Winter 2017

Penal Incapacitation: A Situationist Critique

Guyora Binder
University at Buffalo School of Law

Ben Notterman

ARTICLES

PENAL INCAPACITATION: A SITUATIONIST CRITIQUE

Guyora Binder* & Ben Notterman**

INTRODUCTION

> Objects or ends of penal justice . . .: 1*st*, *Example*—prevention of similar offences . . . by the repulsive influence exercised on the minds of bystanders by the apprehension of similar suffering in case of similar delinquency. 2*dly*, *Reformation*—prevention of similar offences on the part of the *particular individual* punished . . . by curing him of the *will* to do the like in future. 3*rdly*, *Incapacitation*—prevention of similar offences on the part of the same individual, by depriving him of the *power* to do the like.[1]

As we today look back at the infamous cases of *Dred Scott v. Sandford*[2] and *Plessy v. Ferguson*[3] to understand the ideologies of slavery and racial segregation, so too will later generations look to *Ewing v. California*[4] to understand mass incarceration. In *Ewing*, the Supreme Court upheld the constitutionality of a sentence of twenty-five years-to-life for stealing three golf clubs, under California's infamous "Three Strikes and You're Out" recidivist sentencing law.[5] In holding this harsh sentence proportionate, the Court determined that sentences of imprisonment could be justified by the goal of incapacitation alone, without requiring any empirical evidence that such sentences would in fact reduce crime.[6] Instead, the Court simply assumed that locking up a prior offender would prevent crime that would otherwise occur.[7] So, as we increased our incarcerated population

---

* SUNY Distinguished Professor and Hodgson Russ Faculty Scholar, University at Buffalo Law School. Thanks are owed to Kristian Klepes for invaluable research assistance, and to Jennifer Hunt, Anya Bernstein, Jessica Su, and participants at a Buffalo Law Faculty Workshop for comments and suggestions.

** J.D., New York University School of Law, 2014.

1. 4 JEREMY BENTHAM, *Panopticon vs. New South Wales*, *in* THE WORKS OF JEREMY BENTHAM 173, 174 (John Bowring ed., 1843).
2. 60 U.S. 393 (1857).
3. 163 U.S. 537 (1896).
4. 538 U.S. 11 (2003).
5. *Id.*
6. *Id.* at 25.
7. *See infra* Part III (discussing the assumptions underlying incapacitation theory).

700%,[8] what were we thinking? The answer *Ewing v. California* suggests is that we thought we were incapacitating dangerous offenders.[9] This Article argues that we were fundamentally mistaken. We were not incapacitating danger, but attributing it to individuals. We were not reducing the risk of crime, but redistributing it.

In two recent cases, *Graham v. Florida*[10] and *Miller v. Alabama*,[11] the Supreme Court changed the landscape of Eighth Amendment jurisprudence by requiring a more searching proportionality review of certain sentences of incarceration. Challenges to sentencing practices (as opposed to individual sentences) required a comparison of the severity of the authorized sentences to the gravity of the crimes punished.[12] In making this comparison, the Court considered proportionality to all purposes of punishment cumulatively—retribution, deterrence, rehabilitation, and incapacitation.[13] Moreover, it subjected incapacitation rationales to a test of empirical evidence.[14] These decisions undermine the continued authority of *Ewing* and its uncritical acceptance of incapacitation as a justification for very long sentences. If such sentences cannot be shown to prevent crime, they may no longer satisfy the requirements of the Eighth Amendment.

Incapacitation was first identified as a function of punishment by utilitarian philosopher and legal reformer Jeremy Bentham.[15] For Bentham, public policy was best evaluated by its contribution to public utility, the maximum expected net aggregate pleasure of all members of society.[16] From this utilitarian perspective, punishment was an evil, reducing utility by inflicting suffering.[17] It could be justified only insofar as it prevented more suffering by preventing crime.[18] Accordingly, incapacitation justifies incarceration, only insofar as it reduces crimes overall, and at an acceptable social cost. If, as its critics claim, mass incarceration imposes unacceptable economic and social costs, it cannot fulfill the

---

8. LAUREN-BROOKE EISEN & INIMAI CHETTIAR, BRENNAN CTR. FOR JUSTICE, THE REVERSE MASS INCARCERATION ACT 3 (2015), https://www.brennancenter.org/sites/default/files/publications/The_Reverse_Mass_Incarceration_Act%20.pdf (noting America's prison population grew 700% since 1970).

9. *Ewing*, 538 U.S. at 30 ("[Ewing's sentence] reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated.").

10. 560 U.S. 48 (2010).

11. 132 S. Ct. 2455 (2012).

12. *See id.* at 2463; *Graham*, 560 U.S. at 67–68.

13. *See Miller*, 132 S. Ct. at 2465; *Graham*, 560 U.S. at 71–72.

14. *See Miller*, 132 S. Ct. at 2465; *Graham*, 560 U.S. at 71–72. This Article focuses primarily on proportionality in the Court's noncapital cases; incapacitation has effectively been removed from consideration as a penological justification for capital punishment, *see* Harris v. Alabama, 513 U.S. 504, 517 (1995) (finding incapacitation "largely irrelevant" to analysis of state executions), though proportionality analysis itself is no longer easily divided into capital and non-capital settings.

15. FRANKLIN E. ZIMRING & GORDON HAWKINS, INCAPACITATION: PENAL CONFINEMENT AND THE RESTRAINT OF CRIME 19–21 (1995).

16. Guyora Binder, *Foundations of the Legislative Panopticon: Bentham's Principles of Morals and Legislation*, *in* FOUNDATIONAL TEXTS IN MODERN CRIMINAL LAW 79, 79–83 (Markus D. Dubber ed., 2014).

17. *See id.*

18. *See id.*

aim of incapacitation, which is to maximize utility. Although incapacitation is a possible function of punishment, incapacitation can also be pursued by other means. Thus, individuals can be restrained preventively, without their having committed any crime. Moreover, incapacitation need not be directed at particular individuals, let alone past offenders. Locks, surveillance cameras, and passwords are examples of incapacitation strategies directed generally at populations. These strategies make crime less likely by changing the situation confronting anyone who might otherwise commit it. Thus, penal incapacitation measures are a subset of incapacitation measures. The goal of incapacitation can only justify *punishment* insofar as restraining particular past offenders will prevent crimes that would otherwise occur, without causing greater harm than the crime prevented or any alternative means of preventing crime.

This Article examines incapacitation as a justification for punishment. It focuses this inquiry through the prism of a generation of research in psychology on the relative importance of situation and character (or "disposition") in accounting for behavior. It argues that incapacitation of past offenders is fundamentally flawed as a rationale for punishment. The problems with penal incapacitation are both conceptual and empirical. As a method of crime control, penal incapacitation is necessarily dispositionalist.[19] It presupposes that past offenders are uniquely dangerous individuals who are destined to offend and re-offend regardless of social context. This assumption, however, must contend with empirical studies showing that situational forces frequently overwhelm individual disposition; the causes of crime are often dangerous situations rather than dangerous people.[20] With respect to welfare, there is thus little to be gained by incapacitating all offenders on the basis of their imagined predispositions to offend. What sustains the illusion that penal incapacitation is welfare-enhancing is the Fundamental Attribution Error, a pervasive cognitive bias that causes humans to underestimate the power of situational factors and overemphasize disposition or personality.[21] We will acknowledge that there may be a much smaller population of offenders with discernible dispositions to offend (most of whom would probably be incarcerated even in a penal regime aimed at goals other than incapacitation). Thus incapacitation may justify some incarceration, but not mass incarceration.

Penal incapacitation rests on an understanding of behavior that is deeply inconsistent. Its proponents view offenders as inherently dangerous and likely to reoffend regardless of where they are put. Yet it also presumes that offenders will not continue to offend once they are incarcerated. A possible rejoinder is that an incapacitationist criminal justice system need not prevent crime in prison. The difficulty with this solution is that it abandons an essential feature of incapacita-

---

19. *See infra* Part III.

20. *See infra* notes 233–55 and accompanying text.

21. Lee Ross, *The Intuitive Psychologist And His Shortcomings: Distortions in the Attribution Process*, 10 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 173, 184–87 (1977).

tion: its utilitarianism. From a utilitarian perspective, the welfare of all persons counts equally, including that of offenders. There is no purpose served by imposing suffering on an offender merely to shift additional suffering from one victim to another. If the purpose of incapacitation is not to reduce crime but to redistribute it to the guilty, it abandons its claim to advance the public welfare. Thus conceived, incapacitation is not a distinct rationale for punishment at all, but instead is a means to retribution. Yet a retributive strategy of redistributing crime to past offenders must embrace the unpalatable assumption that offenders deserve not just their prescribed punishment, but also an increased risk of criminal victimization. Moreover, retribution cannot justify sentences like Ewing's that seem undeserved. If our current strategy of penal incapacitation serves neither utility nor desert, it is tempting to interpret it critically, as an ideological practice that disguises normative judgments (of blame) as facts (about risk). We will argue that our current practice of penal incapacitation is best understood as a segregation regime, which both prevents offenders from associating with other members of society, and stigmatizes them as unworthy to do so. Given our country's history of racial segregation and the disproportionately minority composition of the inmate population, such segregation is not an acceptable use of the criminal justice system.[22]

Our argument proceeds as follows. Part I describes the belated emergence of incapacitation as the dominant aim of criminal justice, and the modern incapacitation strategies that have contributed to mass incarceration. These incapacitation strategies have included reduced probation and parole, recidivist statutes, and possession offenses. Part II summarizes the place of incapacitation in the Supreme Court's Eighth Amendment proportionality review of noncapital sentencing decisions, and reviews the theoretical premises and empirical assumptions of penal incapacitation. It includes a critical discussion of the methods available to identify which individuals are disposed to offend in the future. Part III discusses psychology's attribution theory and offers a situationist critique of penal incapacitation and its dispositionalist assumptions. It also describes attribution errors and suggests that the plausibility of incapacitation theory rests on such errors. Part IV offers a critical reinterpretation of incapacitation as an expressive practice of segregating and stigmatizing offenders. Part V considers the significance of these criticisms of incapacitation for its place in Eighth Amendment jurisprudence. It argues that after *Graham* and *Miller*, the weak theoretical and empirical basis for believing that mass incarceration can incapacitate should preclude incapacitation from justifying life terms and other severe sentence enhancements. A brief conclusion summarizes the argument.

---

22. *See infra* Section IV.E.

I. MODERN INCAPACITATION STRATEGIES

A. The Rise of Incapacitation

Although Bentham identified "*Incapacitation*" as one way that punishment might prevent crime, he considered it far less important than general deterrence, which could influence many more potential offenders.[23] He identified incapacitation with transportation, which he mocked as less a means of preventing crime than of removing it from one place to another.[24]

Among the early Americans who pioneered the penitentiary, rehabilitation ("*Reform*" in Bentham's terminology) was the primary aim of this new method of punishment.[25] Rehabilitation continued to dominate American penology until the last quarter of the twentieth century, when support for it suddenly collapsed.[26] Throughout this period, incapacitation was seen as a marginal function of punishment, useful only for a small population of incorrigibly dangerous offenders.[27] In the 1960s and 1970s, however, as crime rates rose, rehabilitation came under attack as paternalistic, arbitrary, potentially discriminatory, and—most devastatingly—ineffectual.[28] A study of prison rehabilitative programs entitled "What Works?" famously concluded that none did.[29] Because incapacitation had long been seen as the default strategy when rehabilitation failed, it filled the void and became "dominant by default."[30] Liberals continued to insist that incapacitation was necessary only for a small group of incorrigibly dangerous offenders. In this sense, they proposed a strategy of selective incapacitation. Yet they offered no method for selecting these few, and their track record of excessive optimism about rehabilitative programs seemed to discredit their optimism about offenders themselves.[31] In an atmosphere of anxiety about rising crime, the public could easily conflate the failure of rehabilitative programs to affect recidivism rates with the inevitable recidivism of all offenders. As Zimring and Hawkins commented:

> The case for incapacitation at the individual level . . . rest[s] on the premise that the individual who has offended once will offend again unless restrained.

---

23. *See* BENTHAM, *supra* note 1, at 174.

24. *Id.* at 184.

25. *See* DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC 79–108 (1971); Edward L. Rubin, *The Inevitability of Rehabilitation*, 19 LAW & INEQ. 343, 347–52 (2001).

26. Rubin, *supra* note 25, at 347; ZIMRING & HAWKINS, *supra* note 15, at 6–10; Francis A. Allen, *The Decline of the Rehabilitative Ideal in American Criminal Justice*, 27 CLEV. ST. L. REV. 147, 149–50 (1978); Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts About the Next*, 70 U. CHI. L. REV. 1 (2003).

27. ZIMRING & HAWKINS, *supra* note 15, at 21–25.

28. FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE 33–34 (1981).

29. Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974).

30. ZIMRING & HAWKINS, *supra* note 15, at 3–17.

31. *Id.* at 10–12.

> The implicit assumption that offenders are intractable and insusceptible to change serves to justify imprisonment for the purpose of restraint on both moral and practical grounds. Indeed an image of the criminal offender as intractable was very much in fashion by the 1990[]s.[32]

This prevalent image of the intractable offender was inflected with racial connotations. Rising crime rates coincided with urban riots and disputes over school desegregation during the 1960s and 1970s to make crime policy a context for racial demagoguery. Richard Nixon, George Wallace, and Ronald Reagan made coded appeals to White resentment by identifying themselves with "law and order" or referring to city streets as dangerous "jungles."[33] Anti-crime rhetoric also attacked judges as indifferent to crime victims. The Supreme Court, already under attack for mandating school desegregation, made itself a target of anti-crime rhetoric by expanding constitutional safeguards in criminal procedure and restricting the death penalty.[34] Critiques of judicial discretion motivated calls for uniform, determinate sentencing, culminating in the 1987 Federal Sentencing Guidelines and guideline schemes in about half the states.[35] Parole and probation were increasingly portrayed as a revolving door, releasing incorrigibly violent offenders to prey on the public. The 1988 presidential campaign revealed the political potency of this narrative, as ads for George Bush held Michael Dukakis responsible for a violent crime committed by a furloughed black prisoner named Willie Horton and showed prisoners exiting a revolving door.[36] California's 1994 "Three Strikes" law was propelled by public outrage over another violent crime by a parolee.[37]

Proponents of incapacitation recognized the public's taste for higher incarceration rates in the 1970s. James Q. Wilson presciently observed, "Since society clearly wishes its criminal laws more effectively enforced . . . this means rising prison populations perhaps for a long period . . . ."[38] Wilson therefore proposed a strategy of collective incapacitation—confining all offenders. He speculated—in

---

32. *Id.* at 15.

33. WILLIAM STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 234, 236–39 (2011); JONATHAN SIMON, GOVERNING THROUGH CRIME 50 (2007).

34. *See, e.g.*, Arthur G. LeFrancois, *On Exercising The Exclusionary Demons: An Essay on Rhetoric, Principle, and the Exclusion Rule*, 53 U. CIN. L. REV. 49, 60–61 (1984); SIMON, *supra* note 33, at 60–62, 113–26.

35. *See* Alschuler, *supra* note 26, at 9–10; Kevin Reitz, *Sentencing: Guidelines*, *in* 4 ENCYCLOPEDIA OF CRIME & JUSTICE 1429, 1429–40 (2002); TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976); ANDREW VON HIRSCH, DOING JUSTICE (1976); MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

36. Beth Schwartzappel & Bill Keller, *Willie Horton Revisited*, THE MARSHALL PROJECT (May 13, 2015), https://www.themarshallproject.org/2015/05/13/willie-horton-revisited#.Mx6RZ5aqD.

37. FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 4–7 (2001) (discussing role of murder of Polly Klaas by parolee Richard Davis in referendum campaign for this law); Ewing v. California, 538 U.S. 11, 14–15 (2003) (discussing influence of Polly Klaas case).

38. Farnsworth Fowle, *Study Shows Prison Population Rose 13% in 1976 to Set a Record*, N.Y. TIMES (Feb. 18, 1977), http://www.nytimes.com/1977/02/18/archives/study-shows-prison-population-rose-13-in-1976-to-set-a-record.html (quoting James Q. Wilson).

advance of empirical evidence—that substantial reductions in crime would follow.[39] He presented the prospect of these benefits as a matter of common sense, to be presumed absent contrary evidence:

> When criminals are deprived of their liberty, as by imprisonment . . . their ability to commit offenses against citizens is ended . . . .
>
> . . .
>
> . . . [T]here is one great advantage to incapacitation as a crime control strategy—namely it does not require us to make any assumptions about human nature. By contrast, deterrence works only if people take into account the costs and benefits of alternative courses of action . . . . Rehabilitation works only if the values, preferences, or time-horizons of criminals can be altered by plan . . . .
>
> Incapacitation, on the other hand, works by definition: its effects result from the physical restraint placed upon the offender and not from his subjective state. More accurately, it works provided at least three conditions are met: some offenders must be repeaters, offenders taken off the streets must not be immediately and completely replaced by new recruits, and prison must not increase the post-release criminal activity of those who have been incarcerated sufficiently to offset the crimes prevented by their stay in prison.
>
> The first condition is surely true . . . . [T]he great majority of persons in prisons are repeat offenders, and thus prison, whatever else it may do, protects society from the offenses those persons would commit if they were free.
>
> The second condition . . . seems plausible . . . except, perhaps, for certain crimes (such as narcotics trafficking or prostitution), which are organized along business lines. For . . . predatory street crimes—robbery, burglary, auto theft, larceny—there are no barriers to entry and no scarcity of criminal opportunities . . . .
>
> . . . In general, there is no evidence that the prison experience makes offenders as a whole more criminal . . . .[40]

By setting the bar for success very low in this passage—any net crime prevention—Wilson was able to argue that unlike rehabilitation, incapacitation was guaranteed to work. The only pertinent question empirical investigation could answer was how much. The U.S. Supreme Court essentially accepted that logic of common sense in *Ewing v. California*, in deferring to the California Legislature's "judgment that protecting the public safety requires incapacitating criminals who already have been convicted of at least one serious or violent crime[,]" without requiring that this judgment be supported by empirical evidence.[41] The haphazard way in which this legislation was drafted belies any notion that the legislature tailored it to

---

39. James Q. Wilson, *If Every Criminal Knew He Would be Punished if Caught . . .*, N.Y. TIMES MAG. (Jan. 28, 1973), http://www.nytimes.com/1973/01/28/archives/if-every-criminal-knew-he-would-be-punished-if-caught-but-he-doesnt.html.

40. JAMES Q. WILSON, THINKING ABOUT CRIME 145–47 (2d rev. ed.1983) (citation omitted).

41. *Ewing*, 538 U.S at 29–30.

empirical findings.[42]

Yet even if we accepted that confinement prevented crime by definition, it would still be a particularly costly way of doing so, in also preventing all useful activity by its targets, while maintaining them at public expense.[43] If incapacitation is conceived in utilitarian terms as a strategy for maximizing the social welfare, incapacitation only succeeds if it costs less than the crime it prevents and all alternative means of preventing that crime. The high cost of collective incapacitation made the scale of expected prevention matter. While an influential paper claimed that imposing a five-year sentence for every violent offense would reduce violent crime by 80%,[44] later analyses predicted that five-year mandatory sentences for felonies would reduce felonies by at most 15%—less if the highest-rate offenders could expect to find themselves back in prison within five years anyway.[45]

Criminologists responded to the high cost and modest benefit of collective incapacitation by trying to make incapacitation more selective. Interviews with inmates revealed that a high percentage of their crimes had been committed by a small number of high-rate offenders. It seemed that if these high-rate offenders could be identified and selectively confined, incapacitation would be achieved at less cost. Peter Greenwood and Allan Abrahamse developed a list of biographical factors—essentially past offending, incarceration, drug use, and unemployment—that seemed to predict high-rate offending.[46] Yet subsequent re-analyses diminished the predictive power of these factors. Moreover, critics pointed to four mechanisms likely to further reduce the preventive efficacy of selecting offenders for incapacitation. First, because rules of complicity inculpate multiple offenders in group crimes, participants in criminal groups tend to be liable for many crimes. In this sense, they may be high-rate offenders. Yet group offenses will not generally be prevented by the removal of one member. The number of persons liable for the offense may decrease (unless another participant is recruited) but the harm inflicted may not. Second, non-prisoners with the predictive factors were unlikely to offend at the rates of prisoners, since high-rate offending increases the odds of arrest and imprisonment. Third, for this method of prediction to be applied, some of the predictive data has to be gathered from offenders, who have no

---

42. Determined to prevent the Republican Governor from using a recidivist sentencing statute as an election issue, the Democratic leadership of the legislature committed to pass whatever the Governor proposed. The Governor proposed language previously offered as a popular initiative. *See* ZIMRING, HAWKINS & KAMIN, *supra* note 37, at 3–7.

43. CHRISTIAN HENRICHSON & RUTH DELANEY, VERA INST. OF JUSTICE, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS 9 (2012) (finding that average per prisoner cost of incarceration in forty states studied in 2010 was $31,286).

44. Shlomo Shinnar & Reuel Shinnar, *The Effects of the Criminal Justice System on the Control of Crime: A Quantitative Approach*, 9 L. & SOC'Y. REV. 581 (1975).

45. Jacqueline Cohen, *Incapacitation as a Strategy for Crime Control: Possibilities and Pitfalls*, 5 CRIME & JUST. 1, 27 (1983).

46. PETER W. GREENWOOD & ALLAN ABRAHAMSE, RAND CORP., SELECTIVE INCAPACITATION (1982).

incentive to supply it. Fourth, in practice, law enforcement personnel are likely to deploy discretion to resist differential punishments of offenders committing similar offenses.[47]

These obstacles to selective incapacitation might have convinced researchers that incapacitation could not achieve cost-effective prevention. Instead, proponents argued that collective incapacitation would automatically select high-rate offenders through "stochastic selection," as higher rate offenders would be more likely to be arrested and convicted.[48] Yet stochastic selection can disproportionately confine high-rate offenders and still confine many more low-rate offenders. Moreover, the stochastic selection hypothesis presumes that those who have offended at a high rate in the past will offend at a high rate in the future, without offering any causal account of offending that could justify that presumption. In place of a causal theory, it simply assumes that offense rates are traits of individuals, dispositions that persist, regardless of environment.[49]

Both selection based on predictive instruments and stochastic selection depend on this attribution of past offenses to persistent dispositions. As such, both are equally vulnerable to the group criminality objection, which suggests that high-rate offending may depend on environmental rather than dispositional factors. Evidence indicates that co-offending is high for the offenses of robbery and burglary—precisely the offenses Wilson assumed would not be subject to a replacement effect.[50] Both prediction and stochastic selection are similarly vulnerable to the argument that by the time offenders are confined, their remaining criminal careers may be shorter than their sentences. One study found an average career-length for violent crime of less than ten years.[51]

Despite the high cost of collective incapacitation and the empirical challenges facing selective incapacitation, American policymakers pursued incapacitation enthusiastically. The ensuing sections describe several incapacitative practices that emerged during the late twentieth century and that continue today: the reduction of probation and parole; recidivist sentencing enhancements; the increased investigation, prosecution, and punishment of possession offenses; and lengthening prison terms. Common to these incapacitative practices is an underlying assumption that offenders offend because of an inherent disposition to do so.

---

47. *See* 1 NAT'L RESEARCH COUNCIL, CRIMINAL CAREERS AND "CAREER CRIMINALS" 134–35 (Alfred Blumstein, Jacqueline Cohen, Jeffrey A. Roth & Christy Visher, eds., 1986).

48. Alex R. Piquero & Alfred Blumstein, *Does Incapacitation Reduce Crime?*, 23 J. QUANTITATIVE CRIMINOLOGY 267, 272–74 (2007); José Canela-Cacho et al., *Relationship between the Offending Frequency (λ) of Imprisoned and Free Offenders*, 35 CRIMINOLOGY 133, 133–76 (1997).

49. Dan Markel, *Retributive Justice and the Demands of Democratic Citizenship*, 1 VA. J. CRIM. L. 1, 117 (2012) ("[S]elective incapacitation requires a prospective threat-based approach to sentencing and, in so doing, treats us as *unwavering* sources of risk rather than as persons capable of responding to reasons.").

50. Piquero & Blumstein, *supra* note 48, at 272–74.

51. *Id.*

B. Disappearance of Probation and Parole

Parole and probation arose early in the twentieth century as mechanisms to rehabilitate offenders.[52] Unlike incapacitation, rehabilitation presupposes that people have the capacity to change. The primary focus of parole programs through the 1960s was to facilitate reentry by providing employment and housing-related services.[53] The percentage of prisoners released on parole exceeded 70% in 1977.[54] As crime-control rhetoric infused American politics in the 1980s and 1990s, parole and probation gave way to determinate sentencing.[55] Some states abolished parole entirely, and many others severely limited its use.[56] By 1997, only 28% percent of prisoners were paroled.[57]

As public attitude and the political climate changed, parole and probation services began devoting more resources to surveillance and control of parolees.[58] No longer avenues toward reintegration, these institutions redirected offenders back into prison by placing new conditions on offenders, such as curfew and drug tests.[59] The professional orientation of parole officers shifted, as new recruits increasingly had training in criminal justice rather than social work.[60] Unsurprisingly, parole violations increased drastically: the percentage of state parolees successfully completing supervision fell from 70% in 1984 to 44% in 1996.[61] Now aided by the use of GPS and DNA technology, revocations continue to be a major source of recidivism throughout the country.[62]

C. Recidivist Sentence Enhancements

Recidivist sentencing laws enhance punishment for reoffenders. A well-publicized example is California's "three-strikes" law. Under that law, offenders previously convicted of two or more "serious" or "violent" crimes could be sentenced to a term of 25 years to life for an additional felony.[63] The law produced

---

52. *See, e.g.*, Joan Petersilia, *Parole and Prisoner Reentry in the United States*, 26 CRIME & JUST. 479 (1999).
53. *Id.* at 502.
54. *Id.* at 489.
55. A determinate sentence is one whose length is fixed by the sentencing body/judicial officer at the time of sentencing. Steven Chanenson, *The Next Era of Sentencing Reform*, 53 EMORY L.J. 377, 382–85 (2005).
56. Petersilia, *supra* note 52, at 494–95 (noting that fourteen states had abolished parole by 1998).
57. *Id.* at 489.
58. *Id.* at 507–08.
59. *See id.* at 507–08.
60. *Id.* at 508.
61. *Id.* at 512–13.
62. *Id.* at 483 (explaining that parole revocation symbolizes the "lock 'em up and throw away the key attitudes").
63. CAL. PENAL CODE § 667(e)(2)(a) (West 2016). Since 2012, the third strike must also be a "serious" or "violent" felony. *See* J. RICHARD COUZENS & TRICIA A. BIGELOW, THE AMENDMENT OF THE THREE STRIKES SENTENCING LAW 5 (2016), http://www.courts.ca.gov/documents/Three-Strikes-Amendment-Couzens-Bigelow.pdf.

some very harsh sentences, including that in *Ewing*.[64] California's three-strikes law was by no means unusual. As recounted by the majority in *Ewing*, "between 1993 and 1995, three-strikes laws effected a sea change in criminal sentencing throughout the Nation,"[65] reflecting "a deliberate policy choice" that repeat offenders "must be isolated from society in order to protect the public safety."[66] Like parole reduction, recidivist statutes were proposed in response to "outcry against repeat offenders" and "disaffection with the rehabilitative model."[67]

Statistical analyses suggest California's Three Strikes law did not make the public appreciably safer.[68] One reason may be that a large majority of offenders to whom the statute has been applied were incarcerated for non-violent crimes.[69] Another explanation is that three-strikes sentencing provisions are often applied to offenders who are nearing an age at which criminal behavior tends to drop off precipitously.[70] As a result, many such offenders are incarcerated just as incarceration begins to serve no public safety purpose.[71] Recidivist statutes may also be counterproductive insofar as incarceration increases the probability that an individual commits additional crimes after release.[72] Incarceration can sever social and familial connections, impede the pursuit of education, compromise job prospects, and expose offenders to criminal networks. The experience of prison appears to cause some prisoners to develop responses necessary for survival inside prisons but that disserve them on the outside.[73]

Where the decline of probation and parole show the repudiation of rehabilitation as an aim of punishment, recidivist sentencing enhancements more clearly show the embrace of a strategy of identifying and incapacitating the dangerous.

D. Possession Offenses

Incapacitation is not limited to the back end of our criminal justice system. Incapacitative justice also relies on law enforcement to predict dangerous conduct

---

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

65. *Id.* at 24 (citation omitted).

66. *Id.*

67. Miller v. Alabama, 132 S. Ct. 2455, 2478 (2012) (Roberts, C.J., dissenting); *see* Lockyer v. Andrade, 538 U.S. 63, 80 (2003) (Breyer, J., dissenting) ("Although the State alludes in passing to retribution or deterrence . . . its only serious justification for the 25-year minimum treats the sentence as a way to incapacitate a given defendant from further crime . . . .").

68. *See* ZIMRING, HAWKINS & KAMIN, *supra* note 37, at 85–105 (noting crime dropped significantly after 1994, but there was no evidence that the three strikes law contributed by means of either incapacitation or deterrence); EHLERS ET AL., JUSTICE POLICY INST., STILL STRIKING OUT: TEN YEARS OF CALIFORNIA'S THREE STRIKES, 12–19 (2004) *infra* note 122.

69. *See* EHLERS ET AL., *supra* note 68, at 8 ("[N]early two thirds . . . of second or third strikers were serving time for a nonviolent offense.").

70. Robinson, *infra* note 82, at 1451.

71. *Id.*

72. *See, e.g.*, Jalila Jefferson-Bullock, *The Time Is Ripe to Include Considerations of the Effects on Families and Communities of Excessively Long Sentences*, 83 UMKC L. REV. 73, 76 (2014).

73. *See* Martin H. Pritikin, *Is Prison Increasing Crime?*, 2008 WIS. L. REV. 1049 (2008).

and identify its perpetrators before it occurs. As detailed in a pivotal article by Markus Dubber, crimes of drug and gun possession became enormously popular tools for "identification and neutralization" of potential offenders during the war on crime.[74]

The number and variety of possession offenses are striking. In 1998, there were 156 possession offenses proscribed in New York, including 115 felonies.[75] Possession charges accounted for 18% of arrests throughout the state in 1998, and one-third of those ultimately sentenced to jail or prisons.[76] Possession can carry harsh penalties—eleven in New York were punishable by terms of life.[77] The Supreme Court in *Harmelin v. Michigan* upheld the life sentence given to a first-time offender convicted of cocaine possession.[78] Possession is frequently charged along with other offenses in order "to increase the incapacitative potential of a given conviction."[79]

Since contraband rarely causes harm independent of any additional use, possession offenses are essentially inchoate, designed to identify persons likely to cause harm and to enable police to interfere before harm occurs. Possession offenses arguably stretch basic principles of criminal law in order to broaden the dragnet of incapacitation and ease the path to prosecution.[80] Thus, the law of possession elevates "instrumentalities of crime" to crime itself[81] in order to criminalize those it suspects are likely to become criminals. It evades limits on attempt liability, by requiring no "substantial step" towards causing harm.[82] Possession crimes attenuate the requirement of culpability because knowledge of possession is often presumed.[83] Possession crimes attenuate the requirement of an act by ascribing "constructive possession" to suspects in the vicinity of contraband.[84]

The Supreme Court has reshaped criminal procedure to facilitate the search for contraband and the law of possession. *Terry v. Ohio* enabled officers to stop, question, and search suspects on the basis of reasonable suspicion of imminent crime.[85] The fact that reasonable suspicion justifying a stop and frisk can be

---

74. Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 856 (2001) (describing possession "as the most convenient gateway into the criminal justice system").

75. *See id.* at 859.

76. *Id.*

77. *Id.*

78. *See* Harmelin v. Michigan, 501 U.S. 957 (1991).

79. Dubber, *supra* note 74, at 901.

80. *See id.* at 873 ("Given the flexibility of its conception and the convenience of its enforcement, possession offenses alone can quickly and easily incapacitate large numbers of undesirables for long periods of time.").

81. *See* 18 U.S.C. § 924(c) (2016) (proscribing the possession, brandishing, or discharging of firearms).

82. *See* Dubber, *supra* note 74, at 907–08; Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventative Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1448 n. 71 (2001).

83. *See* Dubber, *supra* note 74, at 864–65; State v. Adkins, 96 So. 3d 412, 415 (Fla. 2012).

84. *See* N.Y. PENAL LAW § 220.25(a) (McKinney 2016); United States v. Maldonado, 23 F.3d 4, 6–7 (1st Cir. 1994).

85. *See* Dubber, *supra* note 74, at 835.

established by such diffuse indices of guilt as flight from police in a high crime area[86] shows that reasonable suspicion need not be of any particular crime. Once stopped, a suspect can be asked to identify himself, enabling a check for outstanding arrest warrants.[87] *Schneckloth v. Bustamonte* held that one need not be informed of one's right to refuse a police search for contraband in the absence of probable cause.[88] These and many other holdings allow police to investigate citizens who are not actively causing harm, for evidence of dangerous propensities. Even if a stop exposes neither contraband nor an outstanding warrant, it can still lead to an arrest for disorderly conduct, obstruction of governmental administration, or even assault. In all these ways the search for contraband became central to a strategy of identifying and arresting dangerous persons.

The fact that presence in a high crime area and flight from police can justify stops as reasonable suggests that suspected dangerousness can serve as a proxy for race. Studies have indeed shown that African Americans are more likely than Whites to be stopped on foot[89] and in cars,[90] more likely to be searched if stopped,[91] and more likely to be arrested,[92] particularly for drug offenses.[93]

E. Increasing Length of Prison Sentences

As currently practiced, penal incapacitation separates offenders from society "for as long as possible."[94] Congress passed the Comprehensive Crime Control Act of 1984 to require longer, more determinate criminal sentencing and eliminate parole for federal prisoners.[95] The Act's "truth in sentencing" component—responding to frustration with judicial sentencing discretion—mandated that federal prisoners serve at least 85% of their sentences.[96] Ten years later, Congress offered financial incentives for states to follow suit with their own truth in

86. Illinois v. Wardlow, 528 U.S. 119 (2000).

87. Hiibel v. Sixth Judicial Dist. of Nev., 542 U.S 177 (2004).

88. Schneckloth v. Bustamonte, 412 U.S. 218, 227–28 (1973).

89. *See, e.g.*, Andrew Gelman et al., *An Analysis of the New York City Police Department's "Stop-and-Frisk" Policy in the Context of Claims of Racial Bias*, 102 J. AM. STAT. ASS'N 813 (2007).

90. U.S. GEN. ACCOUNTING OFFICE, RACIAL PROFILING: LIMITED DATA AVAILABLE ON MOTORIST STOPS 8–10 (2000), http://www.gao.gov/new.items/gg00041.pdf [http://perma.cc/CCK2-GKQH].

91. *Traffic Stops*, BUREAU OF JUSTICE STATISTICS, http://www.bjs.gov/index.cfm?ty=tp&tid=702 (last visited Oct. 8, 2016).

92. CHRISTOPHER HARTNEY & LINH VUONG, NAT'L COUNCIL ON CRIME AND DELINQUENCY, CREATED EQUAL: RACIAL AND ETHNIC DISPARITIES IN THE U.S. CRIMINAL JUSTICE SYSTEM 10 (2009), http://www.nccdglobal.org/sites/default/files/publication_pdf/created-equal.pdf.

93. Jamie Fellner, *Race, Drugs, and Law Enforcement in the United States*, 20 STAN. L. & POL'Y REV. 257, 261, 269–74 (2009); Katherine Beckett et al., *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105, 106 (2006).

94. Craig Haney, *Demonizing the "Enemy": The Role of "Science" in Declaring the "War on Prisoners,"* 9 CONN. PUB. INT. L.J. 185, 187 (2010).

95. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (1984) (codified as amended in scattered sections of 18 U.S.C.).

96. *See* 18 U.S.C. § 3624 (2016).

sentencing statutes, which most did.[97] Meanwhile, states developed a variety of sentence-enhancing statutes, including not only three-strikes statutes, but also mandatory minimums, stricter drug penalties, and the expanded use of life without parole sentences. To what end? Studies have found no clear incapacitative effect of these longer sentences on public safety,[98] while minority offenders, particularly African Americans, have borne the brunt of longer sentences.[99]

In state systems, time served increased substantially across all crime categories between 1990 and 2009—37% for violent crimes, 36% for drug crimes, and 24% for property crimes—although sentence length varied substantially across states.[100] These increases were the result of sentence enhancement legislation as well as decreasing use of probation and parole.[101] Federal sentencing exhibited a similar overall trend: average time served more than doubled between 1988 and 2012, and increased across all categories of crime.[102] The increase was caused in large part by mandatory minimum sentencing, the federal "truth in sentencing" policy,[103] and the number of inmates serving life without parole—which grew from 12,453 in 1992 to 41,000 in 2008.[104]

This unprecedented lengthening of prison sentences cannot be justified by penological purposes other than incapacitation.[105] Although incarceration undoubtedly has a deterrent effect,[106] there is little evidence that lengthening prison

---

97. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796 (1994); *see* ELSA CHEN, IMPACTS OF THREE STRIKES AND TRUTH IN SENTENCING ON THE VOLUME AND COMPOSITION OF CORRECTIONAL POPULATIONS 19 (2000), https://www.ncjrs.gov/pdffiles1/nij/grants/187109.pdf; William Pizzi, *Understanding the United States' Incarceration Rate*, 95 JUDICATURE 207, 207–08 (2012) (discussing New York's "Jenna's Law").

98. *See* CHEN, *supra* note 97, at 34; Richard L. Lippke, *Crime Reduction and the Length of Prison Sentences*, 24 L. & POL'Y 17, 22 (2002); Jefferson-Bullock, *supra* note 72, at 82.

99. Joshua B. Fischman and Max M. Schanzenbach, *Racial Disparities Under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J. EMPIRICAL L. STUD. 729 (2012).

100. PEW CTR. ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS 3 (2012), http://www.pewtrusts.org//media/legacy/uploadedfiles/wwwpewtrustsorg/reports/sentencing_and_corrections/prisontimeservedpdf.pdf.

101. *Id.* at 7. Although much of the increase in time served was achieved through determinate sentencing reforms rather than longer maximums, that does not mean that sentence length was not an independently important goal of sentencing reform. Care could have been taken to lower maxima while pushing minima up, so as to make determinacy neutral as to time served. But as Wilson observed, there was a clear perception that the public wanted more punishment. *See* FOWLE, *supra* note 38.

102. *See* PEW CHARITABLE TRUST., PRISON TIME SURGES FOR FEDERAL INMATES 2 (2015), http://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2015/11/prison-time-surges-for-federal-inmates.

103. *See id.* at 4.

104. Sharon Dolovich, *Exclusion and Control in the Carceral State*, 16 BERKELEY J. CRIM. L. 259, 308 (2011).

105. *See* Jefferson-Bullock, *supra* note 72, at 82 ("It is fair to say that none of these policies were grounded in research-based evidence that connected their enactment to reducing crime or producing any positive criminal justice outcome.").

106. RANDOLPH ROTH, AMERICAN HOMICIDE 9 (2009) (explaining collapse of law enforcement causes homicide rates to skyrocket).

sentences increases this deterrent effect.[107] Some studies even report that longer sentences may actually exacerbate recidivism.[108]

Nor do rehabilitation or retribution provide a satisfactory explanation for increasingly punitive sentencing. As to the former, most prison systems are bereft of educational and workplace training.[109] Life sentences serve no rehabilitative purpose,[110] and it was the rejection of rehabilitation that led policymakers to embrace incapacitation.[111] If anything, data suggests that longer sentences stimulate antisocial tendencies by disconnecting prisoners from their families, stirring individual and community-wide resentment, exposing non-violent offenders to the criminogenic influence of more hardened offenders, and over-crowding prisons to a degree that increases aggression.[112]

As for the goal of retribution, sentence-enhancing practices generate outcomes that seem out of line with just deserts.[113] The Supreme Court's docket in recent years offers striking examples: fifty years to life for stealing videotapes worth $200;[114] forty years for possessing nine ounces of marijuana;[115] life imprisonment for obtaining $121 by false pretenses;[116] and life, without parole, for possession of

---

107. *See* Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 143 (2003); VALERIE WRIGHT, THE SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 5 (2010), http://www.sentencingproject.org/doc/Deterrence%20Briefing%20.pdf (citing David Farrington, Paul Langan & Per-Olof H. Wikstrom, *Changes in Crime and Punishment in America, England and Sweden between the 1980s and 1990s*, 3 STUD. IN CRIME PREVENTION, 104 (1994)).

108. *See* WRIGHT, *supra* note 107, at 6; Jefferson-Bullock, *supra* note 72, at 76.

109. *See, e.g.*, Gregory A. Knott, *Cost and Punishment: Reassessing Incarceration Costs and the Value of College-in-Prison Programs*, 32 N. ILL. U.L. REV. 267, 281–82 (2012) (discussing the defunding of prison education in the 1990s); Editorial, *A College Education for Prisoners*, N.Y. TIMES (Feb. 16, 2016), http://www.nytimes.com/2016/02/16/opinion/a-college-education-for-prisoners.html?_r=1.

110. *See, e.g.*, Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012) ("Life without parole 'forswears altogether the rehabilitative ideal.'").

111. JOHN BRAITHWAITE & PHILIP PETTIT, NOT JUST DESERTS: A REPUBLICAN THEORY OF CRIMINAL JUSTICE (1990); ZIMRING & HAWKINS, *supra* note 15.

112. *See* Jefferson-Bullock, *supra* note 72, at 87–89 ("Paradoxically, longer federal sentences have also resulted in a staggering increase in recidivism.").

113. *See* Lockyer v. Andrade, 538 U.S. 63, 83 (2003) (Souter, J., dissenting) (arguing that if a sentence of fifty years-to-life for stealing videotapes worth $200 "is not grossly disproportionate, the principle has no meaning"); Jefferson-Bullock, *supra* note 72, at 75 (calling for legislation to "transform our federal sentencing scheme from one of stringent, excessive incapacitation to one that punishes the morally blameworthy"). The pursuit of retribution requires that "[f]irst, the primary object of criminal sanctions is to punish culpable behavior" and "[s]econd, the severity of the sanctions visited on the offender should be proportioned to the degree of his culpability." ALLEN, *supra* note 28, at 66. Similarly, "[t]he penalty is . . . not just a means of crime prevention but a merited response to the actor's deed, 'rectifying the balance' . . . and expressing moral reprobation of the actor for the wrong." ANDREW VON HIRSCH, DOING JUSTICE 51 (1976). As a principle of proportionality, retribution requires that "one should not be punished more harshly than one deserves." Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 683 (2005).

114. *Lockyer*, 538 U.S. at 66–77.

115. Hutto v. Davis, 454 U.S. 370 (1982).

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

cocaine.[117] The Court did not even discuss desert when it upheld Ewing's sentence of twenty-five years-to-life for shop-lifting.[118] Public opinion no longer accepts enhanced sentencing as just.[119]

Finally, sentence-enhancing legislation exacerbates racial disparities in prison populations. Patterns in discretionary exceptions to mandatory minimum penalties reveal a racial bias on the part of courts.[120] Offenders can avoid being subject to federal mandatory minimums by way of a legislative "safety valve" that judges may choose to apply when sentencing nonviolent, first-time drug offenders. Data reveals that a disproportionately low percentage of eligible African American offenders receive the benefit of this safety-valve provision.[121] In California, a 2004 report showed African American offenders comprised a higher percentage of second and third strikers than of prisoners generally, perhaps reflecting the predictably cumulative effect of higher arrest and conviction rates in a recidivist sentencing regime.[122]

In sum, the incapacitation strategies we have surveyed—the reduction of probation and parole, the imposition of recidivist sentences, the policing of possession, and the lengthening of sentences—have combined to incarcerate more people for longer, on the basis of their perceived danger.

II. INCAPACITATION AND EIGHTH AMENDMENT SENTENCING PROPORTIONALITY

Part I reviewed the political origins of incapacitative strategies and their prevalence in modern crime control. This Part reviews the role of incapacitation as a justification for punishment within Eighth Amendment proportionality jurisprudence. It then critically examines incapacitation theoretically, as a utilitarian justification for punishment. Finally, it critically examines incapacitation empirically, as a practice of selecting individuals for punishment on the basis of predictions of dangerousness.

A. Incapacitation in Eighth Amendment Jurisprudence

Eighth Amendment jurisprudence embodies a contradiction, expressed in the language of the Amendment itself, prohibiting punishment that is both "cruel and

---

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

118. Ewing v. California, 538 U.S. 11 (2003); *see* Lee, *supra* note 113, at 679–84 (criticizing the plurality opinion for failing to take retribution into account as a side constraint in proportionality analysis).

119. *See* Jefferson-Bullock, *supra* note 72, at 80 (noting a recent shift in public opinion away from longer, incapacitative sentences).

120. *See* U.S. Sentencing Comm'n, *Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, 24 FED. SENT'G REP. 185, 188–89 (2012) (explaining that Black offenders receive relief from mandatory minimums at significantly lower rate than do offenders of other races).

121. *See id.* at 188.

122. *See* EHLERS ET AL., JUSTICE POLICY INST., RACIAL DIVIDE: AN EXAMINATION OF THE IMPACT OF CALIFORNIA'S THREE STRIKES LAW ON AFRICAN AMERICANS 3 fig.1 (2004).

unusual."[123] A prohibition on cruel punishment sounds like a substantive right to decent treatment, restricting the injuries government can inflict. By contrast, a prohibition on "unusual" punishment sounds like a procedural restriction, a requirement that injuries be inflicted systematically, according to rules. Because the prohibition is conjunctive, it seems that a "cruel" punishment can become more acceptable by being imposed more "usually." Eighth Amendment jurisprudence on proportionality bears out the paradox implicit in this phrasing. Disproportionate punishment violates not "decency" as such, but "the evolving standards of decency that mark the progress of a maturing society."[124] The Court has taken the punishments recently assigned by legislatures and imposed by courts as evidence of these evolving standards.[125] Thus, proportionality review has two aspects, described in *Graham v. Florida*, which we may call comparative proportionality and instrumental proportionality.[126] Comparative proportionality measures the consistency of a sentence with sentences imposed by other jurisdictions, while instrumental proportionality measures the consistency of a sentence with the justifying purposes of punishment.[127]

Chief Justice Warren apparently anticipated that application of "evolving standards of decency" would make prevailing punishments—and therefore constitutionally permissible punishments—progressively more lenient.[128] Instead, in the face of rising crime rates, the Court's efforts to constitutionalize criminal justice provoked political resistance.[129] Candidates campaigned for stiffer sentences and less judicial discretion.[130] As incarceration rates rose, sentences lengthened, and legislatures embraced incapacitation, these evolving standards of severity had a self-legitimizing effect. The comparative prong of proportionality analysis impeded the Eighth Amendment from checking a national movement to impose harsh punishments routinely.[131]

Nevertheless, even when punishments are rising generally, there will be outlier cases—like that of *Ewing*—that provoke consideration of instrumental proportionality. In considering the instrumental proportionality of capital punishment, the Court has recognized only retribution and deterrence as relevant penal purposes (on the assumption that imprisonment is adequate to incapacitate, and that

---

123. U.S. CONST. amend. VIII.

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

125. *See, e.g.*, Enmund v. Florida, 458 U.S. 782, 813–14 (1982); Kennedy v. Louisiana, 554 U.S. 407, 420 (2008); Graham v. Florida, 560 U.S. 48, 61 (2010).

126. GUYORA BINDER, FELONY MURDER 34–35 (2012). Youngjae Lee makes a similar distinction between comparative and noncomparative desert. *See* Lee, *supra* note 113, at 685.

127. BINDER, *supra* note 126, at 34–35.

128. *See Trop*, 356 U.S. at 101.

129. *See* SIMON, *supra* note 33, at 93; STUNTZ, *supra* note 33, at 217.

130. *See* SIMON, *supra* note 33, at 113–32 (discussing the backlash against the Warren Court's criminal procedure and death penalty decisions provoking attacks on the judiciary in political campaigns).

131. *See* Ewing v. California, 538 U.S. 11, 24–25, 29–30 (2003); *supra* note 113 and text accompanying note 1 for definitions of these concepts. The Court, however, does not define these terms.

execution cannot serve rehabilitation).[132] Because offenders without culpability are both less blameworthy and less deterrable, the Court has often reasoned that the proportionality of capital punishment must depend on the culpability of the crime.[133] In *Ewing*, however, the Court ignored culpability, and reasoned that sentences of incarceration need not serve the penal purposes of retribution or deterrence.[134] Instead, the Court held that punishment is proportional if there is a "reasonable basis for believing" that it advances *any* of the traditional justifications for punishment—retribution, rehabilitation, deterrence, or incapacitation.[135]

Because the *Ewing* Court saw advancement of any purpose of punishment as sufficient to justify a term of years as proportionate, it concluded that the goal of incapacitating repeat offenders could justify an indeterminate life sentence for an ex-offender caught stealing. Because the sentence did not need to advance desert or deterrence, it did not matter that it was clearly out of line with the offender's culpability: "To be sure, Ewing's sentence is a long one. But it reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated."[136]

Thus, *Ewing* seemed to leave very little space for judicial proportionality in reviewing noncapital sentences. In most jurisdictions a felony is simply an offense punishable by a year or more. If incapacitation of past offenders suffices to justify a life-maximum term as proportionate for any felony, legislatures are free to choose any sentence between a year and life for any reason or no reason. Yet, as a theoretical purpose for imprisonment, incapacitation means more than simply preventing an offender from committing certain future crimes; it requires that punishment improve public safety, and indeed public welfare, by achieving a net decrease in violent crime at an acceptable cost.

Less than a decade after *Ewing*, *Graham v. Florida* prohibited life without parole for all juveniles convicted of non-homicide offenses.[137] The *Graham* Court articulated a new "categorical" standard of proportionality applicable to review of entire sentencing practices, as opposed to individual sentences.[138] The analysis consists of two prongs we have described: determining whether a sentencing practice is contrary to national consensus, and, if so, assessing the penalty in light of the defendant's culpability and the other purposes of punishment.[139]

---

132. Gregg v. Georgia, 428 U.S. 153, 183–84 (1976).

133. Atkins v. Virginia, 536 U.S. 304, 306–07 (2002); Roper v. Simmons, 543 U.S. 551, 568, 571 (2005); Enmund v. Florida, 458 U.S. 782, 798 (1982).

134. *See Ewing*, 538 U.S. at 28.

135. *Id.*

136. *See id.* at 30.

137. Graham v. Florida, 560 U.S. 48, 74–75 (2010).

138. *Id.* at 62. Categorical challenges implicate a "particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes." *Id.*

139. *Id.* at 61–62.

When assessing whether sentencing juveniles to life without parole for non-homicide crimes served any legitimate purpose, the Court was moved by empirical evidence distinguishing juvenile and adult minds.[140] Whether this preference for empirical evidence will become a lasting feature of proportionality jurisprudence is one of *Graham*'s many unanswered questions.[141] What does seem clear is that *Graham* restored retribution as a limitation on noncapital sentencing; a sentencing practice that improves public safety may nonetheless be struck down as excessive in relation to that deserved for the offense or necessary to deter it.[142] "Incapacitation," Justice Kennedy explained, "cannot override all other considerations, lest the Eighth Amendment's rule against disproportionate sentences be a nullity."[143]

More recently, *Miller v. Alabama* held that the Eighth Amendment prohibits mandatory sentences of life without parole for juveniles, even for homicide.[144] *Miller* combined *Graham*'s "categorical" analysis with an individualized assessment of culpability that would account for a defendant's age and "environmental vulnerabilities."[145] Emphasizing that "[a]n ever-growing body of research in developmental psychology and neuroscience" supported the distinction between juvenile and adult offenders, the Court again refused to credit the assumption that certain offenders are irretrievably depraved by virtue of the type of crime they committed.[146] Applying the framework of *Graham* and *Miller* to recidivist statutes requires more rigorous examination of incapacitation's theoretical and empirical assumptions.

B. Incapacitation as a Penological Theory

To incapacitate is to render incapable of committing crimes. Penal incapacitation assumes that certain past offenders are inherently dangerous and should therefore be confined in state custody, where they can be monitored and controlled. An incapacitative justification for incarcerating an offender presupposes that offender's propensity to commit crimes. Incarceration imposes a large social cost: it deprives the offender of liberty, deprives society of the benefit of any prosocial conduct the offender would otherwise perform, and involves cost of confining and maintaining the offender. To justify penal incapacitation, the offender's expected crimes must be sufficiently harmful, and their probability sufficiently high, to outweigh this expected cost. In addition, there must be no less costly means of preventing these offenses. The only expected crimes sufficiently harmful to justify

---

140. *Id.* at 68.

141. *See* Michael H. O'Hear, *Not Just Kid Stuff? Extending Graham and Miller to Adults*, 78 MO. L. REV. 1087, 1113 (2013)

142. Youngjae Lee, *The Purposes of Punishment Test*, 23 FED. SENT'G REP. 58, 59–60 (2010).

143. Graham v. Florida, 560 U.S. 48, 73 (2010).

144. Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012).

145. *Id.*

146. *Id.* at 2464 & n.5, 2465.

the social cost of preventive confinement are violent crimes.[147]

As explained by Wilson, penal incapacitation requires three assumptions. First, past offenders, or some identifiable subgroup of past offenders, must be more likely than others to commit crimes in the future.[148] Second, offenders removed from society will not be replaced by other potential offenders.[149] Third, incarceration will not make offenders substantially more likely to commit crimes upon release than they would have been if left at large during that time.[150]

Incapacitation also requires two additional assumptions that Wilson left unmentioned. Thus, a fourth necessary assumption is that incarcerated offenders will not offend or suffer offenses at the same or greater rates while incarcerated.[151] To the extent that crimes are committed in prison, incarceration merely shifts the risk of crime to a different segment of the population rather than reducing its overall occurrence.[152] A fifth necessary assumption is that there is no less costly alternative means of achieving the same crime reduction. This fifth assumption can be seen as a corollary of the first, however. If crime is caused by inherent character traits, environmental interventions are unlikely to be effective. Conversely, if crime is caused by environmental circumstances, incapacitating individuals will likely be less effective than altering the environment.

Each of these assumptions is problematic.[153] Consider the assumption that incarcerated offenders will not be "replaced" by other individuals. Even Wilson conceded that such replacement is likely insofar as crimes are committed by organizations operating in illicit markets.[154] These crimes occur regardless of whether one individual is incarcerated.[155] Moreover, in a market catering to addictive preferences, in which demand may not decline with higher prices, competing organizations may absorb the "displaced" transactions previously belonging to other organizations.[156] While Wilson treated such offending as marginal, drug crimes currently constitute about one-third of annual admissions to

---

147. Rummel v. Estelle, 455 U.S. 263, 284 (1980) (upholding a Texas recidivist statute).

148. WILSON, *supra* note 40, at 146; *see* Note, *Selective Incapacitation: Reducing Crime Through Predictions of Recidivism*, 96 HARV. L. REV. 511, 514–15 (1982).

149. WILSON, *supra* note 40, at 146.

150. *Id.*; Andrew D. Leipold, *Recidivism, Incapacitation, and Criminal Sentencing Policy*, 3 U. ST. THOMAS L. J. 536, 543 (2006).

151. *See id.* at 556.

152. *See infra* Part IV.

153. Paul Robinson points to a further drawback of incapacitation—that by breaking the link between punishment and desert, incapacitation may erode the legitimacy of criminal prohibitions and thereby weaken their deterrent effect. Robinson, *supra* note 82, at 1432.

154. WILSON, *supra* note 40, at 145; *see also* Todd. R. Clear, *The Impact of Incarceration on Public Safety*, 74 SOC. RES. 613, 617 (2007) (explaining that "many of the crimes a person behind bars might have been involved in were he free occur anyway").

155. *See* WILSON, *supra* note 40, at 145.

156. *See* Isaac Ehrlich, *Crime, Punishment, and the Market for Offenses*, 10 J. ECON. PERSP. 43, 57 (1996).

prison.[157] Crimes against property and persons motivated by drug purchase may also be subject to a replacement effect. But more significantly, the assumption that only black-market transactions are subject to replacement effects is baseless. Recall that predatory crimes like burglary and robbery are often committed by groups, because there is strength in numbers, and because peer pressure can overcome moral inhibition and fear.[158] Yet the feasibility and probability of a group offense are not necessarily affected by the removal of one member,[159] who may be replaced in any case. While the political rhetoric of the war on crime may promote images of sadistically motivated offenders,[160] most crime is committed to obtain social or economic resources not available through more conventional channels.[161]

Next, the assumption that incarceration will have no effect on the post-release rate of offending appears false.[162] Indeed, some studies have found a net increase in crime as a consequence of high incarceration rates.[163] Physical and psychological trauma,[164] recruitment into criminal networks, overcrowding, and severance of family and community ties are a few aspects of prison that demonstrably aggravate recidivism.[165] The prison environment resembles a theater of war in its constant threat of unforeseeable violence. Adding to these effects that push ex-prisoners toward violence, there are also economic incentives that pull them toward crime. While a criminal record in itself will reduce the job prospects of offenders, a record of incarceration adds to these barriers, because we have a strong cognitive bias towards attributing misfortune to character. Thus, the infliction of a more severe punishment is likely to influence potential employers to see the offender as more culpable and incorrigible. Unfortunately, fear of ex-convicts can make their recidivism a self-fulfilling prophecy.

---

157. Jonathan Rothwell, *Drug Offenders in American Prisons: The Critical Distinction Between Stock and Flow*, BROOKINGS SOC. MOBILITY MEMOS (Nov. 25, 2015), http://www.brookings.edu/blogs/social-mobility-memos/posts/2015/11/25-drug-offenders-stock-flow-prisons-rothwell.

158. Piquero & Blumstein, *supra* note 48, at 273–75; Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1316–20 (2003).

159. Clear, *supra* note 154, at 617.

160. *See* Esther I. Madriz, *Images of Criminals and Victims: A Study on Women's Fear and Social Control*, 11 GENDER & SOC'Y 342, 346 (1997); Samuel H. Pillsbury, *Evil and the Law of Murder*, 24 U.C. DAVIS L. REV. 437, 466 (1990).

161. *See, e.g.*, Douglas L. Yearwood & Gerry Koinis, *Revisiting Property Crime and Economic Conditions: An Exploratory Study to Identify Predictive Indicators Beyond Unemployment Rates*, 48 SOC. SCI. J. 145, 154 (2011) (discussing causal relationship between labor market conditions and property crime).

162. Jefferson-Bullock, *supra* note 72, at 88 (quoting United States v. Blake, 89 F. Supp. 2d 328, 345 (E.D.N.Y. 2000)) ("The [prison] atmosphere makes debilitation much more likely than rehabilitation. Whether by introducing petty criminals to more violent offenders, forcing prisoners into racist gangs, or subjecting them to violence and rape, too often the prison system serves merely to exacerbate the criminal tendencies of its inhabitants.").

163. *See infra* Part III.

164. Craig Haney, *Psychology and the Limits to Prison Pain: Confronting the Coming Crisis in Eighth Amendment Law*, 3 PSYCHOL. PUB. POL'Y & L. 499, 538–39 (1997) (discussing prison-induced PTSD).

165. *See e.g.*, Pritikin, *supra* note 73, at 1051–54.

Nor can we assume that relocating offenders to prison will prevent them from committing crimes, or being victimized. By almost all accounts, prisons are brutal, violent places.[166] Prisoners lack the opportunity to flee from threats and their complaints may be greeted with official indifference and retaliation from those they accuse. As many as one-in-five male inmates reportedly experience sexual assault while incarcerated,[167] and a recent report estimated that physical assaults are eighteen times more common behind prison walls for men and twenty-seven times more common for women.[168] Prison staff also face assaults from inmates.[169] To these crimes by inmates, we must add crimes predictably committed against inmates by correctional staff, who are obliged to coerce and control an antagonistic population, while facing little risk of sanctions for abusing their authority.[170]

Finally, let us turn to the foundational premise that past offenders are more likely than the rest of the general population to offend in the future as a result of intrinsic personality traits.[171] As we have noted, the less confident we are that crime inheres in character, the more hopeful we can be that crime can be reduced by improving social conditions rather than disabling individuals. Because of the enormous social cost of mass incarceration, incapacitation's fundamental premise of inherent dangerousness should not simply be assumed. We should require evidence. The next Section considers the kinds of evidence that can support predictions of dangerousness.

C. Selective Incapacitation and Predictions of Dangerousness

Selective incapacitation requires predictions as to which offenders are most likely to recidivate. Can such predictions be made with sufficient confidence to justify the high social cost of incarceration beyond that required for such other goals as deterrence and retribution? Researchers have evaluated two methods of prediction: clinical assessment and actuarial assessment. Actuarial assessment has played a particularly important role in guiding sentencing decisions, prisoner classification, and parole decisions.[172]

---

166. *See infra* Section IV.A.

167. STOP PRISONER RAPE, IN THE SHADOWS: SEXUAL VIOLENCE IN U.S. DETENTION FACILITIES 5 (2006), http://justdetention.org/wp-content/uploads/2015/10/In-The-Shadows-Sexual-Violence-in-U.S.-Detention-Facilities.pdf. According to this report, the "the rates of sexual abuse at women's prisons vary widely, [but] at the worst facilities[,] as many as one in four prisoners is victimized." *Id.* at 5.

168. Nancy Wolff et al., *Physical Violence Inside Prisons: Rates of Victimization*, 34 CRIM. JUST. & BEHAV. 588, 595 (2007).

169. *See* Karen F. Lahm, *Inmate Assaults on Prison Staff: A Multilevel Examination of an Overlooked Form of Prison Violence*, 89 PRISON J. 131 (2009).

170. STOP PRISONER RAPE, *supra* note 167, at 13–14 (stating that a significant percentage of sexual assaults against inmates are committed by correctional staff).

171. *See* WILSON, *supra* note 40, at 181.

172. Melissa Hamilton, *Adventures in Risk: Predicting Violent and Sexual Recidivism in Sentencing Law*, 47 ARIZ. ST. L.J. 1, 2 (2015).

1. Clinical Predictions

Clinical assessment can be based on observation, interviews, administration of psychological tests, and review of case histories. Such assessments have had a poor track record of predictive accuracy. During the last quarter of the twentieth century, a consensus developed among psychologists and psychiatrists that predictions could not be reliably based on clinical assessments. One analysis of ten studies found only a 0.10 correlation between predicted and actual reoffending by sex offenders.[173] "Guided" clinical assessments, which consider factors linked empirically to violence are more effective, achieving a correlation of 0.23.[174]

Nevertheless, psychologists have had some success in predicting violent recidivism on the basis of a clinical diagnosis of antisocial personality disorder ("ASPD").[175] Under the criteria set out in the most recent Diagnostic and Statistical Manual of Mental Disorders ("DSM-5"), ASPD consists of impairments in "personality function" (undeveloped sense of self) and "interpersonal functioning" (lack of empathy and intimacy), as well as elevated manipulativeness, deceitfulness, callousness, hostility, impulsivity, risk taking, and irresponsibility.[176] A diagnosis of ASPD requires that these impairments are "stable across time and consistent across situations."[177] Thus, such a diagnosis cannot be made on the basis of one interview, but requires sustained observation over a long period of time. A recent survey of relevant studies found that 14% of individuals diagnosed with ASPD commit acts of violence, compared with a rate of 1–2% in the general population.[178]

While psychopathy is not a formal diagnosis included in the DSM-5, many clinicians and researchers recognize it as a sub-group of ASPD with greater

---

173. R. Karl Hanson, *What Do We Know About Sex Offender Risk Assessment?*, 4 PSYCHOL. PUB. POL'Y & L. 50, 54 (1998); Tamara Rice Lave, *Controlling Sexually Violent Predators: Continued Incarceration at What Cost?*, 14 NEW CRIM. L. REV. 213, 231 (2011). To illustrate the inefficacy for sentencing of a predictor achieving a correlation coefficient of 0.1, Hanson provides a numerical example in which 20% of a population will reoffend and the predictor correctly predicts reoffending only 25% of the time. Hanson, *supra* note 173, at 53–54.

174. Hanson, *supra* note 173, at 54–55.

175. *See*, *e.g.*, Richard Rogers et al., *Diagnostic Validity of Antisocial Personality Disorder: A Prototypical Analysis*, 16 L. & HUM. BEHAV. 677 (1992); Glenn D. Walters, *Psychopathy and Crime: Testing the Incremental Validity of PCL-R-Measured Psychopathy as a Predictor of General and Violent Recidivism*, 36 L. & HUM. BEHAV. 404 (2012).

176. THE OXFORD HANDBOOK OF PERSONALITY DISORDERS 44 (Thomas A. Widiger ed., 2012).

177. *See* Jerome C. Wakefield, *DSM-5 and the General Definition of Personality Disorder*, 41 CLINICAL SOC. WORK J. 168, 176 (2013); *see also* Jasmin Wertz et al., *Etiology of Pervasive Versus Situational Antisocial Behaviors: A Multi-Informant Longitudinal Cohort Study*, 87 CHILD DEV. 312, 312 (2016) (stating that cross-situational antisocial behavior in children signals more "severe" pathology and helps predict likelihood of persistent adult offending).

178. Rongqin Yu et al., *Personality Disorders, Violence, and Antisocial Behavior: A Systematic Review and Meta-Regression Analysis*, 26 J. PERSONALITY DISORDERS 775, 779–80 (2012). It is widely believed that ASPD is more prevalent in prison than in the general population. *See* Andrea L. Glenn et al., *Antisocial Personality Disorder: A Current Review*, 15 CURRENT PSYCHIATRY REP. 427, 427 (2013) (reporting ASPD present in 47% of male prisoners compared with approximately 3% of general male population).

potential for planned, instrumental aggression.[179] However, psychopathy is often identified in a single lengthy semi-structured interview, developed by Robert Hare, called a Psychopathy Checklist—Revised ("PCL-R").[180] Hare estimated that psychopaths, although comprising only 1% of the population, are responsible for one-third of all violent crime,[181] and other researchers found that high scores on this test predicted very high rates of violent recidivism (77%) among offenders released from a maximum security psychiatric hospital.[182] Yet the latter study was based on a very high-risk population with a base violent recidivism rate of 40%.[183] Hare developed a simplified actuarial instrument for quickly assessing psychopathic traits, referred to as the Psychopathy Checklist—Screening Version, finding that future violent offenders were 70% more likely to score high on this test. This predictive power is similar to that of actuarial instruments based on static factors (past events not subject to intervention). As we shall see, however, this level of predictive accuracy is not adequate for predicting dangerousness within a population with very low base rates of offending.

Even using clinical diagnoses of ASPD would require incapacitating seven individuals in order to prevent violence by a single offender.[184] Nevertheless, a diagnosis of ASPD in combination with other predictive factors might predict violent reoffending with greater reliability. In addition, there is some prospect for improving the efficacy of diagnoses of ASPD and clinical identifications of psychopathy, as recent research has indicated that mechanical reading of MRI's can now predict high psychopathy scores with 70% accuracy.[185] Such mechanical diagnosis might lower costs and increase the availability of clinical prediction, but at present would lower its accuracy. On the other hand, conceivably at some point in the future, neuroimaging—or neuroimaging in combination with other tech-

---

179. *See* Glenn et al., *supra* note 178, at 428 ("Psychopathy, while not recognized in the diagnostic criteria of DSM 5, describes individuals with many of the features of ASPD, but who, in addition, demonstrate a characteristic set of interpersonal and affective features, including superficial charm, manipulative-ness, callousness, and shallow affect . . . ."); Thomas Nadelhoffer et al., *Neuroprediction, Violence, and the Law: Setting the Stage*, 5 NEUROETHICS 67, 80 (2012).

180. Nadelhoffer et al., *supra* note 179, at 80; R.D. HARE ET AL., THE HARE PSYCHOPATHY CHECKLIST—REVISED PCL-R (1991).

181. Robert D. Hare & Leslie M. McPherson, *Violent and Aggressive Behavior by Criminal Psychopaths*, 7 INT'L J.L. & PSYCHIATRY 35 (1984).

182. Grant Harris et al., *Psychopathy and Violent Recidivism*, 15 L. & HUM. BEHAV. 625, 632 (1991).

183. The violent recidivism rate for non-psychopaths was 21%. *Id.*

184. Yu et al., *supra* note 178, at 779–80. Note, however, that roughly two-thirds of those offenders with ASPD will commit several offenses. *Id.* at 784–85.

185. *See* Vaughn R. Steele et al., *Machine Learning of Structural Magnetic Resonance Imaging Predicts Psychopathic Traits in Adolescent Offenders* 1 (Dec. 9, 2015) (unpublished article), http://dx.doi.org/10.1016/j.neuroimage.2015.12.013; B.C. Fink et al., *Assessment of Psychopathic Traits in a Youth Forensic Sample: A Methodological Comparison*, 40 J. ABNORMAL CHILD PSYCHOL. 971 (2012). On issues raised by neuroprediction generally, see Nadelhoffer et al., *supra* note 179, at 86. A useful survey of research on neuroimaging and prediction of violence is Yaling Yang & Adrian Raine, *Prefrontal Structural and Functional Brain Imaging Findings in Antisocial, Violent, and Psychopathic Individuals: A Meta-Analysis*, 174 PSYCHIATRY RES. 81 (2009).

niques—could improve prediction. Neuroimaging also has the potential to help identify therapeutic interventions that could obviate confinement for offenders presenting ASPD or psychopathy.[186]

2. Actuarial Predictions

Actuarial instruments use recidivism rates in a sample population of past offenders to identify correlations between reoffending and offender characteristics, such as being male or having a prior criminal record. Each characteristic is then assigned a "weight" or score based on the strength of its correlation with recidivism, and these weights are aggregated to predict the likelihood that a particular individual will reoffend. Because false positives result in needless incarceration, we should be sure that risk assessment tools are methodologically sound and reasonably accurate.[187]

There is no clear consensus on the accuracy of actuarial predictions or even on how to evaluate the accuracy of these predictions.[188] Actuarial instruments nevertheless play an influential role in determining sentencing length, prisoner classification, parole decisions, and post-release civil commitment.[189] Two aspects of actuarial tools are particularly problematic. First, actuarial tools over-predict dangerousness, as a large majority of offenders classified as dangerous never commit violent crimes.[190] Second, some factors used to predict dangerousness, such as credit scores or past unemployment, relate to the offender's socioeconomic status rather than his disposition.[191] By relying on these actuarial predictions, states may incarcerate offenders no more dangerous than their more fortunate fellow citizens, while leaving social and economic factors that encourage violence to continue unabated.

Actuarial instruments inevitably produce many times more false positives than true positives when used to predict violent offenses or sexual offenses.[192] The reason for this is that base rates for such offenses are generally low across the population. As a result, even if past violent offenders and sexual offenders are significantly more likely than the rest of the population to commit such offenses, their rates of violent reoffending are far lower than the popular image of intractably dangerous offenders would suggest. For example, a U.S. Department of Justice study of almost 10,000 sex offenders (almost all convicted of rape, sexual assault, or child molestation) found that only 5.3% were arrested for a new sex

---

186. Nadelhoffer, *supra* note 179, at 81–82.

187. *See* Melissa Hamilton, *Public Safety, Individual Liberty, and Suspect Science: Future Dangerousness Assessments and Sex Offender Laws*, 83 TEMP. L. REV. 697, 712–13 (2011).

188. *Id.* at 726. *See* Robinson, *supra* note 82, at 1450 ("A scientist's ability to predict future criminality using all available data is poor[.]").

189. *See* Lave, *supra* note 173, at 213–18.

190. *Id.* at 237.

191. Robinson, *supra* note 82, at 1439–40.

192. *See* Lave, *supra* note 173, at 238–39.

crime within the first three years after release.[193] Only 3.3% of convicted child molesters were rearrested for a sex crime against a child during that period.[194] In the face of such low base rates, any tool predicting recidivism is likely to be far less accurate than the assumption that any given past offender will not recidivate. In the case of child molesters, this optimistic assumption will be accurate 97% of the time; in the case of sexual offenders, it will be accurate 95% of the time.[195] Tamara Lave's analysis of Static-99, a widely used actuarial tool with a reported accuracy rate of 70% in predicting sexual offending, found that every accurate prediction of this type of recidivism would be accompanied by a minimum of 5.6 incorrect positive predictions.[196] Thus, actuarial tools exaggerate the likelihood that any particular offender poses a danger to the public.[197]

Application of a predictive instrument depends on similarity between the sample population on which it was based and the population to which it is being applied.[198] Yet Static-99 is based on data from British and Canadian psychiatric institutions and maximum security prisons.[199] Both population groups present risk factors not present to the same extent in the general population of American offenders. Psychiatric inmates typically present psychoses and have been found dangerous or self-destructive by a court, while maximum security prisoners have typically committed violent crimes and have been deemed dangerous by a

---

193. PATRICK A. LANGAN, ERICA L. SCHMITT & MATTHEW R. DUROSE, BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 1 (2003).

194. *Id.* at 24.

195. Lave, *supra* note 173, at 242.

196. *Id.* at 238–40, 270–71. To understand why this ratio of 5.6 false positives for every true positive is a minimum, and that a predictive method that is 70% accurate almost certainly performs much worse than this in identifying the 5.3% of sex reoffenders who will reoffend, consider three examples:

> (1) Assume that for every 1000 sex offenders, 53 will recidivate. A predictor that is 70% accurate in predicting both offending and non-offending will correctly identify (and incapacitate) 37 of 53 future offenders (37 true positives, 16 false negatives), but will incorrectly identify and wrongly incarcerate 284 suspects (284 false positives, 663 true negatives). Thus false positives/true positives = 284/37 = 7.7.
> (2) A predictor that is accurate 70% of the time that minimizes false positives will maximize false negatives. It also, unfortunately, would have to minimize true positives, while maximizing true negatives. Thus it will correctly predict and prevent 0 offenses (0 true positives, 53 false negatives) and will misidentify and wrongly incarcerate 247 suspects (247 false positives, 700 true negatives). Assuming no true positives, false positives/true positives = 247/0 = infinity.
> (3) A predictor that somehow miraculously identifies every future offender (53 true positives, 0 false negatives) would also misidentify and wrongly incarcerate 300 suspects (300 false positives, 647 true negatives). Thus false positives/true positives = 300/53 = 5.6. This is the very best that a 70% accurate predictor could do. Yet surely it is unlikely that all of the 300 mistakes it would make would be false positives and 0 would be false negatives.

In sum, a 70% accurate predictive instrument would wrongly incarcerate somewhere between 5.6 and infinity suspects for every offense prevented.

197. *See* Robinson, *supra* note 82, at 1450–54.

198. *See* Hamilton, *supra* note 172, at 36–37.

199. *Id.*

sentencing judge. Predictions made using this data will likely exaggerate the probability that offenders will recidivate.[200]

In fact, over-prediction may result even from sentencing offenders on the basis of predictive instruments developed using a population of offenders. Here the problem is that the mean rate of reoffending for the population of prisoners may greatly exceed the rate of reoffending for most offenders because of the presence in the population of a small group in which the rate of reoffending is very high.[201] The reasons for this may be (1) dispositional factors not captured by actuarial instruments, such as Antisocial Personality Disorder; (2) situational factors, such as social relationships with gang members; or (3) biographical factors, such as early abuse or lead exposure. Such hidden factors may raise the reoffending rate of the prison population as a whole, leading courts to overestimate the probability that most offenders will reoffend.

Another way that actuarial predictions may over-predict dangerousness is by placing undue weight on nonviolent offenses. Many actuarial tools predict whether or not an offender will commit any type of future crime.[202] If only violent crime imposes enough cost on society to warrant incapacitative incarceration,[203] grouping all predicted crime together results in excessive incapacitation.

Assuming that actuarial tools were able to accurately predict future offending, these predictions would not necessarily show that offenders possess an inherent criminal predisposition. Instead, predictive factors may reflect situational determinates of behavior that are beyond an offender's control.[204] For instance, the most widely used instrument for predicting general recidivism, the Level of Service Inventory—Revised, evaluates criminal history, education and employment, financial resources, family and marital status, housing accommodations, leisure and recreation activities, companions and social influences, alcohol and drug problems, emotional and personal difficulties, and attitudes regarding crime and authority.[205] A prediction of "high-risk" generated by the situational factors on this list indicts not the individual offender but the social circumstances of the

---

200. *Id.*

201. Bernard E. Harcourt, *Risk as a Proxy for Race: The Dangers of Risk Assessment*, 27 FED. SENT'G. REP. 237, 240 (2015).

202. *See* Hamilton, *supra* note 172, at 19–20 ("Many instruments count any illegal act . . . [and] operationalize recidivism as a simple dichotomous measure.").

203. *See* Leonard J. Long, *Rethinking Selective Incapacitation: More at Stake than Controlling Violent Crime*, 62 UMKC L. REV. 107, 122–23 (1993) (citation omitted) ("Selective incapacitation is 'the idea that an effective way to sanction offenders is to reserve scarce prison and jail space for those who are predictably the most dangerous and criminally active.'").

204. Haney, *supra* note 164, at 527–28 ("Remarkably, the diagnostic equations used to identify candidates for selective incapacitation actually transformed situational and structural variables such as unemployment into dispositional traits and used them as indices of future dangerousness.").

205. *See* Amanda L. Gentry et al., *Comparing Sex Offender Risk Classification Using the Static-99 and LSI-R Assessment Instruments*, 15 RES. ON SOC. WORK PRAC. 557, 559 (2005).

offender's background.[206] Actuarial predictions ascribe risk more often to individuals from marginalized communities, which are saturated with crime, poverty, inadequate schools, fewer employment opportunities, elevated incidence of child abuse and neglect, drug use and distribution, and other consequences of socioeconomic blight.[207] Even criminal history, while specific to an individual offender, incorporates crime-inducing situational forces imposed by violent, overcrowded prisons and by the many barriers to reentry that follow criminal conviction.

Law enforcement agencies also use socioeconomic factors to target potential offenders.[208] Although political and legal constraints do not allow police to overtly target the unemployed, uneducated, indigent, or members of racial or national minorities,[209] people with such characteristics are often concentrated together geographically.[210] By mapping "hot spots" in crime-laden urban neighborhoods, law enforcement officers can target marginalized community members indirectly. A consequence of thus deploying police will be to incapacitate offenders for some crimes caused by unfortunate social and economic circumstances beyond their control. Indeed, statistical regression models indicate that neighborhood context may be the greatest contributor to racial disparities in violent behavior.[211]

Social and structural factors used for predictive policing are self-reinforcing, because increased police presence in low-income neighborhoods will lead to a higher rate of detection there.[212] For instance, even if race has no bearing on drug use, users who are Black will be arrested at greater rates if police spend more time patrolling neighborhoods where residents are disproportionately Black.[213] Police will not only uncover more crime where they are deployed, they will also generate crime, as contentious interactions between civilians and police often result in arrests.[214] To the extent police use historical arrest data to guide resource

---

206. *See* Dawinder S. Sidhu, *Moneyball Sentencing*, 56 B.C.L. REV. 671, 721 (2015) (noting that "individuals who live in areas of concentrated poverty unjustifiably face the prospect of an adverse risk profile" for reasons beyond their control).

207. *See, e.g.*, Haney, *supra* note 164, at 570–71.

208. Noting the unreliability of instruments used to predict dangerousness, the RAND report observed that instead "short-term negative changes in life *circumstances* may sharply increase criminal activity," whereas "such positive short-term changes as living with a girlfriend, attending school, or receiving justice system supervision may decrease the odds of recidivism." *See* WALTER L. PERRY ET AL., PREDICTIVE POLICING: THE ROLE OF CRIME FORECASTING IN LAW ENFORCEMENT OPERATIONS 91 (2013) (emphasis added), http://www.rand.org/content/dam/rand/pubs/research_reports/RR200/RR233/RAND_RR233.pdf. Similarly, the Virginia Sentencing Commission's system of scoring dangerousness has offenders receiving "dangerousness" points for being nineteen or younger, unemployed, male, and single. *See* VIRGINIA SENTENCING GUIDELINES (VA. SENTENCING COMM'N 2014).

209. *See* Sidhu, *supra* note 206, at 695.

210. *See, e.g.*, Bernard E. Harcourt, *From the Ne'er-Do-Well to the Criminal History Category: The Refinement of the Actuarial Model in Criminal Law*, 66 L. & CONTEMP. PROBS. 99, 137 (2003).

211. *See* Robert J. Sampson et al., *Social Anatomy of Racial and Ethnic Disparities in Violence*, 96 AM. J. PUB. HEALTH 224, 231 (2005).

212. Harcourt, *supra* note 210, at 135.

213. *See id.* at 146.

214. Nirej S. Sekhon, *Redistributive Policing*, 101 J. CRIM. L. & CRIMINOLOGY 1171, 1213 (2011).

allocation, predictive methods will entrench past racial bias in perpetuity.[215] One prominent critic of actuarial prediction, legal and political theorist Bernard Harcourt, suggests that this impact on racial minorities is intentional rather than incidental.[216] Harcourt observes that race had been openly used to evaluate offender dangerousness in parole decisions throughout much of the twentieth century.[217] Only after the explicit use of race became politically unacceptable during the 1960s did criminal history become the most relied-upon predictor of dangerousness. Given that African Americans have long been overrepresented in prison populations, Harcourt reasons that the choice to use criminal history was made with an expectation of a racially disparate impact.[218]

In sum, clinical predictions of dangerousness appear to lack validity unless they are based on either a diagnosis of anti-social personality disorder, or statistical predictors that could be used for an actuarial assessment. Even predictions based on anti-social personality disorder are probably not reliable enough to justify confinement as cost-effective. Actuarial models tend to over-predict future dangerousness and their use will recommend more incarceration than is beneficial to public welfare. By attributing crime to offender dispositions, the use of such instruments discourages interventions in criminogenic environmental circumstances, including both situational and biographical influences on behavior. If such interventions can prevent crime at less social cost, incapacitation of individuals—which prevents prosocial as well as antisocial conduct at great expense—is unwarranted. In addition, the heavy reliance of actuarial tools on past criminal history imposes a disproportionate toll on African American and Latino communities.[219] These minority populations suffer a "ratchet effect" because criminal history triggers more police attention and higher sentences.[220]

In deciding whether to incapacitate offenders, legislatures should weigh the social value of confining true positives—those correctly predicted to commit violent offenses—against the social cost of confining both true and false positives. The trade-off between prevention and its costs requires a contestable value judgment. But that judgment cannot even be made without estimating the number of true and false positives. The Supreme Court should not approve sentences as proportionate to the goal of incapacitation without evidence that the selection was

---

215. Harcourt, *supra* note 201, at 240 ("[Racial] imbalance will get incrementally worse each year if law enforcement departments rely on the evidence of last year's correctional traces—arrest or conviction rates—when setting next year's profiling targets.").

216. *Id.* at 238.

217. *Id.* (noting that the use of race to predict dangerousness "ebbed in the 1970s as a result of the Civil Rights movement . . . but was nevertheless replaced with two other trends—the narrowing of the prediction instruments and the focusing of those tools on prior criminal history").

218. *Id.*

219. *See id.*

220. *Id.* at 240.

based on defensible methods of prediction, and that the social costs of confinement, and of prediction itself, were considered.

III. FLAWED PSYCHOLOGICAL FOUNDATION OF INCAPACITATION: SITUATIONISM AND THE FUNDAMENTAL ATTRIBUTION ERROR

The previous Part showed there is little evidence that modern incapacitation strategies can significantly reduce violent crime at an acceptable cost. Yet the case for incapacitation is often presented as a matter of common-sense rather than empirical analysis. Both James Q. Wilson and Justice O'Connor, writing for the majority in *Ewing*, treated the preventive effects of incapacitation as self-evident. Such unreflective equation of confinement with prevention reflects the widely shared assumption that crime must be caused by character. This Part critiques that assumption by reviewing psychological research in the field of Attribution Theory. This research shows both the causal influence of situations on behavior, and the tendency of lay observers to underestimate that influence.

Attribution theory describes the process by which people attribute each other's behavior to causes either internal and person-specific ("dispositional") or external and context-specific ("situational").[221] A dispositionalist approach to punishment assumes that "[c]rime resides within the person and is caused by the way he thinks, not his environment."[222] By contrast, a situationist approach to punishment construes criminal behavior by examining the immediate situational contexts in which behavior occurs and the biographical contexts that shape behavior over time. These biographical contexts can influence behavior by affecting norms, preferences, skills, and opportunities; by affecting emotion; and by affecting physiology.[223] Most contemporary psychologists view behavior as a product of the interaction among dispositions, biographical contexts, and situational contexts.[224]

---

221. *See* Laura J. Templeton & Timothy F. Hartnagel, *Causal Attributions of Crime and the Public's Sentencing Goals*, 54 CAN. J. CRIMINOLOGY & CRIM. JUST. 44, 45–46 (2012).

222. Haney, *supra* note 164, at 516, 526 (citation omitted). At the cognitive level, "disposition" refers to a probability that a person will exhibit a specific behavior contingent on various situational factors. These probabilities, while affected by genetic makeup, are constantly "updated" to reflect information collected by experience, so that, for instance, the probability that person X will commit crime Y increases after traumatic experience Z. A disposition is subject to constant change early in life then gradually stabilizes, but never becomes fixed.

223. *Id.* at 569–70 (citation omitted) ("In spite of recent, extremist attempts to dispositionalize and biologize crime, modern psychological research and theory clearly support the view that the roots of criminal behavior are to be found in the social and developmental histories of those who perform it, and the social context in which it occurs."); *see also* Michelle A. Coyne & John E. Eck, *Situational Choice and Crime Events*, 31 J. CONTEMP. CRIM. JUST. 12, 16 (2015) (distinguishing situational influences of "proximate settings" and "distal social structures and institutions").

224. David. C. Funder, *Towards a Resolution of the Personality Triad: Persons, Situations and Behavior*, 40 J. RES. PERSONALITY 21, 28–29 (2006); Ryne A. Sherman et al., *The Independent Effects of Personality and Situations on Real-Time Expressions of Behavior and Emotion*, 109 J. PERSONALITY & SOC. PSYCHOL. 872, 872, 886 (2015).

A. A Situationist Critique of Incapacitation Theory

Penal incapacitation is arguably based on a confused account of human behavior. While arguing that situational strategies are necessary to control prisoners, incapacitation theory assumes that criminal behavior is generated by an offender's dangerous disposition: that "[c]rime resides within the person and is 'caused' by the way he thinks, not his environment."[225] Selective incapacitation conceptualizes dangerousness as a personal, immutable characteristic that can be observed and detected.[226] But if dangerousness is truly a fixed component of individuals, why is it so difficult to accurately predict who engages in violence in the future? Perhaps because most violence is not simply a product of individual disposition but is rather an effect of the dynamic interaction between individuals and their social environments, with the latter sometimes overwhelming the former.[227] In light of evidence that incarcerating more people for longer does not reduce crime,[228] crime control would be better advanced by directing resources to situational and biographical causes of crime.[229]

In offering a situationist critique of incapacitation, we do not claim that human behavior is *exclusively* generated by situational cues. Rather, we share the prevailing view that behavior proceeds from the interaction among disposition, biography, and situation.[230] Nor do we deny that some people may be disposed to engage in violence even under favorable circumstances. Yet much of this dispositionally-caused crime is committed by a small percentage of offenders who exhibit antisocial personality disorder or psychopathy.[231] While these individuals are

---

225. Haney, *supra* note 164, at 526.

226. *See* Dolovich, *supra* note 104, at 300 ("At the heart of this construction is . . . an assertion, based on the fact of persistent illegal conduct, of what he or she must inherently *be*."). *See generally* MODEL PENAL CODE § 1.02 (2015) (providing that a general purpose of criminal law is to control "persons whose conduct indicates that they are disposed to commit crimes").

227. *See, e.g.*, Haney, *supra* note 164, at 502–03 (citations omitted) (citing empirical research "that variations in social setting and context play an extremely important causal role in the incidence of criminality, aggression and violence, homicide, and even torture" and that "exposure to a variety of background situations and developmental context (e.g., poverty and parental maltreatment) constitutes a significant risk factor in delinquency and adult criminal behavior").

228. *See* OLIVER ROEDER ET AL., BRENNAN CTR. FOR JUSTICE, WHAT CAUSED THE CRIME DECLINE? 4 (2015), http://www.brennancenter.org/sites/default/files/publications/What_Caused_The_Crime_Decline.pdf.

229. *See, e.g.*, Haney, *supra* note 164, at 503–04 ("[E]xclusively individual-centered approaches to crime control like imprisonment are self-limiting and doomed to failure if they do not simultaneously address criminogenic situational and contextual factors[.]").

230. Sherman et al., *supra* note 224, at 886.

231. Kent A. Kiehl et al., *Limbic Abnormalities in Affective Processing by Criminal Psychopaths as Revealed by Functional Magnetic Resonance Imaging*, 50 BIOLOGICAL PSYCHIATRY 677, 682 (2001) ("The results support the hypothesis that criminal psychopathy is associated with abnormalities in the function of structures in the limbic system and frontal cortex while engaged in processing of affective stimuli."); *see also* David J. Cooke et al., *Casting Light on Prison Violence in Scotland*, 35 CRIM. JUST. & BEHAV. 1065, 1075 (2008) (explaining that when criminogenic environment of prison is ameliorated, "residual violence will be 'person centered,' and can be addressed as such" and further explaining that one definition of "dispositional crime" is crime that most individuals would *not* commit were they placed in a situation identical to that in which the crime is committed).

disproportionately present in prison populations, they nonetheless comprise a relatively small minority of prisoners.[232] Even if it is justifiable to incapacitate past violent offenders presenting such disorders, limiting incapacitation to this population would greatly reduce its scale. Moreover, policy interventions affecting biographical influences on disposition may reduce the scope of necessary incapacitation further.

Empirical research over the course of the twentieth century built toward the conclusion that personal traits are less stable than lay people assume, and *situations* play a major and often dominant role in shaping behavior. Psychologists have shown that "individual responses to specific situations are surprisingly consistent across persons," whereas one person's behavior across different situations is extremely variable.[233] In particular, two famous experiments showed that most people will engage in cruelty or violence in certain situations, and will impose arbitrary suffering upon an undeserving victim. This should cause us to question that offenders are "of 'a different breed' and necessarily wicked."[234]

In 1961, psychologist Stanley Milgram conducted an experiment in which he directed the subject (assigned the role of "teacher") to give a series of increasingly painful electric shocks to another participant (the "learner") sitting on the opposite side of a wall.[235] The learner was in fact Milgram's assistant.[236] The teacher was instructed to ask the learner a series of questions; with each incorrect answer, the teacher was told to administer an increasingly powerful shock.[237] As the shocks escalated, the teacher began to hear the learner screaming, complaining of chest pains, banging on the wall, and pleading to stop the experiment.[238] Beginning at 330 volts, the shocks met with silence.[239] Before the experiment, Milgram polled psychiatrists, members of Yale's faculty, random middle-class adults, and students, all of whom predicted that subjects would refuse the experiment.[240] Psychiatrists "expected that only 4 percent would reach 300 volts, and that only a pathological fringe of about one in a thousand would administer the highest shock . . . ."[241] Incredibly, 65% of subject teachers delivered the maximum 450-volt shock, and all subjects delivered shocks of at least 300 volts.[242] The results suggested that most people would commit antisocial acts—including acts of violence and cruelty—if

---

232. *See supra* Section II.C.1.

233. Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1395 (2003).

234. *See* Dolovich, *supra* note 104, at 300.

235. Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371, 373 (1963).

236. *Id.* (noting that the subject believed that the roles of Teacher and Learner were randomly assigned at the outset of the experiment).

237. *Id.* (noting that the shock switches were labeled to indicate the level of danger posed).

238. *Id.* at 374.

239. *Id.*

240. *Id.* at 375.

241. Stanley Milgram, *The Perils of Obedience*, HARPER'S MAG., Dec. 1973, at 64.

242. Milgram, *supra* note 235, at 375–76.

ordered to by an authority figure. Moreover, the dispositions encouraging such behavior are not inherently antisocial. To the contrary, the deference to authority and cooperativeness that motivated cruel behavior here, ordinarily encourages compliance with law.

Philip Zimbardo's 1971 Stanford Prison Experiment was another striking demonstration of how situational forces can overwhelm individual personality traits and provoke sadistic behavior in normal adults.[243] Subjects[244] were randomly assigned roles as either a guard or prisoner in Zimbardo's makeshift prison.[245] Guards were prohibited from hitting or assaulting the prisoners but were otherwise unrestrained in their treatment of prisoners.[246] Internalizing these roles, the guards began to dispense increasingly harsh and punitive measures when prisoners resisted their authority.[247] They resorted to psychological and physical abuse without apparent hesitation, while the prisoners grew submissive and internalized their roles as dehumanized objects of authority.[248] Conditions rapidly deteriorated. Prisoners were forced to defecate in small buckets which they had to clean with their own hands, subjected to sleep deprivation, compelled to exercise until physical exhaustion, and confined for hours alone in a small closet.[249] By day three of the planned two-week experiment, one prisoner "began suffering from acute emotional disturbance, disorganized thinking, uncontrollable crying, and rage."[250] The experiment, designed to span two weeks, lasted only five days before being terminated.[251]

Zimbardo's controversial experiment suggests that most people are capable of cruelty *if placed in a situation that tends to elicit cruel behavior*.[252] This experiment has been invoked to explain how people become complicit in war crimes.[253] Zimbardo later testified as to the power of situational forces at a military hearing in defense of a U.S. soldier charged with abusing prisoners at Abu

---

243. *See, e.g.*, Craig Haney, Curtis Banks & Philip Zimbardo, *Interpersonal Dynamics in a Simulated Prison*, 1 INT'L J. CRIMINOLOGY & PENOLOGY 69, 69 (1973).

244. *Id.* at 73 (explaining that subjects were screened to eliminate individuals with criminal pasts and psychological problems).

245. *Id.* at 72.

246. *Id.* at 74–75.

247. *Id.* at 89.

248. *Id.* at 94.

249. *Id.* at 95.

250. DONALD O. GRANBERG & JOHN F. GALLIHER, A MOST HUMAN ENTERPRISE: CONTROVERSIES IN THE SOCIAL SCIENCES 42 (2010) (discussing effects of Zimbardo's experiment on the prisoners).

251. Haney, Banks & Zimbardo, *supra* note 243, at 81.

252. *See, e.g.*, Susan D. Rozelle, *Practice Attributional Charity: Cognitive Bias in Intentional Homicide Law*, 47 TEX. TECH. L. REV. 41, 50–51 (2014); Andrew E. Lelling, *A Psychological Critique of Character-Based Theories of Criminal Excuse*, 49 SYRACUSE L. REV. 35, 80–81 (1998).

253. Arthur G. Miller et al., *Explaining the Holocaust: Does Social Psychology Exonerate the Perpetrators?*, *in* UNDERSTANDING GENOCIDE: THE SOCIAL PSYCHOLOGY OF THE HOLOCAUST 301, 313–14 (Leonard S. Newman & Ralph Erber eds., 2002).

Ghraib,[254] and published a book collecting numerous examples illustrating how situational forces cause deviant behavior.[255]

Many people believe that violent actions are sometimes reasonable, and indeed the enforceability of law requires that the law justify use of force by officials.[256] Legal defenses, including public authority, defensive force, duress, necessity, and provocation, reflect a common understanding that violence can in certain situations be justified or excused.[257] Moreover, these defenses are usually conditioned on a reasonable balance of interests.[258] In this sense the criminality of any particular act of violence can be located on a spectrum, such that the reasonableness of some acts of criminal violence may fall just short of the threshold required for justification. Despite these subtleties we commonly associate violent crime with abject depravity. Although popular culture often portrays violent offenders as predators who gratuitously stalk random strangers, most violent crime occurs in the gray area where someone is provoked or threatened.[259] The point is not that all people are equally inclined to engage in violence, but that criminal law does not evaluate violence independently from situational cues.

Many situational determinates of crime are subtle ones that gradually overwhelm one's ability to resist temptation and impulse.[260] It is no coincidence that violent crime is most common in areas of economic blight[261] or that "the most

---

254. *Demonstrating the Power of Social Situations Via a Simulated Prison Experiment*, AMERICA PSYCHOLOGICAL ASSOCIATION, http://www.apa.org/research/action/prison.aspx (last visited Oct. 9, 2016).

255. PHILLIP ZIMBARDO, THE LUCIFER EFFECT 5–8 (2007).

256. Jonathan Jackson, et al., *Monopolizing Force? Police Legitimacy and Public Attitudes Toward the Acceptability of Violence*, 19 PSYCHOL. PUB. POL'Y & L. 479, 486, 490 (2013); GUYORA BINDER, THE OXFORD INTRODUCTIONS TO U.S. LAW: CRIMINAL LAW 334–35 (Dennis Patterson ed., 2016); Pillsbury, *supra* note 160, at 451–52.

257. Pillsbury, *supra* note 160, at 451–52; Bill McCarthy & John Hagan, *Homelessness: A Criminogenic Situation*, 31 BRIT. J. CRIMINOLOGY 393 (1991).

258. Pillsbury, *supra* note 160, at 444–47.

259. *See id.* at 461–62; Guyora Binder, *Homicide*, *in* THE OXFORD HANDBOOK OF CRIMINAL LAW 702, 702 (Markus D. Dubber & Tatjana Hörnle eds. 2014) ("In most societies the majority of homicides are the unlucky consequences of broadly tolerated routines of violence rooted in conflicting claims of social status and justified by norms of sociability, loyalty, or honor."); Dolovich, *supra* note 104, at 299 ("No doubt there *are* people in state custody too violent and dangerous to be released—the Charles Mansons, the Jeffrey Dahmers . . . [b]ut it is hard to credit the notion that such people are anything but exceptions."). Moreover, "the vast majority of violent crimes are assaults where one person hits or slaps another or makes a verbal threat. Only about 8% of the victims of violent crime nationally went to a hospital emergency room . . . ." *Id.* at 297 n.117 (quoting a report by the National Criminal Justice Commission).

260. *See* Catherine DeCarlo Santiago et al., *Socioeconomic Status, Neighborhood Disadvantage, and Poverty-Related Stress: Prospective Effects on Psychological Syndromes Among Diverse Low-income Families*, 32 J. ECON. PSYCHOL. 218 (2011) (finding a causal relationship between low income and delinquency).

261. *See, e.g.*, Pablo Fajnzylber et al., *What Causes Violent Crime?*, 46 EUR. ECON. REV. 1323, 1330–31 (2002) (documenting the positive correlation between violent crime and nations' GDP from 1970 to 1994); Toby Seddon, *Drugs, Crime and Social Exclusion: Social Context and Social Theory in British Drugs—Crime Research*, 46 BRIT. J. CRIMINOLOGY 680, 680 (2006) (describing how economic factors affect illicit drug markets); Kevin M. Drakulich et al., *Instability, Informal Control, and Criminogenic Situations: Community Effects of Returning Prisoners*, 57 CRIME L. & SOC. CHANGE 493 (2012); *see generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH 62

serious concentrations of human difficulty are invariably found huddled together with unemployment, poverty, housing decay, and other social disadvantages."[262] Criminologist Toby Seddon suggests that drug trade proliferates in low-income communities not only to satisfy employment needs, but also "to create a meaningful daily structure and identity."[263] Nor is an adequate response that not everyone exposed to adverse circumstances eventually becomes violent, for "while it is possible to overcome horrific circumstances, horrific circumstances do have a marked effect . . . [and] that effect is larger than we are comfortable admitting."[264] Incapacitation ignores these biographical and situational causes of crime by locating the roots of violent behavior exclusively in the offender's disposition. This misattribution is implicit in the development of risk assessment tools, and allows us to avert our eyes from criminogenic conditions society has the power—and arguably the responsibility—to alter.

While discounting the role that social and economic factors play in precipitating violence outside of prisons, incapacitation assumes that situations inside prisons do not generate criminal behavior.[265] Yet many situational aspects of prisons appear to be criminogenic, and, as previously noted, prisons seem to aggravate recidivism.[266] The constant threat of unprovoked violence tends to cause long-term psychological trauma.[267] Disruption of family and community ties "dampen the internal pressures to abide by law."[268] Abuse by prison guards erodes respect for authority and damages self-esteem.[269] Overcrowding and inhumane prison conditions add to the physical and psychological trauma endured by many offenders.[270] A dearth of educational and vocational programming further diminishes the likelihood for employment and successful reentry.[271]

(Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977) (noting that in eighteenth century France the public expressed "agitation . . . against punishments for certain offences connected with social conditions such as petty larceny").

262. Seddon, *supra* note 261, at 680. This position is empirically supported by research on gene-environment interactions. *See, e.g.*, Hexuan Liu et al., *Gene by Social-Environment Interaction for Youth Delinquency and Violence: Thirty-Nine Aggression-Related Genes*, 93 SOC. FORCES 881 (2014).

263. Seddon, *supra* note 261, at 692.

264. Rozelle, *supra* note 252, at 43–44.

265. *See supra* Section II.B.

266. *See* José Cid, *Is Imprisonment Criminogenic?*, 6 EUR. J. CRIMINOLOGY 459, 471–72 (2009).

267. Haney, *supra* note 164, at 538–39 (discussing prison-induced PTSD).

268. Pritikin, *supra* note 73, at 1056.

269. Haney, *supra* note 164, at 539–40.

270. *Id.* at 543–44 (citations omitted) ("A large literature on the consequences of overcrowding has documented a range of specific adverse effects on persons confined in prisons and jails, including increases in negative affect, elevated blood pressure, a greater number of illness complaints, higher rates of disciplinary infractions, and increased recidivism."); *see* Karen F. Lahm, *Inmate Assaults on Prison Staff: A Multilevel Examination of an Overlooked Form of Prison Violence*, 89 PRISON J. 131.

271. Graham v. Florida, 560 U.S. 48, 79 (2010) ("In some prisons, moreover, the system itself becomes complicit in the lack of development . . . . [I]t is the policy in some prisons to withhold counseling, education, and rehabilitation programs for those who are ineligible for parole consideration.").

To be fair, there are many prisoners whose impulsivity and indifference to suffering threaten the safety of others, even outside of criminogenic situations.[272] By one estimate, roughly 15–25% of male prisoners are psychopathic.[273] Yet the resulting violence is part of the situation facing other prisoners, and further contributes to that situation's criminogenic effects. The prevalence of dispositionally-caused violence pressures the other 75–85% of prisoners to engage in defensive violence or preemptive displays of aggression as means of adaptation and survival.[274] As a result, they may be influenced in ways that render them more likely to commit crimes on the outside.[275]

Yet even psychopaths are more likely to act violently as a result of unfavorable social conditions. Although psychopathy has been associated with abnormal brain function, such malfunction is more likely in response to an array of biographical aggravators, including poverty, child abuse, low socioeconomic status, and low parental education.[276] Whether these contextual factors actually trigger psychopathic "externalization" depends on an individual's genetic sensitivity and the nature of the situational conditions to which the individual is exposed.[277] For instance, psychopathic symptoms increase within days of incarceration.[278] That at least some types of psychopathy appear responsive to therapeutic intervention further undermines the notion that fixed dispositional qualities underlie antisocial behavior. One researcher notes that "a relatively brief and focused contextual intervention in the first grade can have . . . a dramatic effect on growth of serious forms of antisocial behavior in adolescence."[279] Other researchers have reported that cognitive-behavioral therapy effectively treats at least certain types of psychopathy.[280]

Recent research has indicated the interaction of genetic endowments and biographical context in the development of psychopathic behavioral symptoms. Researchers report that males with a certain variant of the gene Monoamine Oxidase A ("MAOA") who witnessed acts of violence in childhood were more likely to engage in violence, impulsivity, aggression, and antisocial behavior later

---

272. Kent A. Kiehl & Morris B. Hoffman, *The Criminal Psychopath: History, Neuroscience, Treatment, and Economics*, 51 JURIMETRICS 355, 355–56 (2011). The authors also report that psychopaths are four to eight times more likely than other prisoners to commit violent crimes after released. *Id.* at 355.

273. *Id.* at 356; *see also* STOP PRISONER RAPE, *supra* note 167, at 11.

274. *See* Jenny Tew et al., *Prison Culture and Prison Violence*, 221 PRISON SERV. J. 15, 15–16 (2015).

275. *See* Pritikin, *supra* note 73, at 1099.

276. *See* Javdani N. Sadeh et al., *Serotonin Transporter Gene Associations with Psychopathic Traits in Youth Vary as a Function of Socioeconomic Resources*, 119 J. ABNORMAL PSYCHOL. 604, 608 (2010).

277. *See id.*

278. Haney, *supra* note 164, at 534.

279. Thomas J. Dishion & Gerald R. Patterson, *The Development and Ecology of Antisocial Behavior: Linking Etiology, Prevention, and Treatment*, *in* 3 DEVELOPMENTAL PSYCHOPATHOLOGY 658 (Dante Cicchetti ed., 2016).

280. *See* Callie H. Burt & Ronald L. Simons, *Pulling Back the Curtain on Heritability Studies: Biosocial Criminology in the Postgenomic Era*, 52 CRIMINOLOGY 223, 249 (2014).

in life.[281] Without exposure to such situations, however, men with the high-risk MAOA variant were not behaviorally different from men with the low-risk variant.[282] Other historical factors that produce antisocial behavior in combination with MAOA are social exclusion,[283] childhood maltreatment, "material deprivation," and low education level.[284] These findings confirm that, even among people who are in some sense more "predisposed" to antisocial behavior than others, propensities toward violence can be expressed or suppressed based on contextual factors amenable to policy intervention.[285]

Environmental hazards also have a surprising causal role in disposition-based behavior. Consider the apparent relationship between violent crime and lead-based products.[286] Researchers report a striking correlation across countries, states, cities, and even neighborhoods between consumption of leaded gasoline and rates of violent crime.[287] Brain images of people with moderate lead exposure show reduced functionality in areas of the brain responsible for emotional regulation, impulse control, executive function, and communication.[288] Indeed, some scholars believe that the elimination of leaded gasoline was the most important factor in the dramatic drop in homicide rates during the 1990s—far more important than any incapacitative or deterrent effects of increased imprisonment.[289]

A rational alternative to divining and punishing evil disposition is to mitigate the social conditions that make expression of deviance more likely. This would mean investing in intervention rather than incapacitation—reducing poverty, expanding social investment in child welfare and education, and ameliorating environmental

---

281. Rose McDermott et al., *MAOA and Aggression: A Gene-Environment Interaction in Two Populations*, 57 J. CONFLICT RESOL. 1043, 1043, 1058 (2012).

282. *Id.* at 1057.

283. D. Gallardo-Pujol et al., *MAOA Genotype, Social Exclusion and Aggression: An Experimental Test of a Gene-Environment Interaction*, 12 GENES BRAIN & BEHAV. 140, 140 (2012).

284. David Fergusson et al., *Moderating Role of the MAOA Genotype in Antisocial Behaviour*, 200 BRIT. J. PSYCHIATRY 116, 121 (2012).

285. In fact, biologists believe that individuals with heightened vulnerability to negative environments exhibit heightened potential for success in positive environments. Jay Belsky, *Differential Susceptibility to Environmental Influences*, 7 INT'L J. CHILD CARE & EDUC. POL'Y 15 (2013); David Dobbs, *The Science of Success*, ATLANTIC (Dec. 2009), http://www.theatlantic.com/magazine/archive/2009/12/the-science-of-success/307761.

286. *See* Kevin Drum, *Lead: America's Real Criminal Element*, MOTHER JONES (Feb. 11, 2016), http://www.motherjones.com/environment/2016/02/lead-exposure-gasoline-crime-increase-children-health ("Gasoline lead may explain as much as 90 percent of the rise and fall of violent crime over the past half century."); Kim M. Cecil et al., *Decreased Brain Volume in Adults with Childhood Lead Exposure*, 5 PLOS MED. 741, 741 (2008) (concluding that childhood lead exposure is associated with reductions in gray matter in prefrontal cortex); Rick Nevin, *Understanding International Crime Trends: The Legacy of Preschool Lead Exposure*, 104 ENVTL. RES. 315, 315 (2007) (finding "very strong association between preschool blood lead and subsequent crime rate trends" across nine countries).

287. Drum, *supra* note 286.

288. *See id.*

289. *See id.*; Jessica Wolpaw Reyes, *Environmental Policy as Social Policy? The Impact of Childhood Lead Exposure on Crime* (Nat'l Bureau of Econ. Research, Working Paper No. 13097, 2007); PAUL BUTLER, LET'S GET FREE: A HIP-HOP THEORY OF JUSTICE 170–74 (2009).

hazards. Such a strategy would aim at fostering prosocial dispositions and enabling prosocial behavior, rather than trying to identify and incapacitate antisocial dispositions.

B. Attribution Error and Excessive Blame

The previous Section described how antisocial behavior arises through a combination of genetic endowments, biographical influences, and situational influences. This Section explains why both the public and legal decision-makers systematically underestimate the substantial contribution of situational influences to antisocial behavior. Similarly, it explains why voters, legislators, and judges simply presume that crime is caused by character, rather than basing their understanding of crime on empirical evidence. To all of these actors, the responsibility of criminals for crime is a matter of common sense. To the extent that we see crime as evidence of bad character, we will see constant confirmation of the assumption that people of bad character are disposed to commit crimes.

Our weak ability to perceive situational causes of crime is a result of attribution errors documented by cognitive psychology. Foremost among these is the Fundamental Attribution Error ("FAE"), the tendency for observers to overestimate the role of dispositional factors in explaining behavior, while failing to recognize situational forces at play.[290] FAE induces us to attribute crime entirely to an offender's disposition.[291] By magnifying the causal role of a defendant's character relative to other variables affecting behavior, FAE induces excessive blame, which in turn encourages excessive punishment.[292] Incapacitation theory purports to promote utility, without regard to desert, but humans cannot overcome their own cognitive biases just by stipulating them away. A utilitarian may reject retribution as an aim of punishment, but cannot so easily resist attribution.

Early experiments establishing the Fundamental Attribution Error demonstrated the irrational resistance of subjects to situational explanations of behavior.[293] In 1967, Edward Jones and Victor Harris divided students into two groups and instructed them to read an essay by a student who had been assigned either to support or oppose Fidel Castro.[294] Both groups were then asked to rate the writers' "true" beliefs regarding Castro.[295] Even knowing that the writer had no choice over what to write, subjects who had read the pro-Castro essay rated the writer's beliefs as far more pro-Castro than did the students who read the anti-Castro essay,

---

290. Ross, *supra* note 21.

291. Dripps, *supra* note 233, at 1399.

292. *See id.* at 1428.

293. Edward E. Jones & Victor A. Harris, *The Attribution of Attitudes*, 3 J. EXPERIMENTAL SOC. PSYCHOL. 1, 3 (1967).

294. *Id.* at 4, 8.

295. *Id.*

and vice versa.[296] Hence, subjects failed to account for salient situational constraints and accordingly drew baseless conclusions about authors' positions on a controversial topic. In another classic experiment, observers rated basketball players shooting free throws in a well-lit gymnasium as significantly more skilled than basketball players in a dimly-lit gymnasium, even though the former (who were in fact no more skilled) held a clear situational advantage.[297] Over-attribution of outcomes to individuals appears to be partly culturally determined, as the effect is more pronounced in Western cultures and particularly in the United States.[298]

FAE is notable for the *strength* of its effect on the observer. For instance, subjects in one study were told that Person A had been more honest or friendly than Person B on a particular occasion, then asked to estimate the probability that Person A would also be more honest or friendly in a subsequent situation.[299] Whereas the actual probability (based on other studies of cross-situational behavior) was roughly 55%, subjects on average estimated an 80% likelihood.[300] This remained true even "when the question spelled out the nature of the situation, making it very clear that participants were being asked to predict behavior in a very different kind of situation."[301] More generally, correlation in trait-related behavior in two separate situations eliciting certain traits (like honesty or friendliness) is 0.15, but is perceived to be 0.80.[302] So, not only do we overestimate the consistency and relevance of intrinsic character, we overestimate substantially.

A related cognitive bias is the Just World Fallacy, the assumption that consequences of an action reflect the morality of the actor.[303] We attribute the misfortune of others to dispositional flaws rather than external factors, in order to preserve our belief that people usually get what they deserve. Taking a more situationist perspective on behavior would be psychologically unsettling and cognitively taxing, because situational forces are more difficult to ascertain and control. Borrowing from Milgram, Melvin Lerner documented the Just World Fallacy by having subjects watch what they believed was a live video of a volunteer receiving painful electric shocks.[304] One group of subjects was permitted to intervene, while

---

296. *Id.* at 7, 11.

297. *See* Dripps, *supra* note 233, at 1397.

298. Salil K. Mehra, *Blaming: Harm Attribution in the United States and Japan*, 75 U. PITT. L. REV. 39 (2013); Adam Benforado & Jon Hanson, *The Great Attributional Divide: How Divergent Views of Human Behavior Are Shaping Legal Policy*, 57 EMORY L.J. 311, 380–81 (2008) (citations omitted) ("A burgeoning cultural-psychology literature shows how Western cultures tend to be more dispositionist than Eastern cultures.").

299. *See* ZIVA KUNDA, SOCIAL COGNITION 432–34 (1999).

300. *Id.* at 434.

301. *Id.*

302. *Id.* at 433–34.

303. Adrian Furnham, *Belief in a Just World: Research Progress Over the Past Decade*, 34 PERSONALITY & INDIVIDUAL DIFFERENCES 795, 802–03 (2003).

304. Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 101–02 (2004).

the other had no choice to but continue watching.[305] Afterwards, subjects given no choice to intervene were far more critical and disparaging in their feedback of the volunteers and awarded them less compensation.[306] In Lerner's own words, "the sight of an innocent person suffering without the possibility of reward or compensation motivated people to devalue the attractiveness of the victim in order to bring about a more appropriate fit between her fate and her character."[307] The lesson: rather than accept that bad things happen to good people, we prefer to think of people to whom bad things happen as bad.

Attribution errors affect every part of our justice system.[308] For instance, jurors often treat as highly probative a confession that is patently coerced,[309] attributing the confession to the individual's guilty conscience even when the coercive factors producing the confession have been explained to them.[310] Factfinders infer guilt based on seemingly irrelevant character evidence.[311] Factfinders exhibiting strong just-world beliefs are more likely to impose longer sentences on individuals from low socioeconomic profiles.[312] Some psychologists believe this phenomenon explains juror attribution of blame to rape victims and skepticism regarding claims of abuse.[313]

Attribution biases influence our perception of entire groups, not just individuals.[314] A meta-analysis of empirical studies concluded that group members are more likely to attribute positive behavior of fellow group members to dispositional qualities and negative behaviors to situational factors.[315] On the other hand, we generally attribute negative behavior of members of groups to which we do not belong to dispositional traits common to all members of that group.[316] These patterns can affect sentencing:[317] "White jurors more readily believe that blacks

---

305. *Id.*

306. *Id.*

307. *Id.* at 101 (quoting Melvin L. Lerner & Dale T. Miller, *The Attribution Process: Looking Back and Ahead*, 85 PSYCHOL. BULL. 1030, 1032 (1978)).

308. *See* Dripps, *supra* note 233, at 1385–86 (proposing that the fundamental attribution error "has important and disturbing implications for the theory and practice of criminal law" and that its existence helps explain the doctrines of attempt and felony murder); Lee Ross & Donna Shestowsky, *Contemporary Psychology's Challenges to Legal Theory and Practice*, 97 NW. U. L. REV. 1081, 1093 (2003) (explaining the failure of entrapment claims in terms of dispositional attribution errors).

309. *See* Saul M. Kassin & Lawrence S. Wrightsman, *Coerced Confessions, Judicial Instructions, and Mock Jury Verdicts*, 11 J. APPLIED SOC. PSYCHOL. 489, 489 (1981).

310. *See id.*

311. Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 528–29 (1983).

312. *See id.*; Naomi J. Freeman, *Socioeconomic Status and Belief in a Just World: Sentencing of Criminal Defendants*, 36 J. APPLIED SOC. PSYCHOL. 2379, 2387–88 (2006).

313. Rozelle, *supra* note 252, at 48.

314. *See* Benforado & Hanson, *supra* note 298, at 326.

315. Robert J. Smith et al., *Implicit White Favoritism in the Criminal Justice System*, 66 ALA. L. REV. 871, 903 (2015).

316. *See* Benforado & Hanson, *supra* note 298, at 326.

317. *See id.*

will continue to be dangerous in the future and are more likely to ignore mitigating evidence, treating instances of the defendant's bad character as more representative of the 'true character' of people of 'his kind' than instances of good behavior."[318]

C. Attribution Errors and Incapacitation Theory

Attribution errors are likely to distort decision-making within institutions pursuing the goal of incapacitation, causing decision-makers to over-attribute crime to dispositions and so to over-predict recidivism.[319] Yet attribution error not only distorts our judgment of offenders, it also distorts our judgment of incapacitation theory itself, lending it unmerited credibility.[320] This Section argues that incapacitation's key assumptions are all bolstered by cognitive misattribution.

The most important assumption of penal incapacitation is that past offenders are likely to reoffend. This assumption is unexceptionable if interpreted to mean only that past offenders are, in the aggregate, somewhat more likely to offend than the general population. After all, if some persons are disposed to offend at a high rate, and these are over-represented among offenders, offenders as a group will be more likely to offend than the general public. Yet thus interpreted, the assumption would not justify incapacitation as welfare maximizing. The Fundamental Attribution Error reassures us that each offender is disposed to commit crime. When Wilson insists that incapacitation requires no assumptions about human nature,[321] he implies that we need not know or alter the situational determinants of crime in order to prevent it. When the Supreme Court in *Ewing* and other cases approves recidivist sentencing enhancements on the ground that recidivists "by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society" it treats offenses themselves as conclusive evidence that offenses are entirely caused by dispositions.[322] In treating recidivism as self-explanatory, Justice O'Connor ignored the fact that convictions makes reintegration difficult, by restricting an offender's social and economic opportunities.[323]

---

318. Andrew E. Taslitz, *Wrongly Accused: Is Race a Factor in Convicting the Innocent?*, 4 OHIO ST. J. CRIM. L. 121, 126 (2006); *see also* Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 768 n.53 (2005).

319. *See* Dripps, *supra* note 233, at 1428–29; Lelling, *supra* note 252, at 39.

320. *See generally* Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 303 (2003) ("If . . . fundamental attribution error contributes to false impressions and self-understandings, and misguided legal theories and laws, then it should find support in the major social policy disputes that animate and define our history."); Dolovich, *supra* note 104, at 305 ("The appeal of the individualist framework is not hard to fathom. If the causes of crime are wholly internal, exclusively the product of an individual's inherent disposition, crime prevention becomes a simple matter: get rid of the criminals.").

321. *See* WILSON, *supra* note 40, at 145–46.

322. Ewing v. California, 538 U.S. 11, 29 (2003) (quoting Rummel v. Estelle, 445 U.S. 263, 276 (1980)).

323. *See, e.g.*, Dolovich, *supra* note 104, at 280–82.

Thus recidivism can as easily be explained by situational as by dispositional factors.

The second assumption of incapacitation theory—that incapacitated criminals will not be replaced—is also bolstered by attribution errors.[324] Studies consistently show that people underestimate the degree to which discrete situations elicit the same behavior from different people.[325] Replacement effects are not unique to illegal drug markets. In a study about the efficacy of administrative segregation, prison administrators noticed that segregating disruptive prisoners simply gave rise to "a new crop" of problematic prisoners.[326] The natural organization of prison into a hierarchy of social roles likely had more to do with generating disruptive behavior than any of the individual prisoners.[327] As noted above, robbery and burglary are often committed in groups as well.[328] Crime is committed in groups for the same reason that most other human activities take place in groups—because people are sociable. And as Milgram and Zimbardo demonstrated, most people will do what those around them seem to expect of them. If much crime is generated by social influences that would lead most similarly situated people to commit the same crime, then incapacitation does not systematically target crime so much as it targets individuals who "lack the ability to extricate themselves from . . . crime-producing settings."[329]

Attribution error similarly causes courts and policymakers to underestimate the possibility that incarceration increases the rate of offending after release.[330] Physically and psychologically traumatized, prisoners may leave prison more likely to commit violent crime than when they entered,[331] less employable, and more likely to form social relationships with others who have been similarly stigmatized. Attribution of offending to disposition effaces these social influences on offending.

That most behavior appears consistent with both situational and dispositional inferences allows attribution errors to go undetected over time: "[b]ecause the people we observe will tend to behave *as if* they are motivated by disposition and not situation, the data we collect will appear to confirm our flawed dispositionist conception of the humans we are observing[.]"[332] This is how attribution errors

---

324. *See supra* Section II.B.

325. *See* Dripps, *supra* note 233, at 1395.

326. Cooke et al., *supra* note 231, at 1072.

327. *See* Sharon Dolovich, *Two Models of the Prison: Accidental Humanity and Hypermasculinity in the L.A. County Jail*, 102 J. CRIM. L. & CRIMINOLOGY 965, 1011 (2012).

328. Piquero & Blumstein, *supra* note 48, at 272–74.

329. Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012).

330. *See* Ross & Shestowsky, *supra* note 308, at 1100–01.

331. *See* Pritikin, *supra* note 73, at 1054–55.

332. Hanson & Yosifon, *supra* note 320, at 176.

sustain the backwards logic of incapacitation.[333] It induces us to reinterpret every instance of deviant conduct as an expression of antisocial character, thereby reinforcing our common sense view that character causes conduct.

IV. INCAPACITATION AS SEGREGATION RATHER THAN CRIME CONTROL

As we have observed, utilitarianism is fundamentally egalitarian. Within a given society, the pursuit of "public utility"[334] weighs equally the welfare of all and pursues "the greatest happiness of the greatest number" regardless of their identities.[335] Thus, from a utilitarian perspective, the utility of prisoners counts as part of the public utility, and the harm to offenders is a cost that makes punishment, insofar as applied, always a necessary evil.[336] Penal incapacitation cannot be fairly characterized as serving public utility, unless the crime prevented outside of prison exceeds the resulting crime that occurs in prison, including crime committed against prisoners. Crime prevented must also be weighed against any additional crime outside of prison generated by incarceration, and any additional social costs.[337]

Judged by the standard of utility, modern incapacitation strategies have failed. The shift from rehabilitative to incapacitative aims has been accompanied by a great increase in incarceration and its social cost, with at most a small effect on violent crime.[338] Our very limited ability to predict which offenders will commit violent crimes precludes a strategy of selective incapacitation. While purporting to select for dangerousness, we have effectively adopted a strategy of collective incapacitation and thereby achieved mass incarceration, at a substantial expenditure of resources and waste of human capacity. Since incapacitation strategies do not achieve utility, it seems probable that they have prevailed and persisted because of their distributive or expressive effects.

---

333. *See* Dolovich, *supra* note 104, at 278; Donald Braman et al., *Some Realism about Punishment Naturalism*, 77 U. CHI. L. REV. 1531, 1600–01 (2010).

334. Guyora Binder & Nicholas J. Smith, *Framed: Utilitarianism & Punishment of the Innocent*, 32 RUTGERS L.J. 115, 166–68 (2000); JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 11–13 (J.H. Burns & H. L. A. Hart eds., Clarendon Press 1996) (distinguishing public utility and private utility).

335. JEREMY BENTHAM, A COMMENT ON THE COMMENTARIES AND A FRAGMENT ON GOVERNMENT 393 (J. H. Burns & H. L. A. Hart eds., Athlone Press 1977).

336. *See, e.g.*, G.E. MOORE, ETHICS 8 (1971).

337. *See* Miller v. Alabama, 132 S. Ct. 2455, 2490 (2012) (Roberts, C.J., dissenting) ("If imprisonment does nothing else, it removes the criminal from the general population and prevents him from committing additional crimes *in the outside world*.") (emphasis added); Drakulich et al., *supra* note 261, at 514 ("If the aim of incarceration is a social good . . . then the social costs of incarceration must be included when assessing whether a net good is really being achieved.").

338. RYAN S. KING ET AL., THE SENTENCING PROJECT, *Incarceration & Crime: A Complex Relationship* 2–4 (2005) (finding that although violent crime dropped by 34% between 1991 and 2003, only about one-fourth of this was due to increased incarceration, presumably involving some undetermined combination of incapacitative and deterrent effects).

This Part explores these distributive and expressive dimensions of incapacitation. It argues that the effect of incapacitation strategies is less to reduce the cost of crime and crime control than to redistribute it to offenders and their communities,[339] and to thereby stigmatize them as less worthy of social protection. Moreover, the fact that African Americans bear a disproportionate share of this redistributed risk gives this stigma further significance as a continuation of the legacy of slavery and segregation.

A. Crime in Prison

As we have seen, incapacitation theory rests on the assumption that violent crime is dispositional—that its cause inheres in the characters of those who commit it, rather than their social circumstances. On this assumption, the transfer of violent offenders from one social environment to another might not be expected to alter their rates of offending. The assumption that incarceration incapacitates potential offenders requires that either (1) violent crime will not occur in prison at equal or greater rates, or (2) violent crime in prison simply does not count. That Wilson did not specify any empirical assumption about the effectiveness of prison in suppressing violence when he first proposed a strategy of incapacitation suggests the second alternative: that he was not counting the welfare of prisoners as part of the social welfare calculus.

It is widely acknowledged that violence occurs in prison, although prisoners may face retaliation if they report assaults by either fellow prisoners or guards, and prison officials may have little incentive to ascertain and publicly acknowledge the extent of violence.[340] Prisons were particularly violent in the 1970s when Wilson first proposed that incarceration be increased. Officially reported prison homicide rates ranged as high as 600 per 100,000 inmates in some states.[341] For 1972, the rate of officially reported homicides for prisons nationwide was 70 per 100,000, compared to 7 for the nation as a whole.[342] Suicide is also an important metric of prison violence, as it is often an effort to escape constant threats of violence from other prisoners, and homicides may be misclassified as suicides by authorities.[343] In 1980, the officially reported prison homicide rate was 54 per 100,000 and the

339. *See* Susan Dimock, *Criminalizing Dangerousness: How to Preventively Detain Dangerous Offenders*, 9 CRIM. L. & PHIL. 537, 540 (2015) ("Incapacitation as a tool of crime control affects the rate of crime, not by changing offenders or their social conditions, but by 'rearranging the distribution of offenders in society.'").

340. Ahmed A. White, *The Concept of "Less Eligibility" and the Social Function of Prison Violence in Class Society*, 56 BUFF. L. REV. 737, 757 (2008).

341. *See* DAVID A. JONES, THE HEALTH RISKS OF IMPRISONMENT 151–55 (1976); LEE H. BOWKER, PRISON VICTIMIZATION 23 (1980).

342. Colin C. Carriere, *The Dilemma of Individual Violence in Prisons*, 6 NEW ENG. J. PRISON L. 195, 202 (1980).

343. *California Corrections: Confronting Institutional Crisis, Lethal Injection, and Sentencing Reform in 2007*, 13 BERKELEY J. CRIM. L. 117, 121 (2008).

suicide rate was 34 per 100,000.[344] In 1983, jails reported a very low homicide rate of 5 per 100,000, but an astronomical suicide rate of 129.[345] Assault was also prevalent, as a 1977 study of North Carolina prisons reported an official rate of 7,000 per 100,000, while a victim survey found that 78% of inmates reported suffering assaults.[346] Sexual assault was also prevalent, although rarely reported. Some victim surveys reported rape rates as high as 14,000 per 100,000, while even higher numbers of inmates reported being sexually assaulted or harassed.[347] In light of these data it does not seem that incarceration was inhibiting violent offending by prisoners during the period when Wilson proposed his incapacitation strategy. Indeed, it seems likely that prison conditions were having a criminogenic effect.

As incarcerations rates rose, inmate homicide and suicide rates fell. From 1980 to 2002, prison homicide rates dropped from 54 to 4 per 100,000 and suicide rates dropped from 34 to 14. From 1983 to 2002, jail homicide rates dropped from 5 to 3 per 100,000 and suicide rates dropped from 129 to 47.[348] These declines have been ascribed to better security measures, better emergency medical care, and a greater proportion of nonviolent offenders in the now much larger inmate population.[349] On the other hand, rates of assault and sexual assault remained high. A 2007 study found that physical assault against a male is roughly 18 times more likely in prison than in the general population.[350] While the Bureau of Justice Statistics reported a rate of only 315 sexual assaults per 100,000 reported to prison authorities in 2004,[351] a 2003 Human Rights Watch analysis of victim surveys estimated that between 10% and 30% of prison and jail inmates had been sexually assaulted.[352]

The failure of incapacitation's proponents to consider prison violence suggests that their aim was not to reduce the risk of violent crime as such, but to redistribute that risk from innocents to past offenders.[353] Indifference to violence among

---

344. CHRISTOPHER J. MUMOLA, BUREAU OF JUSTICE STATISTICS, SUICIDE AND HOMICIDE IN STATE PRISONS AND LOCAL JAILS 2 (2005).

345. *Id.*

346. Seventy-eight percent of inmates reported being assaulted within the past year, but did not indicate how often. Dan A. Fuller & Thomas Orsagh, *Violence and Victimization Within a State Prison System*, 2 CRIM. JUST. REV. 35 (1977).

347. *See* Helen M. Eigenberg, *Rape in Male Prisons: Examining the Relationship Between Correctional Officers' Attitudes Toward Male Rape and Their Willingness to Respond to Acts of Rape*, *in* PRISON VIOLENCE IN AMERICA 145 (Michael C. Braswell et al. eds., 1994); Daniel Lockwood, *Issues in Prison Sexual Violence*, *in* PRISON VIOLENCE IN AMERICA 97 (Michael C. Braswell et al. eds., 1994).

348. MUMOLA, *supra* note 344, at 2.

349. *Id.*

350. Wolff et al., *supra* note 168, at 595.

351. ALLEN J. BECK & TIMOTHY A. HUGHES, BUREAU OF JUSTICE STATISTICS, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES, 2004 4 (2005)

352. HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2003), https://www.hrw.org/legacy/reports/2001/prison/report.html.

353. *See* Dimock, *supra* note 339, at 551 ("Violent offenders forfeit their right not to be used for social benefit in this way, in consequence of acting in ways that forfeit their entitlement to a presumption of harmlessness; the

inmates is inconsistent with the utilitarian premise that the welfare of all members of society counts equally. Indeed, the position that only non-offenders deserve protection from violence would seem to be a principle of retributive desert rather than utility. We might better refer to the aim of separating potentially violent offenders from the innocent as "segregation" rather than "incapacitation" of offenders. Such segregation of offenders not only sets them apart from "society" physically—it also sets them apart from "society" expressively, by implying that their welfare does not count as part of the social welfare. As punishment theorist Sharon Dolovich observes, by excluding the offender from society both physically and expressively mass incarceration treats the prisoner as "someone without moral or political standing, someone outside the circle of humanity, to whom few if any obligations are owed."[354] Physical separation is a powerful way to distance ourselves emotionally from those on whom we inflict suffering.[355] Milgram and Zimbardo have shown that the potential for such cruelty exists in all of us. Mass incarceration is our Zimbardo experiment.

B. Community Effects of Incarceration

The costs of incarceration include collateral harm to the families and communities of prisoners. Incarceration rates vary dramatically across neighborhoods, some losing substantial portions of their potential wage earners to prisons while other neighborhoods in the same city lose almost none.[356] The return of traumatized and unemployable ex-prisoners to these neighborhoods creates additional risk of violent crime.[357]

Often the families of offenders become incapacitated by proxy, losing capacity for prosocial conduct. Incarceration dismantles family units. Marriage rates decline.[358] The education of children is affected negatively when a parent is incarcerated.[359] Children are more likely to offend if one of their parents is incarcerated.[360] The remaining parent becomes more likely to abuse or neglect children, while research indicates that abuse or neglect increases a child's risk of

---

redistribution of the risk they pose is justified because it is a reasonable response to their fault in being dangerous to their fellows, which status is incompatible with full membership in the social contract.").

354. Dolovich, *supra* note 104, at 330–31.

355. *See* Jane Goodman-Delahunty & Siegfried Ludwig Sporer, *Unconscious Influences in Sentencing Decisions: A Research Review of Psychological Sources of Disparity*, 42 AUSTL. J. FORENSIC SCI. 19, 29 (2010).

356. *See* Drakulich et al., *supra* note 261, at 497.

357. *See, e.g.*, *id.* at 514 ("[R]eturning prisoners are associated with a reduced capacity for collective efficacy, the fostering of social situations conducive to criminal behavior, and higher levels of violent crime."); Pritikin, *supra* note 73, at 1082 (estimating that the criminogenic impact of parental incarceration increases crime by four percent).

358. Drakulich et al., *supra* note 261, at 497.

359. *See* John Hagan & Holly Foster, *Intergenerational Educational Effects of Mass Imprisonment in America*, 85 SOC. EDUC., 259, 277–79 (2012).

360. Drakulich et al., *supra* note 261, at 493 (claiming high incarceration rates create criminogenic situations in certain neighborhoods by disrupting social networks and local economy).

juvenile arrest by 55% and increases the risk of committing a violent crime by nearly twofold.[361]

Incarceration destabilizes local housing markets by removing income-earning adults from their homes.[362] Many single-parent households are unable to retain their homes and are forced to "double-up" with other families or face homelessness.[363] Constant parole revocation causes the "churning" of offenders into and out of high-crime, low-income neighborhoods, and prevents the growth of stable familial and community relationships.[364] In turn, high-risk neighborhoods lack the social capital and economic resources to effectively address local crime problems.[365]

A criminal history creates a stigma that makes even the most capable ex-offender unlikely to find stable employment.[366] Imprisonment often disrupts or precludes education,[367] and the scarcity of education and training in prisons does not help. By one estimation, only one out of five released offenders finds stable employment after leaving prison.[368] Many state and federal laws render prisoners ineligible for student loans.[369] Even food stamps and basic forms of public assistance are denied offenders.[370] Meanwhile, pervasive criminal background checks ensure that an offender's sentence follows him to job interviews.[371] Exiled from the legal labor market, prisoners seek income and a restored sense of purpose in illegal markets. In all these ways, incarceration begets incarceration by entrenching conditions of poverty and social exclusion.[372] Sociologist Loic Wacquant describes the result as a "*carceral continuum* which entraps a redundant population . . . who circulate in a closed circuit between its two poles in a self-

---

361. Shay Bilchik & Michael Nash, *Child Welfare and Juvenile Justice: Two Sides of the Same Coin*, JUV. & FAM. JUST. TODAY (Fall 2008), http://cjjr.georgetown.edu/wp-content/uploads/2014/12/Fall-08-NCJFCJ-Today-feature1.pdf.

362. Drakulich et al., *supra* note 261, at 509.

363. *See generally* Deborah M. Thompson, *Breaking the Cycle of Poverty*, 31 CREIGHTON L. REV. 1209, 1210 n.3 (1998) (discussing the difficult task of counting homeless youth and families, especially given the fact that some families double up with other families and never enter a shelter).

364. *See* Drakulich et al., *supra* note 261, at 497 (discussing the effect of high incarceration rates on "the social processes on which informal social control depends: participation in voluntary associations, feelings of community solidarity, and neighboring activities").

365. *Id.*

366. Devah Pager, *The Mark of a Criminal Record*, 108 AM. J. SOC. 937, 960–62 (2003).

367. *See* Hagan & Foster, *supra* note 359.

368. Christopher Stafford, Note, *Finding Work: How to Approach the Intersection of Prisoner Reentry, Employment, and Recidivism*, 13 GEO. J. ON POVERTY L. & POL'Y 261, 262 (2006).

369. *See* Nick Anderson, *Advocates Push to Renew Pell Grants for Prisoners, Citing Benefits of Higher Education*, WASH. POST (Dec. 3, 2013), https://www.washingtonpost.com/local/education/when-congress-cut-pell-grants-for-prisoners/2013/12/03/fedcabb2-5b94-11e3-a49b-90a0e156254b_story.html.

370. *See, e.g.*, 21 U.S.C. § 862(a) (2016) (barring federals benefits for persons convicted of a felony).

371. Shawn D. Bushway, *Labor Market Effects of Permitting Employer Access to Criminal History Records*, 20. J. CONTEMP. CRIM. JUST. 276, 276–78 (2004).

372. *See* Dolovich, *supra* note 104, at 307 ("At a minimum, it seems clear that a system that responds to crime with conditions certain to (re)produce antisocial behavior will find itself relying more and more heavily on a carceral response.").

perpetuating cycle of social and legal marginality . . . ."[373]

In sum, incapacitation strategies predictably impose the costs of crime control, not only on offenders, but on their families and neighborhoods. The result is to broaden the class of expected offenders and to proliferate the spaces in which crime risk is both concentrated and confined.[374] That proponents of incapacitation ignore these collateral consequences of incarceration suggests that they are excluding entire communities from the social welfare calculus.

C. Permanent Exclusion as Denunciation

Life sentences for repeat offenders like the one upheld in *Ewing v. California* cannot be justified or understood as cost-effective ways to prevent violent crime. Were efficient prevention the goal, prisoners would be released when they no longer pose a threat to the general population.[375] The relationship between crime and age is well documented, most studies showing that criminal behavior declines sharply as individuals reach their late twenties.[376] "Aging inmates" (fifty years and older) recidivate at less than half the rate as other former prisoners.[377] Yet a Justice Department report acknowledged that an inordinate number of elderly offenders are incarcerated,[378] largely as the result of incapacitative sentencing policies: the elimination of parole and the introduction of mandatory minimums, and longer sentences.[379] The majority of these individuals pose no substantial threat to the public, require health services not available in prisons, and cost the public far more money to incarcerate than other prisoners.[380] The predictable wastefulness of lengthy recidivist sentences strongly suggests that they serve expressive rather than instrumental purposes. They denounce recidivists as unworthy to participate in society by permanently banishing them.

D. The Opportunity Costs of Incapacitation

A fourth way that incapacitation strategies express contempt for offenders and their communities is by preferring costly and ineffective methods of crime control, that harm them, over cheaper and more effective methods that would benefit them. Such pro-social crime-preventive strategies are readily available. First, because

---

373. Loïc Wacquant, *The New 'Peculiar Institution: On the Prison as Surrogate Ghetto*, 4 THEORETICAL CRIMINOLOGY 377, 384 (2000).

374. Harcourt, *supra* note 201, at 240.

375. Robinson, *supra* note 82, at 1451.

376. *See, e.g.*, *id.*

377. OFFICE OF THE INSPECTOR GEN., U.S. DEP'T. OF JUSTICE, *The Impact of an Aging Inmate Population on the Federal Bureau of Prisons* iii (2016), https://oig.justice.gov/reports/2015/e1505.pdf.

378. *Id.* at 37, 42.

379. *Id.* at 3.

380. *Id.*

crime is strongly associated with poverty, any policy that reduces poverty is also likely to reduce violent crime.[381] Other social welfare strategies shown to reduce crime include prison education and job-training;[382] prisoner reentry services;[383] drug treatment programs;[384] prison work release programs;[385] cognitive-behavioral psychotherapy;[386] realigning financial incentives for parole agencies to achieve lower revocation rates;[387] and reducing exposure to environmental toxins, such as lead.[388] It seems that proponents of incapacitation are willing to spend public resources to confine potential offenders, but not to offer them rewarding alternatives to crime. This perverse choice seems premised on the view that providing such opportunity would reward them for their criminal dispositions.[389]

E. Incapacitation as Racial Segregation

As we have noted, mass incarceration segregates in the sense that it excludes offenders and their communities from the social welfare calculus. Yet the disproportionately minority composition of the inmate population means that mass incarceration also perpetuates an earlier history of racial segregation.[390] The emergence of a successful electoral politics of "law and order" immediately after the civil rights movement's successful campaign against de jure segregation suggests that the resulting war on crime was also a reassertion of racial hierarchy. The skewed racial composition of the large inmate population it produced supports this interpretation. Thus, a Bureau of Justice Statistics study found that black men were imprisoned at more than six times the rate of white men in the last quarter of

---

381. *See generally* Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9, 10 (1985) (indicating a direct correlation between policies reducing poverty and those reducing violent crime).

382. John H. Esperian, *The Effect of Prison Education Programs on Recidivism*, 61 J. CORRECTIONAL EDUC. 316, 316–17 (2010).

383. Nora Wikoff et al., *Recidivism among Participants of a Reentry Program for Prisoners Released Without Supervision*, 36.4 SOC. WORK RES. 289, 289 (2012).

384. Elizabeth J. Gifford et al., *The Effects of Participation Level on Recidivism: A Study of Drug Treatment Courts Using Propensity Score Matching*, 9 SUBSTANCE ABUSE TREATMENT, PREVENTION & POL'Y 40 (2014).

385. Grant Duwe, *An Outcome Evaluation of a Prison Work Release Program: Estimating Its Effects on Recidivism, Employment, and Cost Avoidance*, 26 CRIM. JUST. POL'Y REV. 531, 531–35 (2015).

386. Chris Hansen, *Cognitive-Behavioral Interventions: Where They Come from and What They Do*, 72 FED. PROBATION 43, 43, 45–46 (2008).

387. VERA INST. OF JUSTICE, PERFORMANCE INCENTIVE FUNDING: ALIGNING FISCAL AND OPERATIONAL RESPONSIBILITY TO PRODUCE MORE SAFETY AT LESS COST 2 (2012), http://www.vera.org/files/performance-incentive-funding-report.pdf.

388. *See* Drum, *supra* note 286.

389. Stephen J. Morse, *The Twilight of Welfare Criminology*, 49 N.Y. ST. B.J. 11, 22 (1977) (denying that society lacks moral standing to punish if it fails to eradicate poverty, because crime is chosen rather than caused by social conditions, and offenders rather than the public should bear the cost of crime control).

390. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW (2010) (explaining the relationship between the disproportional amount of minorities that are imprisoned and the history of early segregation).

the twentieth century.[391] About as many African American men are inmates today as were slaves in 1850.[392]

In a regime that punishes on the basis of predicted dangerousness—literally prejudice—cognitive biases make racial discrimination almost inevitable. If group members are more likely to attribute blame to members of other groups, members of minority groups are more likely to be blamed.[393] The Just World Fallacy makes us especially prone to blame those who are poorer and less fortunate. As Bernard Harcourt has observed, in a regime where criminal history is the primary predictor of dangerousness, the effect of any such racial discrimination will be compounded again and again, making "risk . . . a proxy for race."[394]

V. INCAPACITATION AND THE FUTURE OF EIGHTH AMENDMENT PROPORTIONALITY

Penal incapacitation is based on flawed psychological assumptions that, in the present state of knowledge, cannot be used to rationally select offenders for incarceration. This circumstance may change, as the combined use of actuarial assessment, clinical observation, neuroimaging, and genetics may improve our ability to predict violence. Yet it is also possible that such scientific advances will enable therapeutic interventions that will obviate confinement as a means of arresting that danger. We must also recognize that the methods of prediction adopted by legislatures, sentencing judges, parole boards, and other officials may fall short of scientific best practices. If prediction improves sufficiently, truly selective incapacitation may become possible and may be justified as preventive in some cases. We do not rule out the possibility that some practice of selective incapacitation could withstand searching scrutiny under the Eighth Amendment. Yet such justifiable incapacitation would probably be much smaller in scope than our current apparatus of mass incarceration. Officials might well conclude that

---

391. THOMAS P. BONCZAR, BUREAU OF JUSTICE STATISTICS, PREVALENCE OF IMPRISONMENT IN THE U.S. POPULATION, 1974–2001 56 (2003) (indicating that African Americans constitute 40% of the inmate population despite making up only 13% of the general population); Leah Sakala, *Breaking Down Mass Incarceration in the 2010 Census: State-By-State Incarceration Rates by Race/Ethnicity*, PRISON POL'Y INITIATIVE (May 28, 2014), http://www.prisonpolicy.org/reports/rates.html.

392. *Compare* E. ANN CARSON, BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2014 29 app. tbl.3 (2015), http://www.bjs.gov/content/pub/pdf/p14.pdf ("Percent of sentenced prisoners under jurisdiction of state or federal correctional authorities, by age, sex, race, and Hispanic origin") (indicating that there were 516,900 African American male prisoners in federal or state facilities in 2014) *and* TODD D. MINTON & ZHEN ZENG, BUREAU OF JUSTICE STATISTICS, JAIL INMATES AT MIDYEAR 2014 3 tbl.2 (2015), http://www.bjs.gov/content/pub/pdf/jim14.pdf ("Percent of inmates in local jails, by characteristics, midyear 2000 and 2005–2014") (noting 85.3% of jail inmates in 2014 were male) (noting that there were 263,800 African Americans in local jails in 2014) *with* U.S. CENSUS, STATISTICAL VIEW OF THE UNITED STATES 90–91 tbl.83 (showing that there were 696,764 African American male slaves age twenty and over in 1850).

393. *See* Dripps, *supra* note 233, at 1433 (explaining FAE causes "observers systematically . . . to exaggerate the degree of culpable wrongdoing" of offenders); *see also* Benforado & Hanson, *supra* note 298, at 326 (observing prejudice to minority defendants wrought by FAE).

394. Harcourt, *supra* note 201, at 237.

such modest predictive success would not repay the effort and expertise required to achieve it.

Barring substantial improvement in predictive success (unaccompanied by a similar improvement in therapeutic success), how should our critique affect the role of incapacitation in Eighth Amendment proportionality analysis? Recall that in *Ewing v. California* the Court reasoned that California's recidivist sentencing statute embodied "a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated."[395] Under *Ewing*, a rational belief that incapacitating an offender improves public safety is enough to render the sentence constitutional; the sentence need not be proportional to culpability, desert, or deterrence.[396]

However, there is reason to doubt *Ewing*'s continued standing in Eighth Amendment law, at least where an offender challenges the constitutionality of a "sentencing practice" rather than an individual sentence. Recall that in *Graham v. Florida*, which barred life without parole for juvenile offenders convicted of non-homicide offenses, the Court introduced an entirely new analysis derived from its death penalty cases.[397] Under *Graham*, the Court asks whether a national consensus opposes the sentencing practice in question.[398] If so, the Court independently compares the culpability of an offender with the severity of his punishment, as well as the extent to which a sentence advances the penological justifications of punishment.[399] Unlike *Ewing*, which required only that one justification be advanced, *Graham* requires consideration of all four penological goals: rehabilitation, retribution, deterrence, and incapacitation.[400] Indeed, the retributive injustice of life without parole for juveniles convicted of non-homicide crime outweighed whatever beneficial incapacitative effects could be expected, and the prospect for juvenile rehabilitation weighed heavily against the dubious assumption that Graham "would be a risk to society for the rest of his life."[401]

Writing for the majority in *Graham*, Justice Kennedy distinguished previous cases as challenges to particular sentences rather than to entire "sentencing practices."[402] Yet this distinction is elusive.[403] Assessment of the proportionality of any particular sentence would seem to require comparison of like sentences for like crimes, and perhaps consideration as to whether they have been committed by

---

395. Ewing v. California, 538 U.S. 11, 30 (2003).
396. *Id.*
397. Graham v. Florida, 560 U.S. 48, 60–61 (2010).
398. *Id.* at 62.
399. *Id.* at 67–68.
400. *Id.* at 71–74.
401. *Id.* at 73.
402. *Id.*
403. Michael M. O'Hear, *The Beginning of the End for Life Without Parole?*, 23 FED. SENT'G REP. 1, 1, 3 (2010).

offenders with similar characteristics. It would seem that this analysis implicates "a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes."[404] Could not a defendant in Ewing's position challenge the "practice" of punishing nonviolent recidivists with life sentences? Could not a defendant like Allen Harmelin challenge Michigan's practice of life imprisonment for first time offenders convicted of drug possession?[405] There is no obvious reason why future defendants cannot trigger *Graham*'s more searching proportionality review by simply proposing a categorical ban on the applicable sentencing practice. And while *Graham* and *Miller* insisted that "children are different" for Eighth Amendment purposes, they found age to be relevant only because age bears on culpability.[406] It would be strange to recognize culpability as pertinent to desert and deterrence for juveniles but not adults. Thus it seems likely that, in cases where a sentencing practice is challenged, *Graham* has revived the retributive constraint on punishment that the Court neglected in *Ewing*.[407]

An alternative interpretation would be that the Court required justification of juvenile life without parole by reference to desert and deterrence because rehabilitation is obviously not served by such a sentence, and incapacitation is a particularly unconvincing rationale for permanently confining a juvenile whose behavior should change with maturation. But if so, the Court has moved away from deference to the felt imperatives of legislatures to incapacitate offenders they fear. The Court now seems ready to require that such fears be justified by empirical evidence. Indeed, *Graham* and *Miller* do emphasize the importance of providing

---

404. *Graham*, 560 U.S. at 61; *see also* O'Hear, *supra* note 403, at 3 ("But this distinction is not likely to prove durable, because any Eighth Amendment challenge to a sentence can be easily recharacterized as a challenge to a practice.").

405. *See* Harmelin v. Michigan, 501 U.S. 957 (1991) (upholding sentence of life without parole for first time offender convicted of possessing 672 grams of cocaine).

406. Miller v. Alabama, 132 S. Ct. 2455, 2464 (2012).

407. *See* Lee, *supra* note 142, at 60. Note that the redistributive effects of incarceration create serious problems even if the Eighth Amendment includes a retributive "side constraint." Generally speaking, the fundamental attribution error ("FAE") will lead to excessive prison terms by causing courts and policymakers to overestimate an offender's causal role in provoking violence. *See* Dripps, *supra* note 233, at 1433 ("If culpability and proportionality are likely to be applied badly in a retributive system, these concepts are just as vulnerable to FAE when incorporated into utilitarian accounts as side-constraints."). Further, once we acknowledge that certain adverse social settings increase the likelihood of violence, it follows that such adverse situations can bear on culpability. *See, e.g.*, Paul H. Robinson, *Are We Responsible for Who We Are? The Challenge for Criminal Law Theory in the Defenses of Coercive Indoctrination and "Rotten Social Background,"* 2 ALA. C.R. & C.L.L. REV. 53, 64 (2011). In other words, someone facing more powerful situational constraints will tend to be less culpable, all else equal, than one in a more favorable situation. But because attribution biases cause us to ignore situational factors or even blame the unfortunate for their bad luck, people facing adverse situations may be deemed more culpable than more fortunate offenders who commit the same crime. This dynamic can create a problematic distribution of sentences, arranged by socioeconomic status. While a retributive side constraint tolerates random inconsistencies across sentences, it loses much of its normative appeal if it permits systematic unfairness in the form of class-based sentencing. *See Miller*, 132 S. Ct. at 2467–69 (recognizing Eighth Amendment requires consideration of background in juvenile offenders); Robinson, *supra* note 82, at 1442 (suggesting that desert does not merely "operate at the extremes of disproportionality" but requires an "ordinal ranking of cases" in which those less culpable receive lesser sentences).

empirical support that a sentencing practice advances its articulated purpose.[408]

Justice Kagan's majority opinion in *Miller* noted the inability of science and social science to predict which juvenile offenders are likely to continue offending in the future, weakening the state's incapacitation argument.[409] On the other hand, she found that neuroimaging and behavior psychology "show fundamental differences between juvenile and adult minds" such that "[the] actions [of juveniles] are less likely to be evidence of 'irretrievably depraved character' than are the actions of adults."[410] In short, the state's inability to forecast which offenders would continue to threaten public safety in the distant future, together with the plaintiff's evidence regarding juvenile brain development, discredited the claim that Graham's sentence rationally advanced the goal of incapacitation.[411]

Consider how *Graham* would apply to a practice of sentencing nonviolent recidivists who have at least two prior "serious or violent" felonies to life imprisonment. Under *Graham*'s first prong, California could argue that similar recidivist statutes have been enacted in many states, belying a national consensus against the sentencing practice.[412] But Justice Kennedy explained that statutory authorization may be less important than "actual sentencing practices."[413] After all, thirty-seven states and the federal government permitted life sentences without parole for non-homicide offenses for juveniles in some cases, yet only an estimated 129 juvenile offenders in the country were actually serving life sentences without parole, and only fifty-two outside of Florida.[414] The Court also compared this number with the total number of serious non-homicide offenses committed by juveniles, to estimate the very low rate at which such sentences were imposed in comparable cases.[415] Certainly, a Ewing-like defendant could argue that the vast majority of shoplifters do not receive life sentences, even those with prior felony convictions. Would it not be "fair to say that a national consensus has developed against" such a sentencing practice?[416]

A defendant like Ewing would likely satisfy *Graham*'s second prong. Studies show that extremely long sentences have little or no positive incapacitative effect

---

408. *See Graham*, 560 U.S. at 68–70; *Miller,* 132 S. Ct. at 2464.

409. *Miller*, 132 S. Ct. at 2464 (reasoning that "[o]ur decisions rest[] not only on common sense—on what "any parent knows"—but on science and social science as well").

410. *Graham*, 560 U.S. at 68.

411. *Id.*

412. *Id.* at 62.

413. *Id.* at 62–64.

414. *Id.*

415. *Id.* at 65–66 (articulating that "[a]lthough it is not certain how many of these numerous juvenile offenders were eligible for life without parole sentences, . . . in proportion to the opportunities for its imposition, life without parole sentences for juveniles convicted of nonhomicide crimes is as rare as other sentencing practices found to be cruel and unusual").

416. *Id.* at 67 (quoting Atkins v. Virginia, 536 U.S. 304, 316 (2002)).

on crime rates,[417] whereas alternative crime-control approaches have gained considerable traction.[418] Given that actuarial predictions have been unable to accurately predict violent recidivism, and that a law like California's does not restrict life sentences to offenders who can be shown empirically to pose a risk of violence, it would be impossible to justify Ewing's sentence as serving the purpose of incapacitation. The obvious mismatch between Ewing's culpability and his sentence would preclude any judgment that a life sentence was necessary for desert or deterrence. Thus, it appears difficult after *Graham* and *Miller* to justify imposing a life sentence on our hypothetical shoplifter. Nor would the Court have to explicitly overrule *Ewing*, since Ewing did not frame his challenge as a challenge to a sentencing practice, and offered no evidence showing the ineffectiveness of California's three-strike law in selecting the demonstrably dangerous or reducing crime.[419]

Perhaps *Miller* should be read to indicate that extremely long sentences, which are analogous to death in that they are effectively life-destroying, may be imposed for the sole purpose of incapacitation only after an individualized assessment of incorrigibility is made.[420] Since these life-ending sentences may violate desert, while very few people are truly incorrigible, the state should be expected to produce objective evidence of incorrigibility. When a state rests a sentence entirely on a speculative prediction about an offender's incapacity for change, it arguably imposes a sentence that, "lacking any legitimate penological justification[,] is by its nature disproportionate."[421]

Moreover, there is something nonsensical about trying to justify lifelong confinement on the basis of incapacitation. Incapacitation arguably implies an exigent threat, not a threat that may or may not exist sometime in the future. The Court hints at this point in *Graham*: "Here one cannot dispute that this defendant posed an *immediate risk* . . . but it does not follow that he would be a risk to society for the rest of his life."[422] Treating confinement for life as necessary on grounds of

---

417. *See* BRIAN BROWN & GREG JOLIVETTE, LEGISLATIVE ANALYST'S OFFICE, A PRIMER: THREE STRIKES—THE IMPACT AFTER MORE THAN A DECADE 33 (2005), http://www.lao.ca.gov/2005/3_Strikes/3_strikes_102005.pdf (finding no clear effect of the three-strikes law on public safety).

418. *See, e.g.*, Alexandra Galassi et al., *Therapeutic Community Treatment of an Inmate Population with Substance Use Disorders: Post-Release Trends in Re-Arrest, Re-Incarceration, and Drug Misuse Relapse* 12 INT'L J. ENVTL. RES. & PUB. HEALTH 7059 (2015); Nkechi Taifa & Catherine Beane, *Integrative Solutions to Interrelated Issues: A Multidisciplinary Look Behind the Cycle of Incarceration*, 3 HARV. L. & POL'Y REV. 283, 295 (2009) ("A variety of research demonstrates that investments in drug treatment, interventions with at-risk families, and school completion programs are more cost-effective than expanded incarceration as crime control measures.").

419. Reply Brief for Petitioner at 12, Ewing v. California, 538 U.S. 11 (2003) (No. 01-6978) (2002 WL 31120962) (arguing that "[t]he effectiveness of a state's sentencing policy . . . is irrelevant for Eighth Amendment purposes"); *see* O'Hear, *supra* note 141.

420. Miller v. Alabama, 132 S. Ct. 2455, 2463–64 (2012).

421. *Graham*, 560 U.S. at 71.

422. *Id.* at 73 (emphasis added).

incapacitation requires a view of the defendant's behavior as entirely determined by a permanently fixed disposition. This assumption is necessary only if incapacitation cannot call for periodic reevaluations of offender dangerousness.[423] Prior to the emergence of mass incarceration, offender dangerousness was periodically assessed by parole boards, which viewed incapacitation as the inverse of rehabilitation.[424] The notion that *determinate* sentences are necessary for incapacitation reflects an ideological rejection of rehabilitation that changes the meaning of incapacitation from an empirically sensitive placement aimed at affecting consequences, to an expressively motivated attribution of depravity, aimed at distinguishing and excluding offenders from society.

Miller's dissenters would reduce incapacitation to an inherent consequence of imprisonment, which presumes that offenders would recidivate if unconfined, and that crimes against inmates do not matter.[425] This superficial account of incapacitation would render proportionality a "nullity," since all incarceration incapacitates in that limited sense of the word.[426] As a utilitarian justification for punishment, however, incapacitation is satisfied not by simply confining an offender, but by the more complicated task of making the world less violent. To meaningfully assess incapacitation in this way requires considering the impact of a sentencing practice on "an entire class of offenders."[427] *Graham*'s distinction between categorical and individual challenges, while elusive, allows us to test incapacitation as a penological theory by asking more broadly whether a sentencing practice, applied to a particular group of offenders, would actually achieve a net decrease in violent crime. That is something Florida and Alabama did not do. To that end, *Graham* and *Miller* suggest the Court is no longer willing to consign defendants to life-destroying sentences on the basis of guesswork.[428] The next state to defend a sentencing practice on grounds of incapacitation will likely need to produce some empirical evidence that imposing long sentences on a particular class of offenders actually reduces violent crime overall.

Finally, *Graham* and *Miller* reflect a new appreciation for situational constraints on behavior. Courts must reckon with the moral significance of "environmental vulnerabilities" that shape the lives of juvenile offenders.[429] Under *Miller*, states are constitutionally required to distinguish between "the child from a stable

---

423. *See* Robinson, *supra* note 82, at 1446 ("[I]f the justification for detention is dangerousness, then logically the government ought to be required periodically to prove the detainee's continuing dangerousness. If the dangerousness disappears, so does the justification for detention.").

424. Daniel S. Medwed, *The Innocent Prisoner's Dilemma: Consequences of Failing to Admit Guilt at Parole Hearings*, 93 IOWA L. REV. 498–501 (2008).

425. *See Miller*, 132 S. Ct. at 2490 ("If imprisonment does nothing else, it removes the criminal from the general population and prevents him from committing additional crimes in the outside world.").

426. *Graham*, 560 U.S. at 73.

427. *See id.* at 61.

428. O'Hear, *supra* note 141, at 1105.

429. *Miller*, 132 S. Ct. at 2465.

household and the child from a chaotic and abusive one" in imposing life-destroying sentences.[430] If *Graham* and *Miller* are to be taken seriously, courts and policymakers may not deliver juvenile offenders into permanent exile without considering the social context in which they committed their crimes. Extending the same standard of decency to adult offenders is the next frontier of Eighth Amendment sentencing proportionality.

CONCLUSION

Incapacitation of offenders has been an influential goal of criminal justice policy during the era of mass incarceration. While the Supreme Court's Eighth Amendment jurisprudence has accepted incapacitation alone as a justifying purpose for recidivist sentencing enhancements, recent decisions have judged severe sentences by reference to all purposes of punishment cumulatively, and have tested claims of incapacitative benefits against empirical evidence. This Article has criticized incapacitation theory as both theoretically and empirically flawed. We have seen that incapacitation theory greatly underestimates situational factors contributing to crime and over-attributes dangerousness to individuals. It also systematically ignores crime committed in prison, implying that offenders deserve to be victimized. By assuming that criminality inheres in individual character, incapacitation theory attributes blame to individuals for situational causes of misfortune. These flaws preclude incapacitation from rationally justifying lengthy recidivist sentence enhancements as preventive, and suggest that such sentences cannot meet the more demanding proportionality standard applied in recent Eighth Amendment cases.

430. *Id.* at 2467–68.