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MASS INCARCERATION PARADIGM SHIFT?: CONVERGENCE IN AN AGE OF DIVERGENCE

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The peculiar harshness of modern American justice has led to a vigorous scholarly debate about the roots of mass incarceration and its divergence from humanitarian sentencing norms prevalent in other Western democracies. Even though the United States reached virtually world-record imprisonment levels between 1983 and 2010, the Supreme Court never found a prison term to be "cruel and unusual punishment" under the Eighth Amendment. By countenancing extreme punishments with no equivalent elsewhere in the West, such as life sentences for petty recidivists, the Justices' reasoning came to exemplify the exceptional nature of American justice. Many scholars concluded that punitiveness had become its defining norm.

Yet a quiet revolution in Eighth Amendment jurisprudence, a wave of reforms, and other social developments suggest that American penal philosophy may be inching toward norms—dignity, proportionality, legitimacy, and rehabilitation—that have checked draconian prison terms in Europe, Canada, and beyond. In 2010, the Supreme Court began limiting the scope of life imprisonment without parole for juveniles in a series of landmark Eighth Amendment cases. Partly drawing upon the principles in these decisions, twenty-two states have abolished life without parole categorically for juveniles, providing them more protections than under the Eighth Amendment. The narrow focus on the differences between juveniles

* Assistant Professor, McGill Faculty of Law. I am grateful for the helpful comments and suggestions I received on this article, including from Daniel Abebe, Ralph Richard Banks, Mary Campbell, Guy-Uriel Charles, Anthony A. Doob, Lisa Kern Griffin, Amalia Kessler, Joshua Kleinfeld, H. Timothy Lovelace, Bertrall Ross, David Sklansky, Ji Seon Song, Yanbai Andrea Wang, Cheryl Webster, Justin Weinstein-Tull, Robert Weisberg, and participants in the Emerging Scholars Program Workshop.

and adults in the aftermath of these reforms obscured American law's increasing recognition of humanitarian norms that are hardly age-dependent—and strikingly similar to those in other Western democracies. Historiography sheds light on why the academy has largely overlooked this relative paradigm shift. As America faced mass incarceration of an extraordinary magnitude, research in recent decades has focused on divergence, not convergence.

This Article advances a comparative theory of punishment to analyze these developments. In the United States and throughout the West, approaches toward punishment are impermanent social constructs, as they historically tend to fluctuate between punitive and humanitarian concerns. Such paradigm shifts can lead to periods of international divergence or convergence in penal philosophy. Notwithstanding the ebb and flow of penal attitudes, certain long-term trends have emerged in Western societies. They encompass a narrowing scope of offenders eligible for the harshest sentences, a reduction in the application of these sentences, and intensifying social divides about their morality. Restrictions on lifelong imprisonment for juveniles and growing social polarization over mass incarceration in the United States may reflect this movement. However, American justice appears particularly susceptible to unpredictable swings and backlashes. While this state of impermanence suggests that the reform movement might reverse itself, it also demonstrates that American justice may keep converging toward humanitarian sentencing norms, which were influential in the United States before the mass incarceration era.

Two patterns regarding the broader evolution of criminal punishment ultimately stand out: cyclicality and steadiness of direction. The patterns evoke a seismograph that regularly swings up or down despite moving steadily in a given direction. American justice may cyclically oscillate between repressive or humanitarian aspirations, and simultaneously converge with other Western democracies in gradually limiting or abolishing the harshest punishments over the long term.

INTRODUCTION

Mass incarceration has been such an enduring and extraordinary phenomenon that it has profoundly shaped the notion that justice in the United States is inherently harsher than in Europe, where more humane conceptions of punishment are influential. Because prison population explosion emerged approximately four decades ago,[1] many jurists have known no other penal system in America. The Supreme Court's reasoning only reinforced this image. As America faced imprisonment levels on a scale virtually unprecedented in global history,[2] the Court recurrently concluded that the Eighth Amendment's bar on "cruel and unusual punishments" effectively does not cover draconian prison terms.[3] These circumstances came to obscure how conceptions of justice in America have historically been impermanent, ebbing and flowing between repressive and humanitarian approaches.

Despite the extensive scholarly focus on America's divergence from Europe in the mass incarceration era,[4] a remarkable measure of convergence

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[1] *See generally* Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 939 (2016) (discussing the gradual surge of the U.S. incarceration rate from the 1970s to the 2000s).

[2] *See generally* CHRISTOPHER HARTNEY, US RATES OF INCARCERATION: A GLOBAL PERSPECTIVE, NAT'L COUNCIL CRIME & DELINQ. 3 (2006).

[3] *See* Lockyer v. Andrade, 538 U.S. 63, 83 (2003) (upholding constitutionality of fifty-year-to-life sentence for petty recidivist); Ewing v. California, 538 U.S. 11, 31 (2003) (plurality opinion) (upholding constitutionality of twenty-five-year-to-life sentence for petty recidivist); Harmelin v. Michigan, 501 U.S. 957, 996 (1991) (plurality opinion) (upholding constitutionality of life imprisonment without parole for first-time felon convicted of possessing a large quantity of cocaine). Prior to *Harmelin*, the last Supreme Court decision to hold a prison sentence unconstitutional was Solem v. Helm, 463 U.S. 277, 303 (1983), which found life without parole "cruel and unusual punishment" for a petty offender who had issued a no account check for $100.

[4] Scholars have advanced diverse theories about the causes of mass incarceration and the United States' divergence from norms that have tempered punitiveness in Europe, Canada, and other democratic societies. *See generally* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2012) (describing mass incarceration as primarily the product of institutional racism); DAVID GARLAND, THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2002) [hereinafter "THE CULTURE OF CONTROL"] (arguing that various social factors shaped harsher attitudes toward crime and

has received scant attention. American penal philosophy may be inching toward penal norms that have checked ruthless prison terms in modern Europe: dignity, proportionality, legitimacy, and rehabilitation. As the Supreme Court recognized these norms in landmark decisions limiting juveniles' eligibility for life without parole—*Graham v. Florida*,[5] *Miller v. Alabama*,[6] and *Montgomery v. Louisiana*[7]—the evolution of juvenile justice overshadowed how these are non-age-dependent sentencing principles that could also protect adult prisoners. The way that American jurists increasingly think of juveniles' rights resembles the way that European jurists tend to think of the rights of both juveniles *and* adults. Yet, prior to *Graham*, dissenting Justices had already advanced these principles in

contributed to mass incarceration); BERNARD E. HARCOURT, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF THE NATURAL ORDER (2011) (analyzing the interrelated evolution of capitalism and penal systems since the nineteenth century); MUGAMBI JOUET, EXCEPTIONAL AMERICA: WHAT DIVIDES AMERICANS FROM THE WORLD AND FROM EACH OTHER 195 (2017) (arguing that mass incarceration is the product of a "poisonous cocktail blending multiple peculiar ingredients," including atypical institutions, a shift in judicial philosophy, limited socioeconomic solidarity, racial discrimination, religious traditionalism, populism, anti-intellectualism, sensationalized media coverage of crime, a subculture of violence, a narrow conception of human dignity, and skepticism of international human rights standards); JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017) (providing data suggesting that prosecutors were particularly instrumental in driving mass incarceration because of their increased tendency to file felony charges); JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007) (analyzing how changing conceptions of American government in the post-New Deal era contributed to mass incarceration); WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE (2011) (identifying a broad range of institutional, legal, and social factors behind mass incarceration); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003) (describing how the historical trend in the United States has been to normalize the harsh treatment of low-status persons, unlike in continental Europe); Jeffrey Bellin, *Reassessing Prosecutorial Power Through the Lens of Mass Incarceration*, 116 MICH. L. REV. 385 (2018) (analyzing the influential role of legislators, among other social actors, in driving mass incarceration by passing harsh sentencing laws); Kleinfeld, *supra* note 1, at 939 (exploring the "great divergence" between America and Europe regarding criminal punishment).

[5] Graham v. Florida, 560 U.S. 48, 82 (2010) (barring life imprisonment without parole for juveniles convicted of nonhomicide offenses). *Graham* partly stems from the Court's abolition of the juvenile death penalty. *See* Roper v. Simmons, 543 U.S. 551, 572–73 (2005) (reasoning that "[t]he differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability").

[6] Miller v. Alabama, 567 U.S. 460, 489 (2012) (holding that life in prison without parole cannot be a mandatory punishment for juveniles convicted of homicide).

[7] Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016) (holding that *Miller* established a substantive constitutional rule that should apply retroactively to teenagers mandatorily sentenced to life without parole).

controversial 5-4 decisions affirming life sentences inflicted on nonviolent adult offenders.[8] A difference of one vote would therefore have led to earlier convergence,[9] further calling into question essentialism about the inherent harshness of American justice. Strikingly, in the *Graham* line of decisions, the Court adopted multiple sentencing principles that it once rejected and that are the norm in Europe.[10]

This Eighth Amendment paradigm shift may be a microcosm of broader developments in American penal philosophy. After decades of relative indifference, mass incarceration has become the object of greater public concern, thereby leading to diverse state and federal reforms benefiting both juveniles and adults.[11] While scholars have downplayed the Supreme Court's role in penal reform by emphasizing that criminal justice is primarily run at the state and local levels, they have neglected how a symbiotic relationship can exist between its interpretation of the Eighth Amendment and state reform movements.[12] Tellingly, state reformers nationwide invoked the Supreme Court's reasoning in *Graham*, *Miller*, and *Montgomery* as a justification to make their juvenile justice systems less punitive.[13] As of October 2019, twenty-two states had abolished life without parole categorically for juveniles—providing them more protections than what the Eighth Amendment requires—a four-fold increase in the number of abolitionist states since 2012.[14]

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[8] Lockyer, 538 U.S. at 77 (Souter, J., dissenting); Ewing, 538 U.S. at 35 (Breyer, J., dissenting); Harmelin, 501 U.S. at 1009 (White, J., dissenting); Rummel v. Estelle, 445 U.S. 263, 285 (1980) (Powell, J., dissenting); *see also* Hutto v. Davis, 454 U.S. 370, 381 (1982) (per curiam) (Brennan, J., dissenting).

[9] *See id.*

[10] *See infra* Section II.

[11] *See infra* Section III.

[12] See *infra* note 404 and accompanying text.

[13] *See generally* CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, RIGHTING WRONGS: THE FIVE-YEAR GROUNDSWELL OF STATE BANS ON LIFE WITHOUT PAROLE FOR CHILDREN (2016) [hereinafter "CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, RIGHTING WRONGS"]; *see also infra* Section III.

[14] CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, *States that Ban Life without Parole for Children*, https://www.fairsentencingofyouth.org/media-resources/states-that-ban-life/ [https://perma.cc/3ZFN-M3UG] (last visited Oct. 12, 2019) [hereinafter "CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, *States that Ban Life without Parole for Children*"]; *see also* State v. Bassett, 428 P.3d 343, 346 (Wash. 2018) (abolishing life without parole for juveniles under the Washington Constitution); State v. Sweet, 879 N.W.2d 811, 839 (Iowa 2016) (abolishing life without parole for juveniles under the Iowa Constitution); CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, RIGHTING WRONGS, *supra* note 13 (describing nationwide reform movement to abolish life imprisonment without parole for juveniles). The shift has not been uniform, as various jurisdictions balked at the notion of treating juveniles less punitively. Illustratively, "[t]o the dismay of many penal reformers and juvenile advocates, the state of

Overlooking the broader view of the *Graham*, *Miller*, and *Montgomery* trilogy, jurists have largely reduced these cases to a narrow "juveniles are different" doctrine. Focusing on neurological and social science that the Justices cited to support their conclusion regarding the diminished culpability of immature teenagers,[15] experts have mainly identified the *Graham* line of cases as stepping stones toward expanding the rights of juveniles, not adults.[16]

This Article examines a hypothesis with wider implications: whether American penal philosophy is inching toward norms that protect all people from draconian prison terms in contemporary Western democracies. Under this hypothesis, approaches toward punishment are impermanent social constructs, as they tend to cyclically fluctuate between repressive and humanitarian concerns. Such paradigm shifts can lead to periods of international divergence or convergence in penal philosophy. After a lengthy period of divergence, American justice may thus be drawing closer to norms that have tempered punitiveness in Europe. While the emergence of the

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Pennsylvania reacted to the *Miller* decision by hastily enacting [harsh] legislation." Marie Gottschalk, *Sentenced to Life: Penal Reform and the Most Severe Sanctions*, 9 ANN. REV. L. & SOC. SCI. 353, 359 (2013). Pennsylvania thus replaced mandatory life without parole for juveniles with a dismal choice: life without parole (again) or 25 to 35 years in prison prior to eligibility for parole. *Id.*

[15] *See generally* Laurence Steinberg, *The Influence of Neuroscience on US Supreme Court Decisions About Adolescents' Criminal Culpability*, 14 NATURE REV. NEUROSCIENCE 513, 515–16 (2013) ("*Influence of Neuroscience on US Supreme Court Decisions*").

[16] *See, e.g.*, CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, RIGHTING WRONGS, *supra* note 13, at 4 (discussing the "growing momentum across state legislatures to reform criminal sentencing laws to prohibit children from being sentenced to life without parole"); Beth Caldwell, *Banished for Life: Deportation of Juvenile Offenders as Cruel and Unusual Punishment*, 34 CARDOZO L. REV. 2261 (2013) (suggesting that immigration authorities apply *Graham* and *Miller*'s reasoning to juvenile deportation proceedings); Barry C. Feld, *A Slower Form of Death: Implications of* Roper v. Simmons *for Juveniles Sentenced to Life Without Parole*, 22 NOTRE DAME J.L. ETHICS & PUB. POL'Y 9, 64–65 (2008) (arguing that *Roper*'s reasoning be extended to juvenile life imprisonment cases); Sarah French Russell, *Review for Release: Juvenile Offenders, State Parole Practices, and the Eighth Amendment*, 89 IND. L.J. 373 (2014) (arguing that *Graham* and *Miller* should lead to reforms in juvenile parole procedures); Robin Walker Sterling, *Juvenile-Sex-Offender Registration: An Impermissible Life Sentence*, 82 U. CHI. L. REV. 295 (2015) (proposing reforms to teenage sex offender registration based on *Graham* and *Miller*). By contrast, few scholars have especially focused on extending *Graham* and its progeny to the rights of adult prisoners. *See, e.g.*, Jonathan Simon, *Dignity and Risk: The Long Road from* Graham v. Florida *to Abolition of Life without Parole*, *in* LIFE WITHOUT PAROLE 282 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012); William W. Berry III, *More Different Than Life, Less Different Than Death*, 71 OHIO ST. L.J. 1109, 1113 (2010) (arguing that *Graham* should lead to heightened constitutional review of all life without parole sentences); Michael M. O'Hear, *Not Just Kid Stuff? Extending* Graham *and* Miller *to Adults*, 78 MO. L. REV. 1087 (2013) (discussing prospects for broadening the Court's juvenile jurisprudence to adults).

Graham, *Miller*, and *Montgomery* jurisprudence provides a lay of the land—an ecology of sentencing in modern America—the Article is not about doctrine but about a broader phenomenon in the evolution of penal philosophy. These cases illustrate the phenomenon, yet the Article's final section provides other examples, such as the evolution of the death penalty in America and the rest of the Western world.[17]

Moreover, alongside these cycles of divergence and convergence, another pattern may be at play: a long-term trend toward limiting or abolishing the harshest criminal punishments in the West. Scholars have often described the United States as an exception to this trend, and justifiably so given the harshness of its penal system.[18] Nevertheless, Supreme Court decisions and state reforms restricting the scope of life without parole, the polarization of American society over mass incarceration, the decline of the death penalty, and other social developments may reflect the long-term evolution of punishment in Western democracies. From this angle, America may be a laggard rather than the permanent exception in circumscribing the harshest punishments.[19] Even though the relative steadiness of this long-term abolitionist trend may appear incompatible with the unsteadiness of cyclical attitudes toward punishment, we will see that this is not necessarily the case after widening the historical lens.[20]

The Article therefore identifies two simultaneous historical patterns—cyclicality and steadiness of direction—influencing criminal punishments in Western societies. It is not a historicist account affirming that the evolution of punishment follows rigid historical laws.[21] These patterns are amenable to change or reversal, as history does not inherently flow in a particular direction. Still, examining such patterns can help understand a given historical period. The magnitude of mass incarceration in the United States has at times eclipsed these historical undercurrents and fostered essentialism about the ruthlessness of American justice. While scholars have advanced insightful theories regarding the emergence of mass incarceration,[22] an

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[17] *See infra* Section III.

[18] *See generally supra* note 4.

[19] *See generally* David Garland, *Capital Punishment and American Culture*, 7 PUNISHMENT & SOC'Y 347, 355 (2005).

[20] *See infra* Section III.

[21] "Historicism" has multiple definitions, which can range from historical analysis in general to distinct philosophical understandings. *See* Dwight E. Lee & Robert N. Beck, *The Meaning of Historicism*, 59 AM. HIST. REV. 568, 577 (1954). In this Article, the term refers to the notion that a set of "laws" steers the history of humankind, such as the claim that societies inherently evolve toward progress. *See also* KARL R. POPPER, THE POVERTY OF HISTORICISM 3, 5, 41, 81 (2d ed. 1976) (calling into question the existence of historical laws).

[22] *See supra* note 4.

intricate phenomenon defying a single explanation,[23] the patterns that this Article describes are another piece of the puzzle.

Avoiding a simple dichotomy between America and Europe, this Article also considers the rest of the Western world: Canada, Australia, and New Zealand.[24] Humanitarian sentencing norms appear to have gone the farthest in Europe, although they are influential in Canada and play a non-negligible role in Australia and New Zealand.[25] These circumstances suggest that humanitarian sentencing norms are not fundamentally "European" and are evolving in diverse Western societies. These developments are relevant to Émile Durkheim's sociological theory regarding the gradual expansion of prisoners' rights in liberal democracies.[26] We will accordingly examine the implications of Durkheim's century-old theory, particularly because it addressed the norm of "dignity,"[27] which has gained traction in the United States and other modern Western democracies.[28]

Research on international convergence has primarily focused on a different matter: the U.S. Supreme Court's contentious citation of global standards as persuasive authority in several Eighth Amendment cases.[29]

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[23] Carol Steiker has observed how academics have offered a "wide range of explanatory accounts . . . about the divergence of the United States in criminal and capital justice policies." Carol S. Steiker, *Capital Punishment and Contingency*, 125 HARV. L. REV. 760, 764 (2012) (book review). The intriguing validity of disparate theories evokes "the parable of the blind men describing an elephant based on their examination of a single part (the trunk, the ear, the tail, and so forth)," as scholars may identify "a different creature depending on the nature of the chosen focal point." *Id.*

[24] Legal scholars, sociologists, and political scientists typically favor comparing the United States to other Western nations sharing democratic political systems, industrialized economies, and relatively similar cultural roots. On the comparison of the United States to other Western nations, see generally JOUET, *supra* note 4; JOHN W. KINGDON, AMERICA THE UNUSUAL (1999); SEYMOUR MARTIN LIPSET, AMERICAN EXCEPTIONALISM: A DOUBLE-EDGED SWORD (1997). Russia and certain Russian-leaning former Soviet bloc countries like Belarus are not normally considered Western nations. JOUET, *supra* note 4, at 6.

[25] *See infra* Section II.

[26] Émile Durkheim, *Deux lois de l'évolution pénale*, 4 ANNÉE SOCIOLOGIQUE 65 (1900).

[27] *Id.* at 88–90.

[28] *See infra* Section II.A.

[29] Martha Minow has shed light on this controversy. "In recent years, I have watched the swirling debate over whether the United States courts should consult international or comparative law," she writes, explaining that it is a puzzling debate since "no one disagrees that United States judges have long consulted and referred to [such] materials." Martha Minow, *The Controversial Status of International and Comparative Law in the United States*, 52 HARV. INT'L L.J. ONLINE 1, 1–2 (2010), https://dash.harvard.edu/handle/1/10511098 [https://perma.cc/92UK-5W2H]; *see also* Carrie Menkel-Meadow, *Why and How to Study "Transnational" Law*, 1 UC IRVINE L. REV. 97, 129 n.47 (2011) ("In recent years, there has been extensive debate about what role the use and interpretation of 'foreign' or international law should have in American constitutional jurisprudence."); *e.g.*, Graham v. Florida, 560 U.S.

Scholarship has mostly ignored the dimensions of convergence I identify in this Article, including a revealing citation across the Atlantic. The European Court of Human Rights pointed to the Supreme Court's *Graham* opinion for support when abolishing life sentences with no possibility of release for European prisoners.[30] This is partly because *Graham* and its progeny recognized core principles resembling those in European penal philosophy: i) punishments must not violate human dignity; ii) punishments must be proportional to culpability; iii) punishments must serve a legitimate penal purpose; and iv) punishments should generally provide hope for rehabilitation and release.

First, this Article describes how justice in America and other Western democracies diverged tremendously for decades, which underscores the significance of subsequent developments. The Eighth Amendment's interpretation is a microcosm of this historical period. Between 1983 and 2010, the Supreme Court never found a prison sentence "cruel and unusual punishment."[31] As America faced mass incarceration on virtually world-record levels, a slim majority of Justices concluded that even inflicting life sentences on petty recidivists, such as shoplifters, was not "cruel and unusual."[32]

Second, I suggest that American penal philosophy may be converging toward humanitarian norms—dignity, proportionality, legitimacy, and rehabilitation—that are prevalent in European nations, Canada, and various other liberal democracies. Beginning in 2010, the Justices applied these principles in juvenile life without parole cases, but I present the hypothesis

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48, 81 (2010) (underlining that "the United States is the only Nation that imposes life without parole sentences on juvenile nonhomicide offenders," which the unratified Convention on the Rights of the Child forbids); Roper v. Simmons, 543 U.S. 551, 574 (2005) (finding that "the United States is the only country in the world that continues to give official sanction to the juvenile death penalty," which would violate the Convention on the Rights of the Child); Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (noting that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved").

[30] Case of Vinter and Others v. the United Kingdom, 66069/09, 130/10, and 3896/10, Eur. Ct. H.R. (2013) [hereinafter "Vinter"], ¶ 73 (citing *Graham*, 560 U.S. at 48). *Graham* was among the diverse sources that the European Judges cited in their vast survey of international and foreign law barring life sentences. *See id.* ¶¶ 59–75.

[31] Rachel E. Barkow, *Categorizing Graham*, 23 FED. SENT'G. REP. 49, 49 (2010) ("Before *Graham* it had been almost three decades since the Court had found a noncapital sentence unconstitutional . . . ."); Eva Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 148 (2007) (noting that since *Solem*, a 1983 decision, the Justices "never reversed a non-death sentence on the ground that it was too severe for the crime of conviction").

[32] Lockyer v. Andrade, 538 U.S. 63, 63 (2003).

that these principles are not fundamentally age-dependent, which is why European courts notably tend to apply them to all prisoners. For instance, a person cannot forfeit her dignity by entering adulthood, as dignity is a principle rooted in the intrinsic worth of a human being. Historiography, the history of historical studies, helps explain why these signs of convergence have received limited attention. Given the extraordinary harshness of American justice in the age of mass incarceration, scholarship in recent decades has primarily focused on analyzing its divergence from European penal philosophy.[33]

Third, I present a comparative theory on the historical evolution of American justice to shed light on these developments. Approaches toward punishment are impermanent social constructs that ebb and flow between repressive and rehabilitative aspirations. Such cycles are not unique to the United States, as they exist throughout the West, from Europe to Canada to Australia to New Zealand. Depending on the period, the sociopolitical climate may lead penal attitudes in diverse Western nations to move in similar or opposite directions. These circumstances are among the reasons why the U.S. Supreme Court, as well as state courts and legislatures, may be converging toward humanitarian sentencing norms prevalent in other Western democracies following decades of divergence. Yet the modern American penal system appears particularly susceptible to swings and backlashes. Although this state of impermanence suggests that the quiet revolution in American penal philosophy might be stopped in its tracks or potentially rolled back, it confirms that penal norms in America are not locked in stone and could continue converging with Europe, Canada, and beyond. Indeed, beside the cyclicality of penal attitudes, certain long-term trends stand out in Western societies, including narrowed eligibility for the harshest punishments, reduced frequency of these punishments, and intensifying social divides about their acceptability, which may eventually lead to their abolition.[34]

While mass incarceration is a multifaceted problem that cannot be resolved by a silver bullet,[35] this Article ultimately suggests that an Eighth Amendment paradigm shift could be a step toward reducing America's immense prison population. Experts generally agree that the reform proposals that have received the most public attention and support, such as decriminalizing marijuana and ending the "War on Drugs," cannot

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[33] *See supra* note 4 and accompanying text.

[34] *See* Garland, *supra* note 19, at 355.

[35] Scholars have identified a host of factors shaping mass incarceration, thereby suggesting the need to envision reform from multiple angles. *See generally supra* notes 4, 23 and accompanying text.

unilaterally end mass incarceration.[36] By the same token, the Supreme Court or other federal authorities cannot singlehandedly tackle mass incarceration, as criminal justice in America is mainly controlled by state and local governments. We will nonetheless see that a symbiotic relationship can exist between the Court's decisions and reforms by state actors. Yet Justices may prove more receptive to some claims than others. For example, addressing institutional racism may be indispensable to lasting criminal justice reform, but the Supreme Court has presently closed the door to such systemic constitutional challenges.[37] By contrast, the Eighth Amendment's reinvigoration could restrict sentences that disproportionately harm racial and ethnic minorities, as well as socioeconomically disadvantaged whites. The reasoning of *Graham*, *Miller*, and *Montgomery* may thus provide guidance to ensure that all persons receive humane sentences. Although U.S. juvenile justice remains very harsh by international standards, it is the sphere of American justice where the principles of dignity, proportionality, legitimacy, and rehabilitation have gained the most traction, partly due to the Supreme Court's impetus. From juvenile justice, these principles may contribute to a broader paradigm shift in the penal system.

I. DIVERGENCE: AMERICAN EXCEPTIONALISM AND MASS INCARCERATION

Without taking measure of how American law embraced extraordinary punitiveness for decades, one cannot fully grasp the changing penal landscape following Supreme Court decisions and state reforms gradually restricting the scope of life without parole since 2010.[38] Accordingly, this

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[36] *See generally* James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 24–25 (2012) (emphasizing that mass incarceration is not "exclusively (or overwhelmingly) a result of the War on Drugs," as "drug offenders constitute only a quarter of our nation's prisoners, while violent offenders make up a much larger share: one-half"); *see also* U.S. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2015 14 (2016) (indicating that 52.9% of state prisoners were convicted for violent crimes).

[37] *See* McCleskey v. Kemp, 481 U.S. 279, 320 (1987) (holding that statistical evidence of institutional racism in capital sentencing is irrelevant, as defendants must prove specific intent of discrimination in their individual case—a nearly unattainable standard of proof without examining systemic patterns). Many scholars have analyzed how *McCleskey* and other decisions have precluded successful constitutional challenges to institutional racism in the penal system. *See, e.g.*, David C. Baldus et al., *Race and Proportionality Since* McCleskey v. Kemp *(1987): Different Actors with Mixed Strategies of Denial and Avoidance*, 39 COLUM. HUM. RTS. L. REV. 143, 143 (2007); John J. Donohue, *Empirical Analysis and the Fate of Capital Punishment*, 11 DUKE J. CONST. L. & PUB. POL'Y 51, 84, 85, 94, 105 (2016); Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1835, 1841–42 (2000).

[38] *See infra* Sections II and III.

section will present evidence suggesting that American justice profoundly diverges from humanitarian norms prevalent in other Western democracies, before considering evidence that American justice may be converging toward these norms in the next section.

At the outset, it may reasonably appear as if Americans approach criminal punishment from a radically different angle than Europeans, if not the rest of the international community. The United States has the highest incarceration rate worldwide.[39] It is home to 5% of the world's population but a quarter of the world's prisoners.[40] Leaving aside Stalinist Russia, there are few historical examples of mass incarceration on such a colossal scale.[41] Mass incarceration is even more striking if one parses the "astronomical" incarceration rate for African-Americans.[42] The peculiar nature of mass incarceration further comes to light when comparing the United States not only to European countries, but also to the rest of the Western world: Canada, Australia, and New Zealand.[43] America's incarceration rate is three to ten times higher than those of other modern Western democracies.[44] In the words of David Garland, mass incarceration "is an unprecedented event in the history of the U.S. and, more generally, in the history of liberal democracy."[45]

My research has described how mass incarceration reflects "American exceptionalism," an idea often misunderstood or misrepresented as a faith in American superiority.[46] The primary definition of this storied concept has historically been that America is an *exception*, objectively and descriptively,

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[39] WORLD PRISON BRIEF, PRISON POPULATION RATE, http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All [https://perma.cc/L6AJ-NZ4S] (last visited Oct. 4, 2018).

[40] Michelle Ye Hee Lee, *Fact Check: Does the United States Really Have 5 Percent of the World's Population and One Quarter of the World's Prisoners?*, WASH. POST (Apr. 30, 2015), https://www.washingtonpost.com/news/fact-checker/wp/2015/04/30/does-the-united-states-really-have-five-percent-of-worlds-population-and-one-quarter-of-the-worlds-prisoners/?utm_term=.abd1b99e5138 [https://perma.cc/TB9X-D22P].

[41] HARTNEY, *supra* note 2 (comparing the incarceration rate in modern America and the Soviet Union in 1950). It is noteworthy that incarceration in Stalinist prisons was qualitatively different since it encompassed the repression of alleged dissidents.

[42] STUNTZ, *supra* note 4, at 47–48 ("If the general imprisonment rate is high, the rate of black incarceration can fairly be called astronomical," as in the year 2000 it "exceed[ed] by one-fourth the imprisonment rate in the Soviet Union in 1950—near the end of Stalin's reign, the time when the population of the Soviet camps peaked").

[43] Regarding the definition of the Western world, see *supra* note 24.

[44] *See* WORLD PRISON BRIEF, PRISON POPULATION RATE, *supra* note 39.

[45] David Garland, *Introduction: The Meaning of Mass Imprisonment*, *in* MASS IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES 1, 1 (David Garland ed., 2001).

[46] JOUET, *supra* note 4, at 21–26.

especially compared to other Western democracies.[47] Distinctive features of American history, culture, law, politics, economic attitudes, religious beliefs, and race relations have thus shaped peculiar ways of thinking about crime. For instance, America has historically been the Western democracy with the highest proportion of racial and ethnic minorities, which has fostered a greater degree of institutional racism compared to European nations.[48] Other features of American exceptionalism, including the relative weight of populism, anti-intellectual skepticism of expert knowledge, Christian fundamentalism, and market fundamentalism have also been part of the "poisonous cocktail" making modern American justice exceptionally harsh, counter-productive, and inegalitarian.[49]

A defining feature of American exceptionalism and mass incarceration long seemed to be the rejection of humanitarian sentencing principles that have limited punitiveness in Europe: dignity, proportionality, legitimacy, and rehabilitation.[50] Marie Gottschalk illustratively described how "[o]ver the past 40 years or so, retribution has become a central feature of U.S. penal policy, supplanting rehabilitation and even public safety as the chief aim."[51] As Justice Antonin Scalia pointedly asserted during oral arguments in an Eighth Amendment case, "modern penology has abandoned that rehabilitation thing, and they no longer call prisons reformatories . . . [P]unishment is the criterion now. Deserved punishment for crime."[52] Scalia went on to suggest that a punishment's lack of rehabilitative purpose was therefore "irrelevant."[53] Jonathan Simon has equally observed how "[life without parole] defines the logic of contemporary [American] penality . . . in its embrace of a totalizing promise of prison incapacitation extended to the very limits of life, and unmediated by any further consideration of the prisoner as a distinct human being."[54] By contrast, the European Court of Human Rights has barred life without parole as an inhumane punishment negating the value of prisoners' lives, thereby

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[47] *Id.*; *see also generally* JACK P. GREENE, THE INTELLECTUAL CONSTRUCTION OF AMERICA: EXCEPTIONALISM AND IDENTITY FROM 1942 TO 1800, 4–5 (1993); LIPSET, *supra* note 43, at 18; James W. Ceaser, *The Origins and Character of American Exceptionalism*, 1 AM. POL. THOUGHT 2 (2012).

[48] JOUET, *supra* note 4, at 210–11.

[49] *Id.* at 195.

[50] *See infra* Section II.

[51] Gottschalk, *supra* note 14, at 370.

[52] Oral Argument at 18:49, Miller v. Alabama, 567 U.S. 460 (2012) (No. 10-9646), https://www.oyez.org/cases/2011/10-9646 [https://perma.cc/F262-DMXR].

[53] *Id.* at 19:07.

[54] Simon, *supra* note 16, at 282.

rejecting claims that this punishment is warranted by retribution or public safety.[55]

An overview of the Supreme Court's Eighth Amendment jurisprudence from 1980 to 2010, the age of mass incarceration, would seem to confirm that the humanitarian principles that have led other Western democracies to significantly limit or fully forbid draconian prison sentences are incompatible with the ethos of American justice. After all, even as the United States practically reached world-record imprisonment levels, the Court repeatedly held that extremely harsh prison terms do not violate the Eighth Amendment's bar on "cruel and unusual punishments." This approach mirrored wider social developments in how Americans thought about crime, as Supreme Court decisions do not exist in a vacuum.

In *Rummel v. Estelle*, a 1980 decision, the Court reasoned that the Eighth Amendment offers essentially no protection against prison terms lacking proportionality to culpability.[56] It thus affirmed the life sentence that a defendant received under Texas's "three strikes" statute for several minor nonviolent offenses: fraudulently using a credit card to obtain $80 worth of goods or services, passing a forged check for $28.36, and obtaining $120.75 by false pretenses.[57] Over the dissenting opinion of four Justices, the majority announced, "[O]ne could argue without fear of contradiction by any decision of this Court that . . . the length of the sentence actually imposed [for a felony] is purely a matter of legislative prerogative."[58] Put otherwise, the Court notified state authorities that it would not preclude them from imposing life sentences on any convicted felons.[59] It added that Eighth Amendment challenges should succeed only in "exceedingly rare" situations.[60]

Two years later, *Hutto v. Davis*, a succinct *per curiam* decision, found no constitutional violation with a Virginia prisoner's forty-year sentence for possession and distribution of nine ounces of marijuana.[61] The Court reiterated its "reluctan[ce] to review legislatively mandated terms of imprisonment."[62] In a revealing twist of events, the Justices also

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[55] Vinter, ¶¶ 12, 21, 23, 46, 52, 119–22, 139.

[56] Rummel v. Estelle, 445 U.S. 263, 263 (1980).

[57] *Id.* at 266.

[58] *Id.* at 274.

[59] The majority provided a minor caveat by stating in a footnote that "a proportionality principle" might apply "if a legislature made overtime parking a felony punishable by life imprisonment." *Id.* at 274 n.11.

[60] *Id.* at 272.

[61] Hutto v. Davis, 454 U.S. 370, 370 (1982) (per curiam).

[62] *Id.* at 374 (quoting *Rummel*, 445 U.S. at 274).

reprimanded both the Fourth Circuit Court of Appeals and a District Court for their unwillingness to follow *Rummel*'s narrow interpretation of the Eighth Amendment, as these lower courts had found the forty-year sentence in *Hutto* unconstitutional notwithstanding *Rummel*.[63] "[U]nless we wish anarchy to prevail within the federal judicial system," the majority wrote, "a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be."[64]

Justice Lewis Powell grudgingly concurred with the *Hutto* majority, feeling bound by *Rummel* despite his belief that the forty-year sentence was "unjust and disproportionate to the offense" of possessing and distributing marijuana "said to have a street value of about $200."[65] Three other Justices, led by William Brennan, dissented in strong language denouncing the majority's decision to issue a *per curiam* opinion "[w]ith the benefit of neither full briefing nor oral argument" in this important case.[66] In their view, the majority had moved toward "the complete abdication of our responsibility to enforce the Eighth Amendment."[67]

Around this period, state and local governments adopted increasingly harsh sentencing laws and policies due to the rise of the "tough on crime" movement.[68] The Supreme Court's decisions did not cause this social shift, yet its majority's reasoning tended to exemplify the evolution in American penal attitudes. While rehabilitation was a core principle in American sentencing in prior decades, it was largely discredited.[69] Critics charged that rehabilitation did not "work" and amounted to illegitimate, immoral criminal-coddling.[70] Once one assumes that most offenders are incorrigible and nothing more than their worst acts, the next logical step is not difficult to envision: "Lock them up and throw away the key." From this angle, endless prison terms cannot be "cruel and unusual" under the Eighth Amendment.

In 1983, however, the Court moved away from *Rummel* and *Hutto*'s narrow conception of prisoners' rights. The Court held in *Solem v. Helm* that it was "cruel and unusual punishment" for South Dakota to inflict life without

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[63] *Id.* at 375; *see also* Davis v. Zahradnick, 432 F. Supp. 444, 449 (W.D. Va. 1977), *aff'd per curiam sub nom.*, Davis v. Davis, 646 F.2d 123 (4th Cir. 1981), *rev'd sub nom.*, *Hutto*, 454 U.S. at 370.

[64] *Hutto*, 454 U.S. at 375.

[65] *Id.* (Powell, J., concurring in the judgment).

[66] *Id.* at 381 (Brennan, J., dissenting).

[67] *Id.* at 383.

[68] *See supra* note 4.

[69] *See generally* GARLAND, *supra* note 4, at 20, 58, 62, 143; Michael Tonry, *Can Twenty-first Century Punishment Policies Be Justified in Principle?*, *in* RETRIBUTIVISM HAS A PAST: HAS IT A FUTURE? 3, 7–8 (Michael Tonry ed., 2011).

[70] GARLAND, *supra* note 4, at 20, 58, 62, 143.

parole on a petty recidivist who had issued a "no account" check for $100.[71] The main reason for the Court's change of direction appears to be the evolving judicial philosophy of Justice Harry Blackmun.[72] After being in the majority in *Rummel*, Blackmun joined the four Justices who had dissented in that precedent to form a new 5-4 majority in *Solem*.[73] The *Solem* majority notably reasoned that the Eighth Amendment encompasses a "general principle of proportionality."[74] It identified three factors to determine whether a prison sentence is disproportional: i) "the gravity of the offense and harshness of the penalty"; ii) sentences imposed "in the same jurisdiction"; and iii) sentences for "the same crime in other jurisdictions."[75]

Nevertheless, *Solem* hardly seemed to spur a change in American penal philosophy or undermine the "tough on crime" movement. The U.S. incarceration rate nearly doubled in the next decade.[76] The number of successful Eighth Amendment challenges drawing upon *Solem* appears to have been absolutely minimal.[77] Conversely, dramatically less punitive penal systems were becoming the norm elsewhere in the West.[78] No other Western democracy experienced mass incarceration.[79] And even those possessing their own versions of the "tough on crime" movement, from France to Canada to New Zealand, had markedly more moderate penal systems than

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[71] Solem v. Helm, 463 U.S. 277, 277 (1983). The Supreme Court has historically found Eighth Amendment violations in few other noncapital cases. *See* Estelle v. Gamble, 429 U.S. 97, 98 (1976) (holding that deliberate indifference to prisoners' serious medical needs does not comport with the Eighth Amendment); Trop v. Dulles, 356 U.S. 86, 104 (1958) (plurality opinion) (holding that depriving a military deserter of his U.S. citizenship violated the Eighth Amendment); Weems v. United States, 217 U.S. 349, 382 (1910) (holding that sentencing a defendant to hard labor for falsifying an official document violated the Eighth Amendment).

[72] Justice Blackmun's judicial philosophy particularly evolved on the death penalty during his time on the Court. In his last year on the bench, he famously declared "I will no longer tinker with the machinery of death." Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari).

[73] The four *Rummel* dissenters were Justices William Brennan, Thurgood Marshall, Lewis Powell, and John Paul Stevens. *See* Rummel v. Estelle, 445 U.S. 263, 285 (1980) (Powell, J., dissenting).

[74] *Solem*, 463 U.S. at 288.

[75] *Id.* at 291–92.

[76] The incarceration rate per 100,000 U.S. residents skyrocketed from 280 to 530 prisoners between 1983 and 1993. U.S. BUREAU OF JUSTICE STATISTICS, KEY STATISTIC: INCARCERATION RATE (1980-2015), https://www.bjs.gov/index.cfm?ty=kfdetail&iid=493#Publications [https://perma.cc/A5Q3-AWMC] (last visited Oct. 2, 2017).

[77] Harmelin v. Michigan, 501 U.S. 957, 1015 n.2 (1991) (White, J., dissenting) (noting that "the parties have cited only four cases decided in the [eight] years since *Solem* in which sentences have been reversed on the basis of a proportionality analysis").

[78] *See infra* Section II.

[79] *See infra* Section II.

the United States.[80] An uncanny taste for repression appeared to be a dominant trait of American exceptionalism.[81]

In 1991, the Supreme Court revisited the application of the Eighth Amendment to lengthy prison terms, but proved even less able to find common ground. In *Harmelin v. Michigan*, a plurality decision, the Court eviscerated the *Solem* standard and concluded that the Eighth Amendment's bar on "cruel and unusual punishments" does not require that a sentence be "proportional" to the crime except in a capital case—a doctrine known as "death is different."[82] The defendant in *Harmelin* had no prior felony convictions.[83] He received a mandatory sentence of life imprisonment without parole after being convicted of possessing 672 grams of cocaine,[84] a substantial quantity sufficient to create between 32,500 and 65,000 doses.[85] The mandatory life sentence precluded him from advancing any mitigating evidence at sentencing. Justice Scalia wrote the principal opinion of the plurality judgment declaring: "Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense, having been employed in various forms throughout our Nation's history."[86] In a separate section of his opinion that was solely joined by Chief Justice William Rehnquist, Justice Scalia argued that the Eighth Amendment was originally meant to "outlaw particular *modes* of punishment," such as torture, rather than "disproportionate or excessive sentences."[87] Scalia asserted that "*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee."[88]

Justice Anthony Kennedy, joined by Justices Sandra Day O'Connor and David Souter, authored *Harmelin*'s controlling concurring opinion. Unlike Scalia, Kennedy considered that the Eighth Amendment "encompasses a

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[80] *See infra* notes 216, 381–385 and accompanying text.

[81] On the meaning of American exceptionalism, see *supra* notes 46–47, and accompanying text.

[82] *See Harmelin*, 501 U.S. at 995–96 (plurality opinion) (noting that solely death sentences require individualized review under the Eighth Amendment given the "qualitative difference between death and all other penalties").

[83] *Id*.

[84] *Id.* at 961.

[85] *Id.* at 1002 (Kennedy, J., concurring).

[86] *Id.* at 995 (plurality opinion) (stating that "mandatory death sentences abounded in our first Penal Code").

[87] *Id.* at 975–85 (emphasis in original).

[88] *Id.* at 994–95.

narrow proportionality principle."[89] Yet Kennedy found that this principle was not violated by the first-time felon's life sentence for drug possession.[90]

By contrast, the four dissenting Justices in *Harmelin* stood united in concluding that the Eighth Amendment bars disproportional prison sentences.[91] Disputing the conclusions of Justice Scalia's originalist analysis, they advanced historical evidence that the original meaning of "cruel and unusual punishments" either encompassed a review of disproportional prison sentences or did not prohibit it.[92] The dissenters further stressed that the Eighth Amendment's language is ambiguous[93] and that the Court had recognized that the meaning of "cruel and unusual punishments" depends on the "'evolving standards of decency that mark the progress of a maturing society.'"[94] Drawing upon *stare decisis*, the four Justices concluded that the plurality had failed to provide a reasonable basis to depart from the proportionality standard established in *Solem*.[95]

The *Harmelin* plurality's narrow conception of prisoners' rights proved controversial.[96] Tellingly, the Michigan Supreme Court distanced itself from it the following year.[97] Even though the U.S. Supreme Court had found no Eighth Amendment violation with the sentence that the Michigan defendant had received in *Harmelin*, the Michigan Supreme Court emphasized that *Harmelin* "is only persuasive authority for purposes of this Court's interpretation and application of the Michigan Constitution," and that "we may in some cases find more persuasive, and choose to rely upon, the reasoning of the dissenting justices of [the United States Supreme Court]."[98] The Michigan Supreme Court accordingly held that mandatory life without parole was a disproportionately harsh punishment for cocaine possession

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[89] *Id.* at 997 (Kennedy, J., concurring).

[90] *Id.* at 1009.

[91] Justices Harry Blackmun and John Paul Stevens formally joined Justice Byron White's dissenting opinion. *See id.* (White, J., dissenting). Justice Thurgood Marshall filed a separate dissent, stating, "I agree with Justice White's dissenting opinion, except insofar as it asserts that the Eighth Amendment's Cruel and Unusual Punishments Clause does not proscribe the death penalty." *Id.* at 1027 (Marshall, J., dissenting). Marshall had formerly concluded that the death penalty inherently violates the Eighth Amendment. Gregg v. Georgia, 428 U.S. 153, 231 (1976) (Marshall, J., dissenting).

[92] *Harmelin*, 501 U.S. at 1009–12 (White, J., dissenting).

[93] *Id.* at 1011.

[94] *Id.* at 1015 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).

[95] *Id.* at 1021 (White, J., dissenting).

[96] *See generally* Nilsen, *supra* note 31, at 113, 148, 169.

[97] People v. Bullock, 485 N.W.2d 866, 875 (Mich. 1992); *see also* Nilsen, *supra* note 31, at 165 n.262 (discussing *Bullock* and Michigan state reform efforts following *Harmelin*).

[98] *Bullock*, 485 N.W.2d at 870.

under the Michigan Constitution.[99] *Harmelin* may nonetheless be the most significant precedent regarding the intersection of mass incarceration and constitutional law. Despite being a plurality opinion, the Supreme Court and lower courts proved highly deferential to its rationale that a prison sentence need not be remotely proportional to culpability to pass muster under the Eighth Amendment.[100]

Placed in a wider societal context, *Harmelin* epitomized the contemporary American zeitgeist. By giving prisoners facing ruthless sentences no constitutional recourse, *Harmelin*'s reasoning paralleled the mercilessness characterizing American justice in this historical period. Among other developments, "broken windows" policing advocated "zero tolerance" against petty offenders,[101] and legislative reforms provided for lengthy mandatory stays in prison, if not permanent incapacitation, regardless of mitigating circumstances.[102]

As mass incarceration reached historic levels, the Supreme Court heard more challenges to extreme sentences. In 2003, in *Ewing v. California*, another plurality found no constitutional violation by a sentence of twenty-five-years-to-life imposed on a man who had shoplifted golf clubs worth approximately $1,200—his "third strike" under California law.[103] The *Ewing* plurality comprised of Justices Kennedy, O'Connor, and Rehnquist followed Kennedy's *Harmelin* concurrence by concluding that the Eighth Amendment "forbids only extreme sentences that are 'grossly disproportionate' to the crime."[104] The *Ewing* plurality additionally reasoned that three strikes laws aim to punish, deter or incapacitate career criminals, thereby reflecting "a rational legislative judgment, entitled to deference."[105] Justices Scalia and

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[99] *Id.* at 877. Moreover, "[i]n 1998, the Michigan legislature moved to an optional rather than a mandatory life sentence and, in 2002, raised the triggering quantity from 650 to 1000 grams." Elizabeth Napier Dewar, Comment, *The Inadequacy of Fiscal Constraints as a Substitute for Proportionality Review*, 114 YALE L.J. 1177, 1180 n.18 (2005).

[100] Barkow, *supra* note 31, at 49–50; Nilsen, *supra* note 31, at 113, 148, 169.

[101] *See generally* LOÏC WACQUANT, PRISONS OF POVERTY 14–18 (2009).

[102] *See, e.g.*, FRANKLIN E. ZIMRING, GORDON HAWKINS & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 4–7, 17 (2001) (describing the roots of the three strikes legislation that California adopted in 1994, which was a mandatory version of preexisting laws on the incarceration of recidivists); Kate Stith & Steve Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 227–28, 231, 285–86 (1993) (explaining the emergence of federal sentencing guidelines requiring harsh mandatory minimum stays in prison).

[103] Ewing v. California, 538 U.S. 11, 28 (2003) (plurality opinion).

[104] *Id.* at 23 (quoting Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring)).

[105] *Id.* at 24–28, 30.

Thomas concurred in the judgment but asserted that the Eighth Amendment lacks any proportionality principle at all.[106]

In *Lockyer v. Andrade*, a *habeas corpus* case decided on the same day as *Ewing*, the Court held that the Eighth Amendment likewise offered no protection to Leandro Andrade, a petty, nonviolent recidivist who received a fifty-year-to-life sentence under California's three strikes statute after shoplifting videotapes worth $153.[107] Compared to Ewing, who had previously been convicted of robbery at knifepoint,[108] Andrade had a minor criminal record consisting of convictions for theft, burglary, and marijuana transportation.[109] That did not change the equation. Writing for a 5-4 majority, Justice O'Connor reasoned that "[t]he gross disproportionality principle reserves a constitutional violation for only the extraordinary case."[110] Andrade, then thirty-seven years old,[111] was thus condemned to die in prison for stealing videotapes. The dissenting Justices declared that "[i]f Andrade's sentence is not grossly disproportionate, the principle has no meaning."[112]

Leandro Andrade's fate can also be understood in the context of the American zeitgeist. By effectively negating the value of Andrade's life, the Supreme Court and California authorities seemed to adopt the ideology of the so-called "victims' rights" movement. The movement has commonly reflected a "zero-sum" mindset perceiving any concern for prisoners' rights, well-being, or rehabilitation as being, anti-victim, unlike restorative justice models.[113] While the movement's role in capital cases has received significant attention,[114] its logic extended to other areas of American sentencing.[115] Tending to victims or caring about the public meant that

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[106] *Id.* at 31 (Scalia, J., concurring in judgment); *id.* at 32 (Thomas, J., concurring in judgment).

[107] Lockyer v. Andrade, 538 U.S. 63, 63 (2003).

[108] *Ewing*, 538 U.S. at 18–19.

[109] *Lockyer*, 538 U.S. at 66–67.

[110] *Id.* at 77.

[111] *Id.* at 79 (Souter, J., dissenting).

[112] *Id.* at 83.

[113] *See, e.g.*, GARLAND, *supra* note 4, at 143; Mary Margaret Giannini, *Equal Rights for Equal Rites?: Victim Allocution, Defendant Allocution, and the Crime Victims Rights' Act*, 26 YALE L. & POL'Y REV. 431, 439–40 (2008).

[114] *See generally* CAROL S. STEIKER & JORDAN M. STEIKER, COURTING DEATH: THE SUPREME COURT AND CAPITAL PUNISHMENT 211 (2016) (noting that the victims' rights movement had significant influence over capital punishment in the 1980s and 1990s, although since then it has been rivaled by new, anti-death penalty victims' groups).

[115] Procedurally, the victims' rights movement has often focused on having judges consider victim impact statements at sentencing. On a broader level, the movement has minimized prisoners' rights by equating justice for victims almost exclusively with retribution

offenders must be treated harshly. By ironically framing dehumanizing justice as the embodiment of compassion, the victims' rights movement exemplified the peculiarities of American law. The fundamental ethos of justice in the United States appeared to be unmistakable punitiveness, as illustrated by the proliferation of revealing mottos: "tough on crime," "zero tolerance," "you do the crime, you do the time," "an eye for an eye," and "just deserts."[116]

Meanwhile, the Supreme Court made the Eighth Amendment the most irrelevant when it was the most needed. In 1994, the U.S. prison population topped the one million mark for the first time in history.[117] In 2002, it reached two million prisoners.[118] As the Supreme Court countenanced extreme punishments with no equivalent in the Western world, the extraordinary divergence of American justice seemed undeniable.

However, one of the Justices, who had reasoned that the Eighth Amendment barely protects defendants from ruthless prison terms, eventually showed growing concern about the human toll of prison population explosion. Justice Anthony Kennedy denounced mass incarceration in a 2003 speech at the American Bar Association (ABA).[119] Noting that "countries such as England, Italy, France and Germany" have a drastically lower incarceration rate than the United States, Kennedy emphatically called for legislative reform: "It is a grave mistake to retain a policy just because a court finds it constitutional . . . . A court decision does not excuse the political branches or the public from the responsibility for unjust laws."[120] Kennedy's remarks suggested a realization that mass

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and incapacitation, rather than rehabilitation and alternatives to incarceration. The movement developed nationwide and grew influential in diverse types of cases. *See, e.g.*, GARLAND, *supra* note 4, at 143, 159, 169; Giannini, *supra* note 113, at 439–40; Kristin Henning, *What's Wrong With Victims' Rights in Juvenile Court: Retributive Versus Rehabilitative Systems of Justice*, 97 CAL. L. REV. 1107 (2009). *But see* Giannini, *supra* note 113, at 473 ("[T]here are circumstances at sentencing where victims express statements of mercy, forgiveness, or hope for the defendant's rehabilitation.").

[116] *See generally* JOUET, *supra* note 4, at 203.

[117] U.S. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 1994 (1995), https://bjs.gov/content/pub/pdf/Pi94.pdf [https://perma.cc/37RF-26W6]; *see also* Pierre Thomas, *U.S. Prison Population, Continuing Rapid Growth Since 80s, Surpasses 1 Million*, WASH. POST, Oct. 28, 1994, at A3.

[118] U.S. BUREAU OF JUSTICE STATISTICS, PRISONERS IN 2002 (2003), https://www.bjs.gov/content/pub/pdf/p02.pdf [https://perma.cc/3F3D-LZRK]; *see also* Fox Butterfield, *Prison Rates Among Blacks Reach a Peak, Report Finds*, N.Y. TIMES, Apr. 7, 2003.

[119] Anthony Kennedy, Associate Justice, U.S. Supreme Court, Address at the American Bar Association Annual Meeting (Aug. 9, 2003), https://www.supremecourt.gov/publicinfo/speeches/viewspeech/sp_08-09-03 [https://perma.cc/ZF3Y-LT2Z].

[120] *Id.*

incarceration may not reflect legitimate penological goals, as illustrated by his reference to James Whitman's scholarly book *Harsh Justice*.[121] "Professor Whitman concludes that the goal of the American corrections system is to degrade and demean the prisoner," Kennedy observed.[122] "That is a grave and serious charge. A purpose to degrade or demean individuals is not acceptable in a society founded on respect for the inalienable rights of the people."[123] Kennedy's speech led to the creation of an ABA commission that bore his name and that was tasked with investigating solutions to mass incarceration.[124] The Justice Kennedy Commission presented its recommendations to the ABA the following year.[125] Given the relative absence of meaningful reform at either the state or federal level in the aftermath of his speech and the commission's report, it is plausible that Kennedy came to see a greater role for the Eighth Amendment in addressing mass incarceration.

Beginning in 2010, the Court expanded the Eighth Amendment's scope in three juvenile cases: *Graham v. Florida*, *Miller v. Alabama*, and *Montgomery v. Louisiana*. Justice Kennedy not only was in the majority in all of these cases; he authored the *Graham* decision that departed from the rigid reasoning of his own influential plurality opinion in *Harmelin* by distinguishing it as follows: "The present case involves an issue the Court has not considered previously: a categorical challenge to a term-of-years sentence [i.e., life without parole for a juvenile in a nonmurder case]."[126] Kennedy also remarkably wrote: "The concept of proportionality is central to the Eighth Amendment."[127] *Graham* consequently held that life imprisonment without parole was "cruel and unusual punishment" for minors convicted of nonhomicide offenses. The dissenters protested that the

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[121] *Id.*; *see also* WHITMAN, *supra* note 4.

[122] Kennedy, Address at the American Bar Association Annual Meeting, *supra* note 119.

[123] *Id.*

[124] James Podgers, *Prison Country: ABA to Study Issues Justice Kennedy Raised at Annual Meeting*, 89 ABA JOURNAL 1, 87 (2003).

[125] AMERICAN BAR ASSOCIATION JUSTICE KENNEDY COMMISSION, REPORTS WITH RECOMMENDATIONS TO THE ABA HOUSE OF DELEGATES (Aug. 2004), https://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_kennedy_JusticeKennedyCommissionReportsFinal.authcheckdam.pdf [https://perma.cc/85YT-GCH4] [hereinafter "JUSTICE KENNEDY COMMISSION REPORT"].

[126] Graham v. Florida, 560 U.S. 48, 61 (2010); *see also* Barkow, *supra* note 31, at 49 (discussing *Graham*'s historical significance as the first decision to depart from *Harmelin*'s logic).

[127] *Graham*, 560 U.S. at 59 (quoting Weems v. United States, 217 U.S. 349, 367 (1910) (alteration in original)).

majority had disregarded *stare decisis* and *Harmelin*'s "death is different" doctrine that limited proportionality review to capital cases.[128]

Harmelin was again at issue in *Miller*, a subsequent challenge to life without parole for all juveniles.[129] In the course of oral arguments, Justice Sonia Sotomayor asked Bryan Stevenson, the prominent human rights attorney who represented Evan Miller, "[H]ow do you deal with *Harmelin* . . . if *Harmelin* says we don't look at individualized sentencing?"[130] Stevenson tellingly responded, "It's a challenge, and I concede that," before suggesting that the Court follow the *Graham* standard.[131] As *Harmelin* would indeed have posed an obstacle to the juvenile's claim, John C. Neiman, Jr., who appeared on behalf of Alabama, urged the Court to follow that precedent during his oral argument: "*Harmelin* effectively sets a bright line here such [] that individualized sentencing is only required in [] a death penalty case."[132]

Justice Elena Kagan's majority opinion in *Miller* ultimately dismissed as "myopic" the claim that *Harmelin* barred relief under the Eighth Amendment: "*Harmelin* had nothing to do with children and did not purport to apply its holding to the sentencing of juvenile offenders. . . . [A] sentencing rule permissible for adults may not be so for children."[133] *Miller* held that life without parole could not be a mandatory sentence for a murder perpetrated by a juvenile.[134] Four years later, in *Montgomery v. Louisiana*, the Justices found that *Miller* had announced a substantive constitutional rule that should apply retroactively, opening the door for numerous juveniles serving mandatory life terms to seek resentencing.[135]

Graham, *Miller*, and *Montgomery* were partly the fruit of the Court's abolition of the juvenile death penalty in *Roper v. Simmons*, a 2005 precedent.[136] *Roper* was itself predicated on *Atkins v. Virginia*, a 2003 decision abolishing the death penalty for the "mentally retarded."[137] *Atkins* and *Roper* both held that capital punishment should be reserved for the most culpable offenders, a category excluding juveniles and the mentally disabled.

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[128] *Id.* at 99–100, 103–05 (Thomas, J., dissenting).

[129] Miller v. Alabama, 567 U.S. 460 (2012).

[130] Oral Argument at 8:51, *Miller*, 567 U.S. 460. (No. 10-9646), https://www.oyez.org/cases/2011/10-9646 [https://perma.cc/AL37-XLHJ].

[131] *Id.*

[132] *Id.* at 38:30.

[133] *Miller*, 567 U.S. at 481.

[134] *Id.* at 489.

[135] Montgomery v. Louisiana, 136 S. Ct. 718, 736–37 (2016).

[136] Roper v. Simmons, 543 U.S. 551, 551 (2005).

[137] Atkins v. Virginia, 536 U.S. 304, 304 (2002).

Atkins and *Roper* initially appeared to confirm the enduring principle that the death penalty is the only type of punishment that must be proportional to culpability under the Eighth Amendment, as death is "qualitatively" different from incarceration.[138]

Nevertheless, in *Graham*, *Miller*, and *Montgomery* the Court analogized life without parole to the death penalty given that both punishments condemn people to death behind bars.[139] Citing neurological and behavioral science demonstrating that teenagers' brains are not fully developed, the Court reasoned that the diminished decision-making ability of juveniles mitigates their culpability.[140] In *Graham* and its progeny, "death is different" may thus have given way to a new principle: "juveniles are different."

Yet a broader evolution suggests that a paradigm shift in American society may not be narrowly limited to juveniles' rights. Alongside state sentencing reforms and a rising social debate about ending mass incarceration,[141] the Supreme Court appears increasingly concerned about dignitary harms in the penal system.[142] In particular, beside the *Graham* and *Montgomery* decisions, Justice Kennedy authored the majority opinion in *Brown v. Plata* concluding that abusive conditions of incarceration violate "human dignity."[143] This pattern seemed to confirm Kennedy's concern about the tension between human dignity and harsh prison sentences, which

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[138] Harmelin v. Michigan, 501 U.S. 957, 995–96 (1991) (plurality opinion). In practice, "death is different" has not been synonymous with a thorough review of each death row prisoner's culpability and mitigating circumstances. The Supreme Court and lower appellate courts have been disinclined to overturn death sentences, instead deferring to state authorities' efforts to impose capital punishment. *See* DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION 267 (2010) (describing how in the mid-1990s "the Court made it clear that it would no longer examine case-specific proportionality, review capital sentencing patterns for evidence of disparity, nor require state appellate courts to conduct comparative proportionality review").

[139] *See generally Miller v. Alabama*, 567 U.S. 460, 474–75 (2012).

[140] *See generally id.* at 471–73; Steinberg, *supra* note 15, at 513.

[141] *See infra* Section III.

[142] Dignity has gained importance in other areas of constitutional law. *See* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 PENN. L. REV. 169, 169 (2011); *e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015) (emphasizing that same-sex marriage is a constitutional right required by "equal dignity in the eyes of the law"); United States v. Windsor, 570 U.S. 744, 771 (2013) (finding that the Defense of Marriage Act "interfere[s] with the equal dignity of same-sex marriages"); Lawrence v. Texas, 539 U.S. 558, 567, 574, 575 (2003) (holding that criminalizing intimate homosexual relations is an affront to "dignity"); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992) (plurality opinion) (reasoning that abortion is a constitutional right, under certain conditions, partly because it reflects "choices central to dignity and personal autonomy").

[143] Brown v. Plata, 563 U.S. 493, 511 (2011).

he had signaled in his 2003 speech at the American Bar Association[144] and his endorsement of the ABA commission on criminal justice reform.[145] But Kennedy was not the lone conservative-leaning member of the Court willing to expand the Eighth Amendment's scope. Strikingly, Chief Justice John Roberts concurred with the judgment in *Graham*[146] and was in the majority in *Montgomery*,[147] although he dissented in *Miller*.[148] These developments demonstrated that, notwithstanding the Court's historic reluctance to enforce the Eighth Amendment, its interpretation is not set in stone. Moreover, historical and comparative evidence suggests that the evolution of Western sensibilities extends far beyond the idiosyncrasies of individual Supreme Court Justices.[149]

II. CONVERGENCE: AMERICAN PENAL PHILOSOPHY INCHES TOWARD HUMANITARIAN NORMS PREVALENT IN OTHER WESTERN DEMOCRACIES

If mass incarceration in the United States long exemplified divergence, American justice may now be converging toward penal norms that have limited punitiveness in other Western democracies: dignity, proportionality, legitimacy, and rehabilitation. Because the Supreme Court recognized these sentencing principles in its landmark juvenile decisions, few scholars have focused on how these principles are not age-dependent and could extend to adult prison cases.[150] Indeed, *Graham*, *Miller*, and *Montgomery* have so far precipitated breakthroughs in juvenile justice reform—not adult criminal sentencing—in diverse states nationwide.[151] Jonathan Simon is a notable exception in the academy, as he observed how *Graham*'s recognition of dignity principles may ultimately influence Eighth Amendment jurisprudence and state laws concerning adults.[152] But this development is unlikely to occur, unless the Justices and more experts take a broader view

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144 Kennedy, *supra* note 119.

145 JUSTICE KENNEDY COMMISSION REPORT, *supra* note 125.

146 Graham v. Florida, 560 U.S. 48, 86 (2010) (Roberts, C.J., concurring in judgment).

147 Montgomery v. Louisiana, 136 S. Ct. 718, 725 (2016).

148 Miller v. Alabama, 567 U.S. 460, 493 (2012) (Roberts, C.J., dissenting).

149 *See infra* notes 434–437 and accompanying text.

150 *See supra* note 16 and accompanying text.

151 *See supra* note 14 and accompanying text.

152 Simon, *supra* note 16, at 285–86; *see also* Berry, *supra* note 16, at 1109 (suggesting how courts could conceptualize an Eighth Amendment safeguard against life without parole for all prisoners in the aftermath of *Graham*); O'Hear, *supra* note 16, at 1138 (examining how the Justices' "approach leaves room for lower courts to begin the process of extending *Graham* and *Miller* and developing principled limitations on the imposition of [life without parole] on adult offenders").

of *Graham* and its progeny. So far these cases have primarily been reduced to a narrow "juveniles are different" doctrine that effectively pits children against adults by suggesting that the former should be treated mercifully and the latter mercilessly. From this angle, the *Graham* line of cases could cement and legitimize grossly excessive prison terms for adults, rather than challenge their constitutionality. However, a closer reading of these decisions reveals significant parallels with sentencing principles that have protected both juveniles and adults from draconian prison terms in modern Europe, Canada, Australia, and New Zealand.[153]

Scholarly research on international convergence in Eighth Amendment decisions has largely concentrated on a different matter: the Supreme Court's citation of unratified international treaties and foreign law as persuasive authority.[154] But the Justices did not simply conclude that inflicting certain ruthless punishments on juveniles violates international human rights standards.[155] In this section, we will see that convergence has also been at the level of penal philosophy and has not been fully one-sided. The European Court of Human Rights remarkably cited *Graham* as persuasive authority when prohibiting, for all persons, lifelong incarceration without the possibility of release in Europe.[156]

Insofar as the Eighth Amendment is a microcosm of American penal philosophy, our analysis of its evolution will lay the groundwork to explore broader patterns of convergence in the next section. Drawing upon the principles announced in *Graham* and its progeny, twenty-two states and the District of Columbia have abolished life without parole categorically for juveniles, granting them more rights than under the Eighth Amendment.[157] State actors have equally been debating whether to put an end to the mass incarceration era and its punitiveness.[158] These developments may reflect a long-term trend in the Western world toward reducing the scope of offenders and offenses eligible for the harshest sentences.[159]

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153 *See generally* JOUET, *supra* note 4, at 194–96, 218–21.

154 *See supra* note 29 and accompanying text.

155 *Id.*

156 Vinter, ¶ 73 (citing Graham v. Florida, 560 U.S. 48, 48 (2010)).

157 CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, *States that Ban Life without Parole for Children*, *supra* note 14; *see also* CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, RIGHTING WRONGS, *supra* note 13.

158 *See infra* Section III.

159 *Id.*

A. HUMAN DIGNITY

Dignity has emerged as an increasingly influential constitutional principle in Europe,[160] America,[161] and beyond,[162] although it has distant historical roots.[163] While it is a multifaceted concept with competing definitions,[164] one salient understanding of human dignity rests on the intrinsic worth of the person.[165] As Neomi Rao describes, "the dignity that arises from one's humanity is the most universal and open understanding of the term. This dignity indicates that worth and regard arise in each individual simply by virtue of being human."[166] In Xavier Bioy's analytical framework, the rising importance of dignity reflects a "hierarchisation of values" placing respect for the human person as the foremost consideration,[167] thereby explaining why dignity is deemed inviolable and inalienable.

Émile Durkheim, the French sociologist, observed over a century ago that the norm of dignity could attenuate the harshness of punishments by leading people to identify with offenders at a human level.[168] Durkheim traced this development to the long-term societal evolution from pre-modern or authoritarian societies, such as absolute monarchies and theocracies,

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[160] *See generally* LA DIGNITÉ SAISIE PAR LES JUGES EN EUROPE (Laurence Burgorgue-Larsen ed., 2010).

[161] Henry, *supra* note 142, at 169 (presenting historical and empirical evidence of the Supreme Court's increasing reliance on the principle of dignity).

[162] *See* Luís Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. INT'L & COMP. L. REV. 331 (2012) (describing the growing weight of dignity as a principle in international courts, domestic courts in Western democracies, including the United States, as well as the legal systems of developing nations).

[163] *See generally* Xavier Bioy, *Le concept de dignité*, *in* LA DIGNITÉ SAISIE PAR LES JUGES EN EUROPE 13, *supra* note 160, at 26–32 (describing the historical origins of dignity, from Antiquity to the Middle Ages and modern times); Simon, *supra* note 16, at 287 (discussing the diverse roots of dignity in Enlightenment philosophy, Greco-Roman antiquity, and Abrahamic religious traditions).

[164] *See generally* GEORGE KATEB, HUMAN DIGNITY ix (2011) (acknowledging the difficulty in defining the concept of dignity); Henry, *supra* note 142, at 169 (2011) (noting that the principle of dignity is invoked by both liberal and conservative Supreme Court Justices); Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183 (2011) (describing conflicting definitions of dignity).

[165] *See, e.g.*, KATEB, *supra* note 164, at ix; Bioy, *supra* note 163, at 24–33; Laurence Burgorgue-Larsen, *La dignité dans la jurisprudence de la Cour européenne des droits de l'homme*, *in* LA DIGNITÉ SAISIE PAR LES JUGES EN EUROPE 55, *supra* note 160, at 57; Simon, *supra* note 16, at 287–88; Rao, *supra* note 164, at 196.

[166] Rao, *supra* note 164, at 196.

[167] Bioy, *supra* note 163, at 24 (author's translation).

[168] Durkheim, *supra* note 26, at 65.

toward secularized liberal democracies.[169] Under Durkheim's theory, the bulk of offenses in pre-modern or authoritarian regimes are considered affronts to God, the monarch or society itself.[170] Liberal democracies are founded on different premises that lead them to mainly penalize offenses perpetrated against individuals.[171] This societal shift toward individualization was not limited to victimhood, but also encompassed greater empathy toward the individual offender. As Durkheim described (in dated yet prescient language), in a liberal democracy "[w]hat concerns man concerns us all; because we are all men. The feelings protecting human dignity thus are personally dear to us."[172] From this perspective, valuing the lives of both the victim and offender is not mutually exclusive, as it would be "a contradiction to avenge the human dignity violated in the person of the victim, by violating it in the person of the culprit."[173]

Durkheim's theory of dignity, announced in 1900, finds support in growing reservations toward punishments that simply negate the value of prisoners' lives.[174] Two-thirds of all countries worldwide have abolished capital punishment in law or practice, a steady reformist trend since the early twentieth century.[175] Even though this shift has various underlying causes, such as the geopolitical influence of European countries that made abolition a cornerstone of their foreign policy,[176] it partly reflects an evolution in Western sensibilities. With the exception of the United States, all modern Western democracies—European nations, Canada, Australia, New Zealand—have abolished the death penalty and identify it as an inherent human rights violation.[177] In their view, killing incapacitated prisoners who

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169 *See generally id.*

170 *Id.* at 74–77, 87, 91–95.

171 *Id.* at 81, 86, 91–95.

172 *Id.* at 88 (author's translation).

173 *Id.* at 90.

174 Michel Foucault called into question Durkheim's theory by arguing that criminal punishments actually evolve toward insidious forms of social control that are not synonymous with valuing prisoners' lives. MICHEL FOUCAULT, SURVEILLER ET PUNIR 31 (Gallimard ed. 2010) (1975). For a discussion of Foucault's theory, see *infra* note 432 and accompanying text.

175 *See generally* AMNESTY INTERNATIONAL, DEATH SENTENCES AND EXECUTIONS 42 (2017); DEATH PENALTY INFO. CTR., ABOLITIONIST AND RETENTIONIST COUNTRIES, https://deathpenaltyinfo.org/abolitionist-and-retentionist-countries?scid=30&did=140 [https://perma.cc/PQ2H-RCZR] (last visited Nov. 11, 2017).

176 Western European nations notably convinced former Soviet bloc nations to abolish the death penalty as a condition of entry into the Council of Europe and European Union. *See* FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 36–37 (2003).

177 JOUET, *supra* note 4, at 218–24; ZIMRING, *supra* note 176, at 27, 39, 46–47.

could be imprisoned is an affront to human dignity.[178] They normally refuse to extradite arrestees to countries retaining the death penalty, including America, unless they receive assurances that extraditees will not face execution.[179] Moreover, the European Court of Human Rights forbids its forty-seven member states to conduct any extradition that may lead to the death penalty.[180]

Besides the decline in capital punishment, growing reservations toward life sentences or imprisonment per se appear consistent with Durkheim's theory. Europe has gone the farthest in the West in refraining from condemning prisoners to die or spend decades behind bars.[181] And when European offenders do face life imprisonment, their sentences typically have a realistic possibility of parole or executive pardon.[182] As early as 1977, the German Constitutional Court illustratively barred mandatory life sentences because that punishment "strikes at the very heart of human dignity . . . without regard to the development of [the prisoner's] personality."[183] This relative consensus culminated in the European Court of Human Rights' 2013 *Vinter* decision, which held by a 16-1 vote that member

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[178] *Id.*

[179] France notably refused to provide legal assistance to U.S. authorities seeking the death penalty against Zacarias Moussaoui, a French citizen involved in the terrorist attacks of September 11, 2001. ZIMRING, *supra* note 176, at 42–45; *see also* United States v. Burns, [2001] 1 S.C.R. 283, 284–85 (Can.) (Canada Supreme Court decision refusing to extradite suspects to the United States if they could be executed); Robert Harvie & Hamar Foster, *Shocks and Balances:* United States v. Burns*, Fine-Tuning Canadian Extradition Law and the Future of the Death Penalty*, 40 GONZ. L. REV. 293 (2004); John Kifner, *France Will Not Extradite If Death Penalty Is Possible*, N.Y. TIMES, Mar. 31, 2001, at B4 (describing France's refusal to extradite American accused of murdering an abortion doctor, unless U.S. authorities guaranteed he would not face capital punishment).

[180] Al-Saadoon & Mufdhi v. The United Kingdom, App. No. 61498/08 Eur. Ct. H.R. ¶¶ 120, 123 (2010) (reasoning that the death penalty inherently violates the European Convention on Human Rights' right to life and right not to be subjected to inhuman or degrading punishments, thereby precluding member states from extraditing any prisoner who may face the death penalty); Al Nashiri v. Poland, App. No. 28761/11 Eur. Ct. H.R. 456, 576–79, 598 (2015) (concluding that Poland violated the European Convention on Human Rights by transferring to American authorities a member of Al Qaeda who may be executed by the United States).

[181] Simon, *supra* note 16, at 285. For instance, life without parole has not garnered substantial judicial attention in Australia, unlike in Europe. *See* Kate Fitz-Gibbon, *Life Without Parole in Australia*, *in* LIFE IMPRISONMENT: A GLOBAL HUMAN RIGHTS ANALYSIS 75, 76 (Dirk van Zyl Smit & Catherine Appleton eds., 2019).

[182] Vinter, ¶ 68; Simon, *supra* note 16, at 285 (both discussing the state of the law in European nations).

[183] Bundesverfassungsgericht [BVerfG] [German Constitutional Court] June 21, 1977, 45 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 187, 245 (F.R.G.), *quoted in* Nilsen, *supra* note 31, at 164.

states cannot sentence prisoners to lifelong incarceration without a genuine possibility of release.[184] The Judges quasi-unanimously found that such a punishment was dehumanizing, running afoul of Article 3 of the European Convention on Human Rights:[185] "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."[186]

Reservations toward lifelong imprisonment are not limited to Europe, as they appear to reflect a broader evolution in the Western world. In Canada, the longest sentence one may receive for first-degree murder is life with the possibility of parole after twenty-five years,[187] but it can be imposed consecutively for multiple homicides following a 2011 reform intended to "toughen" Canadian justice, such as by leading to seventy-five years before eligibility for parole for a triple homicide.[188] Nevertheless, these cases are rare[189] and the Canadian penal system does not routinely apply very lengthy prison terms.[190] Canada's incarceration rate has remained rather steady since the 1950s[191] and is nearly one-sixth that of the United States.[192] Mass incarceration also does not exist in Australia and New Zealand, although local "tough on crime" movements have had a greater impact than in Canada

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[184] Vinter, ¶¶ 119–22, 139.

[185] *Id.*

[186] European Convention on Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221.

[187] Canada Criminal Code, R.S.C. 1985, c. C-46, art. 745.

[188] Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act, S.C. 2011, c. 5 (Can.); *see also* Alexandra Pester, *Canada's Longest Recent Sentences and the Questions and Controversies of Consecutive Life Sentences*, THE COURT (Mar. 21, 2017), http://www.thecourt.ca/canadas-longest-recent-sentences-questions-controversies-consecutive-life-sentences/ [https://perma.cc/QAA5-JN93]. Another Canadian reform proposal aimed to eliminate parole altogether for certain murderers, yet it had not passed as of October 2019. Sean Fine, *Tories to Table Life in Prison Without Parole, Shifting Legal Landscape*, GLOBE AND MAIL, (Jan. 27, 2015), https://www.theglobeandmail.com/news/politics/tories-to-table-life-in-prison-without-parole-shifting-legal-landscape/article22646714/ [https://perma.cc/BH5S-78GQ].

[189] Pester, *supra* note 188.

[190] *See* Anthony N. Doob & Cheryl Marie Webster, *Weathering the Storm? Testing Long-Standing Canadian Sentencing Policy in the Twenty-First Century*, 45 CRIME & JUST. 359, 379–81 (2016) [hereinafter "*Weathering the Storm?*"]; Anthony N. Doob & Cheryl Marie Webster, *Countering Punitiveness: Understanding Stability in Canada's Imprisonment Rate*, 40 LAW & SOC'Y REV. 325, 330-32 (2006); Cheryl Marie Webster & Anthony N. Doob, *Punitive Trends and Stable Imprisonment Rates in Canada*, 36 CRIME & JUST. 297, 307-11 (2007).

[191] Doob & Webster, *Weathering the Storm?*, *supra* note 190, at 361 fig. 1; *see also* WORLD PRISON BRIEF, CANADA, http://www.prisonstudies.org/country/canada [https://perma.cc/ZH9Y-9EAY] (last visited Jan. 10, 2018).

[192] *See generally* WORLD PRISON BRIEF, *supra* note 39.

in expanding these nations' prison populations.[193] Still, Australia and New Zealand's incarceration rates are over three times lower than in America.[194] Australia permits life without parole,[195] yet data suggest that authorities apply this punishment far more sparingly than in the United States.[196] In 2010, New Zealand adopted three strikes legislation encompassing life without parole for certain homicides, but in 2016 its Court of Appeal upheld a major challenge to the statute's application in two high-profile murder cases.[197] The Court emphasized that the provision of the New Zealand Bill of Rights Act barring excessive prison terms lists them "alongside torture, cruelty and conduct with degrading effect",[198] and that lengthy incarceration must satisfy the Act's additional provision protecting "the inherent dignity of the person."[199]

In contrast, life without parole is an ordinary facet of contemporary American justice. The number of prisoners receiving this punishment has grown exponentially to approximately 50,000 people, a record level in U.S. history.[200] Life without parole may appear relatively atypical considering that the United States has 2.1 million prisoners,[201] but it is the tip of the iceberg in a penal system where dehumanizing punishments have become normalized.[202]

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[193] WORLD PRISON BRIEF, AUSTRALIA, http://www.prisonstudies.org/country/australia [https://perma.cc/T94M-ESV8] (last visited Jan. 10, 2018); WORLD PRISON BRIEF, NEW ZEALAND, http://www.prisonstudies.org/country/new-zealand [https://perma.cc/4QT7-9CYY] (last visited Jan. 10, 2018).

[194] WORLD PRISON BRIEF, *supra* note 39.

[195] James C. Oleson, *Habitual Criminal Legislation in New Zealand: Three Years of Three Strikes*, 48 AUSTRALIAN AND NEW ZEALAND J. CRIMINOLOGY 277, 281–83 (2015).

[196] Fitz-Gibbon, *supra* note 181, at 78–80.

[197] The New Zealand Court of Appeal did not bar life without parole per se, although it found it was unjustified in two murder cases that garnered media attention. R v. Harrison (2016) NZCA 381, ¶¶ 127–33, 144–49; *see also First Appeal Challenging Three-Strikes Law Dismissed*, NEW ZEALAND HERALD, Aug. 10, 2016.

[198] R v. Harrison (2016) NZCA 381, ¶ 79; *see also* New Zealand Bill of Rights Act 1990 § 9 ("Everyone has the right not to be subjected to torture or to cruel, degrading, or disproportionately severe treatment or punishment.").

[199] R v. Harrison (2016) NZCA 381, ¶ 80 (quoting New Zealand Bill of Rights Act 1990 § 23(5)).

[200] ASHLEY NELLIS, LIFE GOES ON: THE HISTORIC RISE IN LIFE SENTENCES IN AMERICA, SENTENCING PROJECT 5 (2013); *see also* Charles J. Ogletree, Jr. & Austin Sarat, *Introduction: Lives on the Line: From Capital Punishment to Life without Parole*, *in* LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY, *supra* note 16, at 1–3.

[201] WORLD PRISON BRIEF, UNITED STATES, http://www.prisonstudies.org/country/united-states-america [https://perma.cc/854R-N7B8] (last visited Jan. 17, 2019).

[202] *See generally* Simon, *supra* note 16, at 282.

However, the Supreme Court has long recognized that the protection of human dignity is a guiding principle to interpret the Eighth Amendment.[203] While the Justices have often been disinclined to apply this principle, they have proved increasingly able to recognize human dignity in juveniles. In 1989, during the same time period as when it summarily affirmed the constitutionality of extreme prison terms,[204] the Court held by a 5-4 vote that it was constitutional to execute teenage offenders.[205] Conversely, its 2005 majority opinion abolishing the juvenile death penalty in *Roper* underscored that "[b]y protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons."[206] The Justices added that the purpose of the United States Constitution was "to secure individual freedom and preserve human dignity."[207] Although *Graham*, *Miller*, and *Montgomery* did not specifically use the term "dignity," these decisions restricting the applicability of life without parole are also premised on the intrinsic worth of children's lives. In all of these cases, the Court described the defendants' personal backgrounds and mitigating circumstances to demonstrate that lower courts had discounted these aspects of their humanity when sentencing them to die in prison.[208]

Yet human dignity is not an age-dependent principle. A person cannot forfeit his or her dignity by turning eighteen years old and entering adulthood, as dignity is rooted in the inherent worth of a human being.[209] The norm of dignity that seemed to influence the Court's reasoning in juvenile cases may therefore be logically extended to those of adult prisoners. Jonathan Simon has notably posited that the Court's juvenile decisions may have broader implications in developing "dignity as a value in our public law."[210] Acknowledging that "[t]he road from *Graham* to any eventual abolition of [life without parole] may be a long one," Simon advanced that this paradigm shift may depend on "the ability of criminal justice officials, criminologists,

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[203] The Justices announced this standard in *Trop*, an influential 1958 decision. Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

[204] *See supra* Section I.

[205] Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (plurality opinion), *overruled by* Roper v. Simmons, 543 U.S. 551, 551 (2005).

[206] *Roper*, 543 U.S. at 560.

[207] *Id.* at 578.

[208] *See* Montgomery v. Louisiana, 136 S. Ct. 718, 725–26, 736–37 (2016); Miller v. Alabama, 567 U.S. 460, 477–79 (2012); Graham v. Florida 560 U.S. 48, 53, 79 (2010).

[209] *See supra* notes 165–167, 172 and accompanying text.

[210] Simon, *supra* note 16, at 285–86.

and lawyers to promote a commitment to dignity within penality itself."[211] Other scholars have similarly suggested that enhancing the value of dignity in American justice may be a necessary step to move away from unduly harsh punishments.[212]

B. PROPORTIONALITY OF PUNISHMENT TO CULPABILITY

A court can hardly assess whether a punishment is "cruel and unusual" in the abstract and without any frame of reference. Proportionality has historically been a key consideration in theories of punishment examining whether a given sentence fits the crime.[213] Under these circumstances, eviscerating the principle of proportionality from the Eighth Amendment amounts to practically removing the amendment from the Constitution. It is no coincidence that the Eighth Amendment became a dead letter for prisoners precisely during the three decades when the Supreme Court reasoned that no proportionality requirement effectively exists except in capital cases.[214] In all likelihood, the Court would have rejected the juveniles' claims in *Graham*, *Miller*, and *Montgomery* if it had not circumvented the "death is different" doctrine and reinvigorated the proportionality principle that it had last applied in *Solem* back in 1983.[215]

Meanwhile, proportionality has been among the factors that have checked excessive punishments in Europe, as France's case exemplifies. French politicians have clashed over whether the national penal system should emphasize repression or rehabilitation.[216] Nicolas Sarkozy notably cast himself as a law and order conservative.[217] Under his oversight as Minister of the Interior and then President, "[t]he rate of imprisonment rose from 79.2 per 100,000 inhabitants to 99.2" from 2002 to 2012.[218] As of 2018, the French incarceration rate was still approximately 104 per 100,000

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[211] *Id.*

[212] *See, e.g.*, WHITMAN, *supra* note 4 (identifying the greater weight of dignity in continental Europe as a key factor behind its more moderate penal systems).

[213] *See generally* Melissa Hamilton, *Extreme Prison Sentences: Legal and Normative Consequences*, 38 CARDOZO L. REV. 59, 77–78 (2016); Youngjae Lee, *Why Proportionality Matters*, 160 U. PA. L. REV. 1835 (2012).

[214] *See supra* Section I.

[215] Solem v. Helm, 463 U.S. 277, 277 (1983); *see also* Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion) (recognizing that "a punishment is 'excessive' and unconstitutional if it . . . is grossly out of proportion to the severity of the crime").

[216] Jacqueline Hodgson & Laurène Soubise, *Understanding the Sentencing Process in France*, 45 CRIME & JUST. 221, 221–23, 236–37 (2016).

[217] *See generally id.* at 236.

[218] *Id.* at 223.

inhabitants.[219] Despite these fluctuations, France's penal system has remained very moderate compared to the United States, whose incarceration rate is over six times higher.[220] The number of life sentences (with the possibility of parole) imposed in France per year also remained steady under Sarkozy's tenure.[221] The difference between America and France reflects multiple factors, ranging from distinct historical circumstances[222] to a more centrist conception of conservatism in modern-day Europe.[223] But a much greater commitment to proportionality in French sentencing is part of the equation. The French Constitutional Court recognized in 2005 that individualized punishment is enshrined in the nation's constitutional values.[224] Moreover, a vast segment of French politicians and legal practitioners, including prosecutors and judges, have long embraced the substantive analysis of an offender's individual mitigating and aggravating circumstances so that the sentence fits the crime.[225]

Similarly, proportionality in punishment has remained a core principle in Canada, notwithstanding an influential "tough on crime" reform movement. Under Prime Minister Stephen Harper of the Conservative Party, which governed Canada from 2006 to 2015, punitiveness became a central aspect of political rhetoric.[226] Canada further adopted legislation instituting relatively harsh mandatory minimum sentences or restrictions on parole.[227] Nevertheless, Canada's incarceration rate did not increase significantly, partly because judges and other legal actors were skeptical of this punitive streak and resisted efforts to abandon individual sentencing.[228] As in France under President Sarkozy,[229] assessing aggravating and mitigating circumstances to apply a punishment proportional to culpability remained a key value in Canada's penal system. Comparably, in a seminal decision concerning two prominent murder cases, the New Zealand Court of Appeal

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[219] WORLD PRISON BRIEF, *supra* note 39.

[220] *Id.*

[221] *See* Marion Vannier, *A Right to Hope? Life Imprisonment in France*, *in* LIFE IMPRISONMENT AND HUMAN RIGHTS, *supra* note 181, at 205.

[222] *See generally* WHITMAN, *supra* note 4.

[223] *See generally* KINGDON, *supra* note 43, at 55, 72.

[224] Hodgson & Soubise, *supra* note 216, at 240–41.

[225] Vannier, *supra* note 221, at 200, 201, 207; Hodgson & Soubise, *supra* note 216, at 242, 254.

[226] *See* Doob & Webster, *Weathering the Storm?*, *supra* note 190, at 410–11.

[227] *Id.* at 379–83.

[228] *Id.* at 397–410; *see also* Anthony Gray, *Mandatory Sentencing Around the World and the Need for Reform*, 20 NEW CRIM. L. REV. 391, 392-96 (2017) (discussing Canadian Supreme Court decisions finding mandatory sentences unconstitutional).

[229] *See generally* Hodgson & Soubise, *supra* note 216, at 242, 254.

held that applying life without parole under a recently enacted three-strikes statute would be excessive given the defendants' individual circumstances (age, mental health, actions, etc.),[230] and may violate the national Bill of Rights Act's ban on "disproportionately severe treatment or punishment."[231]

This is a far cry from the U.S. Supreme Court's *Harmelin* line of cases, which rejected such substantive analysis and ratified the summary infliction of blatantly disproportional sentences like lifelong incarceration for petty recidivists.[232] It must be noted that these decisions' rejection of proportionality review scarcely stem from an innately distinct conception of constitutionalism in the United States next to France, Canada, and other Western nations. One should be wary of essentialism when analyzing the evolution of American penal norms, which can reflect human agency and historical contingency.[233] Indeed, the Eighth Amendment has encompassed a proportionality principle in other contexts for decades—a double standard suggesting a choice by certain Justices to exclude prison sentences from review. As Justice White's dissent in *Harmelin* observed, "Justice Scalia's position that the Eighth Amendment addresses only modes or methods of punishment is quite inconsistent with our capital punishment cases, which do not outlaw death as a mode or method of punishment, but instead put limits on its application."[234] Justice Souter added that it would be "anomalous" to "suggest that the [text of the] Eighth Amendment makes proportionality review applicable in the context of bail and fines but not in the context of other forms of punishment, such as imprisonment."[235]

The Court eventually chose to apply proportionality review to life without parole in juvenile cases.[236] But it did so using broad language: "The concept of proportionality is central to the Eighth Amendment. Embodied in the Constitution's ban on cruel and unusual punishments is the 'precept of justice that punishment for crime should be graduated and proportioned to

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[230] *See generally* R v. Harrison (2016) NZCA 381, ¶¶ 127–33, 144–58.

[231] *Id.* at 79–84, 101, 107, 111, 114, 119–22; *see also* New Zealand Bill of Rights Act 1990 § 9.

[232] *See supra* Section I.

[233] *See infra* notes 331–339 and accompanying text.

[234] Harmelin v. Michigan, 501 U.S. 957, 1018 (1991) (plurality opinion) (White, J., dissenting).

[235] Ewing v. California, 538 U.S. 11, 33 (2003) (plurality opinion) (Souter, J., dissenting) (quoting Solem v. Helm, 463 U.S. 277, 289 (1983)); *see also Harmelin*, 501 U.S. at 1009 (White, J., dissenting) ("The language of the Amendment does not refer to proportionality in so many words, but it does forbid 'excessive' fines, a restraint that suggests that a determination of excessiveness should be based at least in part on whether the fine imposed is disproportionate to the crime committed.").

[236] *See* Graham v. Florida, 560 U.S. 48, 59 (2010).

[the] offense.'"[237] Additionally, the Court distanced itself from *Harmelin*'s unpersuasive "death is different" doctrine by analogizing life without parole to the death penalty since both condemn people to die in prison.[238] These developments suggest relative convergence with other Western democracies, where the proportionality of punishment is an influential norm.[239]

Going forward, it would be incoherent for the U.S. Supreme Court to strictly limit proportionality review to juvenile cases, as this principle does not become irrelevant the moment when people turn eighteen. Because youth is a mitigating circumstance, a sentence imposed on an adult may reasonably be longer than for an adolescent convicted of the same crime, yet that sentence must still fit the crime. In the absence of a proportionality principle applying to adult prisoners, their sentences may continue to dramatically exceed culpability. Alongside life without parole, mass incarceration has led to the normalization of "virtual life" sentences, namely, prison terms that stretch far beyond the convicted person's life expectancy.[240] Certain courts have thus inflicted sentences spanning hundreds of years, as in the case of a defendant who received 290 years in prison for robberies that netted him approximately $3,000.[241]

C. LEGITIMACY OF PENAL PURPOSE

The *Graham* line of cases acknowledged a longstanding principle: harsh punishments that serve no legitimate penological purpose are suspect. This principle is tied to the proportionality of punishment, yet adds another analytical dimension by assessing whether the state's goal is to oppress the prisoner by inflicting ruthless treatment. Cesare Beccaria, the Italian Enlightenment philosopher, prioritized this principle in his magnum opus *On Crimes and Punishment*, a trailblazing work in criminology that America's Founding Fathers and other prominent thinkers read.[242] "[E]very act of authority between one man and another that does not derive from absolute necessity is tyrannical," Beccaria wrote, cautioning governments against resorting to excessive punishments.[243]

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[237] *Id.* (quoting Weems v. United States, 217 U.S. 349, 367 (1910) (alteration in original)).

[238] *See generally* Miller v. Alabama, 567 U.S. 460, 474–75 (2012).

[239] *See supra* notes 224–231 and accompanying text.

[240] Hamilton, *supra* note 213, at 107.

[241] *Id.* at 110–11, 117.

[242] HENRY F. MAY, THE ENLIGHTENMENT IN AMERICA 118 (1976); John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW J. L. & SOC. POL'Y 195, 212–13 (2009).

[243] CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 8 (David Young trans., 1986).

Despite influencing the likes of Thomas Jefferson, John Adams, Thomas Paine, John Hancock, and Benjamin Rush,[244] Beccaria's principles may have had less concrete influence on the text of the Eighth Amendment[245] than on the law of another nation shaped by Enlightenment ideas: France.[246] In 1789, its revolutionaries inserted in their Declaration of Human Rights and of the Citizen an article stipulating that "[t]he Law must prescribe only the punishments that are strictly and evidently necessary,"[247] echoing Beccaria's definition of a legitimate punishment.[248] Modern French law has adopted the 1789 Declaration as part of its constitutional system.[249] According to William Stuntz, the eminent American scholar, France's Declaration has provided its democracy with more substantive criminal protections than the U.S. Bill of Rights, which primarily consists of procedural safeguards.[250] Banning punishments that are not "strictly and evidently necessary" (or "strictly and obviously necessary," depending on the translation) under the French Declaration entails more lenity than banning only "cruel and unusual punishments" under the Eighth Amendment.[251] Stuntz concludes his comparison by stating that "American law knows nothing like these substantive limits on government power."[252] But does it?

Stuntz's conclusion appears to be an overstatement, as he himself noted that America had incarceration levels comparable to those of European nations until the 1970s.[253] Lenity was not enshrined in the Eighth Amendment's text as much as in the French Declaration, which advances that excessive punishments are illegitimate; yet Stuntz's own magisterial study

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244 Bessler, *supra* note 242, at 19–28.

245 STUNTZ, *supra* note 4, at 74–79.

246 On the influence of Beccaria on French *révolutionnaires*, see CÉCILE BARBERGER, DROIT PÉNAL 5 (1997); JEAN-YVES LE NAOUR, HISTOIRE DE L'ABOLITION DE LA PEINE DE MORT 47, 53 (2011); Robert Badinter, Préface, *in* CESARE BECCARIA, DES DÉLITS ET DES PEINES i, ii (Maurice Chevallier trans., 1991).

247 *See generally* Hodgson & Soubise, *supra* note 216, at 240 (quoting DÉCLARATION DES DROITS DE L'HOMME ET DU CITOYEN art. VIII (Fr. 1789)). "*Déclaration des droits de l'homme et du citoyen*" is either translatable as "Declaration of Human Rights and of the Citizen" or "Declaration of the Rights of Man and of the Citizen." The former translation is arguably more applicable to modern French language.

248 BECCARIA, *supra* note 243, at 8.

249 Hodgson & Soubise, *supra* note 216, at 241; *see also* Pasquale Pasquino, *Classifying Constitutions: Preliminary Conceptual Analysis*, 34 CARDOZO L. REV. 999, 1001 (2013) (discussing the incorporation of the Declaration into French constitutionalism).

250 STUNTZ, *supra* note 4, at 74–79.

251 *Id.* at 77–78.

252 *Id.* at 78.

253 *Id.* at 2–3, 33–34.

reminds us that American justice often applied punishment "sparingly" prior to the mass incarceration era.[254]

The understanding of a legitimate punishment in modern America and France differs partly because the U.S. penal system has grown more populistic.[255] For instance, American judges and prosecutors are usually elected at the local level, although judicial elections are rare by international standards.[256] While this institutional peculiarity long preceded the advent of mass incarceration,[257] it enabled elected judges and prosecutors to campaign by supporting ultra-punitive policies after the "tough on crime" movement emerged in the 1970s.[258] By contrast, French judges and prosecutors are trained civil servants, who are less receptive to political pressure and more driven by policy goals established in consultation with other national experts.[259] The same can be said about other Western societies like Canada, where non-elected judges have resisted political pressure to sentence prisoners more harshly.[260]

From a populist conception of democracy, the greater receptiveness of U.S. officials to public calls for harshness may appear more legitimate than legal systems where experts are mainly in charge. Nevertheless, the American public may be less supportive of draconian punishments than it seems, as many U.S. citizens are ill-informed about criminal justice policy or are swayed by misleading fear-mongering.[261]

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[254] *Id.* at 2, 31, 55, 131, 152, 311.

[255] Regarding the broader populist strand in American political culture, see JOUET, *supra* note 4, at 43–79, 200–03; LIPSET, *supra* note 43, at 19, 46.

[256] *See generally* Jed Handelsman Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 GEORGETOWN L.J. 1351, 1351 n.3 (2010). In France, lower court commercial and labor judges are elected professionals, although they lack jurisdiction over criminal cases. Amalia D. Kessler, *Marginalization and Myth: The Corporatist Roots of France's Forgotten Elective Judiciary*, 58 AM. J. COMP. L. 679, 681–83 (2010).

[257] The legitimacy of judicial elections has been a matter of debate in American society since at least the early nineteenth century, well before the emergence of modern prison population explosion. *See generally* Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 714–25 (1995).

[258] *See generally* Carol S. Steiker, *Capital Punishment and American Exceptionalism*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 57, 77 (Michael Ignatieff ed., 2005). Reform-minded prosecutors have nonetheless been elected after distancing themselves from the "tough on crime" movement. *See generally* David Alan Sklansky, *The Changing Political Landscape for Elected Prosecutors*, 14 OHIO ST. J. CRIM. L. 647 (2017).

[259] Hodgson & Soubise, *supra* note 216, at 224–25, 242.

[260] *See* Doob & Webster, *Weathering the Storm?*, *supra* note 190, at 405–10.

[261] *See generally* JOUET, *supra* note 4, at 201–03; John Gramlich, *Voters' Perceptions of Crime Continue to Conflict with Reality*, PEW RES. CTR. (Nov. 16, 2016), http://www.pewresearch.org/fact-tank/2016/11/16/voters-perceptions-of-crime-continue-to-conflict-with

Furthermore, a draconian punishment is not constitutionally legitimate simply because it might be politically popular. Michael Tonry has described how a factor behind the United States' mass incarceration phenomenon has been extraordinary deference to "whatever punishments policy makers specified, whether or not those policies respected retributive principles or ideas about proportionality, and whether those policies were adopted for substantive reasons or to demonstrate politicians were tough on crime."[262] But the Eighth Amendment cannot persuasively be reduced to the tautology that if the authorities or the public support a particular punishment, then it cannot be "cruel and unusual." If so, why have an Eighth Amendment? Rather, assessing the constitutional legitimacy of a punishment entails assessing its penological purpose.[263]

This is precisely what the Supreme Court did in *Graham*, holding that "[a] sentence lacking any legitimate penological justification is by its nature disproportionate to the offense,"[264] thereby inching toward the Beccarian legitimacy principle recognized in France. Firstly, the Justices concluded that the traditional penal objective of deterrence has diminished weight in juvenile cases in light of neurological and behavioral science showing that juveniles are less capable than adults to grasp the consequences of their actions, leading to impetuous criminal behavior that cannot readily be deterred.[265] Secondly, the traditional penal objective of retribution has diminished legitimacy in juvenile cases because it "relates to an offender's blameworthiness," which the "immaturity, recklessness, and impetuosity" of youth tend to mitigate.[266] Thirdly, permanent incapacitation is a constitutionally suspect objective given evidence that teenagers have significant potential for rehabilitation.[267] Under these circumstances, the

-reality/ [https://perma.cc/7CXA-8LXT]; *see also* Furman v. Georgia, 408 U.S. 238, 362 (1972) (per curiam) (Marshall, J., concurring) ("[T]he question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available.").

[262] Michael Tonry, *Preface*, *in* RETRIBUTIVISM HAS A PAST: HAS IT A FUTURE?, *supra* note 69, at vii.

[263] Constitutional rights or human rights may also be construed as a counter-majoritarian check on abusive power by democratic majorities. JOUET, *supra* note 4, at 220–21.

[264] Graham v. Florida, 560 U.S. 48, 71 (2010).

[265] *See* Miller v. Alabama, 567 U.S. 460, 472–73 (2012).

[266] *Id.* at 472.

[267] *See id.* at 472–73.

Supreme Court reasoned that summarily inflicting life without parole on juveniles harmed them without a valid policy rationale.[268]

While the penological objectives of deterrence, retribution, and incapacitation are more justifiable in adult cases than juvenile ones, they also cannot legitimately justify extreme punishments for adults, such as the fifty-year-to-life sentence that Leandro Andrade received for shoplifting videotapes worth $153.[269] Experts widely agree that "three strikes" laws and other draconian sentencing schemes primarily targeting adults are not reasonably tailored to deter crime.[270] Empirical evidence indicates that far shorter sentences can achieve both general and specific deterrence.[271] Similarly, lengthy prison terms inflicted on adults routinely lack a reasonable relationship to moral culpability.

Mirroring the views of experts, generations of Justices have found the principle of legitimacy relevant to the constitutionality of adults' sentences. When the Supreme Court previously deemed for three decades that "the length of the sentence actually imposed [for a felony] is purely a matter of legislative prerogative,"[272] dissenting Justices objected that a sentence that "makes no measurable contribution to acceptable goals of punishment . . . is nothing more than the purposeless and needless imposition of pain and suffering."[273] For instance, Justice Souter's dissent in *Lockyer* emphasized that a state cannot genuinely defend in the name of public safety a policy resulting in decades of incarceration for a nonviolent adult shoplifter.[274] Justice John Paul Stevens's dissent in *Harmelin* likewise concluded that no legitimate public policy justified a mandatory life without parole sentence for an adult with no prior felony record who had been convicted of cocaine possession, as a "sentence must rest on a rational determination that the punished 'criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator.'"[275]

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[268] The Justices especially made clear that state sentencing authorities had improperly disregarded the mitigating circumstances of the juvenile defendants before deciding to permanently cast them away from society. Montgomery v. Louisiana, 136 S. Ct. 718, 725–26, 736–37 (2016); *Miller*, 567 U.S. at 477–80; *Graham*, 560 U.S. at 53, 79.

[269] Lockyer v. Andrade, 538 U.S. 63, 63 (2003).

[270] *See generally* ZIMRING, HAWKINS & KAMIN, *supra* note 102.

[271] *See generally id.*; Daniel P. Mears et al., *Recidivism and Time Served in Prison*, 106 J. CRIM. L. & CRIMINOLOGY 83 (2016).

[272] Rummel v. Estelle, 445 U.S. 263, 274 (1980); *see also supra* Section I.

[273] Harmelin v. Michigan, 501 U.S. 957, 1013 (White, J., dissenting).

[274] *Lockyer*, 538 U.S. at 81–82 (Souter, J., dissenting).

[275] *Harmelin*, 501 U.S. at 1028 (Stevens, J., dissenting) (quoting Furman v. Georgia, 408 U.S. 238, 307 (1972) (per curiam) (Stewart, J., concurring)).

The presumption of unconstitutionality against harsh practices lacking legitimate policy goals is not limited to criminal punishment. This principle has equally shaped Supreme Court and state court decisions on gay rights.[276] In particular, moral objections to homosexuality, a driving factor behind laws banning same-sex marriages and civil unions,[277] cannot legitimize discrimination.[278] As the Justices concluded in *Obergefell v. Hodges*, the marriages of consenting same-sex adults "pose no risk of harm to themselves or third parties."[279] Banning same-sex marriages therefore serves no legitimate policy goal, but rather "demeans or stigmatizes" gay people.[280]

By the same token, moral support for retribution cannot legitimize extreme punishments for either children or adults. Justice Kennedy had acknowledged this concern in his 2003 speech at the American Bar Association, which suggested awareness that a social desire "to degrade and demean the prisoner" contributed to the gulf between American and European justice.[281] His majority opinion in *Graham* ultimately echoed the perspective of former dissenting Justices, European jurists, and Beccaria when he recognized that a punishment must have a "legitimate penological justification."[282] Announcing a principle relevant to both juvenile and adult cases, Kennedy added that "[c]riminal punishment can have different goals, and choosing among them is within a legislature's discretion . . . . It does not follow, however, that the purposes and effects of penal sanctions are irrelevant to the determination of Eighth Amendment restrictions."[283]

D. HOPE FOR REHABILITATION AND RELEASE

In Dante's *Inferno*, the entrance to hell is marked by an ominous warning: "Abandon every hope, all you who enter."[284] The narrator shudders, observing that "these words I see are cruel."[285] The hopelessness of modern American prisoners condemned to die behind bars concretely illustrates Dante's age-old allegory. Certain inmates facing life without parole indicate

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[276] Simon, *supra* note 16, at 302–04.

[277] Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015) ("Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises . . . .").

[278] *Id.* at 2607.

[279] *Id.*

[280] *Id.* at 2602.

[281] Kennedy, *supra* note 119.

[282] Graham v. Florida, 560 U.S. 48, 71 (2010).

[283] *Id.*

[284] DANTE ALIGHIERI, THE DIVINE COMEDY, VOLUME 1: INFERNO 89 (Mark Musa trans., 2002).

[285] *Id.*

that they would prefer to be executed.[286] While some lifers are resilient, acute psychological distress is an ordinary aspect of their bleak existence.[287]

Modern European nations have been far more inclined than the United States to recognize the severe hardship of lifelong incarceration. In 1977, for example, the German Constitutional Court held that the government violates a prisoner's fundamental rights if it "strips him of all hope of ever earning his freedom."[288] The French Constitutional Court similarly declared, in 1994, that incarceration must aim "not only to protect society and ensure the punishment of the condemned, but also to facilitate his rehabilitation and prepare his eventual reentry into society."[289] For decades, most European democracies avoided condemning prisoners to die without any hope of release.[290] Additionally, certain nations barred life sentences per se, such as Spain, where the longest possible sentence is forty years in prison.[291]

The European Court of Human Rights' 2013 decision in *Vinter* finally held that no member state could condemn people to hopelessly die behind bars.[292] The case involved persons sentenced to life imprisonment for murder in England and Wales.[293] They could only have been eligible for release if they had become "terminally ill or physically incapacitated," among other stringent criteria.[294] The European Judges deemed that these "highly restrictive conditions" barely "could really be considered release at all, if all it meant was that a prisoner died at home or in a hospice rather than behind prison walls."[295] After reviewing the state of international law and the practices of multiple nations, the Judges concluded that imprisonment without a genuine possibility of release is a fundamental human rights

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[286] Jessica S. Henry, *Death-in-Prison Sentences*, *in* LIFE WITHOUT PAROLE, *supra* note 16, at 66, 74–75.

[287] Marie Gottschalk, *No Way Out?*, *in* LIFE WITHOUT PAROLE, *supra* note 16, at 227, 234; Paul H. Robinson, *Life without Parole under Modern Theories of Punishment*, *in* LIFE WITHOUT PAROLE, *supra* note 16, at 138, 157.

[288] BVerfG June 21, 1977, 45 BVerfGE 187, *quoted in* Nilsen, *supra* note 31, at 164.

[289] Cons. Const. no. 93-334 DC, Jan. 20, 1994, ¶ 12.

[290] Vinter, ¶ 68; Simon, *supra* note 16, at 285.

[291] Vinter, ¶ 68 (discussing Spanish law). The longest possible sentence under Spanish law is forty years, yet it may amount to a *de facto* life sentence, depending on the age when the prisoner was convicted. *See* Carmen López Peregrín, *La pena de prisión en España tras las reformas de 2003 y los fines de la pena* (undated), https://www.upo.es/export/portal/com/bin/portal/upo/profesores/mclopper/profesor/1213878047702_la_pena_de_prision_en_espaxa.pdf [https://perma.cc/JU3B-2C4U].

[292] Vinter, ¶ 189.

[293] *Id.* ¶ 12.

[294] *Id.* ¶ 126.

[295] *Id.* ¶ 127.

violation.[296] While the European Court effectively rejected the logic of permanent incapacitation that is commonplace in the United States, it strikingly cited *Graham* as persuasive authority.[297] The citation was succinct, coming as part of a comprehensive survey of international and foreign law, but was significant in light of the tremendous divergence between the European Court of Human Rights and the Supreme Court's penal philosophies in prior decades.

Graham had explicitly held that thrusting the juvenile prisoner into a hopeless predicament was "cruel and unusual": "The State has denied him any chance to [] demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit."[298] Such treatment "deprives the convict of the most basic liberties without giving hope of restoration, except perhaps by executive clemency—the remote possibility of which does not mitigate the harshness of the sentence."[299] The sentence simply offered "no hope" to Terrance Graham, "no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes."[300]

Hopelessness again was at issue during the oral arguments for *Jackson v. Hobbs*, a companion case to *Miller* that concerned life without parole for an Arkansas teenager convicted of felony murder. Justice Ruth Bader Ginsburg told the Arkansas Assistant Attorney General, "[Y]ou're dealing with a 14-year-old being sentenced to life in prison, so he will die in prison without any hope."[301] Justice Sonia Sotomayor pressed on this point by asking "What hope does he have?"[302] The Assistant Attorney General claimed that the juvenile was not deprived of hope because he could apply for executive clemency.[303] The Justices were unconvinced given the rarity of clemency in Arkansas, which Bryan Stevenson, the juvenile's attorney, emphasized in his rebuttal.[304]

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[296] *Id.* ¶ 59–81.

[297] *Id.* ¶ 73 (citing Graham v. Florida, 560 U.S. 48, 48 (2010)).

[298] *Graham*, 560 U.S. at 79.

[299] *Id.* at 69–70.

[300] *Id.* at 79.

[301] Oral Argument (36:22), Miller v. Alabama, *567 U.S. (2012)*, OYEZ (March 20, 2012), https://www.oyez.org/cases/2011/10-9646.

[302] *Id.* at 37:30.

[303] *Id.* at 37:57.

[304] *Id.* at 43:47.

The Court's ensuing decision in *Miller* did not bar life without parole categorically for juvenile homicides, although it found that it cannot be a mandatory sentence partly because that approach would "disregard[] the possibility of rehabilitation."[305] The Court later held in *Montgomery* that the aging petitioner had a constitutional right to seek resentencing because, after being mandatorily sentenced to life without parole as a juvenile, he had "spent each day of the past 46 years knowing he was condemned to die in prison."[306] In the Court's view, such juvenile convicts "must be given the opportunity to show their crime did not reflect irreparable corruption; and, if it did not, their hope for some years of life outside prison walls must be restored."[307]

On this point too, Justice Kennedy seemed to embrace the views of Justices who had dissented against his prior interpretation of the Eighth Amendment. Kennedy's controlling opinion in *Harmelin* had given short shrift to the principle of rehabilitation, stressing that "the Eighth Amendment does not mandate adoption of any one penological theory."[308] When reviewing the *Graham* sentence, however, he wrote that "[t]he penalty forswears altogether the rehabilitative ideal."[309] This mirrored Justice Stevens's dissent in *Harmelin*, which underlined that sentencing an adult to mandatory life imprisonment without parole for cocaine possession "does not even purport to serve a rehabilitative function" and that it is "irrational" to assert that such adult offenders are "wholly incorrigible."[310]

The *Lockyer* dissenters reached the same conclusion, arguing that the nonviolent shoplifter's sentence left him no hope of paying his debt to society: "[A]n 87-year-old man released after 50 years behind bars will have no real life left, if he survives to be released at all."[311] As the defendant had received consecutive twenty-five-year-to-life sentences, the dissenters concluded it was "irrational" to claim that, following his first lengthy sentence, the defendant still "would be so dangerous" that he would need to spend a second stretch of twenty-five years in prison before being eligible for parole.[312]

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[305] Miller v. Alabama, 567 U.S. 460, 478 (2012).

[306] Montgomery v. Louisiana, 136 S. Ct. 718, 736 (2016).

[307] *Id.* at 736–37.

[308] Harmelin v. Michigan, 501 U.S. 957, 999 (1991) (plurality opinion) (Kennedy, J., concurring).

[309] Graham v. Florida, 560 U.S. 48, 74 (2010).

[310] *Harmelin*, 501 U.S. at 1028 (Stevens, J., dissenting).

[311] Lockyer v. Andrade, 538 U.S. 63, 79 (2003) (Souter, J., dissenting).

[312] *Id.* at 82.

Accordingly, *Graham*, *Miller*, and *Montgomery* advanced a principle with potentially profound ramifications: prison sentences inflicted on juveniles cannot negate the value of rehabilitation and possibility of release. As with dignity, proportionality, and legitimacy, the principle of rehabilitation is far from being solely relevant in juvenile cases. Yesteryear the Supreme Court deemed that adolescents could be executed;[313] it has now acknowledged that they are hardly irredeemable.[314] It may eventually recognize that adult prisoners are not, either.

E. AMERICAN PATH DEPENDENCE OR WESTERN CONVERGENCE?

The Supreme Court went from holding for three decades that the Eighth Amendment has virtually nothing to say about draconian prison terms to recognizing key sentencing principles: dignity, proportionality, legitimacy, and rehabilitation. Even though these principles are not age-dependent and resemble those that have made mass incarceration improbable in contemporary Western democracies, jurists have largely reduced *Graham* and its progeny to stepping stones toward reforming juvenile justice, thereby excluding adult prisoners.[315] Before our final section presenting a broader theory on the evolution of American justice, it is worth considering why these landmark precedents may, at first glance, appear to only concern juveniles.

First, practical reasons help explain why *Graham, Miller,* and *Montgomery* have been cabined into a narrow "juveniles are different" doctrine. Eighth Amendment challenges to ruthless sentences inflicted on adult prisoners proved unsuccessful in *Harmelin*, *Ewing*, and *Lockyer*, despite garnering four dissenting votes in each case.[316] Seeing a new opening following *Roper*'s abolition of the juvenile death penalty in 2005, opponents of mass incarceration switched gears by focusing on life without parole for juveniles.[317] Litigators commonly seek narrowly-tailored remedies in an effort to persuade judges. Additionally, the Supreme Court's jurisprudence

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[313] Stanford v. Kentucky, 492 U.S. 361, 380 (1989) (plurality opinion), *overruled by* Roper v. Simmons, 543 U.S. 551 (2005).

[314] *See* Montgomery v. Louisiana, 136 S. Ct. 718, 724 (2016) (quoting Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012)) ("*Miller* determined that sentencing a child to life without parole is excessive for all but 'the rare juvenile offender whose crime reflects irreparable corruption' . . . ."); *Graham*, 560 U.S. at 73 (quoting Roper v. Simmons, 543 U.S. 551, 573 (2005)) ("'It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.'").

[315] *See supra* note 14 and accompanying text.

[316] *See supra* notes 82–112 and accompanying text.

[317] *See Graham*, 560 U.S. at 61 (noting that advocates had raised an issue of first impression).

sometimes moves incrementally in a particular direction, as gay rights illustrate.[318] Litigators were therefore undoubtedly aware that they had a better chance to win test cases incrementally challenging life without parole for juveniles, rather than test cases challenging them for everyone again.[319] But their strategy effectively pitted children against adults, such as by drawing on behavioral and neurological science mitigating teenagers' culpability.[320] This pragmatic litigation tactic reinforced the notion that "juveniles are different," a theme that state legislators later embraced to justify reforms abolishing life without parole for minors.[321]

Second, cabining the aforesaid developments into a narrow "juveniles are different" doctrine may ironically reflect the normalization of harsh justice in America. The doctrine could notably mean that children are not irredeemable, pitting them against incorrigible adults deserving merciless sentences—a zero-sum relationship. This need not be the case. One can imagine an interpretation of "juveniles are different" that would treat age as a mitigating circumstance under the Eighth Amendment, which would be compatible with applying the aforesaid sentencing principles—dignity, proportionality, legitimacy, rehabilitation—to adult prisoners. Conversely, a rigid "juveniles are different" doctrine would create a strict age carve-out excluding adult prisoners from Eighth Amendment protection. It is too early to tell which interpretation will prevail, although the latter would mean that it is not "cruel and unusual" to summarily lock up adults and "throw away the key." Naturally, that was not the intention of reformers like Bryan Stevenson, who litigated *Miller* and is an earnest opponent of mass

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[318] In *Lawrence*, the Court held that sexual relations between men could not be criminalized. Lawrence v. Texas, 539 U.S. 558 (2003). *Lawrence* was a stepping stone toward *Windsor*, which struck the Defense of Marriage Act, a 1996 federal statute excluding same-sex relationships from the definition of marriage. United States v. Windsor, 570 U.S. 744 (2013). Both cases provided foundation for the Court's recognition of same-sex marriage as a constitutional right in *Obergefell*. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[319] Counsel in *Graham* initially sought to abolish life without parole for juveniles in non-murder cases. Br. for Pet'r, Graham, 560 U.S. 48 (No. 08-7412) (2010). After the successful challenge in *Graham*, litigators sought to abolish it for all juveniles. Br. for Pet'r, Jackson v. Hobbs [companion case to *Miller*], 567 U.S. 460 (No. 10-9647); Br. for Pet'r, Miller, 567 U.S. 460 (No. 10-9646). The Justices declined to do so, holding that it could solely be a non-mandatory sentence, as discussed above. But they left the door open for another future categorical challenge, which cannot be excluded given the nationwide movement against life without parole for teenagers. *See generally* CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, RIGHTING WRONGS, *supra* note 13. Due to counsel's efforts, *Montgomery* also subsequently expanded *Graham* and *Miller*'s reasoning. *See generally supra* Section II.A–D.

[320] *See* appellate briefs, *supra* note 319.

[321] *See generally* CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, RIGHTING WRONGS, *supra* note 13, at 4; *see also infra* notes 392–396 and accompanying text.

incarceration.[322] But reform efforts can sometimes backfire, as demonstrated by how certain death penalty opponents helped normalize life without parole by touting it as an alternative to executions.[323] In other words, in a nation where scores of citizens have become inured to world-record incarceration levels,[324] a "progressive" development like the *Graham, Miller,* and *Montgomery* decisions could be interpreted in a way that cements ruthless justice for adults, the truly "bad guys."[325] So far the efforts of children's rights advocates have not backfired, as they have led the Justices toward non-age-dependent Eighth Amendment principles. If these developments ultimately prove fruitless for adult prisoners, it may be because of the notion that they could not conceivably stand for more than "juveniles are different."

Third, historiography helps explain why the academy has devoted limited attention to the relative convergence in penal philosophy between America and other Western democracies, namely European nations, Canada, Australia, and New Zealand. Given the extraordinary magnitude of mass incarceration, scholarship in recent decades has understandably focused on explaining the harshness of American justice and its international divergence, especially from European norms.[326] Moreover, considering the Court's historic reticence to enforce the Eighth Amendment,[327] as well as the fact that criminal justice is largely run at the state and local levels, scholars have justifiably grown skeptical about the Court's capacity to meaningfully address mass incarceration.[328]

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[322] *See* BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 14, 16, 18 (2015).

[323] *See* STEIKER & STEIKER, *supra* note 114, at 211.

[324] A review of public opinion data on imprisonment suggests ambivalence. While numerous Americans are amenable to criminal justice reform, barely half of the public thinks there are too many people in prison. OPPORTUNITY AGENDA, AN OVERVIEW OF PUBLIC OPINION AND DISCOURSE ON CRIMINAL JUSTICE ISSUES 3, 7, 19, 31 (2014).

[325] Regarding the tendency in American society to paint offenders as simply evil people, see JOUET, *supra* note 4, at 194–95, 199, 203, 214–17; Kleinfeld, *supra* note 1, at 1029.

[326] *See supra* note 4 and accompanying text.

[327] *See supra* Section I.

[328] I agree with Marie Gottschalk's observation that, given the harshness of modern American justice, it may be "a mistake to view the *Graham* and *Miller* decisions as major departures from these general trends or to interpret them as signals that the judiciary is the Promised Land in which to roll back life sentences [for adults]." Gottschalk, *supra* note 14, at 357. Yet we will see in Section III that an interrelationship exists between state reforms and Supreme Court decisions in the area of juvenile justice. This suggests that a similar pattern might develop if the Justices reconsider their Eighth Amendment jurisprudence regarding adult prisoners.

All three factors suggest that various forms of path dependence[329] obscured the developments identified above. The first path dependence is predominantly shaped by litigators, the second by punitive mindsets, and the third by the scholarly tendency to focus on the peculiar harshness of modern American justice. Insofar as path dependence drives history, one should not overestimate the significance of the *Graham* line of cases. It is definitely possible, if not plausible, that the Court will decline to extend Eighth Amendment principles of dignity, proportionality, legitimacy, and rehabilitation to adult prisoners. However, one should not underestimate these developments either. *Graham, Miller,* and *Montgomery* might mark a transition toward broadening the constitutional safeguard against "cruel and unusual punishments," which may have a ripple effect on state practices. Twenty-two states have notably abolished life without parole altogether for juveniles, partly by pointing to the Eighth Amendment's expanding scope.[330]

III. IMPERMANENCE: A COMPARATIVE THEORY ON THE EVOLUTION OF AMERICAN JUSTICE

The paradigm shift in American penal philosophy described thus far may reflect a broader phenomenon with potential implications for the future of mass incarceration. In this section, I propose a theory regarding the comparative evolution of criminal punishment to help understand these developments and how penal attitudes are impermanent social constructs. Just as certain elements suggest that mass incarceration has become profoundly ingrained in the United States, other elements suggest that it may not forever remain the face of American justice.

This theory of impermanence revolves around two simultaneous patterns: cyclicality and steadiness of direction. The patterns resemble a seismograph that regularly swings up or down despite moving steadily in a given direction. On one hand, attitudes toward criminal punishment in America and beyond are cyclical, as they historically ebb and flow between repressive and humanitarian aspirations. This may lead to periods of

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[329] While path dependence is a recurrent concept in social theory, James Mahoney has offered an instructive definition: "historical sequences in which contingent events set into motion institutional patterns or event chains that have deterministic properties." J. Mahoney, *Path Dependence in Historical Sociology*, 29 THEORY AND SOCIETY 507, 507 (2000). "The identification of path dependence therefore involves both tracing a given outcome back to a particular set of historical events, and showing how these events are themselves contingent occurrences that cannot be explained on the basis of prior historical conditions." *Id.* at 507–08.

[330] CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, *States that Ban Life without Parole for Children*, *supra* note 14; *see also* CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, RIGHTING WRONGS, *supra* note 13.

divergence or convergence between countries. Nowadays, after a period of considerable divergence due to an ultra-punitive phase in the United States, American penal philosophy may be inching toward principles that have checked draconian prison sentences in other Western democracies: dignity, proportionality, legitimacy, and rehabilitation. On the other hand, we may be witnessing a long-term trend toward limiting or abolishing the harshest criminal punishments in the West. A wider historical lens suggests that, paradoxically, the relative steadiness of this long-term trend may coexist with the unsteadiness of cyclical attitudes toward punishment.

The magnitude of mass incarceration, combined with its peculiar historical and social roots,[331] may lead observers to conclude that harsh justice is innately coded in the "American DNA." Evidence indicates otherwise. While America's state prisoner population exploded by over 700% from the 1970s to the 2010s,[332] its incarceration rate previously was comparable to those of other Western democracies.[333] David Garland's scholarship has instructively warned against essentialism when interpreting the U.S. penal system's peculiarities.[334] His conclusions about America's retention of capital punishment in an age of growing global abolitionism appear applicable to mass incarceration: "Far from being the expression of an unchanging culture, the current American system is the outcome of historical events that unfolded within a distinctive set of institutional

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[331] For diverse theories about the origins of mass incarceration, see *supra* notes 4, 23 and accompanying text.

[332] CHRISTIAN HENRICHSON & RUTH DELANEY, THE PRICE OF PRISONS: WHAT INCARCERATION COSTS TAXPAYERS, VERA INSTITUTE OF JUSTICE 2 (2012).

[333] *See generally* STUNTZ, *supra* note 4, at 2–3, 34.

[334] Garland has further argued against using the "American exceptionalism" framework to describe modern American justice on the ground that it should be reserved for "long-term, widespread, and persistent phenomen[a]." GARLAND, *supra* note 138, at 23. In his view, this framework is inadequate to explain America's retention of the death penalty at a time when all other Western democracies have abolished it, because this distinction "is less than forty years old" and eclipses key nuances, such as significant regional differences in the imposition of capital punishment within the United States. *Id*. From this angle, Garland may likewise object to using "American exceptionalism" to refer to mass incarceration since it is a relatively recent phenomenon as well. I would nonetheless suggest that the exceptionalism framework is instructive to examine modern American justice, provided that the types of nuances that Garland insightfully identifies are taken into account. Indeed, despite opposing the notion that America is an "exception" with regard to capital punishment, Garland expresses similar ideas by describing how America is "a specific variant within a general set" and "an outlier." *Id.* at 23–24. "America's death penalty may not be 'exceptional' but it is certainly distinctive," he concludes, underlining that it stems from "the peculiar ways in which the American state and society are put together." *Id.* at 309.

structures and social processes."[335] Like other dimensions of American exceptionalism,[336] mass incarceration "is not set in stone"[337] as it stems from particular social circumstances and human agency,[338] ranging from the political climate to the nomination of new Justices following tightly contested presidential elections.[339]

Insofar as penal systems are impermanent social constructs, the evolution of capital punishment may shed light on the evolution of draconian prison terms. The path toward the abolition of the death penalty in Western democracies has historically been incremental, encompassing what Garland described as "a reduced range of capital offenses and eligible offenders," a "decline in the frequency of executions," and "the appearance of sharp divisions in public attitudes towards the penalty's propriety."[340] This trend has occurred in the United States notwithstanding the fact that it is the lone Western democracy to retain capital punishment. First, the Supreme Court has abolished the death penalty for certain categories of crimes and offenders. Murder and treason are essentially the sole remaining capital crimes,[341] as the Court concluded that death is an excessive punishment for rape[342] and most accomplices in felony murder cases.[343] It is no longer constitutional to

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[335] GARLAND, *supra* note 138, at 309. For a critique of essentialism, see also Garland, *supra* note 19, at 355, 365–66.

[336] Regarding the definition of American exceptionalism, see *supra* notes 46, 47 and accompanying text.

[337] JOUET, *supra* note 4, at 273.

[338] In addition to Garland, diverse scholars have cautioned against essentialism and fatalism in analyzing the evolution of American justice. *See, e.g.*, Steiker, *supra* note 258, at 774 n.67.

[339] For a discussion of how such factors have shaped the evolution of the U.S. death penalty system, see Steiker, *supra* note 258, at 77.

[340] Garland, *supra* note 19, at 355.

[341] *See* GARLAND, *supra* note 138, at 303; Kristen E. Eichensehr, *Treason in the Age of Terrorism: An Explanation and Evaluation of Treason's Return in Democratic States*, 42 VAND. J. TRANSNATL. L. 1443, 1500–01 (2009).

[342] *See* Kennedy v. Louisiana, 554 U.S. 407, 447 (2008) (finding death penalty unconstitutional for the rape of a child); Coker v. Georgia, 433 U.S. 584, 600 (1977) (plurality opinion) (finding death penalty unconstitutional for the rape of an adult).

[343] *See* Enmund v. Florida, 458 U.S. 782, 801 (1982) (finding death penalty unconstitutional for accomplice felony murder absent "proof that [defendant] killed or attempted to kill" or that he "intended or contemplated that life would be taken"). *But see* Tison v. Arizona, 481 U.S. 137 (1987) (holding that the Eighth Amendment does not prohibit death penalty for accomplice who participates in a felony resulting in murder and whose mental state is reckless indifference). While the Supreme Court "has not conditioned the execution of an actual killer on any culpable mental state," the "execution of felony murderers who kill inadvertently has become 'unusual,'" as only five inadvertent killers have been executed since 1973. Guyora Binder, Brenner Fissell & Robert Weisberg, *Unusual: The Death Penalty for Inadvertent Killing*, 93 IND. L.J. 549, 588–89 (2018).

execute juveniles[344] and the "mentally retarded."[345] Second, the number of death sentences and executions has declined since the start of the twenty-first century;[346] meanwhile, the number of abolitionist states has risen.[347] Third, the death penalty has been a recurrent matter of controversy in American society.[348] As Garland emphasizes, "[t]his trajectory of decline, with minor variations, occurred in the United States just as it did throughout the [W]estern world."[349] Under this framework, America could be seen as a laggard rather than a permanent exception when it comes to the death penalty.

One may draw the hypothesis that this pattern mirrors the evolution of American law toward draconian prison terms. First, the Supreme Court and state authorities have abolished life without parole for certain categories of crimes and offenders. Following *Graham*, life without parole is no longer a constitutional punishment for a juvenile in a nonhomicide case.[350] Under *Miller*, it is also unconstitutional to impose it mandatorily on a juvenile in a homicide case.[351] And twenty-two states have concluded that life without parole should no longer apply in juvenile cases per se, thereby granting them more protections than under the Eighth Amendment.[352] Second, various states have reduced their prison populations.[353] A California ballot initiative illustratively scaled back the state's merciless "three strikes" law.[354] The Supreme Court additionally ordered California, in *Brown v. Plata*, to reduce prison overcrowding because "[a] prison that deprives prisoners of basic sustenance, including adequate medical care, is incompatible with the

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[344] Roper v. Simmons, 543 U.S. 551, 551 (2005).

[345] Atkins v. Virginia, 536 U.S. 304, 304 (2002).

[346] DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2018: YEAR END REPORT 1–5 (2018).

[347] DEATH PENALTY INFO. CTR., *States With and Without the Death Penalty*, https://deathpenaltyinfo.org/states-and-without-death-penalty [https://perma.cc/N5EF-KAXK] (last visited Jan. 19, 2019).

[348] *See* STUART BANNER, THE DEATH PENALTY: AN AMERICAN HISTORY (2009); GARLAND, *supra* note 138.

[349] Garland, *supra* note 19, at 355.

[350] Graham v. Florida, 560 U.S. 48, 82 (2010).

[351] Miller v. Alabama, 567 U.S. 460, 460 (2012).

[352] CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, *States that Ban Life without Parole for Children*, *supra* note 14; *see also* CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, RIGHTING WRONGS, *supra* note 13.

[353] SENTENCING PROJECT, FEWER PRISONERS, LESS CRIME: A TALE OF THREE STATES 1, 2, 8 (2014).

[354] STANFORD LAW SCHOOL THREE STRIKES PROJECT, PROPOSITION 36 PROGRESS REPORT (2014), https://www.threestrikes.org/wp-content/uploads/2018/06/Three-Strike-Project-Prop-36-Progress-Report.pdf [https://perma.cc/95DJ-K56J].

concept of human dignity."[355] That decision may have played a role in reducing California's incarceration rate.[356] Third, a social debate about the propriety of mass incarceration has emerged.[357] The Supreme Court's repeated refusal to find ruthless sentences "cruel and unusual" under the Eighth Amendment between 1983 and 2010 led to pushback from dissenting Justices, lower courts, and prominent experts.[358] A relatively broad range of political leaders, media outlets, traditional civil society organizations, and activist groups have called for reform.[359] A new wave of prosecutors have been elected after opposing mass incarceration.[360] In late 2018, Congress passed a bipartisan federal sentencing reform—the FIRST STEP Act—by an overwhelming margin and with President Donald Trump's support.[361] While the legislation's impact may be limited, it is the product of longstanding efforts to push Congress to address over-punitiveness. Some reformers envision it as a building block toward wider changes.[362]

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[355] Brown v. Plata, 563 U.S. 493, 511 (2011).

[356] Rob Kuznia, *An Unprecedented Experiment in Mass Forgiveness*, WASH. POST (Feb. 8, 2016), https://www.washingtonpost.com/national/an-unprecedented-experiment-in-mass-forgiveness/2016/02/08/45899f9c-a059-11e5-a3c5-c77f2cc5a43c_story.html?utm_term=.ed464b70d3de [https://perma.cc/4T4V-XRC4].

[357] *See* JOUET, *supra* note 4, at 3, 204–07.

[358] *See, e.g.*, Hutto v. Davis, 454 U.S. 370, 375 (1982) (per curiam) (scolding the Fourth Circuit Court of Appeals and a District Court for not following the U.S. Supreme Court's interpretation of the Eighth Amendment); People v. Bullock, 485 N.W.2d 866, 870 (Mich. 1992) (emphasizing that the bar on "cruel or unusual punishment" in the Michigan Constitution has a broader scope than the Eighth Amendment of the U.S. Constitution as interpreted by the Supreme Court); Nilsen, *supra* note 31, at 165 n.262 (discussing the Michigan Supreme Court's pushback against the U.S. Supreme Court in *Bullock*); *see also* Michael J. Zydney Mannheimer, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69, 71 (2012) (describing how 163 experts, including former federal judges, prosecutors, and U.S. Attorneys General, filed an amicus brief in support of a petty offender challenging the constitutionality of his fifty-five-year sentence, to no avail).

[359] *See, e.g.*, Anand Giridharadas, *Momentum on Criminal Justice Repair*, N.Y. TIMES (June 22, 2015), https://www.nytimes.com/2015/06/23/us/momentum-on-criminal-justice-repair.html [https://perma.cc/VZ7H-M9MF].

[360] *See* Sklansky, *supra* note 258.

[361] The acronym stands for "Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person Act." The House and Senate passed the bill by lopsided margins of 358-36 and 87-12, respectively. *See* S.756 - First Step Act of 2018, CONGRESS.GOV, https://www.congress.gov/bill/115th-congress/senate-bill/756/all-actions?q=%7B%22search%22%3A%5B%22%5C%22first+step+act%5C%22%22%5D%7D&r=5&overview=closed#tabs [https://perma.cc/4TQF-4X6V] (last visited Jan. 17, 2019).

[362] *See generally* Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—and What Happens Next*, BRENNAN CTR. FOR JUSTICE (Jan. 4, 2019), https://www.brennancenter.org/blog/how-first-step-act-became-law-and-what-happens-next [https://perma.cc/R6RA-X6NS]; Justin George, *Okay, What's the Second Step?*, MARSHALL PROJECT (Dec. 19, 2018), https://www.themarshallproject.org/2018/12/19/okay-what-s-the-second-step [https://

These three shifts regarding mass incarceration in American society resemble the ones that Garland underlined for the death penalty: narrowed eligibility for harsh punishment, reduced frequency of punishment, and heightened social divide about the punishment's propriety.[363] Assessing how this shift compares to other Western democracies is more challenging than for the death penalty because they have never experienced American-style mass incarceration. Yet the evolution of European penology has been marked by a narrowing scope of repressiveness, limited use of lengthy periods of incarceration, and greater skepticism toward the propriety of incarceration.[364]

That being noted, America's shift on mass incarceration should not be overestimated. The existence of a bipartisan consensus for genuine criminal justice reform was already doubtful years before Donald Trump's Attorney General Jeff Sessions raised eyebrows by directing federal prosecutors to systematically seek the harshest sentences possible.[365] Even though President Trump later backed federal sentencing reform with the FIRST STEP Act, the legislation mainly aims to reduce punishments for select nonviolent offenders.[366] Put otherwise, this legislation covers a segment of

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perma.cc/7789-9RHS]; Charlotte Resing, *How the FIRST STEP Act Moves Criminal Justice Reform Forward*, AM. CIV. LIBERTIES UNION (Dec. 3, 2018), https://www.aclu.org/blog/smart-justice/mass-incarceration/how-first-step-act-moves-criminal-justice-reform-forward [https://perma.cc/7HDU-KS4B].

[363] Garland, *supra* note 19, at 355.

[364] *See supra* Section II. Australia and New Zealand may be relative counter-examples to this trend in the West given that their increasingly harsh penal systems have made more offenders eligible for life sentences, including without parole. Still, their penal systems are drastically more moderate and humane than the United States'. *See generally* Fitz-Gibbon, *supra* note 181, at 75 (discussing life sentences in Australia); Oleson, *supra* note 195, at 278 (noting that "the scope and scale of the New Zealand three-strikes system are modest" compared to U.S. three-strikes laws); Yvette Tinsley & Warren Young, *Overuse in the Criminal Justice System in New Zealand*, INT'L PENAL AND PENITENTIARY FOUNDATION SERIES (forthcoming 2018), https://ssrn.com/abstract=3031128 [https://perma.cc/8RCP-RHUZ] (describing punitive trends in New Zealand); WORLD PRISON BRIEF, *supra* note 39 (indicating that Australia and New Zealand respectively have incarceration rates of 172 and 214 prisoners per resident, compared to 655 prisoners per resident in America).

[365] As I described in *Exceptional America*, talk about a bipartisan consensus for criminal justice reform has existed for at least a decade despite limited change. *See* JOUET, *supra* note 4, at 3–4, 204–07; *see also* Chris Suellentrop, *The Right Has a Jailhouse Conversion*, N.Y. TIMES, Dec. 24, 2006, at E46 (discussing an emerging bipartisan consensus for criminal justice reform); Sari Horwitz & Matt Zapotosky, *Sessions Issues Sweeping New Criminal Charging Policy*, WASH. POST (May 12, 2017), https://www.washingtonpost.com/world/national-security/sessions-issues-sweeping-new-criminal-charging-policy/2017/05/11/4752bd42-3697-11e7-b373-418f6849a004_story.html [https://perma.cc/3HWR-SHHE].

[366] *See generally* Keith Humphreys, *We Have Nothing to Fear from Federal Sentencing Reform*, WASH. POST (Nov. 27, 2018), https://www.washingtonpost.com/business/2018/11/27

federal prisoners, who themselves are a segment of all prisoners nationwide since approximately 91% are in state prisons and local jails.[367] In general, many Democratic and Republican politicians advocating for reform focus almost exclusively on nonviolent offenders, ignoring the fact that most state prisoners were convicted for violent crimes.[368] The misconception that ending the "War on Drugs" will end mass incarceration has also hindered broader reform efforts.[369] America's incarceration rate remains immense.[370] The persistence of violent policing practices,[371] the emergence of a wide surveillance apparatus in the digital age,[372] and other infringements on civil liberties further call into question whether American justice has grown more humane, egalitarian, and democratic.

Moreover, it is relevant to our theory that scarcely predictable swings and backlashes have marked the evolution of American justice in recent decades. When the Supreme Court struck all death penalty statutes nationwide under the Eighth Amendment in 1972, it may have seemed that America was joining other Western democracies in abolishing capital punishment.[373] States reacted by passing new death penalty statutes that the Court approved in 1976.[374] Practically no other modern Western democracy has so far reintroduced capital punishment following its abolition. New Zealand is a noteworthy exception, as it abolished the practice in 1941, briefly reintroduced it in 1950, and permanently abolished it in 1962.[375] For several decades, America now stands as the lone Western democracy to

/we-have-nothing-fear-federal-sentencing-reform/?utm_term=.aa3cc6c7fd4a [https://perma.cc/7LK9-JFHX].

367 WORLD PRISON BRIEF, *supra* note 201.

368 *See* Forman, *supra* note 36, at 24–25.

369 *See supra* note 36 and accompanying text.

370 *See generally* WORLD PRISON BRIEF, *supra* note 39.

371 "The killings of citizens by police in 2016 is a phenomenon in the United States as it is in no other peaceful and fully developed nation on earth." FRANKLIN E. ZIMRING, WHEN POLICE KILL 247 (2017). The peculiar proliferation of firearms in America and the relatedly high rate of assaults on police significantly contribute to this phenomenon. *Id.*

372 As Bernard Harcourt describes, digital media has enabled the rise of a massive surveillance apparatus, although "[n]one of this should come entirely as a surprise. There is a long history of cooperation between tech companies—especially in communications and information delivery—and intelligence in this country and abroad," as illustrated by spying on the American public's telegrams back in the 1920s. BERNARD E. HARCOURT, EXPOSED: DESIRE AND DISOBEDIENCE IN THE DIGITAL AGE 67 (2015).

373 Steiker, *supra* note 258, at 86–88.

374 *Id.*; *see also* Gregg v Georgia, 428 U.S. 153, 231 (1976) (decision reintroducing the death penalty); Furman v. Georgia, 408 U.S. 238, 238 (1972) (per curiam) (decision abolishing the death penalty).

375 FRANKLIN E. ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 9 (1986).

retain capital punishment.[376] Aside from considerable geographic variations,[377] patterns in the usage of the death penalty in American society have been unsteady. After a drop in the 1970s, death sentences and executions surged in the United States, prompting Stuart Banner to observe that "[b]y the end of the twentieth century capital punishment [was] back with a vengeance."[378] Death sentences and executions then dropped again.[379]

Mass incarceration likewise was a hardly foreseeable phenomenon. Until the 1960s, the legal norm and policy goal of rehabilitation was ingrained in the U.S. penal system.[380] This model was mostly repudiated in subsequent decades as the "tough on crime" movement rose, and the prison population exploded. But we saw above that ending mass incarceration has become a matter of recurrent debate in early twenty-first century America. Attitudes toward imprisonment in other Western democracies, such as France,[381] the United Kingdom,[382] Canada,[383] and New Zealand,[384] have also fluctuated between rehabilitative and punitive goals. Certain European leaders advocating harsher justice have even called for emulating America's "tough on crime" policies, illustrating another form of transatlantic convergence.[385] Yet cyclical variations have occurred on a greater scale in the United States than in contemporary Western democracies, which have not experienced mass incarceration. The U.S. penal system is comparatively less stable, partly reflecting broader polarization in modern America about

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[376] JOUET, *supra* note 4, at 218–24; ZIMRING, *supra* note 176, at 27, 39, 46–47.

[377] Profound disparities exist both at the state and county levels. Since 1976 approximately 52% of all executions in the United States stem from barely 2% of its counties. *See* DEATH PENALTY INFORMATION CTR., THE 2% DEATH PENALTY: HOW A MINORITY OF COUNTIES PRODUCE MOST DEATH CASES AT ENORMOUS COSTS TO ALL (2013), https://files.deathpenaltyinfo.org/documents/pdf/TwoPercentReport.f1564408816.pdf [https://perma.cc/RC43-KDNM].

[378] BANNER, *supra* note 348, at 267.

[379] DEATH PENALTY INFO. CTR., *supra* note 346, at 1–6.

[380] *See generally* GARLAND, *supra* note 4, at 20, 58, 62, 143; Tonry, *supra* note 69 at 7–8.

[381] *See generally* Hodgson & Soubise, *supra* note 216, at 221, 221–23, 239–40.

[382] *See generally* GARLAND, *supra* note 4, at 60.

[383] *See generally* Doob & Webster, *Weathering the Storm?*, *supra* note 190, at 410–11, 414–15.

[384] *See generally* John Pratt & Marie Clark, *Penal Populism in New Zealand*, 7 PUNISHMENT & SOC'Y 303 (2005); Tinsley & Young, *supra* note 364, at 17–31. Regarding the abolition, reintroduction, and re-abolition of the death penalty in New Zealand, see also ZIMRING & HAWKINS, *supra* note 375, at 9.

[385] *See* WACQUANT, *supra* note 101, at 7–55 (discussing attempts to "export" harsh American justice to Europe).

whether to extend or radically roll back basic constitutional rights.[386] By demonstrating that U.S. penal attitudes are not locked in stone, however, this state of impermanence suggests that American justice is amenable to the social transformations that have limited punitiveness elsewhere in the West.

The evolution of juvenile justice in the United States epitomizes how paradigm shifts between rehabilitative and repressive concerns have shaped American law. The late nineteenth and early twentieth centuries saw the creation of juvenile court systems aiming to protect children from traditional criminal law's punitiveness.[387] Although early juvenile courts could treat children harshly despite their benevolent rhetoric, they carried a therapeutic mandate.[388] This objective was largely abandoned after the emergence of mass incarceration in the 1970s, when teenagers routinely faced merciless punishments. In particular, the influential "super-predator" theory reversed the original juvenile justice system's conception of teenagers as vulnerable persons in need of treatment, instead painting them as practically worse than adults due to their violent callousness.[389] The main proponent of the "super-predator" scare, the criminologist John DiIulio, ultimately disavowed his own research[390] and joined an *amicus* brief that criminologists filed in *Miller* to oppose life without parole for juveniles.[391]

Building on *Graham*, the Court's decision in *Miller* bolstered a national reform movement leading the number of states banning life imprisonment without parole for juveniles to quadruple between 2012 and 2018.[392] As of October 2019, twenty-two states had banned the practice.[393] They include

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[386] These circumstances reflect particularly profound partisan divisions in American society over a wide range of basic legal and policy issues, including the role of government, wealth inequality, race, religion, and human rights. *See* JOUET, *supra* note 4, at 27–39.

[387] CLIFFORD E. SIMONSEN, JUVENILE JUSTICE IN AMERICA 29 (3d ed. 1991); Sanford J. Fox, *Juvenile Justice Reform: A Historical Perspective*, 22 STAN. L. REV. 1187, 1207 (1970).

[388] *See generally* SIMONSEN, *supra* note 387 at 29, 35; DAVID S. TANENHAUS, THE CONSTITUTIONAL RIGHTS OF CHILDREN: IN RE GAULT AND JUVENILE JUSTICE 3, 8–11 (2011); Fox, *supra* note 387, at 1207.

[389] *See* Elizabeth Becker, *As Ex-Theorist on Young 'Superpredators,' Bush Aide Has Regrets*, N.Y. TIMES, Feb. 9, 2001, at 19.

[390] *Id.*

[391] Brief of Jeffrey Fagan et al. as Amici Curiae in Support of Petitioners, Miller, 567 U.S. at 460 (No. 10-9646), 2012 WL 174240 ("Amicus Brief of Criminologists in Miller").

[392] CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, *Washington State Supreme Court Rules Life Without Parole for Children Unconstitutional* (Oct. 18, 2018), https://www.fairsentencingofyouth.org/washington-state-supreme-court-rules-life-without-parole-children-unconstitutional/ [https://perma.cc/XF6H-KC4C] (noting that five states abolished life without parole for juveniles in 2012, whereas twenty-one had done so by the end of 2018).

[393] CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, *States that Ban Life without Parole for Children*, *supra* note 14.

predominantly liberal states like Connecticut, Massachusetts, and Vermont, as well as predominantly conservative states like Texas, Utah, and Wyoming.[394] Sim Gill, the District Attorney for Salt Lake County, Utah, illustratively declared that the U.S. Supreme Court's decisions inspired "a major paradigm shift in how the state can and will pursue just outcomes in cases involving juveniles who commit serious crimes."[395] He thus embraced the Utah state legislature's decision to eliminate life without the possibility of parole for minors, finding it a "sound policy" because "given time, juveniles can outgrow antisocial adolescent behavior."[396] California reformers equally pointed to *Miller* for support as the state amended its statute on the transfer of juveniles to criminal court by stipulating that judges may consider mitigating circumstances regarding teenage impetuosity and mental development.[397]

Several state courts have drawn upon the U.S. Supreme Court's Eighth Amendment analysis as persuasive authority to find broader rights for juveniles under their state constitutions.[398] In the words of the Iowa Supreme Court, "[w]e have generally accepted the principles enunciated by the United States Supreme Court in the *Roper*, *Graham*, and *Miller* trilogy in our interpretation of article I, section 17 of the Iowa Constitution,"[399] which also forbids "cruel and unusual punishment."[400] In 2016, it held that inflicting life without parole sentences on juveniles was unconstitutional per se under the Iowa Constitution.[401] In 2018, the Washington Supreme Court found this sentence to be categorically "cruel punishment" under the state's constitution.[402] It added that even if meting out life without parole to a teenager were not inherently "cruel," it would be constitutionally "disproportionate" to culpability.[403]

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394 *See* CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, RIGHTING WRONGS, *supra* note 13, at 4.

395 *Id.* at 11.

396 *Id.*

397 S. Rules Comm., B. Analysis, S.B. 382, 2015-16 Reg. Sess. (Cal. Aug. 13, 2015).

398 For a broader discussion of state court decisions spurred by the U.S. Supreme Court's *Graham* line of cases, see Sarah French Russell & Tracy L. Denholtz, *Procedures for Proportionate Sentences: The Next Wave of Eighth Amendment Noncapital Litigation*, 48 CONN. L. REV. 1121 (2016).

399 Iowa v. Sweet, 879 N.W.2d 811, 833–34 (Iowa 2016).

400 IOWA CONST. art. I, § 17.

401 *Sweet*, 879 N.W.2d at 811.

402 Washington v. Bassett, 428 P.3d 343, 352-55 (Wash. 2018); *see also* WASH. CONST. art. I, § 14.

403 *Bassett*, 428 P.3d at 354–55.

Because criminal justice in America is primarily run at the state and local levels, scholars have correctly underlined that neither the U.S. Supreme Court nor the federal government as a whole can singlehandedly put an end to mass incarceration.[404] At the same time, the evolution of state juvenile justice in the aftermath of *Graham*, *Miller*, and *Montgomery* demonstrates that a symbiotic relationship can exist between federal and state law—to boot one tied to the Eighth Amendment's evolution.

These developments should not obscure how American juvenile justice remains exceptionally harsh by international standards.[405] By some measures, "the gulf in incarceration rates between America and other Western democracies nowadays is even worse for children than for adults."[406] For example, the overall incarceration rate in the United States is respectively nine times and eleven times higher than the rate for Germany and Sweden.[407] But the U.S. juvenile incarceration rate is respectively fourteen times and eighty-four times higher than for these nations.[408] The rest of the Western world bans life sentences and other lengthy prison terms for juveniles.[409] By comparison, the U.S. Supreme Court has taken a limited step in that direction. In *Miller*, the Justices declined to categorically abolish life without parole for juveniles.[410] Beside (nonmandatory) life without parole in murder cases, adolescents can still receive ordinary life sentences (with the possibility of parole) or extremely lengthy prison terms (say twenty

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[404] For instance, John Pfaff has argued that "[t]he federal government cannot end mass incarceration. Ending it will require state-by-state, even county-by-county fights." John Pfaff, *Bill Clinton Is Wrong about His Crime Bill. So Are the Protesters He Lectured*, N.Y. TIMES MAGAZINE (Apr. 12, 2016), http://www.nytimes.com/2016/04/12/magazine/bill-clinton-is-wrong-about-his-crime-bill-so-are-the-protesters-he-lectured.html?partner=bloomberg [https://perma.cc/2UUB-H6A7]; *see also* Gottschalk, *supra* note 14, at 357. By the same token, I previously emphasized that "profound change will probably have to happen at the state and local level." JOUET, *supra* note 4, at 204.

[405] "[M]any juvenile justice advocates and scholars" view America as "a problematic case not to be followed due to its more punitive approach to juvenile cases." Franklin E. Zimring and Máximo Langer, *One Theme or Many? The Search for a Deep Structure in Global Juvenile Justice*, *in* JUVENILE JUSTICE IN GLOBAL PERSPECTIVE 383, 401 (Zimring, Langer & David S. Tanenhaus eds., 2015).

[406] JOUET, *supra* note 4, at 201.

[407] WORLD PRISON BRIEF, *supra* note 39.

[408] NEAL HAZEL, CROSS-NATIONAL COMPARISON OF YOUTH JUSTICE, YOUTH JUSTICE BOARD FOR ENGLAND AND WALES 59 (2008).

[409] JOUET, *supra* note 4, at 218–19.

[410] Miller v. Alabama, 567 U.S. 460, 489 (2012).

to fifty years) for other types of convictions.[411] Stark racial disparities persist, including in states where the reform movement has gained traction.[412]

Certain states have also resisted the Supreme Court's directive to reconsider draconian juvenile punishments. In 2018, the Louisiana Parole Board refused to release the prisoner at the heart of the prominent *Montgomery* ruling, in which the Justices decided to retroactively apply *Miller*'s holding prohibiting life without parole as a mandatory sentence for a child.[413] Henry Montgomery, who is African-American, was seventy-one years old by the time the parole board reviewed the mandatory life without parole sentence he received at seventeen for murdering a police officer. The Board voted by a 2-1 margin to keep him behind bars.[414] Furthermore, prosecutors in Louisiana, as in numerous other states, retain considerable discretion to pursue draconian juvenile sentences. Louisiana prosecutors have sought life without parole in one third of the 258 juvenile cases eligible for resentencing under *Montgomery*, namely the same sentence as before.[415]

Nevertheless, since *Montgomery*, states have halved the number of persons serving juvenile life without parole, both through resentencing hearings and state legislative reforms.[416] Alongside the twenty-two states that have abolished this punishment, another six did not use it as of October 2019.[417] These developments constitute a shift away from the ultra-punitive ideology that characterized juvenile justice for several decades in the age of the "super-predator" theory[418] and a relative return toward the therapeutic mandate that juvenile justice carried before mass incarceration emerged.[419]

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411 JOUET, *supra* note 4, at 218–19.

412 CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, *MONTGOMERY* MOMENTUM: TWO YEARS OF PROGRESS SINCE *MONTGOMERY V. LOUISIANA* 4 (2018).

413 Grace Toohey, *Board Denies Parole to Man Who Served More Than 50 Years After Killing Deputy When He Was Juvenile*, ADVOCATE (Baton Rouge) (Feb. 19, 2018), https://www.theadvocate.com/baton_rouge/news/courts/article_acca953e-1579-11e8-aa66-1b036f45b902.html [https://perma.cc/894K-SCLK].

414 *Id.*

415 LA. YOUTH JUSTICE COALITION, *Louisiana Prosecutors Buck Supreme Court Mandates Regarding Children* (Nov. 2, 2017), http://www.laccr.org/youth-justice/?jjpl_newspost=5746 [https://perma.cc/K9TP-J4E9].

416 CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, *supra* note 412; *see also* JUVENILE SENTENCING PROJECT, *Juvenile Life Without Parole Sentences in the United States: November 2017 Snapshot* (Nov. 20, 2017), https://www.juvenilelwop.org/wp-content/uploads/November%202017%20Snapshot%20of%20JLWOP%20Sentences%2011.20.17.pdf, [https://perma.cc/9Q65-C9ZD].

417 CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, *States that Ban Life without Parole for Children*, *supra* note 14.

418 *See* Becker, *supra* note 389.

419 *See supra* notes 387–388 and accompanying text.

From this historical perspective, the evolution of American justice appears to reflect societal instability rather than an immutable status quo.

Yet how does one reconcile this instability with the hypothesis that America might be on a parallel trajectory as other Western democracies in narrowing eligibility for the harshest prison terms, reducing the frequency of their application, and facing a heightened social divide about these punishments' propriety?[420] Instability and steadiness of direction may seem to be mutually exclusive.

In reality, it is possible for a society's penal system to historically move in a particular direction, such as by gradually eliminating harsh punishments, and for penal attitudes in that society to simultaneously fluctuate between repressive and humanitarian concerns. Political science data reflecting the existence of cycles in American politics provide a lens into this phenomenon. Since the 1950s, the political climate has fluctuated between the left and right.[421] The public's mood has additionally swung to the right when liberals were in power, and to the left when conservatives were.[422] Attitudes toward crime can similarly be more or less conservative or liberal depending on the period.[423] This situation is not limited to the United States. Illustratively, France abolished the death penalty in 1981, and its modern penal system seldom metes out lengthy prison sentences.[424] In past decades, changes in the French political climate have nonetheless contributed to the periodic rise and fall of politicians advocating a harsher penal system.[425] Like a seismograph moving steadily forward notwithstanding how its needle can swing up or down, French law has gone in a given direction despite how the social climate swings between repressive or humane concerns. This does not signify that French justice is necessarily on the path to progress, as Michel Foucault's analysis of subtle forms of modern social control demonstrates.[426] The analogy to the steady direction of a seismograph also has limitations. Because the law is a social construct, its direction may someday reverse itself altogether or lead to uncharted territory. Contrary to Francis Fukuyama's theory, it is doubtful that the advent of liberal democracy in the West will mark the "end of history."[427] For instance, the rise of far-right European

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[420] Garland, *supra* note 19, at 355.

[421] LARRY BARTELS, UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE 289–90 (2d ed. 2016).

[422] *Id.*

[423] *See generally* JOUET, *supra* note 4, at 195–207.

[424] *See generally* Hodgson & Soubise, *supra* note 216, at 233.

[425] *See generally id.* at 223, 236–37.

[426] *See* FOUCAULT, *supra* note 174.

[427] FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992).

political parties aiming to institute illiberal democracies or authoritarian regimes, dismantle the European Union, and repeal human rights standards, including international law requiring E.U. members to abolish the death penalty,[428] readily belie rigid historicism.[429] History does not follow a set of laws. Still, the law has a history. Scholars can identify trends, patterns, and fluctuations. None are invulnerable to change but they may exist for a historical period, which may range from decades to centuries or the foreseeable future.

How does this account relate to seminal theories regarding the evolutionary trajectory of criminal punishments in liberal democracies? Émile Durkheim predicted that punishments would milden over time due to the elimination of corporal sanctions, the death penalty's decline, and the normalization of incarceration as a mode of punishment.[430] As we saw above, Durkheim considered that greater respect for the human dignity of the prisoner played a role in this process.[431] Foucault concurred that liberal democracies gradually became less brutal in their modes of punishment yet called into question Durkheim's theory of increasing mildness.[432] Nonviolent punishments, in Foucault's view, are primarily "a new tactic of power" aiming to control prisoners rather than expand their individual

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[428] E.U. membership requires abolition consistently with its Charter of Fundamental Rights, which states, "No one shall be condemned to the death penalty, or executed." Charter of Fundamental Rights of the European Union art. 2, Dec. 7, 2000, 2000 O.J. (C 364) 1; *see also* PAOLO PASSAGLIA, L'ABOLITION DE LA PEINE DE MORT: UNE ÉTUDE COMPARÉE 145–47 (2012). The Council of Europe (C.O.E.), a distinct body comprising forty-seven member states, has also made abolition a cornerstone of its mission. *See* ZIMRING, *supra* note 176, at 25–29, 36. The European Court of Human Rights, a C.O.E. institution, interprets the European Convention on Human Rights. An optional 1983 protocol to the Convention abolishes the death penalty except in wartime, whereas a 2002 protocol abolishes it in all circumstances. Nearly all member states have ratified them. *See* Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty in All Circumstances, May 3, 2002, Europ. T.S. No. 183 (ratified by all member states except Armenia, Azerbaijan, and Russia); Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Apr. 28, 1983, Europ. T.S. No. 114 (ratified by all member states except Russia). To place Europe's abolitionist foreign policy in a wider analytical context, see also Anu Bradford & Eric A. Posner, *Universal Exceptionalism in International Law*, 52 HARV. INT'L L. J. 1, 6 (2011) (arguing that "the European position is just one among many approaches to international law that reflect a mixture of national self-interest and national (as opposed to universal) values. The United States looks less distinctive when compared to the world as a whole, than when it is compared only to the European democracies.").

[429] Regarding the definition of historicism, see *supra* note 21.

[430] Durkheim, *supra* note 26, at 77–78, 80.

[431] *See id.* and accompanying text.

[432] FOUCAULT, *supra* note 174, at 31.

liberty.[433] The theory of impermanence advanced in my Article appears compatible with both Durkheim and Foucault's claims. If Western democracies are converging in reducing the scope of repressiveness, it may reflect either, or perhaps both, a Durkheimian trend toward milder punishments and a Foucauldian trend toward insidious forms of social control.

My theory evokes a seismograph that regularly swings up or down while moving steadily in a particular direction. American justice may cyclically oscillate between repressive or humanitarian aspirations and simultaneously converge with other Western democracies in gradually limiting or abolishing the harshest punishments over the long term. On a seismograph, a terrible earthquake may occur. This may be one way to perceive mass incarceration—an intense social shock but not the permanent essence of American punishment. On the other hand, it could be that mass incarceration was such a profound shock that it has fundamentally destabilized and altered American justice. Ideological proclivities, discriminatory motives, institutional dynamics, and political incentives to routinely inflict harsh punishments may persist. Nevertheless, even if mass incarceration lasts, the theory may hold true for the gradual abolition of the harshest punishments in the United States, including life without parole and the death penalty. In any event, neither of these potential scenarios signifies that utopia awaits. Social injustices abound in modern Europe, despite the absence of mass incarceration, life without parole, and executions.

In sum, the paradigm shift in American penal philosophy may reflect more than a shift at the Supreme Court, including the evolving judicial philosophies of Anthony Kennedy and other influential Justices. It might therefore continue over time, notwithstanding Kennedy's retirement and replacement by Brett Kavanaugh, a Trump appointee. In addition to the Eighth Amendment's broadening interpretation, we saw that non-negligible reforms have occurred at the state level, and that the long-term trajectory of American justice might be relatively consistent with wider developments in Western sensibilities. The disproportional attention devoted to the idiosyncrasies of swing Justices has not only overshadowed these patterns, but also the fact that idiosyncrasies are far from unique to the United States. At first glance, one may likewise be tempted to dismiss the growing importance of dignity in German law[434] as merely the product of soul-searching and atonement for the Holocaust and other atrocities of the Third

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[433] *Id.* (author's translation).

[434] *See* Luc Heuschling, *La dignité de l'être humain dans la jurisprudence constitutionnelle allemande*, *in* LA DIGNITÉ SAISIE PAR LES JUGES EN EUROPE 115, *supra* note 160, 115–27.

Reich. While these peculiarities have partly shaped the evolution of German law,[435] dignity has gained significance in diverse Western societies.[436] Similarly, one may be inclined to claim that France's abolition of the death penalty in 1981 reflected nothing more than the election of President François Mitterrand and his Socialist government that year, after the left-wing had been out of power for several decades.[437] Such a "Mitterrand effect" might indeed be the most immediate reason why France abolished capital punishment in 1981 and not earlier. However, a wider analytical framework demonstrates that France's abolition of the death penalty is consistent with a trend in the Western world toward reducing the scope of the harshest punishments. Each Western democracy plausibly has its own version of America's "Kennedy effect," France's "Mitterrand effect," or Germany's "Holocaust atonement effect," namely historically contingent factors involving human agency that played a role in penal reform. These factors should not eclipse broader trends in diverse Western societies, which may inch forward on a rather comparable path through different social circumstances. The United States does not appear to be a permanent exception to this trend.[438] At the very least, this historical and comparative perspective may provide a more nuanced picture of American exceptionalism in the age of mass incarceration.

CONCLUSION

If mass incarceration were an edifice, its pillars would include the negation of human dignity, the disproportionality of punishment to culpability, the pursuit of illegitimate policy objectives, and hopelessness for the prisoner whose rehabilitation is irrelevant. The Supreme Court's landmark decisions in *Graham*, *Miller*, and *Montgomery* challenged all these pillars of mass incarceration.[439] While they did so in juvenile life without

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[435] *Id.* at 115, 119. The concept of dignity in modern German law has multiple roots besides repentance for the Nazis' atrocities, as it predated the Third Reich's rise. *See id.* at 115–17, 120, 125–27.

[436] *See, e.g.*, *id.* at 120–23 (noting that the advent of dignity in German law tended to parallel its growing influence in Western Europe and other regions, especially in the post-World War Two era); *see also supra* Section II.A (describing the growing influence of dignity in the penal systems of Western democracies).

[437] *See generally* ZIMRING, *supra* note 176, at 22 (analyzing how France's abolition reflected a European shift, although Mitterrand's election led to the national reform).

[438] *See* Garland, *supra* note 19, at 355.

[439] Empirical evidence indicates that systemic racial discrimination is another driving factor behind mass incarceration, although the Court has been disinclined to address this issue for decades. In comparison, Eighth Amendment jurisprudence has evolved significantly since *Graham*. *See supra* note 37 and accompanying text.

parole cases, their reasoning could largely apply to adults facing draconian prison terms.

The treatment of age nonetheless remains a key point of divergence between European and American punishment, as the Eighth Amendment may be evolving toward a strict age carve-out separating adolescent from adult prisoners. This outcome would partly reflect the focus on neurological and behavioral science that the Justices drew upon in concluding that juveniles are more impulsive than adults and grow more mature with age.[440] As Rachel Barkow noted, "social science data about the reduced culpability of juveniles" may have "tipped the scales" in *Graham* and *Miller*.[441] "Without similar data about the capacity for change in adults, it is unlikely that the Supreme Court will want to take the same categorical leap" in cases involving adults.[442] *Graham* and its progeny could thereby lead to a rigid "juveniles are different" doctrine that would not extend these Eighth Amendment protections to adult prisoners. In fact, by pitting malleable children against supposedly irredeemable adults, the "juveniles are different" framework could serve to rationalize grossly excessive prison terms for those over eighteen.[443]

Even though a detailed discussion of age carve-outs is beyond this Article's scope, it is relevant that the narrow "juveniles are different" doctrine rests on an incomplete understanding of the relationship between age and crime. Firstly, the prefrontal cortex of the brain regulating impulse control does not complete its maturation process until approximately the mid-twenties.[444] Secondly, it is well established that human beings in America and other Western societies tend to "age out" of crime, as the crime rate rises in adolescence, peaks around twenty years old, and then gradually declines before flattening by the fifties.[445] These two scientific elements call into

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[440] *See generally* Miller v. Alabama, 567 U.S. 460, 471–72 (2012); Graham v. Florida, 560 U.S. 48, 69 (2010).

[441] *See* Barkow, *supra* note 31, at 51.

[442] *Id.*

[443] *See supra* Section II.E.

[444] LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 6 (2014). Dr. Steinberg, an expert that the Supreme Court cited, has therefore called for extending the definition of "adolescence" to encompass people aged eighteen to twenty-five. *Id; see also Miller*, 567 U.S. at 471 (citing Laurence Steinberg & Elizabeth S. Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 AM. PSYCHOLOGIST 1009, 1014 (2003)); Roper v. Simmons, 543 U.S. 551, 569 (2005) (citing the same study).

[445] *See* Steinberg, *supra* note 15, at 515–16. Regarding the "aging out" phenomenon, see also STEINBERG, *supra* note 444, at 88; Gottschalk, *supra* note 14, at 235–36; Robert Weisberg, *Meanings and Measures of Recidivism*, 87 S. CAL. L. REV. 785, 789–90, 804 (2014).

question a categorical cutoff under which the Eighth Amendment's bar on "cruel and unusual punishments" would apply to certain draconian prison terms inflicted on juveniles but fully exclude people once they turn eighteen under the pretense that adult offenders are normally irredeemable, unlike children. In other words, the rigid "juveniles are different" doctrine is inconsistent with the very body of science from which it stems.

The focus on the differences between juveniles and adults in the aftermath of *Graham* has overshadowed a measure of convergence between America and other Western democracies after decades of considerable divergence. We saw in this Article that three relative shifts relevant to mass incarceration in the United States are analogous to the shifts that David Garland observed concerning the evolution of the death penalty in the West: narrowed eligibility for punishment, reduced frequency of punishment, and heightened social divide about the punishment's propriety.[446]

My comparative theory regarding the evolution of criminal punishment and Western sensibilities suggests a state of impermanence. American justice may cyclically ebb and flow between repressive or humanitarian approaches and simultaneously converge with the rest of the West in limiting or abolishing the harshest punishments over the long term. Divergence continues to greatly exceed convergence and the ethos of modern American justice helps explain mass incarceration,[447] but norms are social constructs. A lengthy status quo can sometimes appear as an eternal state of affairs, yet it seldom is.

The history of modern criminal justice scholarship sheds light on why these patterns have received insufficient attention. The exceptional punitiveness of modern American law has led scholars to concentrate on its divergence from Europe. This has at times fostered both fatalism and essentialism about the irredeemable ruthlessness of American justice. A profound divergence *does* exist nowadays, as my own scholarship has emphasized,[448] although a few generations ago American justice was not drastically harsher than in Europe or elsewhere in the West.

Should America keep converging with other Western democracies in coming decades, the attenuation or end of mass incarceration will not herald utopia. Imprisonment is not the sole form of harsh social treatment. A just penal system is an ideal that may always remain as elusive as genuine democracy. Societies may still inch toward these ideals.

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[446] Garland, *supra* note 19, at 355.

[447] For a cogent description of distinct norms in modern American and European justice, refer to Kleinfeld, *supra* note 1.

[448] JOUET, *supra* note 4, at 194–231.

Time will tell whether the ongoing developments in American penal philosophy will have broader implications for adult prisoners or whether they will remain mostly limited to juvenile justice. The history of American criminal punishment, like perhaps all of history, can reflect unpredictable swings, backlashes, regressions, and transformations. So far, the Supreme Court has contributed to a relevant paradigm shift. Due to an oft-overlooked symbiotic relationship between federal and state law, the Justices' seminal juvenile decisions bolstered state reform movements.[449] Certain states that once led the nation in passing merciless juvenile sentencing laws, such as Texas, categorically abolished life without parole for minors.[450] This historic reversal suggests that a future paradigm shift regarding the rights of adult prisoners cannot be dismissed.

[449] *See supra* notes 14, 393–401 and accompanying text.

[450] CAMPAIGN FOR THE FAIR SENTENCING OF YOUTH, RIGHTING WRONGS, *supra* note 13, at 4; *see also* Amicus Brief of Criminologists in Miller, *supra* note 391, at 30 ("Texas greatly increased its incarcerated juvenile population" between 1997 and 2007).