison and jail population; for such exaggeration will make it too easy for us to deny that population the rudiments of humane consideration.²³⁰

We can conclude from this discussion of the Eighth Amendment that, at least as presently interpreted, the Eighth Amendment is unlikely to be the locus of reform. For change to occur, collateral consequences must be counted as punishment and recognized as the permanent branding of a class of primarily poor and minority citizens; the standards for assessing violence and cruelty in prison must be less stringent; sentences must be shorter and proportionate to the crimes; and policies that have a racial impact must be changed regardless of whether the impact is intended. One way to reinvigorate Eighth Amendment jurisprudence is to look at the decisions of courts around the world.

²²⁹ MAUER, *supra* note 2, at 147-48 (citing David F. Greenberg & Valerie West, *The Persistent Significance of Race: Growth in State Prison Populations, 1971-1991*, Address Before the Law and Society Association of Aspen, Colorado (June 1998)). “To many Americans, some combination of bad family, bad culture, or bad genes created this young thug whose behavior is presumably beyond the capacity of modern law or social science to improve.” *Id.* at 138.

²³⁰ *Johnson v. Phelan*, 69 F.3d 144, 151-52 (7th Cir. 1995).

Justice Kennedy delivered a scathing critique of American contemporary punishment to the ABA in August 2003. He urged his audience to confront the reality that approximately 10% of all African American men in their mid- to late-twenties are behind bars, and underscored the seriousness of spending more on housing prisoners than educating them. He further condemned the proliferation of mandatory minimum sentences. Kennedy, *supra* note 187, at 1-4.

III. AN EVOLVING GLOBAL STANDARD OF DECENCY

“[L]aws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.”²³¹

Weems warned against a formalistic approach to the Eighth Amendment whereby its protections would “have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality . . . [and] [t]he meaning and vitality of the Constitution [would] have developed against narrow and restrictive construction.”²³² Unfortunately, that prediction has come true. Despite the promise of *Weems*, *Trop*, and *Estelle*, the Court is stuck in a doctrinal mire that prevents it from seeing punishment as it is experienced. The Court itself has acknowledged that its Eighth Amendment cases “have not established a clear or consistent path for courts to follow.”²³³ The Court will never achieve that clear and consistent path unless it starts to apply what Lawrence Blum calls “moral perception” in order to ascertain the salient features of punishment.²³⁴ Such moral perception would identify what is at stake for prisoners personally, socially, economically, and politically, and evaluate these stakes against the values underlying the Eighth Amendment. It would scrutinize the excessively punitive conditions; the new high-tech methods of control; the record-breaking incidence of mentally ill prisoners, prison rapes, AIDS, and tuberculosis; and the inability or unwillingness of prisons to reform prison conditions. A morally perceptive Court would attend to the abundance of reports and surveys that confirm what has long been obvious to many — in the words of Justice Kennedy, our “resources are misspent, our

²³¹ Letter from Thomas Jefferson, former President of the United States, to Samuel Kercheval (July 12, 1816) (quotation inscribed in Jefferson Memorial), *available at* <http://teachingamericanhistory.org/library/index.asp?document-459>.

²³² *Weems v. United States*, 217 U.S. 349, 373 (1910).

²³³ *Lockyer v. Andrade*, 538 U.S. 63, 72-73 (2003) (finding no Eighth Amendment violation based on sentence of 25 years to life under California’s three strikes law).

²³⁴ Ronald C. Den Otter, *The Place of Moral Judgment in Constitutional Interpretation*, 37 *IND. L. REV.* 375, 406-07 (2004) (citing LAWRENCE BLUM, *MORAL PERCEPTION AND PARTICULARITY* 31 (1994)) (arguing intellectual acceptance of, and psychological commitment to, particular moral principles does not guarantee that moral agent will be able to recognize particular situations implicating those principles).

punishments too severe, our sentences too long.”²³⁵ Rather than providing hypothetical redress for constitutional violations, such a Court would consider what is required in the face of these facts, in the real world, to adequately protect the right of human dignity.

Despite the pessimism of scholars and lawyers who believe that the Eighth Amendment no longer offers any real limit on disproportionate or degrading non-capital punishments,²³⁶ and who are disheartened by the limits on prisoner lawsuits due to the PLRA,²³⁷ litigants should not dismiss the importance of constitutional challenges to such punishments. Pendulums swing both ways. The dismal record of three decades of draconian punishment policies cannot be ignored forever. There are some recent signs of hope in this regard: one, ironically, emerged from the Guantanamo and Abu Ghraib scandals, which have focused more attention on the treatment of prisoners generally.²³⁸ Others include state moratoria on the death penalty, federal and state movements away from mandatory minimums and determinate sentencing, decriminalization of minor drug offenses, and recent lower court federal opinions questioning three strikes proportionality²³⁹ and the solitary confinement of mentally ill

²³⁵ Kennedy, *supra* note 187, at 4.

²³⁶ See Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1061 (2004).

²³⁷ See GIBBONS & KATZENBACH, *supra* note 10, at 84 (noting substantial reduction in number of prisoner lawsuits since passage of PLRA).

²³⁸ Press Release, Ctr. for Soc. Justice, National Commission to Examine U.S. Prison Conditions, <http://centerforsocialjustice.org> (follow “Press/Reports” hyperlink; then follow “Criminal Justice Reform” hyperlink under “Article Categories”; then follow “Full Story” hyperlink under “National Commission to Examine U.S. Prison Conditions”) (last visited Sept. 30, 2007).

²³⁹ In *Reyes v. Brown*, the defendant was convicted for perjury on his driver’s license and sentenced to 26 years to life under California’s Three Strikes Law. 399 F.3d 964, 965 (9th Cir. 2005). The Ninth Circuit remanded the case to determine whether the defendant’s third offense was violent, thereby justifying such a severe sentence for perjury. *Id.* at 969-70; see also *Ramirez v. Castro*, 365 F.3d 755, 756, 777 (9th Cir. 2004) (applying grossly disproportional test, court held defendant’s nonviolent triggering offense, theft of VCR, did not justify 25 years to life sentence while noting Eighth Amendment challenges to Three Strikes sentences remain viable in certain “exceedingly rare” cases).

prisoners.²⁴⁰ These signals may foretell a revival of concern with the human dignity of the convicted.²⁴¹

In challenging punishment as unconstitutional, there are two approaches that may help persuade courts to review punishment as it is experienced in reality, providing some basis for judicial reassessment. One draws on the recent interest of several justices in foreign laws and practices, and their stated willingness to consider them as “instructive” for determining evolving standards of decency in punishment. Comparisons to foreign law can show what a substantive, formal ideal of human dignity could mean. The other approach is the potential of the due process clause to provide some protections where the Eighth Amendment may not, along with more meaningful consideration of the true nature of the punishment at issue. I conclude with some observations regarding the utility of both approaches.

A. *Rediscovering Human Dignity in the Eighth Amendment*

In two important Eighth Amendment decisions barring execution of juveniles and the mentally retarded, the Supreme Court indicated a willingness to consider the more robust constitutional conception of

²⁴⁰ See *Jones 'El v. Berge*, 164 F. Supp. 2d 1096, 1117-21 (W.D. Wis. 2001); see also *Goff v. Harper*, 59 F. Supp. 2d 910, 922 (S.D. Iowa 1999), *remanded on other grounds*, 235 F.3d 410 (8th Cir. 2000). The court in *Goff* found Eighth Amendment violations where “inmates, who were or later became mentally ill or disordered, could be housed in lockup cellhouses and never be diagnosed and treated as such because there [was] no follow-up to the screening for mental illness which is done when an inmate first enters the Iowa Department of Corrections (IDOC). Additionally . . . lockup inmates [were] segregated and supervised with indifference to their need for mental health treatment and that inmates with serious, but treatable, mental disorders receive almost no treatment at [Iowa State Penitentiary].” *Goff*, 59 F. Supp. 2d at 922.

²⁴¹ See also CHERYL A. ROBERTS ET AL., THE BOSTON FOUND., *RETHINKING JUSTICE IN MASSACHUSETTS: PUBLIC ATTITUDES TOWARD CRIME AND PUNISHMENT* 3-5 (2005), available at http://www.tbf.org/uploadedFiles/CJL_11.2.05.pdf; VINCENT SCHIRALDI ET AL., JUSTICE POL'Y INST., *THREE STRIKES AND YOU'RE OUT: AN EXAMINATION OF THE IMPACT OF 3-STRIKE LAWS 10 YEARS AFTER THEIR ENACTMENT* 11 (2004) (“[M]ore than half of all states have changed sentencing laws, abolished mandatory sentences, or reformed parole policies to ease crowding and reduce their incarceration rates.”), available at http://www.soros.org/initiatives/justice/articles_publications/publications/threestrikes_20040923/three_strikes.pdf. Currently there are proposals to limit mandatory sentencing before the Massachusetts legislature. See Alexandra Marks, *More States Roll Back Mandatory Drug Sentences*, CHRISTIAN SCI. MONITOR, Dec. 10, 2004, at 2; see also GIBBONS & KATZENBACH, *supra* note 10, at 66-70 (encouraging humane and dignified treatment in prisons).

human dignity found abroad.²⁴² As the Court said when it found the juvenile death penalty unconstitutional, “[T]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”²⁴³ Although Justice Scalia rejects looking at other countries for insights, several of the other justices have argued that in an age of globalization, it no longer makes sense to ignore the thoughtful counsel of foreign courts that are considering some of the same issues that face Americans.²⁴⁴ Even Professor Steven Calabresi, generally no friend of the Supreme Court’s consideration of foreign law, says that the Eighth Amendment is the one constitutional area where it may be advisable for the Court to look abroad.²⁴⁵

If the Supreme Court looks overseas for insight into evolving standards of decency, what will it see? It appears that international courts give a robust interpretation to claims of degrading treatment that violates human dignity. The European Court of Human Rights, for example, found that a prisoner who was confined to his bed in a hot, windowless cell with a toilet that provided no privacy experienced an actionable assault on his dignity.²⁴⁶ Under the European Convention on Human Rights, imprisonment must not subject the prisoner to “distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention [and must secure] his health and well-being”²⁴⁷ The assessment of prison

²⁴² See *Roper v. Simmons*, 543 U.S. 551, 560 (2005); *Atkins v. Virginia*, 533 U.S. 304, 311-12 (2002). In Europe, this is apparent in the decisions interpreting the European Convention of Human Rights. See David Feldman, *The Developing Scope of Article 8 of the European Convention on Human Rights*, 1997 EUR. HUM. RTS. L. REV. 265, 266-67 (citing *Costello-Roberts v. United Kingdom*, App. No. 13134/87, 19 Eur. H.R. Rep. (Ser. A) 112 (1993) (holding seriously adverse effects on physical and moral integrity may violate European Court of Human Rights’ dignity clause)).

²⁴³ *Roper*, 543 U.S. at 578.

²⁴⁴ Justice O’Connor, referring to *Atkins* and *Lawrence*, said, “I suspect that with time, we will rely increasingly on international and foreign law in resolving what now appear to be domestic issues, as we both appreciate more fully the ways in which domestic issues have international dimension, and recognize the rich resources available to us in the decisions of foreign courts.” Sandra Day O’Connor, U.S. Supreme Court Justice, Remarks at the Southern Center for International Studies (Oct. 28, 2003), available at http://www.southerncenter.org/OConnor_transcript.pdf.

²⁴⁵ Steven G. Calabresi, “*A Shining City on a Hill*”: *American Exceptionalism and the Supreme Court’s Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1413-14 (2006).

²⁴⁶ *Peers v. Greece*, 2001-III Eur. Ct. H. R. 275, 297-98.

²⁴⁷ *Kalashnikov v. Russia*, 2002-IV Eur. Ct. H.R. 93, 116-17 (Commission report) (finding Russia violated Article 3 for conditions of imprisonment).

conditions must also take account of their “cumulative effects.”²⁴⁸ The European Convention prohibits treating inmates as if they are beyond redemption.²⁴⁹ These standards of decency explain why so many of our punishments are either rarely used abroad or forbidden under European and other international human rights laws, including capital punishment, life without parole for juveniles, life without parole for adults, mandatory rather than individualized sentencing, frequent use of segregation, and placing mentally ill lawbreakers in prisons rather than hospitals.²⁵⁰

In Germany, where human dignity is enshrined as the first principle of its constitution, imprisonment is a last resort.²⁵¹ Prison sentences, when imposed, are short. Prison administrators are expected to govern under a principle of normalcy, which means that prison life should, as much as possible, approximate life on the outside. Accordingly, prisons offer real jobs to inmates, with pay and vacation. Prisoners often are not required to wear uniforms, and they are addressed respectfully by prison personnel. Prisoner privacy is protected, including their use of the toilet, and there are no bars on the doors. Professor James Whitman, in his study of French and

²⁴⁸ *Dougoz v. Greece*, 2001-II Eur. Ct. H. R. 255, 266 (Commission report).

²⁴⁹ *See, e.g.*, Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221, available at <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm> (prohibiting torture).

²⁵⁰ *See, e.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 21, 1977, 45 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 187 (F.R.G.) (German Federal Constitutional Court condemning imposition of life imprisonment without any possibility for parole); Protocol 13 to the European Convention on Human Rights art. 1, May 3, 2002, Europ. T.S. No. 187 (prohibiting capital punishment in all circumstances), available at <http://conventions.coe.int/Treaty/en/Treaties/Html/187.htm>; Convention on the Rights of the Child art. 37(a), Nov. 20, 1989, 1577 U.N.T.S. 44, 55 (prohibiting juvenile life without parole).

²⁵¹ Article I of Germany's basic laws declares that “the dignity of man is inviolable. To respect and protect it is the duty of all state authority.” Grundgesetz für die Bundesrepublik Deutschland [GG] [Constitution] art. 1 (F.R.G.), reviewed in DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 298-300 (2d ed. 1997). Germany may have developed a broader concept of human dignity than most countries because it presumes that man achieves his ultimate autonomy within a community. German laws were framed to protect the dignity of individuals to live political, economic and moral lives. *See, e.g.*, BVerfG June 21, 1977, 45 BVerfGE 187 (examining constitutionality of life imprisonment); BVerfG Feb. 24, 1971, 30 BVerfGE 173 (articulating court's philosophy of human dignity). Thus, citizens are protected in their private autonomous selves, their relationships with family and friends, and their participation in the larger community. Professor Donald Kommers suggests that this concept is reminiscent of Abraham Lincoln's idea of a fraternal democracy. KOMMERS, *supra*, at 305.

German sentencing practices, acknowledges that this description may be partly aspirational. But the code “is intended to dramatize a fact about [convicts’] dignity. The lives of convicts are supposed to be, as far as possible, no different from the lives of ordinary German people.”²⁵²

Adopting so robust a conception of what human dignity requires would mark a fundamental change in U.S. punishment jurisprudence, where the Supreme Court has said that prisoners housed in maximum security prisons should expect to experience discomfort, and perhaps some degree of danger.²⁵³ Nevertheless, it is possible that the distance of certain punishments from evolving global standards of decency may ultimately offer an avenue for litigants. Prisoners in the United States suffer from too many practices that have come to be considered cruel and unusual by too many people in other developed democracies.

For example, the United States is one of only four industrialized countries that sentence juveniles to life imprisonment without parole.²⁵⁴ It is a uniquely cruel sentence that deprives children of both any hope for return to society and any opportunity for rehabilitation.²⁵⁵ As the Nevada Supreme Court said in reversing a life

²⁵² JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 8 (2003). Professor James Whitman says the difference is due in part to the relative power of the state in European countries compared to the United States, with the United States having the weaker state. Thus, in the United States, popular opinion, needs, desires for revenge, and the concomitant absence of mercy drive punishment policy. *Id.* at 14. Despite Supreme Court language suggestive of the high status of human dignity, foreign judges are more likely than their American counterparts to base opinions on the individual’s right to dignity and decency. *Id.* at 64-66. Because there are generally no mandatory sentences, judges elsewhere are more likely to weigh the punishment’s effectiveness in meeting societal goals. *Id.* at 196-200.

²⁵³ *Rhodes v. Chapman*, 452 U.S. 337, 349-50 (1981). The Court held that a double ceiling does not constitute “unnecessary or wanton [infliction of] pain” and, therefore, does not violate the Eighth Amendment. Despite greater risks of physical harm to inmates, the “Constitution does not mandate comfortable prisons.” *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)).

²⁵⁴ “Life without parole, the most severe form of life sentence, is theoretically available for juvenile criminals in about a dozen countries. But a report to be issued on Oct. 12 by Human Rights Watch and Amnesty International found juveniles serving such sentences in only three others. Israel has seven, South Africa has four and Tanzania has one. By contrast, the report counted 2,200 people in the United States serving life without parole for crimes committed before turning eighteen . . . [and] more than 350 were fifteen or younger . . .” Liptak, *supra* note 28, at A1.

²⁵⁵ International conventions also extend the right to the support and the rehabilitation of juveniles. See International Covenant on Civil and Political Rights art. 14, G.A. Res. 2200 (XXI), at 54, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter

without parole sentence imposed on a thirteen-year-old for killing a man who had sexually molested him, subjecting a child who cannot vote, drink, or drive to “hopeless, lifelong punishment and segregation is not a usual or acceptable response to childhood criminality, even when the criminality amounts to murder.”²⁵⁶ The Convention on the Rights of the Child (“CRC”)²⁵⁷ and several other international conventions explicitly prohibit life without parole for juveniles.²⁵⁸ Despite its failure to ratify this treaty, the United States has manifested a commitment to the CRC principles by being a signatory.²⁵⁹ The

ICCPR] (“In the case of juvenile persons, *the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.*”) (emphasis added). The Inter-America Commission on Human Rights has held that Article VII of the American Declaration of the Rights and Duties of Man requires the state to “make substantial efforts to *guarantee* [juveniles] rehabilitation in order to ‘allow them to play a constructive and productive role in society.’” *Domingues v. United States*, Case 12.285, Inter-Am. C.H.R., Report No. 62/02, OEA/Ser.L/V/II.117, doc. 5 rev. 1 ¶ 83 (2002) (citing *Villigran Morales v. Guatemala* (The Street Children Case), 1999 Inter-Am. Ct. H.R. (ser. C) No. 63, at ¶ 197 (Nov. 19, 1999)); *see also* United Nations Guidelines for the Prevention of Juvenile Delinquency (“The Riyadh Guidelines”) Rule 58, G.A. Res. 45/112, at 204, U.N. GAOR, 45th Sess., Supp. No. 49, U.N. Doc. A/RES/45/112 (Dec. 14, 1990) (“Law enforcement and other relevant personnel, of both sexes, should be trained to respond to the special needs of young persons and should be familiar with and use, to the maximum extent possible, *programmes and referral possibilities for the diversion of young persons from the justice system.*”) (emphasis added).

²⁵⁶ *Naovarath v. State*, 779 P.2d 944, 947 (Nev. 1989) (expressing doubt that virtually hopeless sentence of lifetime incarceration for seventh grader measurably contributed to social purposes to be served by this second most serious penalty).

²⁵⁷ The CRC enumerates internationally accepted civil, political, economic, social, and cultural rights of children. Key provisions of the CRC require courts to consider “the child’s age and desirability of promoting the child’s reintegration and the child’s assuming a constructive role on society”; require in all actions concerning children that the best interests of the child be a primary consideration and mandate that every incarcerated child be treated with “respect for the[ir] inherent dignity,” consequently requiring judicial consideration of the child’s individual needs in relation to their age. Convention on the Rights of the Child arts. 3, 37, 40, G.A. Res. 25, at 167, 171, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/25 (Nov. 20, 1989).

²⁵⁸ Article 37(a) states, “*Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.*” *Id.* art. 37(a) (emphasis added). One hundred and ninety-two of 194 countries have accepted the CRC. OFFICE OF U.N. HIGH COMM’R FOR HUMAN RIGHTS, STATUS OF RATIFICATIONS OF THE PRINCIPLE INTERNATIONAL HUMAN RIGHTS TREATIES 12 (2006), available at <http://www.ohchr.org/english/bodies/docs/status.pdf>.

²⁵⁹ As a signatory, the United States may not take actions that would defeat the Convention’s object and purpose.

When Madeleine Albright, the U.S. permanent representative to the United Nations, signed the CRC on behalf of the United States, she stated, “The convention is a

constitutional issue of juvenile life in prison sentences is ripe for consideration by a Supreme Court that will take this evolving standard of decency seriously.

In other countries, life without parole for adults is also an exceptional sentence. According to the German Constitutional Court, the state “strikes at the very heart of human dignity if [it] treats the prisoner without regard to the development of his personality and strips him of all hope of ever earning his freedom.”²⁶⁰ In 1991, when the Supreme Court decided *Harmelin*, Michigan’s “cocaine/lifer” law was the harshest of its kind in the country. If the justices had looked to foreign law or human rights law at that earlier time, perhaps they would have found it too harsh.²⁶¹ The Michigan Supreme Court has

comprehensive statement of international concern about the importance of improving the lives of the most vulnerable among us, our children. Its purpose is to increase awareness with the intention of ending the many abuses committed against children around the world. . . . United States’ participation in the Convention reflects *the deep and longstanding commitment of the American people*.” Press Release, Madeleine K. Albright, U.S. Permanent Representative to the United Nations on the Occasion of the Signing of the U.N. Convention on the Rights of the Child (Feb. 16, 1995), available at http://hrw.org/campaigns/lwop/case_files/lwop_brief.pdf (emphasis added).

The United States has signed and ratified the ICCPR, but it attached a stipulation stating that the United States “reserves the right, *in exceptional circumstances*, to treat juveniles as adults” United States of America Reservations to the International Covenant on Civil & Political Rights, in 1 MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY GENERAL: STATUS AS AT 31 DECEMBER 2006, at 190 (2007); see CRIMINAL JUSTICE POLICY FOUND. ET AL., DOMESTIC CRIMINAL JUSTICE ISSUES AND THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 19 (2006). The report notes that “[a] life sentence without the possibility of release offers no opportunity for rehabilitation, in express violation of Article 14(4). By their very nature, a rehabilitative function plays no part in statutory or prosecutorial waivers of juveniles into the adult criminal justice system.” *Id.* at 20.

²⁶⁰ Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 21, 1977, 45 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 187, 245 (F.R.G.), reprinted in KOMMERS, *supra* note 251, at 306. The European Union has also renounced life without parole, while also stating that “the present criminal policy in the EU Member States . . . is moving towards keeping imprisonment to an absolute minimum.” Memorandum from European Union on E.U. Policy on the Death Penalty, <http://www.eurunion.org/legislat/deathpenalty/eumemorandum.htm> (last visited Sept. 22, 2007).

²⁶¹ See, e.g., BVerfG June 21, 1977, 45 BVerfGE 187 (1977) (holding mandatory life sentence, without consideration of circumstances of defendant’s crime, violated constitutional right of human dignity); see *R. v. Smith*, [1987] S.C.R. 1045 (Can.) (holding mandatory sentence of seven years for importation or exportation of drugs constituted cruel and unusual punishment).

since looked to these laws to find that the punishment violated its state constitution.²⁶²

Life imprisonment with an opportunity for parole is more acceptable in Europe; however, it is still reserved only for extreme cases.²⁶³ In the United Kingdom courts are authorized to impose life imprisonment for an offense other than murder only when the court determines that a defendant poses a significant risk to the public,²⁶⁴ when the offense is serious enough to require a very long sentence, and where the nature of the offense or the defendant's history suggest the defendant is likely to commit the offense again.²⁶⁵ Other European courts have taken into consideration the fact that unduly long sentences without the possibility of sentence review result in physical and mental

²⁶² Shortly after *Harmelin* was decided, the Michigan Supreme Court held that life without parole was disproportionately severe and thus violated the state constitution. *People v. Bullock*, 485 N.W.2d 866, 875 (Mich. 1992). The state legislature changed the law so that the life sentence for a large quantity of drugs was no longer mandatory. The Michigan legislature is currently considering a bill to eliminate mandatory minimum sentencing and to reduce the sentences of those previously sentenced under the harsh life imprisonment provisions. See Paul M. Bischke, *Michigan Reconsiders Drug-Lifer Sentencing 70 Years after the "Life for a Pint" Law*, THE NOVEMBER COAL., available at <http://www.november.org/razorwire/rzold/06/0602a.html> (last visited Sept. 22, 2007).

²⁶³ For example, Kommers states that the German court has not said that life imprisonment is per se unconstitutional. German law requires a mandatory life sentence for murder and genocide. However, in contrast to the United States, German convicts are eligible for parole after serving 15 years of their life sentence. The German Court held that the state is obligated to consider "the particular situation of each prisoner in terms of his or her capacity for rehabilitation and resocialization and in the light of the principles of human dignity, the rule of law, and the social state." KOMMERS, *supra* note 251, at 311.

²⁶⁴ A life sentence may be imposed for a second serious sexual or violent offense, but the court must consider any exceptional circumstances which would suggest the punishment is disproportionate to the offense committed. Powers of Criminal Courts Act, 2000, c. 6, § 109 (Eng.).

²⁶⁵ See *R. v. Hodgson*, (1968) 52 Crim. App. 113, 113-14 (Eng.); see also *R. v. Offen* (2001) 1 W.L.R. 253, 273-77 (Eng.) (holding life sentence can be reconciled with Human Rights Act's prohibition against inhumane or degrading punishment and rights under Articles 3 and 5 if sentence is not imposed arbitrarily or disproportionately). In *Offen*, five cases were heard together to resolve the constitutionality of a statute requiring the court to impose an automatic life sentence on any person over 18 convicted of two qualifying offenses. *Id.* at 253.

deterioration.²⁶⁶ As Whitman writes, “Mercy matters in Europe,” and it takes the form of common amnesties.²⁶⁷

The U.S. Supreme Court has found no constitutional right to rehabilitation for prisoners,²⁶⁸ although some lower courts have found Eighth Amendment violations where prison conditions made debilitation likely.²⁶⁹ By contrast, international law incorporates a right to progressive social reintegration of prisoners. International law has found that barriers to a prisoner’s successful reintegration violate his fundamental dignity rights.²⁷⁰ This means that rehabilitation programs must be made available to prisoners, and prisoners should be released as soon as they can safely be returned to the community.²⁷¹ Several foreign constitutions and international treaties also explicitly

²⁶⁶ VAN ZYL SMIT, *supra* note 218, at 212-14 (noting controversial litigation over life imprisonment in Germany, England, and Wales supports view that life imprisonment leads to problems resulting from loss of hope for release). The German Supreme Court held that life imprisonment, without consideration of the circumstances of a defendant’s offense, violated the constitutional right of human dignity because (1) experience suggests that life imprisonment is not always necessary to protect society; (2) a continuous lack of freedom, without the possibility of release, results in an “extraordinary physical and psychological burden”; and (3) in determining an appropriate sentence, the state is constitutionally required, on a case-by-case basis, to consider the nature of the offense and the defendant’s potential for rehabilitation. *Id.* at 310-12.

²⁶⁷ See WHITMAN ET AL., *supra* note 252, at 19 (“American punishment is comparatively harsh, comparatively degrading, and comparatively slow to show mercy.”). Whitman argues that these qualities are remnants of Europe’s monarchical roots where, as far back as the Middle Ages, there were traditions of bestowing grace and mercy. He notes that this tradition has done very valuable things for European offenders. *Id.* at 202.

²⁶⁸ *Rhodes v. Chapman*, 452 U.S. 337, 349-50 (1981).

²⁶⁹ See, e.g., *Goodson v. Evans*, 438 F. Supp. 2d 199, 202 (W.D.N.Y. 2006) (“A medical need is [sufficient] for [Eighth Amendment] purposes if it presents ‘a condition of urgency’ that may result in ‘degeneration’ or ‘extreme pain.’” (quoting *Chance v. Armstrong*, 143 F.3d 698, 702 (2d Cir. 1998))). The District Court in *Hutto* criticized punitive isolation, which can be considered either a method of punishment or a condition of confinement, because it “served no rehabilitative purpose . . . [was] counterproductive . . . and made bad men worse.” *Finney v. Hutto*, 410 F. Supp. 251, 277 (E.D. Ark. 1976).

²⁷⁰ VAN ZYL SMIT, *supra* note 218, at 167-96 (discussing principle that no punishment should deprive prisoner of hope of some day returning to full membership in society).

²⁷¹ *Mastromatteo v. Italy*, 2002-VIII Eur. Ct. H.R. 151, 165-68 (2002); see also ICCPR, *supra* note 255, art. 10(3) (stating that “the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation”).

require states to adopt measures that facilitate rehabilitation.²⁷² As to the prison conditions generally, foreign law acknowledges the importance of safeguarding the physical and mental integrity of prisoners by placing positive obligations on government officials to take all reasonable precautions to insure prisoner safety.²⁷³ Solitary confinement has been largely abandoned in developed countries other than the United States.²⁷⁴

²⁷² See American Convention on Human Rights art. 5(6), July 18, 1978, 1144 U.N.T.S. 123 (stating that “[p]unishments consisting of deprivation of liberty shall have as an essential aim the reform and social re-adaptation of the prisoners.”); ICCPR, *supra* note 255, art. 10(3), at 54 (“[P]enitentiary system[s] shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.”); Am. Corr. Ass’n, Declaration of Principles, <http://www.aca.org/pastpresentfuture/principles.asp> (last visited Sept. 27, 2007) (“Hope is a prerequisite for the offender’s restoration to responsible membership in society.”). The constitutions of Spain and Italy both specify that prison sentences should “be oriented towards the re-education and rehabilitation of offenders.” See VAN ZYL SMIT, *supra* note 218, at 13. Similarly, the constitutional courts of Germany, Italy, and Namibia have said that prisoners have a general right to rehabilitation as a result of their constitutional right to human dignity. *Id.* at 213. The German court reasoned, “As bearer of the guaranteed fundamental rights to human dignity the convicted offender must have the opportunity, after completion of his sentence, to establish himself in the community again.” *Id.* at 14 (quoting BVerfG June 5, 1973, 35 BVerfGE 202 (235-36)).

²⁷³ See Kampala Declaration on Prison Conditions in Africa, U.N. Econ. & Soc. Council Res. 1997/36, Annex, U.N. Doc. E/1997/97 (July 21, 1997), available at <http://www.penalreform.org/Kampala-declaration-on-prison-conditions-in-africa.html>; STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS, U.N. Sales No. 1956.IV.4 (1955), available at <http://www.ohchr.org/english/law/pdf/treatmentprisoners.pdf>; Council of Europe Comm. of Ministers, *European Prison Rules*, Recommendation No. R(87)3, app. (1987), available at <http://www.coe.int> (follow “Search” hyperlink; then follow “Committee of Ministers” hyperlink; then type “Rec(87)3E” in “Reference/Keywords” field); The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, <http://www.cpt.coe.int/en/documents/eng-standards-scr.pdf>, 17-28.htm (last visited Sept. 24, 2007); VAN ZYL SMIT, *supra* note 218, at ch. 1, at 7-15. One commentator notes that “protection is a key rationale for the state’s existence” and the courts are available to remedy any failures to discharge the responsibility. Jeremy McBride, *Protecting Life: A Positive Obligation to Help*, 24 E.L. REV. 43, 54 (1999); see also ALISTAIR MOWBRAY, THE DEVELOPMENT OF POSITIVE OBLIGATIONS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY THE EUROPEAN COURT OF HUMAN RIGHTS 4 (2004) (citing *Edwards v. United Kingdom*, 2002-II Eur. Ct. H. R. 137, 159-60 (discussing state’s duty to protect inmates)). The European Court of Human Rights determined that officials should have taken steps to learn inmate’s mental conditions before placing him in a cell with another inmate, whom he killed a few hours later. *Id.* at 20-21.

²⁷⁴ See GIBBONS & KATZENBACH, *supra* note 10, at 54. There is extensive commentary defining solitary confinement in South Africa as a form of torture. See, e.g., DON H. FOSTER, DETENTION AND TORTURE IN SOUTH AFRICA: PSYCHOLOGICAL,

The fact that prisoner health, rehabilitation, and reintegration are essential components of human dignity abroad is potentially instructive to the Court and highly relevant given the limited prison programs, mentally destructive prison conditions, and post-sentence barriers that are routine in the United States. Indeed, the U.N. Human Rights Committee has criticized American disenfranchisement laws that bar more than five million convicted felons from voting as being inconsistent with the International Covenant on Civil and Political Rights, and finding that it served no rehabilitative purpose.²⁷⁵

It is a truism that a society is judged in the world by the way it treats its prisoners. Historically, America's place in the world as a model of human rights supports more vigorous efforts to catch up to evolving standards of decency as reflected in virtually all other developed democracies.²⁷⁶ But the point of utilizing global standards and due process claims is not only to bring punishment closer to the norms that are shared by the rest of the world, but more fundamentally, to bring it closer to the reality of punishment as it is experienced by the prisoner.

In prison conditions suits, the Court has said that harsh conditions, "alone or in combination, may deprive inmates of the minimal civilized measure of life's necessities."²⁷⁷ Eighth Amendment review should include consideration of the sentence in its totality, as Canada's analogous provision does,²⁷⁸ and include consideration of well-established data illuminating the true nature of the punishment. A court should define a punishment as including, for example, an excessively long sentence, debilitating terms in segregation, lack of rehabilitative programs, and post-release legal barriers to reintegration. Adoption of consistent global standards of human dignity will go a long way toward correcting the current distortion in American punishment jurisprudence.

LEGAL, AND HISTORICAL STUDIES 69 (1987) (examining physical and psychological effects of torture).

²⁷⁵ Editorial, *Prisoners and Human Rights*, N.Y. TIMES, July 31, 2006, at A16.

²⁷⁶ Calabresi, *supra* note 245, at 1410-16.

²⁷⁷ *Rhodes v. Chapman*, 452 U.S. 337, 363 (1981) (Brennan, J., concurring) (relying on notion of aggregated claims where if no condition by itself is sufficient for Eighth Amendment claim, number of conditions would suffice).

²⁷⁸ See *R. v Smith*, [1987] S.C.R. 1045 (Can.). The court stated that Charter section 12 "governs the quality of the punishment and is concerned with the effect that the punishment may have on the person on whom it is imposed." *Id.* at 1046. The court is also to consider the effect of the sentence actually imposed, that effect often being a composite of many factors including the nature of the sentence and the conditions under which it is applied. *Id.* at 1047-49.

B. *Due Process, Substantive and Procedural*

In *Harmelin* the Court decided that a mandatory life sentence without the possibility of parole did not violate the Eighth Amendment despite the lack of consideration of the individual circumstances of the crime or history of the defendant.²⁷⁹ A glance abroad at evolving standards of decency would have bolstered the Eighth Amendment argument because much of Europe has rejected mandatory punishment as inconsistent with the defendant's dignity rights.²⁸⁰ But if the Court will not reconsider its Eighth Amendment reasoning in *Harmelin*,²⁸¹ perhaps it will do so under the Due Process Clause due to its heightened recognition of dignity rights.

The Due Process Clause as well as the Eighth Amendment protects a person's liberty rights.²⁸² A substantive due process challenge to the effects of particular punishments on liberty rights may succeed where a challenge under the Eighth Amendment has failed.²⁸³ Mandatory

²⁷⁹ This was in addition to upholding the defendant's life sentence against a proportionality challenge. The Court noted that mandatory sentences had existed since the beginning of the Republic. *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991). Historically, however, pardons and clemency were much more freely used. See, e.g., Editorial, *Abuse Through Disuse*, WASH. POST, Nov. 21, 2004, at B6 (comparing President George W. Bush's displays of mercy to historical trends). On allocation about the defendant's history, see also FED. R. CRIM. P. 32(i)(4); *Perry v. State*, 822 A.2d 434, 456 (Md. Ct. Spec. App. 2002); *State v. Nelson*, 803 A.2d 1, 31-32 (N.J. 2002); *State v. DeCiantis*, 813 A.2d 986, 992 (R.I. 2003); *State v. Maestas*, 63 P.3d 621, 622 (Utah 2002). Today a mandatory sentence will be served unless the prisoner dies, or is a beneficiary of a rare act of clemency. See Liptak, *supra* note 25.

²⁸⁰ See Dirk van Zyl Smit & Andrew Ashworth, *Disproportionate Sentences as Human Rights Violations*, 67 MOD. L. REV. 541, 544 (2004). The German Supreme Court has also held that life imprisonment, without consideration of the circumstances of a defendant's offense, violates the constitutional right of human dignity. KOMMERS, *supra* note 251, at 310-12.

²⁸¹ Despite the Court's continued reliance on *Harmelin*, its dedication to stare decisis has often been less rigid when applied to constitutional precedents. Among the relevant factors to the doctrine's application are whether the rule of the case is unworkable today, and whether facts have changed dramatically enough to reveal a flaw in the Court's original reasoning. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854-55 (1992). We now have two million people in prison, 3.96 times what we had in 1991 when *Harmelin* was decided. According to the Bureau of Justice Statistics, there were 792,535 people in prisons in 1991. Bureau of Justice Statistics, *supra* note 4.

²⁸² Liberty and dignity rights are intertwined in constitutional doctrine. See, e.g., Resnik & Suk, *supra* note 14, at 1935-36 (detailing history of dignity rights in constitutional jurisprudence).

²⁸³ Liberty rights extend beyond the just-convicted to prisoners, parolees, and probationers, because they too have interests in avoiding certain changes of conditions

minimum sentences or life without parole for juveniles and adults are particularly vulnerable on substantive due process grounds.²⁸⁴

Under the Supreme Court's substantive due process cases, deprivation of a fundamental right, such as privacy or voting, is constitutional only if it passes strict scrutiny.²⁸⁵ Where other laws invoking mere liberty interests need only be rationally related to any conceivable legitimate government purpose to survive a due process challenge (rational basis review), strict scrutiny means that once a right is determined to be fundamental, its deprivation must be supported by a compelling state interest, and must be narrowly tailored so that no greater deprivation is inflicted than is necessary to achieve that interest.²⁸⁶ Freedom from confinement is a fundamental liberty right, as the Supreme Court has held in cases involving the confinement of children and mental patients.²⁸⁷

One might have hoped that strict scrutiny would provide a highly effective means of challenging transfers of prisoners to solitary confinement or other harsh conditions, but in *Vitek v. Jones*, the Court held that "a valid criminal conviction and prison sentence extinguish a defendant's right to freedom from confinement."²⁸⁸ *Vitek's* holding

that diminish their liberty. See, e.g., *Wolff v. McDonnell*, 418 U.S. 539 (1974) (finding prisoner has liberty interest in avoiding withdrawal of state-created system of good time credits); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (finding due process requirements are flexible depending on demands of particular situation).

²⁸⁴ This may not be unduly optimistic given the Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). In *Lawrence*, the Court struck down a Texas statute criminalizing homosexual sodomy, holding that the constitutional right to privacy includes a right to engage in private consensual homosexual activity. *Id.* at 588. In Professor Tribe's view, *Lawrence* may be a landmark in the "larger project of elaborating, organizing, and bringing to maturity the Constitution's elusive but unquestionably central protections of liberty, equality, and . . . respect for human dignity." Laurence H. Tribe, *Lawrence v. Texas: The 'Fundamental Right' That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1895 (2004) (explaining that Court's expansive approach to liberty and dignity under substantive due process analysis in *Lawrence* suggests possibility of such greater protections).

²⁸⁵ Tribe puts little stock in the standard of review requirements for due process analysis, saying it "is often more conclusory than informative." Tribe, *supra* note 284, at 1916.

²⁸⁶ See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997) (finding that "the Fourteenth Amendment 'forbids the government to infringe . . . 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest'") (citation omitted).

²⁸⁷ See *Parham v. J.R.*, 442 U.S. 584, 600 (1979) (discussing child's right); *O'Connor v. Donaldson*, 422 U.S. 563, 580 (1975) (discussing mental patients' rights).

²⁸⁸ *Vitek v. Jones*, 445 U.S. 480, 493 (1980); see also *Meachum v. Fano*, 427 U.S.

underscores the vital significance of strict scrutiny prior to sentencing. The issuance of a sentence should be measured by the compelling state interest test because the sentence will eliminate the defendant's fundamental liberty right against confinement. To be sure, the Supreme Court would have to be persuaded to apply its substantive due process doctrine to what it acknowledges to be the fundamental right of liberty from confinement in criminal cases, something it has neither done nor rejected.²⁸⁹

A statute that requires a mandatory minimum term upon a particular conviction is by definition a law that is not "narrowly tailored" under strict scrutiny review. Even if some of those punished deserve a particular sentence, it is impossible that this could be true for all those so punished. Many mandatory minimums for drug crimes burden equally the casual user, the person who sells small quantities to intimate associates, the addict, and the major drug dealer.²⁹⁰ Some impose the same penalty regardless of the quantity involved, or regardless of the defendant's personal characteristics and prospects for rehabilitation. Such laws inevitably treat disparate cases alike, and inflict years of confinement on some defendants for whom that sentence is not necessary. Such a law defeats the possibility for a judge to determine what sentence is necessary to serve the state's compelling interest in the particular case before her. Thus, the

215, 225 (1976).

²⁸⁹ For example, as Professor Sherry Colb points out, in *Bowers v. Hardwick*, 478 U.S. 186 (1986), "[t]he Court failed to recognize that the Georgia sodomy law at issue in *Hardwick* burdened more than just the acts it prohibited. . . . Confinement for engaging in conduct differs from merely making that conduct unavailable." Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different From All Other Rights?*, 69 N.Y.U. L. REV. 781, 806 (1994). Colb argues that laws that subject offenders to prison have not been subject to strict scrutiny, nor has the Supreme Court justified its failure to do so, even though imprisonment "must be justified not only by a valid conviction, but by a valid law. Such a law must only deprive people of their fundamental right to liberty from confinement when confinement is necessary to serve a compelling governmental interest." *Id.* at 849; see also WARREN REDLICH, A SUBSTANTIVE DUE PROCESS CHALLENGE TO THE WAR ON DRUGS 11 (2006), <http://www.redlichlaw.com/crim/substantive-due-process-drug-war.pdf>. Redlich argues that substantive due process should be interpreted to prohibit incarcerating at least some drug offenders, *id.* at 21, who now comprise half of all federal prisoners and a fifth of all state prisoners. Bureau of Justice Statistics, Bulletin: Prisoners in 2005, <http://www.ojp.usdoj.gov/bjs/pub/pdf/p05.pdf> (last visited Sept. 22, 2007).

²⁹⁰ MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT, A 25-YEAR QUAGMIRE: THE "WAR ON DRUGS" AND ITS IMPACT ON AMERICAN SOCIETY 12 (2007) (citing UNITED STATES SENTENCING COMMISSION, COCAINE AND FEDERAL SENTENCING POLICY, May 2007, at 19) ("Among powder cocaine defendants, one in three was categorized as a courier or mule, while only 1 in 13 was classified as an 'importer/high-level supplier.'").

Supreme Court of Canada ruled that a mandatory seven-year sentence under the Narcotics Control Act violated article 12 of the Canadian Charter of Rights and Freedoms, because a guilty verdict “will inevitably lead to the imposing of a totally disproportionate term of imprisonment, for s. 5(1) covers many substances of varying degrees of danger, totally disregards the quantity imported and treats as irrelevant the reason for importing and the existence of any previous convictions.”²⁹¹

Even if courts will not apply strict scrutiny, punishments must be justified as having a rational basis. The right to liberty means at the very least that no one should be sentenced to a particular term of incarceration without good reason, yet there are many prisoners who have suffered such a sentence. As Justice Kennedy said, “When it costs so much more to incarcerate a prisoner than to educate a child, we should take special care to ensure that we are not incarcerating too many persons for too long.”²⁹² Numerous studies by private and governmental sources conclude that our sentencing practices are ineffective in accomplishing their goals and costly in their financial and human costs.²⁹³

Consider again whether mandatory minimum sentences are a rational means of serving legitimate goals. Punishment is traditionally justified by either looking backward at the blameworthiness of the criminal, or looking forward to prevent new crimes and protect public safety. Mandatory minimums do neither: They are not forward-looking because they irrefutably presume the offender cannot reform, thus rejecting his moral and prudential agency. Nor are they backward-looking, because they ignore circumstances relevant to degree of blame, such as poverty or mental illness, except in the extreme cases of insanity and duress. Most defendants are young, poor, of color, nonviolent, and/or addicted to drugs or alcohol. None of this matters if the individual faces a mandatory minimum. Because mandatory minimums blindly apportion moral blame and preventive

²⁹¹ R. v. Smith (Edward Dewey), [1987] S.C.R. 1045, 1046-47 (Can). As one of the concurring judges wrote, “The seven-year minimum sentence is not *per se* cruel and unusual but it becomes so because it must be imposed regardless of the circumstances of the offence or the offender. Its arbitrary imposition will inevitably result in some cases in a legislatively ordained grossly disproportionate sentence.” *Id.* at 1047.

²⁹² Kennedy, *supra* note 187, at 3.

²⁹³ DON STEMEN, VERA INST. OF JUSTICE, RECONSIDERING INCARCERATION: NEW DIRECTIONS FOR REDUCING CRIME 13-16 (2007), available at http://www.vera.org/publication_pdf/379_727.pdf.

potential, they are fundamentally different from sentences selected by a judge from a range of possible terms.

Yet the same Justice Kennedy, who in speeches warned against the irrational length of our sentences, upheld Harmelin's life sentence. He explained the rationality of the mandatory life sentence on the basis that drug use causes crime, yet the sentence was far greater than it would have been had Harmelin committed one of the hypothetically related crimes listed by Justice Kennedy.²⁹⁴ One reason why mandatory minimums seem to elude rational basis scrutiny may be the apparent "subjectivity" involved in drawing the line at a certain number of years. But it is disingenuous for the Court to abdicate the task of judging proportionality because of its difficulty, especially when it is increasingly willing to make such judgments in the non-criminal punitive damages context where corporate money rather than liberty is at stake.²⁹⁵ There is no principle that can explain why proportionality review is so workable in punitive damages cases but not in any others. Surely there are guideposts: crimes against persons are more serious than crimes against property; negligent acts are less serious than intentional ones; mental illness mitigates culpability; and so on. Reasonable constitutional judgments with a reasonable margin of appreciation for diverse approaches can be made.²⁹⁶ It would be more honest for courts to admit the necessity of always-contestable judgments in difficult sentencing cases than to resort to thinly disguised formalisms for avoiding them. As Professor Charles Black so

²⁹⁴ Harmelin v. Michigan, 501 U.S. 957, 1022-23 (1991); see Douglas Husak & Stanton Peele, *Symbolism and Evidence of Drug Harms in U.S. Supreme Court Decisions*, 25 CONTEMP. DRUG PROB. 191, 211-15 (1998), available at <http://www.peele.net/lib/supreme.html>. Because many recently enacted laws build factual findings into the definition of the crime and the punishment, it is fair to say that Congress engages in fact-finding that is unchallengeable except, perhaps, by way of the Sixth Amendment or the Due Process Clause. See Margaret H. Lemos, *The Commerce Power and Criminal Punishment: Presumption of Constitutionality or Presumption of Innocence?*, 84 TEX. L. REV. 1203, 1212-15 (2006).

²⁹⁵ See, e.g., Pamela S. Karlan, "Pricking the Lines": *The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880 (2004) (discussing *BMW v. Gore*, 517 U.S. 599 (1996), and other recent Supreme Court jurisprudence on punitive damages under Eighth Amendment).

²⁹⁶ See Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957, 1957-61 (2004). Volokh states, "[i]f courts are to balance a constitutional right against a government interest, and the government interest is in preventing crime, the weight of the interest must turn on the seriousness of the crime the government is trying to avert. Constitutional law shouldn't be forced into unitary rules that underprotect rights when the government interest in preventing a crime is minor, or underprotect government power when the interest is great." *Id.* at 1957-58.

eloquently said in describing the opposition to the Court's desegregation decisions, the complaint seemed to be that "there is no ritually sanctioned way in which the Court, as a court, can permissibly learn what is obvious to everybody else and to the Justices as individuals. But surely, confronted with such a problem, legal acumen has only one proper task — that of developing ways to make it permissible for the Court to use what it knows" ²⁹⁷

Similarly, barriers to reentry should have to be justified as rational. Collateral consequences that bar, for example, a former inmate and father from obtaining a driving license, receiving housing assistance, or working in numerous jobs promote crime, not safety. Even if the Eighth Amendment has nothing to say about such collateral consequences, as the Supreme Court has said, it is hard to see how the state can justify these laws as having a rational basis.

CONCLUSION

The Supreme Court has often claimed that the Constitution's protections are flexible and dynamic enough to withstand the test of time. With rare exceptions, the Court has not fulfilled this mandate. The various changes in the goals, functions, and principles of punishment recall Justice Brennan's description of punishment as a struggle "between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century" ²⁹⁸

Unfortunately, we have landed on the wrong side of this struggle. We have utterly failed to realize the higher ideals Justice Brennan identified, and instead have rushed to enact ever harsher sentences, three strikes laws, mandatory minimums, and other mechanical punishment policies, and numerous post-release barriers to reintegration. As we have seen, our misplaced faith in draconian punishment has not come without consequence. During the past twenty-five years, as the rate of incarceration has increased by 350%, ²⁹⁹ the primary impact of our punishment regime has been to degrade and destroy the lives of those sentenced, thus devastating whole communities. The toll inflicted has been greatest on those least able to

²⁹⁷ Black, *supra* note 43, at 427-28.

²⁹⁸ *Furman v. Georgia*, 408 U.S. 238, 296 (1972) (Brennan J., concurring) (quoting THORSTEN SELLIN, *THE DEATH PENALTY, A REPORT FOR THE MODEL PENAL CODE PROJECT OF THE AMERICAN LAW INSTITUTE* 15 (1959)).

²⁹⁹ GIBBONS & KATZENBACH, *supra* note 10, at 109.

bear it: the poor, minorities, and the mentally ill. Like the outlawed sentences in *Weems* and *Trop*,³⁰⁰ the pain, anxiety, and irrevocability of many non-death sentences are outside the pale of reasonable punishment.

By failing to recognize the actual consequences of a prison sentence as punishment, and by creating constitutional tests that deflect and deter Eighth Amendment challenges, the Supreme Court has blindly and cruelly accepted form over substance, thus abdicating its responsibility as a guardian of the Eighth Amendment. Unless the Court re-examines its constitutional doctrines to reflect the realities of sentencing, the tragic road we have paved in recent decades will continue.

How would our brand of punishment change if U.S. courts expanded their understanding of the cruel and unusual punishment prohibition to one closer to that of most other developed democracies? Punishment would be both more humane and more effective, and conditions of confinement would become part of the proportionality analysis. Fewer people would be sent to jail, and courts would increase their use of alternatives to incarceration. Courts and legislators would encourage, rather than discourage, continuation of family and community relationships by allowing routine conjugal visits, more extensive family visitations, and nursery care for newborns. They would assure education, job training, and other rehabilitation opportunities, and outlaw the prolonged use of isolation because of its destructive effects on the mental and physical well-being of prisoners. They would insist that state and federal authorities encourage, rather than withhold, the franchise by including political education in prisons, they would overturn laws that brand former prisoners and deny them public benefits, services, and the basic privileges of citizenship. In requiring a more rational, less destructive punishment system that avoids the cruelties so prevalent today, we might find ourselves with a non-criminogenic, even valuable, system of criminal justice.

³⁰⁰ *Trop v. Dulles*, 356 U.S. 86, 101 (1958); *Weems v. U.S.* 217 U.S. 349, 382 (1910).