State Constitutionalism and the Crisis of Excessive Punishment

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ABSTRACT: Fully addressing the mass incarceration crisis in the United States requires correctly identifying and accounting for the institutions that are responsible for it and that are positioned to effect change. While more than 113 million people in the United States are impacted by the criminal justice system, this Article argues that mass incarceration is more than a national crisis; it is also an acute local issue. Ninety percent of people confined in U.S. prisons are confined under state laws, procedures, and norms created by state legislative and executive branches, and thirty-four individual U.S. states have an incarceration rate higher than any country other than the U.S. itself. While a growing popular and scholarly movement is examining the political intractability of mass incarceration, this Article argues that the role of state courts and state constitutions is missing from the debate.

Drawing on two burgeoning movements—the movement to end mass incarceration and the reemerging significance of state constitutionalism—this Article argues that state constitutionalism is critical for curbing the excessive punishment regimes that drive mass incarceration. The Article evaluates state courts' quiet divestment of independent state constitutional interpretation in the years following incorporation, outlining the unique issues posed by constitutional unitarism for limiting excessive punishment. Motivated by recent developments in state courts, the Article highlights the growing support for, and the potential of, independent state constitutionalism for preventing excessive punishments and addressing the mass incarceration crisis. In doing so, the Article offers a path forward, sketching a doctrinal trajectory for state courts to use when interpreting their state constitutional provisions limiting excessive punishments—a path that respects federal developments while also capturing the localism of criminal law and emphasizing

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the potential of state courts as transformative institutions in reducing mass incarceration.

INTRODUCTION

This Article relies on two burgeoning movements in U.S. legal and political culture—the effort to end mass incarceration[1] and the reemerging significance of state constitutionalism[2]—to argue that state constitutionalism is critical for curbing the excessive punishments that drive mass incarceration.

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1. *See generally, e.g.*, Elizabeth Weill-Greenberg, *How Chesa Boudin Is Pursuing His Promise to Reduce Incarceration*, THE APPEAL (Mar. 18, 2021), https://theappeal.org/chesa-boudin-san-francisco-district-attorney-reduce-mass-incarceration-criticism [https://perma.cc/TLP3-2PG5] (discussing "the San Francisco DA's policies [that] have kept people out of jails and prisons"); Kerry L. Haynie, *Containing the Rainbow Coalition: Political Consequences of Mass Racialized Incarceration*, 16 DU BOIS REV. 243 (2019) (providing that mass incarceration stifles minority group's political power); JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017) (arguing that there are other causes of mass incarceration than those typically attributed); DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR (2019) (offering options beyond imprisonment); MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010) (arguing that mass incarceration is comparable to modern day Jim Crowe laws); EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2019) (discussing the prosecutorial role in mass incarceration); RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019) (arguing that criminal justice policy should be based on a model driven by data and expertise rather than the electorate); William W. Berry III, *Eighth Amendment Presumptions: A Constitutional Framework for Curbing Mass Incarceration*, 89 S. CAL. L. REV. 67 (2015) (discussing constitutional presumptions); Andrew Manuel Crespo, *No Justice, No Pleas: Subverting Mass Incarceration Through Defendant Collective Action*, 90 FORDHAM L. REV. 1999 (2022) (discussing plea bargaining as a solution to mass incarceration); Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1370 (2017) ("The catalogue of dysfunction starts with mass incarceration, prison conditions, policing, and—the site at which those three lines intersect—racial justice.").

2. *See generally, e.g.*, JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018) (discussing how state constitutions can protect individual liberty); MICHAEL P. FIX & BENJAMIN J. KASSOW, U.S. SUPREME COURT DOCTRINE IN THE STATE HIGH COURTS (2020) (discussing the way state supreme courts utilize U.S. Supreme Court decisions); JOHN DINAN, STATE CONSTITUTIONAL POLITICS (2018) (providing a definitive survey of rights amendments); Thomas B. Bennett, *State Rejection of Federal Law*, 97 NOTRE DAME L. REV. 761 (2022) (providing examples of state supreme courts rejecting U.S. Supreme Court precedent); Leonore F. Carpenter & Ellie Margolis, *One Sequin at a Time: Lessons on State Constitutions and Incremental Change from the Campaign for Marriage Equality*, 75 N.Y.U. ANN. SURV. AM. L. 255 (2020) (discussing state courts as an avenue for pursuing civil rights advocacy); Erwin Chemerinsky, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695 (2010) (arguing that state courts are not the best avenue to pursue civil rights as they cannot be decided under the U.S. Constitution); Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859 (2021) (discussing state constitutions as a solution to anti-democratic behavior); Neal

The incarceration crisis in the United States "is one of the most pressing civil rights issues of our time."[3] More than half of all adults—113 million Americans—have had a family member locked away in jail or prison.[4] And while the prism of national politics largely shapes the discourse of mass incarceration,[5] the problem with viewing mass incarceration through a national lens is that it obscures the reality that mass incarceration is largely state-created and state-enforced.[6] Ninety percent of the people in U.S. prisons are

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Devins, *State Constitutionalism in the Age of Party Polarization*, 71 RUTGERS U. L. REV. 1129 (2019) (discussing the ability of state courts to grant individual rights); Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323 (2011) (exploring the interaction between federal and state constitutional law); Alexander Reinert, Joanna C. Schwartz & James E. Pfander, *New Federalism and Civil Rights Enforcement*, 116 NW. L. REV. 737 (2021) (exploring the granting of civil rights at the state level); Heather K. Gerken, *Federalism 3.0*, 105 CAL. L. REV. 1695 (2017) (exploring federalism historically and discussing where we should go in the future); David Schleicher, *Federalism and State Democracy*, 95 TEX. L. REV. 763 (2017) (discussing second order elections). *But cf.*, Jonathan L. Marshfield, *America's Misunderstood Constitutional Rights*, 170 U. PENN. L. REV. 853, 854 (2022) (arguing that "state constitutional rights are not built to provide an alternative corpus of meaningful counter-majoritarian protections—at least not in the same way as federal constitutional rights.").

3. Press Release, Econ. Pol'y Inst., Mass Incarceration Is One of the Most Pressing Civil Rights Issues Today (Jan. 16, 2015), https://www.epi.org/press/mass-incarceration-is-one-of-the-most-pressing-civil-rights-issues-today [https://perma.cc/Q935-7YK6] ("The disproportionate incarceration rate of minorities in general, and blacks in particular, is one of the most pressing civil rights issues of our time."); Nicole D. Porter, *Unfinished Project of Civil Rights in the Era of Mass Incarceration and the Movement for Black Lives*, 6 WAKE FOREST J.L. & POL'Y 1, 1 (2016) (providing that "the destructive effects of mass incarceration and excessive punishment are visited disproportionately upon individuals and communities of color and reinforce that the project of the civil rights revolution remains unfinished" (citing Marc Mauer & Meda Chesney-Lind, *Introduction*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 2 (Marc Mauer & Meda Chesney-Lind eds., 2002))); Albert W. Dzur, *An Introduction: Penal Democracy*, 23 THE GOOD SOCIETY 1, 1 (2014) ("The United States is the 'world champion' in incarceration . . . .").

4. BRIAN ELDERBROOM, LAURA BENNETT, SHANNA GONG, FELICITY ROSE & ZOË TOWNS, EVERY SECOND: THE IMPACT OF THE INCARCERATION CRISIS ON AMERICA'S FAMILIES 9 (2018), https://www.publicwelfare.org/wp-content/uploads/2019/04/CJ-EverySecond.FWD_.us_-December-Report-on-family-incarceration.pdf [https://perma.cc/ZVC3-898E].

5. *See* WENDY SAWYER & PETER WAGNER, PRISON POL'Y INITATIVE, MASS INCARCERATION: THE WHOLE PIE 2020 (2020), https://www.prisonpolicy.org/reports/pie2020.html [https://perma.cc/4AFW-UHW6]; Erin Peterson, '*What Can We Do to Help Create 150 Years of Change in 10 Years?*', INST. TO END MASS INCARCERATION (June 30, 2021), https://endmassincarceration.org/what-can-we-do-to-help-create-150-years-of-change-in-10-years [https://perma.cc/92LD-ELY6]; Nancy Kathryn Walecki, *"Decarcerating" America*, HARV. MAG. (Nov.–Dec. 2021), https://www.harvardmagazine.com/2021/11/jhj-decarcerating-america [https://perma.cc/87AL-Z976].

6. On the role of state courts and constitutions in criminal law reform, see, e.g., Charles M. Blow, Opinion, *Criminal Justice Is a State Issue*, N.Y. TIMES (Feb. 24, 2021), https://www.nytimes.com/2021/02/24/opinion/jail-death-penalty-states.html [https://perma.cc/3J86-7N9L]; Matthew Clair & Amanda Woog, *Courts and the Abolition Movement*, 110 CALIF. L. REV. 1 (2022) (discussing the role of courts in the modern abolition movement); William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 AM. CRIM. L. REV. 1627, 1627 (2021) (outlining that while most state courts have adopted the U.S. Supreme Court's narrow interpretation of non-capital, non-juvenile life-without-parole sentences, some "state courts have found that state

confined under laws, procedures, and norms created and carried out at the local and state level.[7]

This Article argues that mass incarceration in the United States is not only a national issue, but also an acute local one. While the United States has the highest incarceration rate in the world, thirty-four individual U.S. states have a higher incarceration rate than *any* other country in the world—with the exception of the United States itself.[8] Critically, though the political intractability of criminal justice policy has historically been a significant driver of the incarceration crisis, this Article argues that missing from the academic and policy debates about mass incarceration is the role of key institutions in the criminal justice system: state constitutions and state courts.[9]

The absence of state courts from discussions of mass incarceration is surprising. An explosion of recent bipartisan recognition and activity from scholars, activists, journalists, philanthropists, and public officials has developed, criticizing the severity and scope of punishment in states across the country and recognizing the role of excessive punishments in driving mass

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punishments violate the Eighth Amendment or its state constitutional analogue"); William W. Berry III, *Cruel State Punishments*, 98 N.C. L. REV. 1201 (2020) (outlining the similarity between the Eighth Amendment and state constitutional analogues, even where linguistic differences exist); Wayne A. Logan, *Fourth Amendment Localism*, 93 IND. L.J. 369, 370 (2018) (observing that over time policing has been largely a local matter); Zachary S. Price, *Faithful Execution in the Fifty States*, 57 GA. L. REV. (forthcoming 2022); and Harry B. Dodsworth, Note, *Identifying the Most Democratic Institution to Lead Criminal Justice Reform*, 116 NW. U. L. REV. 561 (2021); Paul G. Cassell & Margaret Garvin, *Protecting Crime Victims in State Constitutions: The Example of the New Marsy's Law for Florida*, 110 J. CRIM. L. & CRIMINOLOGY 99 (2020); Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 COLUM. L. REV. 1276, 1281–83 (2005) (describing the work of special interest groups in advocating for longer sentencing laws); Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143 (2009); Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 64–66 (2008); Wayne A. Logan, *The Shadow Criminal Law of Municipal Governance*, 62 OHIO ST. L.J. 1409, 1420–21 (2001); Barry Latzer, *The New Judicial Federalism and Criminal Justice: Two Problems and a Response*, 22 RUTGERS L.J. 863 (1991); Dan M. Kahan & Tracey L. Meares, *Forward: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1161–63 (1998); David Cole, *Forward: Discretion and Discrimination Reconsidered: A Response to the New Criminal Justice Scholarship*, 87 GEO. L.J. 1059 (1999); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1973–74 (2008); Joshua Kleinfeld et al., *White Paper of Democratic Criminal Justice*, 111 NW. U. L. REV. 1693 (2017); Brenner M. Fissell, *Against Criminal Law Localism*, 81 MD. L. REV. 1119 (2022).

7. Alexi Jones, *Correctional Control 2018: Incarceration and Supervision by State*, PRISON POL'Y INITIATIVE (Dec. 2018), https://www.prisonpolicy.org/reports/correctionalcontrol2018.html [https://perma.cc/65US-WLD4].

8. Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL'Y INITIATIVE (Sept. 2021), https://www.prisonpolicy.org/global/2021.html [https://perma.cc/2DM3-6FWM].

9. *See, e.g.*, Tracie A. Todd, *Mass Incarceration: The Obstruction of Judges*, 82 L. & CONTEMP. PROBS. 191, 192–93 (2019); *see also* JONES, *supra* note 7 (collecting "data on each state's various systems of correctional control"). *See generally* ELDERBROOM ET AL., *supra* note 4 (outlining regional disparities over whether an adult has had an immediate family member in jail or prison).

incarceration.[10] As this dialogue matures and sharpens, there is a growing consensus for structuring the fight against mass incarceration from the bottom up, starting at the local and state level.[11] This bottom-up approach unlocked a wave of electoral wins for prosecutors, judges, and sheriffs committed to shrinking the criminal legal system, reform-oriented laws passed by state legislatures and through ballot initiatives, and—in the wake of the murder of George Floyd by a Minneapolis police officer—a critical social movement.[12] As a result of these efforts, the nation's incarceration rate hit quarter-century lows in 2021, after quadrupling between 1970 and 2008.[13] Yet, in the face of this progress, America remains the world's most incarcerated country.[14]

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10. For a comprehensive scholarly discussion of prison abolition situated within legal scholarship, see Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1161–62 (2015). *See generally* Angela Y. Davis & Dylan Rodriguez, *The Challenge of Prison Abolition: A Conversation*, 27 SOC. JUST. 212 (2000) (featuring a conversation on the growth and evolution of the prison abolition movement).

11. *See, e.g.*, Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1447 (2016) ("The job of investigating and prosecuting police officers who commit crimes falls on local prosecutors, as it has in the wake of a number of highly public killings of unarmed African-Americans since Michael Brown died in August 2014."); Jocelyn Simonson, *Police Reform Through a Power Lens*, 130 YALE L.J. 778, 783 (2021) (noting that there are "two leading ways of thinking about the objective of reforming the governance of law enforcement"); K. Sabeel Rahman & Jocelyn Simonson, *The Institutional Design of Community Control*, 108 CALIF. L. REV. 679, 692 (2020); Kleinfeld, *supra* note 1, at 1386–87 (2017). *But cf.* John Rappaport, *Some Doubts About "Democratizing" Criminal Justice*, 87 U. CHI. L. REV. 711, 716–17 (2020).

12. *See, e.g.*, Stephen Rushin & Roger Michalski, *Police Funding*, 72 FLA. L. REV. 277, 281–83 (2020) (describing support for defunding that grew across the country even before the murder of George Floyd, premised on the belief that "[t]here are simply too many police officers . . . given discretionary authority to enforce criminal laws in an uneven way that disproportionately criminalizes poorer communities of color," which led many to support "disinvest[ment] from policing altogether and, instead, reallocat[ion] [of] many of these resources towards supporting the community" (footnotes omitted)); *see also* Brentin Mock, *The Price of Defunding the Police*, BLOOMBERG: CITYLAB JUST. (July 14, 2017, 6:00 AM), https://www.citylab.com/equity/2017/07/the-price-of-defunding-the-police/533232 [https://perma.cc/KU8W-TVV5] (discussing the movement to defund the police); *Invests-Divest*, M4BL (2022), https://m4bl.org/policy-platforms/invest-divest [https://perma.cc/C657-8GD6] (laying out a detailed policy platform that favors defunding police).

13. John Gramlich, *America's Incarceration Rate Falls to Lowest Level Since 1995*, PEW RSCH. CTR. (Aug. 16, 2021), https://www.pewresearch.org/fact-tank/2021/08/16/americas-incarceration-rate-lowest-since-1995 [https://perma.cc/5U2S-5NGE]; NAT'L RSCH. COUNCIL OF THE NAT'L ACADS., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 33 (Jeremy Travis, Bruce Western & Steve Redburn eds., 2014); Richard Florida, *The Great Crime Decline and the Comeback of Cities*, BLOOMBERG: CITY LAB JUST. (Jan. 16, 2018, 12:01 PM), https://www.bloomberg.com/news/articles/2018-01-16/understanding-the-great-crime-decline-in-u-s-cities [https://perma.cc/Y77J-DYYZ]; *State-level Incarceration Trends*, VERA INCARCERATION TRENDS (Mar. 24, 2022, 9:51 PM), https://trends.vera.org [https://perma.cc/2NLF-MQJB].

14. *United States Profile*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles/US.html [https://perma.cc/5JDY-AK8X]. For analysis of overcriminalization, see, e.g., DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW 10–11 (2008); Sara Sun Beale,

This news would not have surprised the framers of America's federal and state constitutions, many of whom expressly anticipated structural vulnerabilities inherent in democracy that could operate to undermine the rights of minority factions.[15] Indeed, since people subjected to punishment for serious crimes tend not to be particularly wealthy or powerful, their ability to influence laws that will disproportionately benefit justice-involved populations is very low.[16] Moreover, changes to incarceration policy must contend with the collective emotional response that a single salient crime can produce—for example, a rape or a murder by a person released from prison can incite fear and anger that forces policy rollbacks and can cost elected officials their jobs.

Although our country's constitutional architects positioned the judiciary to serve as a bulwark of liberty to guard against this type of majoritarian overreach,[17] the U.S. Supreme Court has failed to deploy the Eighth Amendment prohibition on "cruel and unusual punishments"[18] to reverse or even slow the worst excesses of America's incarceration crisis.[19] What's more,

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The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization, 54 AM. U. L. REV. 747, 748 (2005).

15. THE FEDERALIST Nos. 10, 51 (James Madison).

16. Zoe Robinson & Stephen Rushin, *The Law Enforcement Lobby*, 107 MINN. L. REV. (forthcoming 2022).

17. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135–59 (1981); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 1–2 (1996); *see also*, Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. & SOC. SCI. 361, 380 (2008). But see the growing counternarrative that has emerged to challenge this traditional characterization of the Court as the defender of unpopular minorities, *especially* Zoë Robinson, *Constitutional Personhood*, 84 GEO. WASH. L. REV. 605, 649–50 (2016); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285, 291, 293 (1957) (for Dahl, "the . . . Court is inevitably a part of the dominant national alliance" because "it would appear, on political grounds, somewhat unrealistic to suppose that a Court whose members are recruited in the fashion of Supreme Court [J]ustices would long hold to norms of Right or Justice substantially at odds with the rest of the political elite[]"); Darren Leonard Hutchinson, *The Majoritarian Difficulty: Affirmative Action, Sodomy, and Supreme Court Politics*, 23 MINN. J.L. & INEQ. 1, 1–4 (2005) (claiming that the Supreme Court is a majoritarian, rather than a countermajoritarian, institution).

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

19. *See, e.g.*, Jed S. Rakoff, *Mass Incarceration: The Silence of the Judges*, N.Y. REV. (May 21, 2015), https://www.nybooks.com/articles/2015/05/21/mass-incarceration-silence-judges [https://perma.cc/6QCD-Q75A]; Tracie A. Todd, *Mass Incarceration: The Obstruction of Judges*, 82 L. & CONTEMP. PROBS. 191, 193 (2019) ("[T]he literature is substantively void of introspective contributions from key participants in the criminal justice system—state judges. A closer look at the role of state judges in the context of contemporary mass incarceration provides myriad academic and practical applications . . . ."); Jonathan Simon, *Can Courts Abolish Mass Incarceration?*, *in* THE LEGAL PROCESS AND THE PROMISE OF JUSTICE 259, 266 (Rosann Greenspan, Hadar Aviram & Jonathan Simon eds., 2019). *See generally* Bridget Mary McCormack, *Staying Off the Sidelines: Judges as Agents for Justice System Reform*, 131 YALE L.J. F. 175 (2021) (arguing for state judges to take a greater role in criminal justice reform); Jonathan Simon, Editorial, *Mass Incarceration on Trial*, 13 PUNISHMENT & SOC'Y 251 (2011) (discussing prison population reduction in California);

nearly all of the country's fifty state constitutions provide the right to freedom from excessive punishment in some form, a right that state courts have the ultimate power and responsibility to vindicate.[20] At the same time, state supreme courts—like their federal counterpart—have mostly abdicated their responsibility to intervene, even though it is the states that are primarily responsible for defining and administering criminal punishment.[21] And despite the recognition that "the true frontier of criminal" legal system reform "is [at] the state level[,]" scholars, advocates, and lawyers have not paid adequate attention to the power and responsibility of state courts to enforce their own constitutions to curb excessive punishment.[22]

Jonathan Simon, *Courts and the Penal State: Lessons from California's Decades of Prison Litigation and Expansion*, 5 CAL. J. POL. & POL'Y 252 (2013) (examining the hostile culture in California's prisons); Leonidas K. Cheliotis, *From Bench to Dock: Putting Judges on Trial*, 42 SOC. JUST. 159 (2015) (reviewing JONATHAN SIMON, MASS INCARCERATION ON TRIAL (2014)) (positively examining Simon's book). Some notable exceptions exist to the U.S. Supreme Court's record of inaction, primarily in the context of the death penalty.

20. *See* ALA. CONST. art. I, § 15; ALASKA CONST. art. I, § 12; ARIZ. CONST. art. II, § 15; ARK. CONST. art. II, § 9; CAL. CONST. art. I, § 17; COLO. CONST. art. II, § 20; CONN. CONST. art. I, § 8; DEL. CONST. art. I, § 11; FLA. CONST. art. I, § 17; GA. CONST. art. I, § 1, paragraph I; HAW. CONST. art. I, § 12; IDAHO CONST. art. I, § 6; ILL. CONST. art. I, § 11; IND. CONST. art. I, § 16; IOWA CONST. art. I, § 17; KAN. CONST. BILL OF RTS. § 9; KY. CONST. § 17; LA. CONST. art. I, § 20; ME. CONST. art. I, § 9; MD. CONST. DECLARATION OF RTS. art. XVI; MASS. CONST. pt. 1, art. XXVI; MICH. CONST. art. I, § 16; MINN. CONST. art. I, § 5; MISS. CONST. art. III, § 28; MO. CONST. art. I, § 21; MONT. CONST. art. II, § 22; NEB. CONST. art. I, § 9; NEV. CONST. art. I, § 6; N.H. CONST. pt. 1, art. XXXIII; N.J. CONST. art. I, para. 12; N.M. CONST. art. II, § 13; N.Y. CONST. art. I, § 5; N.C. CONST. art. I, § 27; N.D. CONST. art. I, § 11; OHIO CONST. art. I, § 9; OKLA. CONST. art. II, § 9; OR. CONST. art. I, § 16; PA. CONST. art. I, § 13; R.I. CONST. art. I, § 8; S.C. CONST. art. I, § 15; TENN. CONST. art. I, § 16; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 9; VA. CONST. art. I, § 9; WASH. CONST. art. I, § 14; W. VA. CONST. art. III, § 5; WIS. CONST. art. I, § 6; WYO. CONST. art. I, § 14; *see also* Berry, *Cruel and Unusual Non-Capital Punishments, supra* note 6; Steven Gow Calabresi, James Lindgren, Hannah M. Begley, Kathryn L. Dore & Sarah E. Agudo, *Individual Rights Under State Constitutions in 2018: What Rights Are Deeply Rooted in a Modern-Day Consensus of the States?*, 94 NOTRE DAME L. REV. 49 (2018) (engaging in a comparative fifty-state survey of state constitutional rights in 1868 and 2018).

21. Bruce L. Benson & Iljoong Kim, Causes and Consequences of Over-Criminalization 18 (unpublished manuscript), https://swb.skku.edu/_res/sier/etc/2014-02.pdf [https://perma.cc/6KQ8-YNPL] ("Thus, the important part of the legislative process takes place behind closed doors and involves only groups representing narrow ranges of interest. This domination by lobbyists in the setting of legislative agendas is not unique to criminal law issues or to California, of course."); *see also* Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE L. REV. 1079, 1091 (1993); Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 727 (2005); Rachel E. Barkow, *The Political Market for Criminal Justice*, 104 MICH. L. REV. 1713, 1721 (2006); Barkow, *supra* note 6, at 1282–83; Lisa L. Miller, *Rethinking Bureaucrats in the Policy Process: Criminal Justice Agents and the National Crime Agenda*, 32 POL'Y STUD. J. 569, 569 (2004).

22. Blow, *supra* note 6.

Over the same time period that the incarceration crisis moved from a fringe social issue to the forefront of the mainstream political imagination, noted scholars and judges from across the political spectrum began to reinvigorate the push for state constitutionalism more generally.[23] Judge Jeffrey Sutton, for example, has recently argued that state constitutionalism is a structural feature of American democracy that is critical to securing the rights and liberties of individuals.[24] Justice Goodwin Liu has echoed Judge Sutton in emphasizing the importance of state constitutionalism to the American constitutional project, stating that "state and federal courts are jointly engaged in interpreting shared texts or shared principles within a common historical tradition or common framework of constitutional reasoning."[25] Both Judge Sutton and Justice Liu urge the recalibration of the existing federal-state balance by emphasizing the structure and process of constitutionalism and "the process by which individual rights take shape in our diverse democracy."[26]

In recent years, state supreme courts have used their own state constitutions to create important rulings in the context of takings,[27] democracy

23. *See* sources cited *supra* note 4.

24. *See* Jeffrey S. Sutton, *What Does—and Does Not—Ail State Constitutional Law*, 59 U. KAN. L. REV. 687, 687 (2011); Jeffrey S. Sutton, Speech, *Why Teach—and Why Study—State Constitutional Law*, 34 OKLA. CITY U. L. REV. 165, 177–78 (2009). *See generally* SUTTON, *supra* note 2 (2018) (exploring the states' role in developing constitutional law); Jeffrey S. Sutton & Brittany Jones, *The Certiorari Process and State Court Decisions*, 131 HARV. L. REV. F. 167 (2018) (exploring the difference in the amount of federal court cases and state supreme court cases heard by the U.S. Supreme Court).

25. Goodwin Liu, *State Courts and Constitutional Structure*, 128 YALE L.J. 1304, 1311 (2019) (reviewing Sutton, *supra* note 2); *see also* Jeffrey S. Sutton, *A Response to Justice Goodwin Liu*, 128 YALE L.J.F. 936, 937–38 (2019).

26. Liu, *supra* note 25, at 1365. This structuralist rationale for state constitutionalism is in contrast to the ideological and outcomes focus of an earlier movement for judicial federalism, including, most prominently, Justice William Brennan's call for robust state constitutional rights in the wake of the Burger Court's winding back of the broad federal constitutional rights jurisprudence of the Warren Court. *See* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550–51 (1986); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977); *see also* Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 271 (1998) (providing an overview of Justice Brennan's new judicial federalism movement).

27. Nestor M. Davidson & Timothy M. Mulvaney, *Takings Localism*, 121 COLUM. L. REV. 215, 215 (2021); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 206 (2004). *See generally* Michael M. Berger, *What's Federalism Got to Do with Regulatory Takings?*, 8 BRIGHAM-KANNER PROP. RTS. CONF. J. 9 (2019) (exploring the need for the U.S. Supreme Court to consider state supreme court decisions); Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. L.F. 53 (2011) (arguing in favor of judicial protection of property rights).

cases,[28] self-incrimination, and search and seizure,[29] amongst others. In crafting such rulings, state court judges have confidently reasserted their power to interpret their own state constitutions, whether or not their readings align with the judgment of the U.S. Supreme Court.[30] Yet, despite state courts' willingness to interpret their own state constitutions in these various contexts, when it comes to guarding against excessive punishment and reigning in the mass incarceration crisis, scholars, judges, and advocates largely continue to ignore the role and responsibility of state courts in addressing the incarceration crisis.

This Article agitates for the latent capacity of state constitutionalism to help redress mass incarceration specifically. The predominant value of U.S. constitutionalism is the liberty of citizens. In the context of criminal justice, these liberty interests have been protected primarily by the U.S. Constitution's Eighth Amendment prohibition against cruel and unusual punishment.[31] Especially since the U.S. Supreme Court incorporated the Eighth Amendment against the states in 1962, both state and federal courts have predominantly looked to Eighth Amendment doctrine to define constitutional limits of criminal punishment. Yet, valuing individual liberty has its foundation in state constitutionalism. Nearly every state has an Eighth Amendment analogue, many with unique constitutional language and original meaning that go even

28. *See, e.g.*, Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 101–03 (2014); Joshua A. Douglas, *State Judges and the Right to Vote*, 77 OHIO ST. L.J. 1, 13–31 (2016); Megan Wilson, *Rethinking How Voters Challenge Gerrymandering: Congress, Courts, and State Constitutions*, 52 LOY. L.A. L. REV. 63, 84–91 (2018).

29. *See generally, e.g.*, Irma S. Raker, *Fourth Amendment and Independent State Grounds*, 77 MISS. L.J. 401 (2007) (exploring the approaches state courts have taken in search and seizure cases); Alexandra S. Jacobs, Comment, *State Constitutional Law—Search and Seizure—"Do You Mind if We Look Around?" The Emergency Aid Exception in Alaskan Jurisprudence.* State v. Gibson, *267 P.3D 645 (Alaska 2012).*, 44 RUTGERS L.J. 727 (2014) (discussing Alaska's search and seizure laws); Joseph C. Welling, *The False Hope of Missouri's Amendment Nine and the Real Problems with Constitutional Protection of Electronic Data and Communications from Government Intrusion*, 60 ST. LOUIS U. L.J. 733 (2016) (discussing a state constitutional amendment voters passed in Missouri relating to search and seizure laws); David Rassoul Rangaviz, *Compelled Decryption & State Constitutional Protection Against Self-Incrimination*, 57 AM. CRIM. L. REV. 157 (2020) (examining how state constitutions can protect against self-incrimination).

30. *See, e.g.*, Commonwealth v. Jones, 117 N.E.3d 702, 713 (Mass. 2019).

31. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 578 (2005) (holding that death penalty is not a proportionate punishment as applied to any juvenile offenders and noting that the drafters of the constitution included "broad provisions to secure individual freedom and preserve human dignity," including the Eighth Amendment prohibition on cruel and unusual punishment); Graham v. Florida, 560 U.S. 48, 69–70 (2010) ("The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration . . . ."); Hall v. Florida, 572 U.S. 701, 708 (2014) ("By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." (quoting *Roper*, 543 U.S. at 572)). On the liberty as a constitutional value underpinning the Eighth Amendment, see Robert J. Smith & Zoë Robinson, *Constitutional Liberty and the Progression of Punishment*, 102 CORNELL L. REV. 413, 455–68 (2017).

further than the federal charter.[32] As a result, state courts have the power to cause wide-sweeping criminal law reform. Unconstrained by federalism concerns, they are able to focus exclusively on their own state's interests. Movements to re-situate criminal justice reform to the local level, then, should include state courts as a critical change agent, supporting state courts as independent arbiters of state constitutions in support of broader criminal justice reform.

This Article proceeds in four Parts. Part I situates the mass incarceration crisis as a bottom-up question and describes the political drivers of the mass incarceration crisis. Part II charts the quiet capitulation of state courts to federal interpretation of constitutional rights, before turning to examine the unique problems posed by unitary constitutionalism in the context of the Eighth Amendment and its state constitutional analogues. Part III examines the rise of the new state constitutionalism movement, outlining the growing support for, and potential of, independent state constitutionalism for more robust protections against excessive punishment. Finally, in Part IV, we chart a path forward, sketching a doctrinal trajectory for state courts to use when interpreting their state constitutional provisions. That trajectory respects federal developments while necessarily capturing the localism of criminal law, highlighting the promise of state courts as a bulwark against mass incarceration.

I. MAJORITARIAN EXCESS AND EXCESSIVE PUNISHMENT

This Article argues that state courts interpreting their own constitutions are an indispensable part of ending the American incarceration crisis. To arrive at the conclusion, this Part begins in Section A by viewing the incarceration crisis not as a national-level phenomenon, but instead through the lens of the states that define and impose punishment. Section B traces how the notion that the incarceration crisis represents a massive civil rights and moral issue has taken hold over the past decade, driving political and cultural support for reducing incarceration in states across the country. This momentum has translated into policy and electoral victories at the city, county, and state levels. Yet, despite this progress, the fact remains that most states in America lock people up at significantly greater levels than they did historically and at much higher rates than in nearly every other country in the world. Ultimately, this Part demonstrates the ongoing need for courts as a structural remedy for majoritarian stickiness, even when political momentum for policy change exists.

A. MAJORITARIANISM ALL THE WAY DOWN: MASS INCARCERATION AS A STATE CRISIS

Conceptually, there is no "United States" incarceration crisis. While a shared culture permeates the fifty states, and while federal incentives inevitably shape state crime and punishment practices, the incarceration crisis is, in reality, the

32. *See infra* notes 102–06.

aggregate of dozens of incarceration crises across a broad swath of the nation.[33] Owing to the devolved nature of criminal law within the U.S. federal system, individual states have primary responsibility for criminal justice policy.[34] State governments hold ninety percent of the U.S. prison population, which results from the fact that states primarily define and impose punishment.[35] As a consequence, thirty-four U.S. states have a higher incarceration rate than *any* other country in the world, with the exception of the United States itself.[36] What's more, *every* U.S. state has a higher incarceration rate than *any* country in the European Union, as well as a higher rate than nearly any other liberal democracy in the world.[37]

Consider opposite ends of the U.S. incarceration spectrum. At one end, Louisiana has an incarceration rate of over 1,000 people per 100,000 adults.[38] At the other end, Massachusetts's incarceration rate is 275 people per 100,000 adults.[39] In other words, Louisiana locks up people at nearly four times the rate of Massachusetts. But even with the lowest incarceration rate in the United States, Massachusetts still locks up its citizens at a rate far higher than the incarceration rate in Europe today.[40] It has not always been this way. Professor Joshua Kleinfeld has noted, "For most of its history, criminal punishment in the United States was milder than punishment in continental Europe—and therefore, it was thought, more humane than Europe's, more enlightened, and more democratic."[41]

Scholars have shown that this radical break with history and tradition is largely a consequence of political expediency.[42] When a salient yet

33. *See* Jones, *supra* note 7.

34. *See generally* the literature cited at *supra* note 22.

35. *Id.*

36. Widra & Herring, *supra* note 8.

37. Professor Michael Tonry has documented how, "[i]n many countries, the maximum sentence that can be imposed for any single offense is 12, 15, or 20 years." Tonry writes, "[i]n most other developed countries, by contrast, a one- or two-year sentence is long and 25- or 200-year sentences are impossible and unimaginable." MICHAEL TONRY, SENTENCING FRAGMENTS, PENAL REFORM IN AMERICA, 1975–2025, at 27, 29 (2016). In 2013, the European Court of Human Rights barred "whole life" sentences under the Convention for the Protection of Human Rights and Fundamental Freedoms. *See* Case of Vinter v. U.K. [2013], App. Nos. 66069/09, 130/10, 3896/10, ¶ 129, 130, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22vinter%22],%22itemid%22:[%22001-122664%22]} [https://perma.cc/MH6C-KCBY].

38. *State-level Incarceration Trends*, *supra* note 13.

39. *Id.*

40. Widra & Herring, *supra* note 8.

41. Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 935 (2016); THE GROWTH OF INCARCERATION IN THE UNITED STATES, *supra* note 13, at 33.

42. Smith & Robinson, *supra* note 31, at 426–27; Michele Goodwin, *Fetal Protection Laws: Moral Panic and the New Constitutional Battlefront*, 102 CALIF. L. REV. 781, 791 (2014) (addressing moral panic over "bad mothers" leading to criminalization of normal risks of pregnancy like stillbirth); Kaytee Vota, *The Truth Behind* Echols v. State*: How an Alford Guilty Plea Saved the West Memphis Three*, 45 LOY. L.A. L. REV. 1003, 1007 (2012) (explaining how Satanic ritual abuse panic

unrepresentative crime captures the public imagination, or a legitimate spike in crime occurs and consequently overzealous fear and anger spread through the public, legislators perceive the desires of their constituents, both directly and via the media and relevant interest groups. Subsequently, legislators are motivated to respond to community outrage, reforms are rolled back, and punishments are ratcheted up.[43]

The Willie Horton saga exemplifies this. In 1986, a man named Willie Horton committed a rape while on a temporary release from prison in Massachusetts.[44] Today, the idea of a furlough from prison is hardly within our political imagination, but in the 1970s and 1980s, over forty states offered furloughs to allow inmates to do things like go to work or attend a loved one's funeral, largely without incident.[45] Such furloughs were not restricted to prisoners serving minimal sentences for misdemeanor crimes. Even people serving long sentences for crimes like murder were eligible in some states, and politicians from both ends of the political spectrum were generally supportive. Indeed, prison furloughs in the 1970s counted Republican California Governor Ronald Reagan among their biggest champions.[46]

However, following Willie Horton's crime while on furlough, George H.W. Bush, then the Republican nominee for President of the United States, wielded the tragedy as a weapon to bludgeon Massachusetts Governor Michael Dukakis, the Democratic nominee, as the man who gave Horton "a weekend pass."[47] Bush's campaign poured great sums of energy and dollars into popularizing the tragedy. His campaign manager even said, "By the time we're finished, they're going to wonder whether Willie Horton is Dukakis' running mate."[48] Bush used the opportunity to label Dukakis as "soft on

in the 1980s and 1990s contributed to innocent men interested in gothic fashion and heavy metal music being wrongfully convicted of three murders); Ronald Burns & Charles Crawford, *School Shootings, the Media, and Public Fear: Ingredients for a Moral Panic*, 32 CRIME, L. & SOC. CHANGE 147 (1999) (discussing the influence of the media on moral panic surrounding school shootings).

43. This legislative behavior is rational according to the public choice literature, even if extra punishment is unnecessary for public safety. *See* Elinor Ostrom, *Collective Action and the Evolution of Social Norms,* 14 J. ECON. PERSPS. 137, 144–45 (2000).

44. *See* Roger Simon, *How a Murderer and Rapist Became the Bush Campaign's Most Valuable Player*, BALT. SUN (Nov. 10, 1990, 12:00 AM), https://www.baltimoresun.com/news/bs-xpm-1990-11-11-1990315149-story.html [https://perma.cc/3DA4-XC94] (discussing the trajectory of the Willie Horton phenomenon in politics); Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 422–36 (2006) (describing the trends and growth in crime story coverage among network and local media outlets).

45. Beth Schwartzapfel & Bill Keller, *Willie Horton Revisited*, MARSHALL PROJECT (May 13, 2015, 6:37 PM), https://www.themarshallproject.org/2015/05/13/willie-horton-revisited [https://perma.cc/W2EP-SF3M].

46. *See id.*; T.R. Reid, *Most States Allow Furloughs from Prison*, WASH. POST (June 24, 1988), https://www.washingtonpost.com/archive/politics/1988/06/24/most-states-allow-furloughs-from-prison/ad22836e-111b-4f09-aa6d-6651d2e9a04e [https://perma.cc/5CCZ-XJ49].

47. Simon, *supra* note 44.

48. *Id.* (quoting Lee Atwater).

crime" and to call for more prisons and harsher punishments. Once Bush won the election, the political lesson that both Democrats and Republicans had learned was how *not* to give any reason to believe they were soft on crime.[49]

The Willie Horton saga is one of a number of discrete moral panics over the last quarter-century—from "juvenile superpredators" to "crack babies"—that contributed to quadrupling the U.S. prison population since 1970.[50] And it is not only federal political actors who deployed these crises for political expediency. In California, for example, the abduction and murder of twelve-year-old Polly Klass by a recidivist paroled from a California prison immediately captured the imagination of the public.[51] Subsequently, a proposed statewide ballot initiative—Proposition 184—mandated strict mandatory minimum sentences for recidivist offenders.[52] Proposition 184, which came about "[w]ithin days" of Polly's death, "bec[ame] the fastest qualifying initiative in California."[53] Three strikes laws and mandatory minimum sentences began to spread across the nation, and twenty-four states enacted three strikes over a two-year period following the death of Polly Klass.[54]

While these panics do not last forever, their residue are frozen into law. Long after public punitiveness declines, people sentenced during the height of the panic remain imprisoned for decades, and people continue to face charges and exposure to harsher sentences crafted during moments of transitory panic. As the Willie Horton saga demonstrates, when moral panic meets unrestrained political majoritarianism, the result is "a one-way ratchet" to more severity.[55] Public anger over crime generates more punitive public

49. Bernard Weinraub, *President Offers Strategy for U.S. on Drug Control*, N.Y. TIMES (Sept. 6, 1989), https://www.nytimes.com/1989/09/06/us/president-offers-strategy-for-us-on-drug-control.html [https://perma.cc/82JU-6LJK]; Robinson & Rushin, *supra* note 16; Dripps, *supra* note 21, at 1091.

50. Smith & Robinson, *supra* note 31, at 427–29.

51. Ewing v. California, 538 U.S. 11, 14–15, 18 (2003) (affirming a sentence of twenty-five years to life upon a non-violent recidivist offender who stole "three golf clubs, priced at $399 apiece, concealed in his pants leg").

52. *Id.*

53. *Id.* at 15.

54. *See generally* JAMES AUSTIN, JOHN CLARK, PATRICIA HARDYMAN & D. ALAN HENRY, "THREE STRIKES AND YOU'RE OUT": THE IMPLEMENTATION AND IMPACT OF STRIKE LAWS (1999), https://www.ojp.gov/pdffiles1/nij/grants/181297.pdf [https://perma.cc/2JG8-3K6T] (comparing the provisions of three-strikes laws in 24 states).

55. Smith & Robinson, *supra* note 31, at 427 (footnote omitted). It was noted that ratchet-up punishment does occur continuously, but spikes in moments when "the public reacts to a real or perceived crime problem in a way that is hysterical and out-of-all-proportion." *Id.* at 417–18 (footnote omitted).

attitudes.[56] In turn, these punitive attitudes predict both legislative attention to crime-related issues *and* incarceration rates.[57]

Broadly speaking, this dynamic is what Professor William Stuntz dubbed "the pathological politics of crim[e]."[58] Criminal law often functions as "a one-way ratchet that makes an ever larger slice of the population felons[.]"[59] Writing in 2002, before the peak of the incarceration crisis, Stuntz described a political reality where constituents demand ever more punishment, especially in moments where crime is particularly salient, and politicians oblige the desires of their constituents.[60] At the same time, prosecutors seek more and broader power to charge criminal conduct, and legislators oblige these prosecutors by creating vaguer laws that increase prosecutorial discretion to file more charges and seek more prison time. Stuntz notes that this dynamic is not partisan. To the contrary, "both major parties have participated in a kind of bidding war to see who can, appropriate the label 'tough on crime.'"[61]

Today, nearly two decades after Stuntz's writing, long and life prison sentences continue to be a major driver of America's sky-high incarceration rate.[62] New laws established more mandatory minimum sentencing schemes, made life sentences available for more crimes, and created "truth in sentencing" laws that translated into fewer opportunities for parole and other forms of early release. As a result, the typical person who commits a violent crime today can be expected to receive a sentence that is at least three times longer than that same person would have received in 1970.[63] As The Sentencing Project has pointed out, "[m]ore people are sentenced to life in prison in America than there were people in prison serving any sentence in 1970."[64] One in seven people in American prisons right now are serving a life or de facto life sentence of over fifty years.[65] New laws established more

56. Devon Johnson, *Anger About Crime and Support for Punitive Criminal Justice Policies*, 11 PUNISHMENT & SOC'Y 51, 61 (2009).

57. Peter K. Enns, *The Public's Increasing Punitiveness and Its Influence on Mass Incarceration in the United States*, 58 AM. J. POL. SCI. 857, 858 (2014).

58. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 505 (2001).

59. *Id.* at 509.

60. *Id.*; *see also* Barkow, *supra* note 21, at 1721, 1282–83.

61. Stuntz, *supra* note 58, at 509.

62. Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, 87 UMKC L. REV. 113, 113–14 (2018).

63. ELLIOTT CURRIE, CRIME AND PUNISHMENT IN AMERICA 11 (1998) ("The National Research Council calculated in 1993 that the average prison time served per violent crime in the United States roughly tripled between 1975 and 1989 (and it has increased even further since)—mainly because offenders were more likely to be imprisoned at all once convicted, partly because many of them stayed behind bars longer once sentenced.").

64. ASHLEY NELLIS, SENT'G PROJECT, NO END IN SIGHT: AMERICA'S ENDURING RELIANCE ON LIFE IMPRISONMENT 4 (2021), https://www.sentencingproject.org/publications/no-end-in-sight-americas-enduring-reliance-on-life-imprisonment [https://perma.cc/HPM7-8AGL].

65. *Id.*

mandatory minimum sentencing schemes, made life sentences available for more crimes, and created "'truth in sentencing' laws that" translated into fewer opportunities for parole and other forms of early release.[66]

B. THE PARADOX OF MAJORITARIAN REFORM OF MASS INCARCERATION

Over the past decade, America has begun reckoning with the unprecedented scope of incarceration. There is now something of a rough bipartisan consensus that America's punitive turn went too far, as well as a growing recognition that excessive punishment in America has not only harmed the people subjected to it, but also destroyed families, destabilized neighborhoods, and torn at the threads of American democracy.[67] A recent national public opinion survey found that seventy-one percent of Americans, including most Republicans and most Democrats, think "that it is important to reduce [the number of people who are in prison]" in America today.[68]

This public appetite for reform has generated significant policy and electoral victories aimed at unwinding mass incarceration using the same majoritarian politics that fueled the crisis in the first place. For example, over the past decade or so, eight states—Colorado, Connecticut, Illinois, Maryland, New Hampshire, New Jersey, New Mexico, and Virginia—legislatively repealed the death penalty.[69] Over roughly the same period, twenty-five states—including, for example, Arkansas, California, Maryland, Ohio, and Texas—legislatively repealed life without parole sentences for juveniles.[70]

In addition to state legislative repeal, states such as Louisiana, Mississippi, and Texas focused on initiatives expanding access to parole and probation.[71]

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66. Mauer, *supra* note 62, at 119 (footnote omitted).

67. *See, e.g.*, German Lopez, *The Controversial 1994 Crime Law that Joe Biden Helped Write, Explained*, VOX (Sept. 29, 2020, 10:25 AM), https://www.vox.com/policy-and-politics/2019/6/20/18677998/joe-biden-1994-crime-bill-law-mass-incarceration [https://perma.cc/B3GZ-FEYS] (noting that President Joe Biden, an architect of a federal crime bill that served as a model of penal excess, advocated during his Presidential campaign for sweeping criminal justice reform); Katherine Miller, *Joe Biden Told a Voter He'll "Go Further" Than Cutting Incarceration by 50%*, BUZZFEED NEWS (July 9, 2019, 3:33 PM), https://www.buzzfeednews.com/article/katherinemiller/joe-biden-incarceration-prison-population-cut-aclu [https://perma.cc/MUL4-AB4U].

68. Memorandum from Danny Franklin, Benenson Strategy Grp., to Interested PARTIES 1 (July 15, 2015), https://www.aclu.org/sites/default/files/field_document/aclu_polling_cjreform_2015.pdf [https://perma.cc/8GRM-TCQZ] (finding that "81% of Democrats, 71% of Independents and 54% of Republicans" agree that "it is important for the country to reduce its prison populations").

69. *State by State: States With and Without the Death Penalty – 2021*, DEATH PENALTY INFO. CTR. (2022), https://deathpenaltyinfo.org/state-and-federal-info/state-by-state [https://perma.cc/4N7B-5TKP].

70. *States That Ban Life Without Parole for Children*, CAMPAIGN FOR FAIR SENT'G YOUTH (2022), https://cfsy.org/media-resources/states-that-ban-%20juvenile-life-without-parole [https://perma.cc/42JM-ZJ2T].

71. *See* Nino Marchese, Lourdes Bautista, Matthew Grady & Michael Bosset, *Embracing Parole Reform Across the States*, AM. LEGIS. EXCH. COUNCIL (Oct. 5, 2021), https://alec.org/article/embracing-parole-reform-across-the-states [https://perma.cc/QKB4-82ND].

In 2017, the same year that Louisiana was the most incarcerated state in the world's most incarcerated country,[72] Louisiana also enacted ten new criminal laws that PEW called "the most significant overhaul of criminal justice laws in state history."[73] Collectively, the package "steers people convicted of less serious crimes away from prison, strengthens incarceration alternatives, reduces prison terms for those who can be safely supervised in the community, removes barriers to re-entry into the community, and bolsters programs that support victims of crime."[74] Similarly, neighboring Mississippi passed criminal law reform of its own in 2021.[75] Its legislation, which likely will impact thousands of cases, strives to "expand parole eligibility for people convicted of first-time offenses, and is expected to impact thousands of people in Mississippi prisons."[76] The Texas legislature also passed a probation reform bill to reduce incarceration for minor "technical violations" of probation and provide more rehabilitative opportunities to people on probation.[77]

In other states, where the public perception was that legislatures did not go far enough for voters, ballot measures created additional reforms. In California in 2014, voters passed Proposition 47, which reclassified certain felonies as misdemeanors.[78] In 2016, California voters passed Proposition 57, which expanded parole consideration and gave judges more discretion over whether children are prosecuted as adults.[79] During that same year in Oklahoma, which was at the time the country's second most incarcerated state, voters passed two measures—one that reclassified some low level drug and property felonies to misdemeanors (State Question 780) and one that

72. Lea Skene, *Louisiana Once Again Has Nation's Highest Imprisonment Rate After Oklahoma Briefly Rose to Top*, ADVOC. (Dec. 25, 2019, 2:02 PM), https://www.theadvocate.com/baton_rouge/news/article_4dcdfe1c-213a-11ea-8314-933ce786be2c.html [https://perma.cc/SJ87-E2NA].

73. Adam Gelb & Elizabeth Compa, *Louisiana No Longer Leads Nation in Imprisonment Rate*, PEW (July 10, 2018), https://www.pewtrusts.org/en/research-and-analysis/articles/2018/07/10/louisiana-no-longer-leads-nation-in-imprisonment-rate [https://perma.cc/P7QC-D526].

74. *Id.*

75. S. 2795, 2021 Leg., Reg. Sess. (Miss. 2021). *See generally* LAURA BENNETT, FWD.US, WE ALL PAY: MISSISSIPPI'S HARMFUL HABITUAL LAWS (2019), https://www.fwd.us/wp-content/uploads/2019/11/FWD-MS-Report-final-web.pdf [https://perma.cc/MB6X-2HZF] (discussing habitual penalties that can be used in Mississippi to lengthen sentences if the defendant has committed a crime in the past); Emily Wagster Pettus, *Will More Miss. Inmates Be Eligible for Possible Parole? Governor Decides Yes, Signs Bill*, CLARION LEDGER (Apr. 22, 2021, 4:30 PM), https://www.clarionledger.com/story/news/politics/2021/04/22/parole-expansion-mississippi-inmates-gov-tate-reeves-sb-2795/7334029002 [https://perma.cc/M9E4-XGY6].

76. *Id.*

77. H. 385, 87th Leg., Reg. Sess. (Tex. 2021); Jerry Madden, *Prison, Probation, and Parole Reforms — The Texas Model*, THE HILL (Dec. 9, 2018, 9:30 AM), https://thehill.com/opinion/criminal-justice/420204-prison-probation-and-parole-reforms-the-texas-model [https://perma.cc/9Z3B-LDWV].

78. Prop. 47, 2013–2014 Cong. (Cal.) (codified at CAL. PENAL CODE § 1170.18 (2022)).

79. *See* Prop. 57, 2016–2017 Cong. (Cal.); CAL. CODE REGS. tit. 15, §§ 2449.1–2449.5, 3490–3493 (2022).

reinvested savings from decreased incarceration into treatment programs (State Question 781).[80] In 2021, Oregon voters decriminalized drug possession, making possession of small amounts of most drugs ticketable and punished with a fine, not prison.[81] And, over the past decade, marijuana decriminalization ballot measures passed in Alaska, Arizona, California, Colorado, Connecticut, Illinois, Maine, Massachusetts, Michigan, Montana, Nevada, New Jersey, New York, Oregon, South Dakota, Vermont, Virginia, and Washington.[82] Recent measures to decriminalize or deprioritize the enforcement of various drug crimes have also passed at the local level. For example, over the past few years, voters in Denver, Detroit, and Washington, D.C., each passed ballot measures to decriminalize phycobilin.[83]

Moreover, since 2015, candidates for head prosecutor running on, at least rhetorically, anti-mass incarceration platforms have won dozens of elections, including in large counties that encompass New York City, Chicago, Dallas, Los Angeles, and Philadelphia.[84] From creating units to affirmatively advocate on behalf of people serving overly harsh sentences, to deprioritizing the prosecution of low level offenses such as drug possession or sex work, to new bail policies that focus on dangerousness and not wealth, these prosecutors

80. Gene Perry, *State Questions 780 & 781: Criminal Justice Reform*, OKPOLICY.ORG: OKLA. POL'Y INST. (May 2, 2019), https://okpolicy.org/state-questions-780-781-criminal-justice-reform [https://perma.cc/MN4R-XU8S].

81. Andrew Selsky, *Oregon 1st State to Decriminalize Possession of Hard Drugs*, PBS (Feb. 1, 2021, 3:43 PM), https://www.pbs.org/newshour/politics/oregon-1st-state-to-decriminalize-possession-of-hard-drugs [https://perma.cc/D7KK-WG24].

82. For an overview of these laws, see generally ANGELA DILLS, SIETSE GOFFARD, JEFFREY MIRON & ERIN PARTIN, CATO INST., THE EFFECT OF STATE MARIJUANA LEGALIZATIONS: 2021 UPDATE (2021), https://www.fuoriluogo.it/wp-content/uploads/2021/02/effect-marijuana-cato.pdf [https://perma.cc/HF9C-97VH]; Claire Hansen, Horus Alas & Elliott Davis Jr., *Where Is Marijuana Legal? A Guide to Marijuana Legalization*, U.S. NEWS (Oct. 7, 2022, 2:24 PM), https://www.usnews.com/news/best-states/articles/where-is-marijuana-legal-a-guide-to-marijuana-legalization [https://perma.cc/6SPM-HYC3].

83. *See* Dustin Marlan, *Beyond Cannabis: Psychedelic Decriminalization and Social Justice*, 23 LEWIS & CLARK L. REV. 851, 853–54 (2019); Andrew Beaujon, *Magic Mushrooms Are Decriminalized in DC as of Today*, WASHINGTONIAN (Mar. 15, 2021), https://www.washingtonian.com/2021/03/15/magic-mushrooms-are-decriminalized-in-dc-as-of-today [https://perma.cc/ADZ5-3UEY]; Frances Kai-Hwa Wang, *Detroit Just Decriminalized Psychedelics and 'Magic Mushrooms.' Here's What That Means*, PBS (Nov. 3, 2021, 3:59 PM), https://www.pbs.org/newshour/politics/detroit-just-decriminalized-psychedelics-and-magic-mushrooms-heres-what-that-means [https://perma.cc/5UJL-TDHM].

84. *See, e.g.*, Liane Jackson, *Change Agents: A New Wave of Reform Prosecutors Upends the Status Quo*, ABA J. (June 1, 2019, 12:00 AM), https://www.abajournal.com/magazine/article/change-agents-reform-prosecutors [https://perma.cc/PNU3-UHKK]; James Queally, *George Gascon Will Be L.A. County's Next District Attorney, Promises Swift Changes*, L.A. TIMES (Nov. 6, 2020, 6:15 PM), https://www.latimes.com/california/story/2020-11-06/george-gascon-la-district-attorney-race-jackie-lacey-concede [https://perma.cc/9ZZR-YYP5].

are ushering in a wave of new practices.[85] Similarly minded reformers have also won sheriff races in counties encompassing Charlotte and New Orleans, as well as local judicial races in Houston, New Orleans, Las Vegas, and Philadelphia.[86]

The depth and breadth of these shifts are substantial. One in five states in America decreased their prison population by over twenty-five percent from peak levels.[87] For example, Alabama, Alaska, Connecticut, New Jersey, New York, Rhode Island, and Vermont have all reduced their prison population by over thirty-three percent.[88] Nonetheless, America remains—by far—the world's most incarcerated nation.[89] Consider that California, despite two recent major ballot initiatives, multiple legislative enactments, and the most vigorous use of the gubernatorial clemency power in generations, *still* incarcerates its citizens at a level three times higher than California's incarceration rate was in the 1970s.[90]

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85. *See, e.g.*, Press Release, Rachel Marshall, District Attorney Boudin Announces Formation of Post-Conviction Unit and Innocence Commission (Sept. 17, 2020), https://www.sfdistrictattorney.org/press-release/formation-of-post-conviction-unit-and-innocence-commission [https://perma.cc/S5V4-N8V5]; Katie Jane Fernelius, *In Nation's Incarceration Capital, a New D.A. Is Freeing People from Prison*, THE APPEAL (Apr. 21, 2021), https://theappeal.org/politicalreport/new-orleans-district-attorney-jason-williams-conviction-reviews [https://perma.cc/4N88-QWUN]; Celeste Fremon, *New Study Finds that Prosecuting Non-Violent Misdemeanors Significantly Raises the Odds for Rearrest*, WITNESS LA (Apr. 1, 2021), https://witnessla.com/new-study-finds-that-prosecuting-non-violent-misdemeanors-significantly-raises-the-odds-for-rearrest [https://perma.cc/5JWA-RLND]; Justin Jouvenal, *Fairfax County Prosecutor Formally Ends Cash Bail, Joining a Growing Movement*, WASH. POST (Dec. 21, 2020, 6:43 PM), https://www.washingtonpost.com/local/public-safety/cash-bail-end-prosecutor-fairfax/2020/12/21/2429124e-43b8-11eb-b0e4-0f182923a025_story.html [https://perma.cc/VLA2-QNXQ].

86. *See, e.g.*, Andrew Schneider, *Meet 'Black Girl Magic,' The 19 African-American Women Elected As Judges In Texas*, NPR (Jan. 16, 2019, 4:17 PM), https://www.npr.org/2019/01/16/685815783/meet-black-girl-magic-the-19-african-american-women-elected-as-judges-in-texas [https://perma.cc/X7YA-BXWA]; Katie Jane Fernelius, *Two New Orleans Public Defenders Elected Judge in a Push to "Flip the Bench,"* APPEAL (Nov. 4, 2020), https://theappeal.org/politicalreport/new-orleans-public-defenders-elected-judge [https://perma.cc/MY59-8X5R]; Sam Mellins, *How Public Defenders Rocked Las Vegas Judge Elections*, APPEAL (Dec. 21, 2020), https://theappeal.org/politicalreport/public-defenders-las-vegas-judge-elections [https://perma.cc/7JVR-GX63]; *New Sheriff in Town: McFadden Ousts Carmichael in Meck County*, WSOC-TV (May 9, 2018, 12:50 PM), https://www.wsoctv.com/news/local/vote-2018-mecklenburg-county-sheriff-race/742846556 [https://perma.cc/T9JA-ZV6N]; Matt Sledge, *Susan Hutson Defeats Marlin Gusman in Orleans Parish Sheriff's Race*, NOLA.COM (Dec. 11, 2021, 9:49 PM), https://www.nola.com/news/politics/article_8d685482-5a0e-11ec-9a37-efa45f6d2c92.html [https://perma.cc/US3T-B5DV].

87. *State-level Incarceration Trends*, *supra* note 13.

88. *United States Profile*, *supra* note 14.

89. *Id.*

90. *See* Scott Graves, CRIMINAL JUSTICE REFORM IS WORKING IN CALIFORNIA 4 (2020), https://calbudgetcenter.org/app/uploads/2020/08/CA_Budget_Center_5-Facts-criminal-justice_Aug2020.pdf [https://perma.cc/62VX-ECQR]; *CaliforniaProfile*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles/CA.html#:~:text=California%20has%20an%20incarceration%20rate,almost%20any%20democracy%20on%20earth [https://perma.cc/H2BA-ZV5P] (explaining that rates of incarceration have grown over the past forty years).

Restoring balance through the political process is extremely difficult due to a structural reality in American politics. The same majoritarianism that in moments of societal panic enact and impose ever harsher sentences cannot be trusted to fully reverse its excesses. This is true for at least three related reasons: First, the people who benefit most from correcting overly harsh punishment are people convicted of crimes, not usually a particularly popular, powerful, or wealthy group of people.[91] As Justice William Brennan put it, "Those whom we would banish from society or from the human community itself often speak in too faint a voice to be heard above society's demand for punishment."[92] Second, much more powerful and wealthy interests use their sway to lobby lawmakers against reducing punishment. One of us has described how "[a]cross the country, the law enforcement lobby—police unions, correctional officer unions, and prosecutor associations—has played an integral role in shaping criminal justice policy," "giv[ing] money to political campaigns," gaining "favorable concessions" from government, and actively "lobby[ing] legislative bodies" to secure the status quo or expansion of America's criminal justice system.[93] Third, lawmakers (and, for that matter, prosecutors and judges) know that even if ninety-nine out of every one hundred people are successfully paroled from prison or released from pretrial detention, even one case can be used by political opponents to paint the lawmaker as soft on crime.[94] Taken together, these factors describe a structural reality in American politics: The same majoritarianism that in moments of societal panic enact and impose ever harsher sentences cannot be trusted to fully restore balance.

More pragmatically, recent legislative and electoral victories, as modest as they are in relation to the scope of the problem that mass incarceration presents, do not guarantee the continued shrinking of the incarceration crisis. That is, the political impetus driving majoritarian reform is likely transitory. This is evidenced by the popular and political response to the rise in murders in cities across the United States that was fueled by the social and economic disruptions of the coronavirus pandemic. Headlines from national news outlets scream of "an unprecedented spike in murders."[95] President Joe Biden has promised to tackle gun violence in America's cities, and voters nationally

91. Robinson & Rushin, *supra* note 16, at 14; Barkow, *supra* note 21, at 726; Dripps, *supra* note 21, at 1091; Miller, *supra* note 21, at 569; Benson & Kim, *supra* note 21, at 18; Jeffrey Bellin, *The Power of Prosecutors*, 94 N.Y.U. L. REV. 171, 191 (2019).

92. McCleskey v. Kemp, 481 U.S. 279, 343 (1987) (Brennan, J., dissenting).

93. Robinson & Rushin, *supra* note 16, at 4 (footnotes omitted).

94. *See supra* notes 44–45 and accompanying text.

95. *See, e.g.*, Ryan Lucas, *FBI Data Shows an Unprecedented Spike in Murders Nationwide in 2020*, NPR (Sept. 27, 2021, 1:12 PM), https://www.npr.org/2021/09/27/1040904770/fbi-data-murder-increase-2020 [https://perma.cc/9EXE-RAXB].

are again ranking crime near the top of their concerns.[96] At the same time, law enforcement unions have ramped up spending against the new guard of reform-minded prosecutorial candidates—spending millions of dollars over the past two election cycles in Chicago, Los Angeles, Philadelphia, and San Francisco.[97] And the retailers associations nationally, and especially in California, are pushing out fear-mongering stories about "waves" of retail thefts threatening store closures that likely played a significant role in forcing Chesa Boudin, San Francisco's top prosecutor, into a recall election in June 2022.[98] In other words, even though ending mass incarceration shot to the top of the national civil rights agenda, and a wave of people, energy, and dollars unlocked policy and political wins in cities, counties, and states across the country, the same intractable structural vulnerabilities still exist—it is majoritarian excess all the way down.[99]

This inability of majoritarian politics to fully unwind the excesses that majoritarian politics created is unsurprising. Indeed, the architects of American constitutionalism foresaw the stickiness of majoritarianism and sought to protect the rights of individuals against majoritarian excess by empowering the judiciary to serve as a check against unconstrained majorities.[100] In Part II, we highlight the structural role of courts—and state courts in particular—to curb the worst excesses of the incarceration crisis, acting as a counterweight to the majoritarian excesses that have been enshrined into state law.

II. THE FAILURE OF STATE COURTS TO CHECK EXCESSIVE PUNISHMENT

While Part I outlined political majoritarianism, especially as it operates at the state level, as a key driver of mass incarceration, this Part describes the role of state courts as pivotal enablers of the expansion of America's excessive punishment regime. Section A outlines a complex narrative that shows how the project of constitutional protectionism and the incorporation of the bill of rights—designed to heighten constitutional liberties in the states—ironically worked to undermine state constitutionalism and state court capacity to protect against excessive punishment. Subsequently, Section B

96. Zolan Kanno-Youngs & Katie Rogers, *Biden Pushes New Efforts to Tackle Gun Violence*, N.Y. TIMES (Oct. 22, 2021), https://www.nytimes.com/live/2021/06/23/us/joe-biden-news [https://perma.cc/6J8A-ZC7R]; Eli Yokley, *Most Voters See Violent Crime as a Major and Increasing Problem. But They're Split on Its Causes and How to Fix It*, MORNING CONSULT (July 14, 2021, 6:00 AM), https://morningconsult.com/2021/07/14/violent-crime-public-safety-polling [https://perma.cc/S6HX-G3ZG].

97. *See* Robinson & Rushin, *supra* note 16, at 25.

98. Bigad Shaban & Robert Campos, *SF District Attorney Chesa Boudin Officially Forced into Recall Election Next June*, NBC (Jan. 11, 2022, 9:31 AM), https://www.nbcbayarea.com/news/local/exclusive-sf-district-attorney-chesa-boudin-officially-forced-into-recall-election-next-june/2725737 [https://perma.cc/QY4M-8L6R].

99. THE FEDERALIST NO. 51 (James Madison); *see* Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 499 (1997).

100. THE FEDERALIST NO. 51 (James Madison); *see* Klarman, *supra* note 99, at 499.

describes how state court acceptance of the primacy of federal constitutionalism undermines robust constitutional protections against excessive punishment. Given that the U.S. Supreme Court's interpretation of the Eighth Amendment effectively stands as the guiding doctrine for nearly all state constitutional analogues, Section B outlines the historic and contemporary Eighth Amendment doctrine, before demonstrating the unique concerns of state court application of federal doctrine in state constitutional interpretation in the context of excessive punishment.

A. CONSTITUTIONAL RIGHTS CENTRISM AS A DRIVER OF EXCESSIVE PUNISHMENT

In the U.S. Constitution, freedom from excessive punishment is codified in the Eighth Amendment's prohibition against the imposition of "cruel and unusual punishment[]."[101] Though the text, history, and norms that define state constitutions vary, nearly every state constitution contains an Eighth Amendment analogue that promises its citizens freedom from excessive punishment. In eleven states the provision contains the same cruel and unusual construction as its federal counterpart.[102] In other states, the state analogue is disjunctive ("cruel or unusual") rather than conjunctive.[103] An additional six states limit legislatures from imposing "cruel" punishments,[104] while thirteen states prohibit "cruel and unusual" punishment along with additional requirements in order for legislation to be considered

101. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."). On the Supreme Court's interpretation of the Eighth Amendment, see, e.g., Smith & Robinson, *supra* note 31, at 415–16; John F. Stinneford, *The Original Meaning of "Cruel,"* 105 GEO. L.J. 441, 444–45 (2017) (tracing the original meaning of "cruel" in the Eighth Amendment); John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1740–42 (2008) (tracing the original meaning of "unusual" in the Eighth Amendment); Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel* and *Unusual?*, 87 WASH. U. L. REV. 567, 572–73 (2010) (arguing that "cruel and unusual" is a conjunctive term); Samuel L. Bray, *"Necessary and Proper" and "Cruel and Unusual": Hendiadys in the Constitution*, 102 VA. L. REV. 687, 688–89 (2016) (arguing "cruel and unusual" should be read disjunctively).

102. ARIZ. CONST. art. II, § 15; COLO. CONST. art. II, § 20; GA. CONST. art. I, § I, para. XVII; IDAHO CONST. art. I, § 6; N.M. CONST. art. II, § 13; N.Y. CONST. art. I, § 5; OHIO CONST. art. I, § 9; TENN. CONST. art. I, § 16; UTAH CONST. art. I, § 9; VA. CONST. art. I, § 9; WIS. CONST. art. I, § 6; Berry, *Cruel and Unusual Non-Capital Punishments*, *supra* note 6, at 1636.

103. ALA. CONST. art. I, § 15; ARK. CONST. art. II, § 9; CAL. CONST. art. I, § 17; HAW. CONST. art. I, § 12; KAN. CONST. BILL OF RTS., § 9; MASS. CONST. pt. 1, art. XXVI; MICH. CONST. art. I, § 16; MINN. CONST., art. I, § 5; MISS. CONST. art. 3, § 28; NEV. CONST. art. 1, § 6; N.C. CONST. art. I, § 27; N.D. CONST. art. I, § 11; OKLA. CONST. art. II, § 9; S.C. CONST. art. I, § 15; TEX. CONST. art. I, § 13; WYO. CONST. art. 1, § 14. Berry, *Cruel and Unusual Non-Capital Punishments*, *supra* note 6, at 1636; Berry, *Cruel State Punishments, supra* note 6, at 1227–32.

104. DEL. CONST. art. I, § 11; KY. CONST. BILL OF RTS., § 17; PA. CONST. art. I, § 13; R.I. CONST. art. I, § 8; WASH. CONST. art. I, § 14; S.D. CONST. art. 6., § 23. Berry, *Cruel and Unusual Non-Capital Punishments*, *supra* note 6, at 1636 n.66.

unconstitutional.[105] For example, the constitutions of Indiana, Maine, New Hampshire, Oregon, and West Virginia require that any punishment be proportionate to the crime, while Louisiana prohibits both cruel and "excessive" punishments.[106]

These state constitutional provisions are, as Professor Joseph Blocher notes, "the root of American constitutionalism."[107] The drafting of the U.S. Constitution drew extensively on the constitutions of the various states, "inspir[ing] its structure and some of its most recognizable features."[108] Of particular influence was the widespread existence of state bills of rights, which claimed for the former British subjects those rights they had claimed as rightfully theirs under British constitutionalism.[109] Far from relegating state constitutional rights to secondary status, the federal bill of rights was intended only to restrict the federal government, not the ability of states to govern their citizens in the manner of their choosing.[110]

For the first 175 years or so after the adoption of the U.S. Constitution and the subsequent bill of rights amendments, the states, as designed, operated as the preeminent source for individual rights protection, enforcing the rights enshrined in their own constitutions.[111] As Professor James Gardner notes, "state constitutions were originally intended to be the primary vehicles

105. Berry, *Cruel and Unusual Non-Capital Punishments*, *supra* note 6, at 1636.

106. IND. CONST. art. 1, § 16; N.H. CONST. pt. I, art. 33; ME. CONST. art. I, § 9; OR. CONST. art. I, § 16; W. VA. CONST. art. III, § 5; LA. CONST. art. I, § 20; Berry, *Cruel and Unusual Non-Capital Punishments*, *supra* note 6, at 1636 n.64.

107. Blocher, *supra* note 2, at 329 (footnote omitted); *see* Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 381 (1980); Randy J. Holland, *State Constitutions: Purpose and Function*, 69 TEMP. L. REV. 989, 989 (1996) ("State charters are the foundation of American Constitutional law."); Gordon S. Wood, *Foreword: State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 911 (1993) (outlining that state constitutions were foundational in establishing "the primary conceptions of America's political and constitutional culture").

108. Blocher, *supra* note 2, at 330 (footnote omitted); Holland, *supra* note 107, at 997 ("In fact, state Declarations of Rights were the primary origin and model for the provisions set forth in the Federal Bill of Rights." (footnote omitted)).

109. Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1199–200 (1985); *see also* McDonald v. City of Chicago, 561 U.S. 742, 818 (2010) (Thomas, J., concurring) ("After declaring their independence, the newly formed States replaced their colonial charters with constitutions and state bills of rights, almost all of which guaranteed the same fundamental rights that the former colonists previously had claimed by virtue of their English heritage." (citation omitted)).

110. Barron *ex rel.* Tiernan v. Mayor of Baltimore, 32 U.S. 243, 247–48 (1833), *superseded by amendment*, U.S. CONST. amend. XIV, *as recognized in* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2246 (2022).

111. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 773 (1992); Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 979 (1985) ("Before the enactment of the first ten amendments to the United States Constitution, fundamental liberties such as freedom from unreasonable searches and seizures were protected by state constitutions.").

for protecting the liberties of Americans, not the supplementary charters they have in many ways become."[112]

Yet, the failure of the states to apply state constitutional rights to benefit those individuals who required their application the most played a role in the drive to the Civil War and Reconstruction and ultimately the "sea change from a state-based protection of individual rights toward one that was federally centered."[113] Beginning in the 1940s, the U.S. Supreme Court began to recognize the constitutional reality that "[t]he constitutional Amendments adopted in the aftermath of the Civil War fundamentally altered our country's federal system."[114] Subsequently, the Court began the process of gradually "incorporating" the federal bill of rights against the states—holding that the states are required to comply with the rights contained in the federal Constitution, as interpreted by the Court.[115] What eventuated was nothing short of a constitutional revolution, led by the U.S. Supreme Court.[116] Over a period of twenty years, the Court engaged in a robust expansion of nearly all individual rights contained in the bill of rights, limiting government capacity to legislate in ways not seen before in U.S. Constitutional history.

Though state courts retain the capacity and authority to interpret rights enshrined in their respective state constitutions,[117] in reality the incorporation of the federal bill of rights establishes a floor of rights protection for individual Americans, regardless of their state.[118] Consequently, state courts largely only

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112. Blocher, *supra* note 2, at 331 (quoting Gardner, *supra* note 111, at 773).

113. *Id.* at 331–35 (noting that "[t]his expansion of federal rights was doubtless due in part to state courts' apparent inability or unwillingness to effectuate the rights guaranteed by their own constitutions" (footnotes omitted)); David Schuman, *A Failed Critique of State Constitutionalism*, 91 MICH. L. REV. 274, 280 (1992) (arguing that the incorporation doctrine "resulted from the unwillingness of many state courts, particularly in the South, to use their own constitutions to protect their citizens from state overreaching").

114. *McDonald*, 561 U.S. at 754 (plurality opinion). The Reconstruction Amendments initially failed to provide the doctrinal basis for the enforcement of the Bill of Rights against the states. *See* Slaughter-House Cases, 83 U.S. 36, 37 (1872) (interpreting the Privileges and Immunities Clause narrowly).

115. Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 253 (1982); *see also* Gerard N. Magliocca, *Why Did the Incorporation of the Bill of Rights Fail in the Late Nineteenth Century?*, 94 MINN. L. REV. 102, 112 (2009).

116. *See* Israel, *supra* note 115, at 325 (quoting A.E. Dick Howard, *The Supreme Court and Federalism, in* THE ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE REPORT, THE COURTS: THE PENDULUM OF FEDERALISM 49, 54 (1979)).

117. Blocher, *supra* note 2, at 334 ("As a doctrinal matter, the most important starting point is the fact that state courts have final authority in construing state charters, just as the Supreme Court bears ultimate power over the federal Constitution." (footnote omitted)); *see also* Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 100 (2000) ("[S]tate supreme courts have the unquestioned, final authority to interpret their state constitutions.").

118. Monrad G. Paulsen, *State Constitutions, State Courts and First Amendment Freedoms*, 4 VAND. L. REV. 620, 642 (1951) ("Although state constitutions contain full statements of our civil

exercise independent interpretive authority over their constitutions when they seek to expand the protections offered by the federal constitution.[119] Mostly, though, state courts resolve claims of rights violations through the mechanism of the federal constitution, and/or to interpret state rights concomitantly with the federal interpretation of the similar right, adopting interpretive approaches to constitutional claims that almost guarantee doctrinal convergence with federal interpretation of common constitutional rights.[120]

A majority of states have adopted what is termed the lockstep approach to state constitutional interpretation, interpreting state constitutional rights to have the same meaning as their analogous federal provisions, without any independent consideration of the state constitutional right.[121] This means that for most states, "the state constitutional analysis begins and ends with consideration of the U.S. Supreme Court's interpretation of the textual provision at issue"[122] and "that much constitutional policymaking by state supreme courts involves application of national judicial policy to the states."[123] The majority of states that have not adopted the lockstep approach to state constitutional interpretation take a "limited lockstep" (or interstitial) approach, where, "state courts assume 'the dominance of federal law and focus directly on the gap-filling potential of state constitutions.'"[124]

The states' Eighth Amendment analogues have not been exempted from this centralization movement. As with other state constitutional analogues, the vast majority of state courts adopt the U.S. Supreme Court's lead, interpreting their Eighth Amendment analogues as if the text, history, and experience of their own state mirrors that of the country as a whole. Section B turns to

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liberties, . . . [o]nly occasionally do state cases concerned with freedom of press, speech, assembly and worship take a position protecting the freedoms beyond what has been required by the United States Supreme Court.").

119. *Id.* at 620 ("State court decisions and state constitutional materials are too frequently ignored by both commentator and counsel when civil liberties questions arise." (footnote omitted)).

120. James A. Gardner, *The Positivist Revolution That Wasn't: Constitutional Universalism in the States*, 4 ROGER WILLIAMS U. L. REV. 109, 109–10 (1998) (deploying the term "doctrinal convergence" and arguing that the convergence of state and federal constitutional law "can be explained in part as the natural continuation of a long, powerful tradition on the state level of constitutional universalism").

121. *See generally* Carpenter & Margolis, *supra* note 2 (discussing state courts as an avenue for pursuing civil rights advocacy). Blocher, *supra* note 2, at 339–40. For a review of the lockstep doctrine, see Robert F. Williams, *State Courts Adopting Federal Constitutional Doctrine: Case-by-Case Adoptionism or Prospective Lockstepping?*, 46 WM. & MARY L. REV. 1499, 1502 (2005). Note that some state constitutions have requirements of lockstep interpretation. *See, e.g.*, FLA. CONST. art. I, § 17 ("[T]he prohibition against cruel and unusual punishment, shall be construed in conformity with decisions of the United States Supreme Court which interpret the prohibition against cruel and unusual punishment provided in the Eighth Amendment to the United States Constitution.").

122. Friedman, *supra* note 117, at 102.

123. Craig F. Emmert & Carol Ann Traut, *State Supreme Courts, State Constitutions, and Judicial Policymaking*, 16 JUST. SYS. J. 37, 47 (1992).

124. Friedman, *supra* note 117, at 104 (quoting *Developments in the Law – The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1357 (1982)).

examine the consequences of this, by describing the U.S. Supreme Court's Eighth Amendment doctrine and its application by state courts as the interpretive approach in analogous state constitutional claims.

B. EIGHTH AMENDMENT DOCTRINE AND THE PROBLEM OF UNITARY LIMITS ON EXCESSIVE PUNISHMENT

1. The Dominance of Gross Disproportionality

For a period spanning nearly two centuries, beginning with the ratification of the Eighth Amendment in 1791, and ending with the 1962 U.S. Supreme Court decision in *Robinson v. California*,[125] the Eighth Amendment's bar on cruel and unusual punishment did not apply to punishments handed out by states.[126] Consequently, the Court decided very few challenges to punishment regimes under the Eighth Amendment over this time period.

As a matter of constitutional principle, across this limited set of pre-incorporation cases, the Court noted "that . . . the [Eighth] Amendment . . . is not static" and "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[127] The Court stated broadly that the prohibition on cruel and unusual punishment embodied "the . . . precept of justice that punishment for crime should be graduated and proportioned to offense."[128] While the Court emphasized the "difficulty" of any "effort to define with exactness the extent of the constitutional provision[,] which provides that cruel and unusual punishments shall not be inflicted,"[129] it nonetheless struck down punishments it determined to be excessive. For example, in *Weems v. United States*, the Court found that the Constitution could not tolerate a member of the U.S. armed forces being imprisoned for twelve years "at hard and painful labor" for the crime of falsifying an official document.[130] Similarly, in *Trop v. Dulles*, the Court held that "denationalization is a cruel and unusual punishment."[131]

After the Eighth Amendment was incorporated against the states, fault lines emerged between a nearly equally divided Court, revealing stark

125. *See generally* Robinson v. California, 370 U.S. 660 (1962) (demonstrating the end of the two-century period).

126. *See id.* at 666–67.

127. Trop v. Dulles, 356 U.S. 86, 100–01 (1958) ("[T]he words of the [Eighth] Amendment are not precise, and . . . their scope is not static." (footnote omitted)).

128. Weems v. United States, 217 U.S. 349, 366–67 (1910).

129. *Id.* at 370, 401 (quoting Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878)).

130. *Id.* at 364, 381–88 (holding that fifteen years of *cadena temporal*, where inmates "shall always carry a chain at the ankle, hanging from the wrists; . . . shall be employed at hard and painful labor, and shall receive no assistance whatsoever from without the [penal] institutions," was an excessive punishment for the crime of falsifying an official public document); *id.* at 383 (White, J., dissenting); *see* Berry, *Cruel and Unusual Non-Capital Punishments*, *supra* note 6, at 1630–31 & n.12.

131. *Trop*, 356 U.S. at 99, 102–03.

disagreements on fundamental questions about the scope of the Eighth Amendment's protections. The first fault line centered on whether challenges to excessive punishment in the context of the death penalty should receive more scrutiny than non-capital punishments. One faction of justices believed that the death penalty merits a stricter proportionality standard because "death is different" in terms of its severity and irrevocability.[132]

Other justices disagreed, rejecting the idea "that the principle of disproportionality" is "less applicable when a noncapital sen[tence] is challenged[,] . . . find[ing] no support in the history of Eighth Amendment jurisprudence" for such a distinction.[133] Specifically, "[t]he constitutional language itself suggests no exception for imprisonment" and, given the constitutional protection against "excessive fines," "it would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not."[134] Moreover, a life without parole sentence, for example, shares characteristics with the death penalty in that "[t]he offender will never regain his freedom" and thus, like the death penalty, the "sentence does not even purport to serve a rehabilitative function."[135]

Another fault line centered on the appropriate level of deference to states in a federalist system in which punishment is defined and imposed primarily at the state level.[136] Noting that even the "[p]enologists themselves have been unable to agree whether sentences should be light or heavy, discretionary or determinate," one faction of justices lamented "the complexity of the comparison" of one person's sentence relative to others sentenced under different statutes under different conditions of parole eligibility.[137] Further, these justices were concerned with the pragmatic issue of how the dispositive federal court obtains information necessary to make decisions about proportionality given the difficulty of factual and moral questions around punishment and the complexity of state sentencing schemes.[138] But another faction of justices disagreed, arguing that it is the role

132. Harmelin v. Michigan, 501 U.S. 957, 959, 994 (1991) (citations omitted); *see* Furman v. Georgia, 408 U.S. 238, 287 (1972) (Brennan, J., concurring) ("The only explanation for the uniqueness of death is its extreme severity."); *id.* at 306 (Stewart, J., concurring) (stating death "is unique in its total irrevocability").

133. Rummel v. Estelle, 445 U.S. 263, 288 (1980) (Powell, J., dissenting); *see* Kenneth Lasson, Rummel v. Estelle*: Mockingbirds Among the Brethren*, 18 AM. CRIM. L. REV. 441, 441 (1981).

134. Solem v. Helm, 463 U.S. 277, 288–89 (1983).

135. *Harmelin*, 501 U.S. at 1028 (Stevens, J., dissenting).

136. *Rummel*, 445 U.S. at 283–84; *see also* Brenner M. Fissell, *Federalism and Constitutional Criminal Law*, 46 HOFSTRA L. REV. 489, 510–11 (2017) ("Without a complete understanding, states are best left to experimentation—'uncertainty reinforces our conviction that any "nationwide trend" toward [certain] sentences must find its source and its sustaining force in the legislatures, not in the federal courts.'" (alteration in original) (quoting *Rummel*, 445 U.S. at 283–84)).

137. *Rummel*, 445 U.S. at 280, 283 (footnotes omitted).

138. *See id.* at 281.

of courts to engage in difficult line drawing and that by using a broad array of objective factors it was possible to police excessive punishment without causing undue confusion or interference in the criminal justice systems of the respective states.[139]

Through this struggle, the "gross[] disproportion[ality]"[140] approach that emerged enshrined "death is different"[141] and extreme deference to state legislatures into the doctrine. Though the Court has found, "as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted,"[142] the justices created a buffer zone around legislative judgements such that "strict proportionality" is not required. Instead, "the Eighth Amendment [only] prohibits imposition of a sentence that is grossly disproportionate to the severity of a crime."[143]

Despite the fractured, patchwork nature of the Supreme Court's Eighth Amendment doctrine, and despite the fact that much of it depends on the unique dynamic of federal courts judging state punishments in a federalist system, the vast majority of state courts have followed this doctrine even when interpreting their own constitutions. The vast majority of states simply adopt the "gross disproportionality" framework even though core assumptions underlying its use at the federal level do not apply at the state level.[144] Even in the few state courts that do not lockstep state constitutional interpretation to federal doctrine, the courts nonetheless "incorporate elements of Supreme Court doctrine or concepts of proportionality in most cases . . . ."[145] For example, the Washington Supreme Court has held that its state constitution offers broader protections than those guaranteed by the Eighth Amendment,

139. *See id.* at 285–307 (Powell, J., dissenting).

140. Solem v. Helm, 463 U.S. 277, 284 (1983) (citation omitted).

141. Harmelin v. Michigan, 501 U.S. 957, 959 (1991) (citation omitted).

142. *Solem*, 463 U.S. at 290.

143. *Id.* at 306 (Burger, C.J., dissenting) (quoting *Rummel*, 445 U.S. at 271). The test requires courts to assess "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction . . . ; and (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.* at 278 (citation omitted). This gross disproportionality framework remains the leading doctrine in nearly all states when faced with a claim under state constitutions. Even in the few state courts that do not lockstep state constitutional interpretation to federal doctrine, the courts nonetheless incorporate proportionality or various portions of U.S. Supreme Court doctrine in many instances. Thus, in substance, even these more expansive doctrines retain the spirit—and thus the limitations—of the U.S. Supreme Court's gross disproportionality framework.

144. Berry, *Cruel and Unusual Non-Capital Punishments*, *supra* note 6, at 1636–37 ("The overwhelming majority of states—forty—follow the Supreme Court's approach in [non-capital] case[s] . . . ." (footnote omitted)).

145. *Id.* (footnote omitted).

yet the Court's four-part test mirrors the federal framework in non-capital cases except that it *also* considers the legislative purpose behind the statute.[146]

In the decades following Eighth Amendment incorporation, the prison population in America exploded.[147] New laws emanated from the states that upended the assumptions that drove the Court's Eighth Amendment jurisprudence. For example, the Court wrote that "[p]arole is a regular part of the rehabilitative process" and "[a]ssuming good behavior, it is the normal expectation in the vast majority of cases" that a person will earn release.[148] But law began to severely hamper—and in the case of the federal system, virtually end—parole. People sentenced to life or long sentences began to more regularly serve their whole sentence behind bars—a fact that changed the size and character of America's incarcerated population.

Yet, despite these dramatic changes, the U.S. Supreme Court has repeatedly upheld extremely long sentences even for relatively minor offenses.[149] The Court has affirmed a life *without parole* sentence for a first conviction of selling "672 grams of cocaine,"[150] a twenty-five year to life sentence based on a recidivism enhancement for stealing $1,197 worth of golf clubs,[151] and another sentence of the same length for stealing $150 worth of videotapes.[152]

After the Court affirmed a fifty-year sentence for a man who had stolen $150 of items from a department store,[153] Dean Erwin Chemerinsky wrote in 2003 "that the U.S. Supreme Court has made clear that there will be no relief from inhumane sentences in the courts" because "[i]f any sentence is grossly

146. *Rummel*, 445 U.S. at 272 ("Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel."); State v. Gregory, 427 P.3d 621, 627 (Wash. 2018).

147. *Criminal Justice Facts*, SENT'G PROJECT (2022), https://www.sentencingproject.org/criminal-justice-facts [https://perma.cc/5APE-TLR9] (providing that the U.S. prison population has had "a 500% increase over the last 40 years").

148. *Solem*, 463 U.S. at 300.

149. *See infra* notes 144–47. The Court did restrict use of the death penalty in a handful of cases starting in the 1970s, reasoning that due to its finality, death is different in kind than other punishments and deserving of more searching scrutiny. Nonetheless, like the prison population, death row populations skyrocketed in the last quarter of the twentieth century. *See supra* notes 50, 131–33 and accompanying text.

150. Harmelin v. Michigan, 501 U.S. 957, 961, 994, 996 (1991).

151. Ewing v. California, 538 U.S. 11, 35 (2003) (Breyer, J., dissenting) (critiquing the affirmation of a sentence of twenty-five years to life for stealing approximately $1,200 of golf clubs where the defendant had prior felony convictions).

152. Lockyer v. Andrade, 538 U.S. 63, 66–67, 70, 77 (2003) (affirming two consecutive sentences of twenty-five years to life for stealing approximately $150 of videotapes where the defendant had three prior felony convictions).

153. *Id.*

disproportionate, surely it is life imprisonment for shoplifting."[154] Writing nearly two decades later, Professor William Berry echoed the same theme, accusing the Court of "erect[ing] a gross disproportionality standard that seems insurmountable in most cases, even for draconian and excessive sentences" and having mostly "rendered the Eighth Amendment a dead letter" save for a handful of cases mostly involving restrictions on capital punishment.[155] The upshot of this centralized interpretation of disproportionate punishment is that freedom from excessive punishment was more rhetorical than real.

Two centuries of judicial review of excessive punishments has resulted in neither the federal courts nor their state counterparts fulfilling their constitutional responsibilities to curb excessive punishment. Indeed, after conducting a fifty-state survey of state court decisions reviewing a challenge to a punishment under a state constitution, Professor William Berry identified only "a small number of state court decisions finding that punishments have violated . . . state constitution[s]."[156] And *very few* of those decisions stemmed from challenges raised this century. But America's status as the world's most incarcerated country is a relatively recent development cemented over the past generation, and widespread societal awareness of the harm that this incarceration crisis has caused is a still more recent development.

The judiciary is intended to serve as a counterweight to unrestrained majoritarianism, and act as an impenetrable bulwark by protecting individual liberty against legislative and executive branch overreach.[157] A robust body of scholarship supports this idea that the Constitution structurally establishes the judiciary to protect against unfettered majoritarian excess.[158] Yet, in practice, it is a role that both the U.S. Supreme Court and their state counterparts have largely abdicated, allowing constitutionally excessive punishments—and the resulting incarceration crisis—to go unchecked.

2. The Emerging Consensus Approach and the Possibility of Constitutional Borrowing

In the face of this crisis, there remains the possibility of more robust judicial intervention by state courts. Contemporary developments in the U.S.

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154. Erwin Chemerinsky, *3 Strikes: Cruel, Unusual and Unfair*, L.A. TIMES (Mar. 10, 2003, 12:00 AM), https://www.latimes.com/archives/la-xpm-2003-mar-10-oe-chem10-story.html [https://perma.cc/43K4-BFAL].

155. Berry, *Cruel and Unusual Non-Capital Punishments*, *supra* note 6, at 1628 (footnote omitted).

156. *Id.* at 1637 (surveying the case law and finding only "a small number of state court decisions finding that punishments have violated the Eighth Amendment or separate state constitutional provisions").

157. THE FEDERALIST NO. 51 (James Madison) (stating "[i]t is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part" because "[i]f a majority be united by a common interest, the rights of the minority will be insecure").

158. *See, e.g.*, ELY, *supra* note 17, at 135–59; Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, *supra* note 17, at 1–2; Graber, *supra* note 17, at 380.

Supreme Court's capital punishment doctrine have shifted away from legislative deference and a proportionality framework toward an approach where courts apply their own independent judgment and apply what the U.S. Supreme Court terms a categorical framework.[159]

This approach is in real ways a triumph of the faction of justices that routinely dissented in the gross disproportionality cases decided since incorporation. For example, the categorical ban approach relies on objective factors to gauge whether a consensus exists for or against a challenged punishment practice.[160] Moreover, the Court uses its own independent judgment to determine whether a punishment meaningfully contributes to a legitimate purpose of punishment.[161] The emerging jurisprudence is also infused with a deeper connection to the broader constitutional principles of liberty and dignity. For example, in *Atkins v. Virginia*, which held that the Eighth Amendment bars the execution of intellectually disabled people, the Court emphasized that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[162] In a follow-up case in which the Court invalidated a Florida Supreme Court decision's overly restrictive definition of what constitutes intellectual disability, the Court wrote, "to impose the harshest of punishments on an intellectually disabled person violates his or her inherent dignity as a human being."[163]

Further, in *Roper v. Simmons*, the Court explained that the Eighth Amendment prohibition on cruel and unusual punishments is one of the Constitution's "broad provisions to secure individual freedom and preserve human dignity."[164] The Court ultimately held in *Roper* that the Eighth Amendment prohibits executing someone under eighteen years old because "the State cannot extinguish his life and his potential to attain a mature understanding of his own humanity."[165] Then, in *Graham v. Florida*, in language strikingly similar to Justice Stevens's dissent in *Harmelin*, the Court blurred the boundaries of its death-is-different approach, explaining: "The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties without giving hope of restoration . . . ."[166]

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159. *See, e.g.*, Erwin Chemerinsky, *Is Any Sentence Cruel and Unusual Punishment?*, 39 TRIAL 78, 78 (2003).

160. *See, e.g.*, Graham v. Florida, 560 U.S. 48, 61 (2010); Miller v. Alabama, 567 U.S. 460, 482 (2012); Atkins v. Virginia, 536 U.S. 304, 312 (2002).

161. *See, e.g.*, *Graham*, 560 U.S. at 61; *Miller*, 567 U.S. at 483; *Atkins*, 536 U.S. at 312.

162. *Atkins*, 536 U.S. at 311 (quoting Trop v. Dulles, 356 U.S. 86, 100–01 (1958)); *see* Smith & Robinson, *supra* note 31, at 462.

163. Hall v. Florida, 572 U.S. 701, 708 (2014).

164. Roper v. Simmons, 543 U.S. 551, 578 (2005); *see* Smith & Robinson, *supra* note 31, at 462.

165. *Roper*, 543 U.S. at 573–74.

166. *Graham*, 560 U.S. at 69–70 (citation omitted); *see* Smith & Robinson *supra* note 31, at 462.

It is true that the categorical ban framework has thus far only been applied to death and juvenile life without parole cases.[167] It is also true that the Court has not applied the framework in two decades.[168] In the intervening period, however, incarceration numbers have spiked, deviating in scale and character from our nation's commitment to proportional punishment. For perspective, there currently are ten times more people serving *life sentences* in California than the total number of people executed in the United States since the beginning of the modern era.[169] The "death is different" distinction is ultimately untenable as a tool for curbing excessive punishment when current incarceration rates fail to reflect any reasonable notion of proportional punishment.

This shift in the size of the country's penal system, along with broader moral awareness of its brutality, undoubtedly contributed to the Court's recent decisions to extend the categorical ban framework from the death penalty to address death-in-prison sentences for juveniles. Today, there is no basis in logic or experience for not expanding the categorical ban framework to other claims that a punishment practice is constitutionally excessive.

As we outline in Part III, these factors, along with state courts' growing awareness of their constitutional duty, have seemingly motivated a growing number of state courts to more actively engage with challenges to punishment practices raised under their respective state constitutions. As Part III describes, a small but growing number of state courts have begun to engage with claims of disproportionate punishment under their state constitutions, *purportedly deploying a categorical framework* to do so. This preliminary engagement of state courts with their local state constitutions in the context of excessive punishment maps onto a growing chorus calling for a resurgence of state constitutionalism in general. In Part III, we argue that the push for state constitutionalism offers a theoretical framework that reinforces why state courts should take the lead on curbing excessive punishment. We also explain how viewing state constitutionalism through the prism of excessive punishment helps to answer several of the biggest theoretical and pragmatic tensions that detractors raise.

III. THE PROMISE OF STATE CONSTITUTIONALISM TO PROTECT AGAINST EXCESSIVE PUNISHMENT

There is a recently reinvigorated dialogue among jurists and scholars aimed at restoring the primacy of state constitutions and state courts in enforcing individual rights. This dialogue, which focuses on "whether state forums might yield the greatest or optimal level of rights protection, at least

167. *Graham*, 560 U.S. at 82; Miller v. Alabama, 567 U.S. 460, 489 (2012); *Atkins*, 536 U.S. at 321.

168. Smith & Robinson, *supra* note 31, at 415, 419.

169. *See, e.g.*, NELLIS, *supra* note 64, at 10.

on some issues,"[170] is accompanied by a recent and modest uptick in state courts interpreting their constitutional provisions more broadly than related federal provisions spanning topics from takings clause cases to marriage equality to searches and seizures to enforcing voting rights.

Leading this state constitutionalism movement are judges, both federal and state.[171] One of the leading proponents of robust state constitutionalism is Judge Jeffrey Sutton, Chief Judge of the U.S. Court of Appeals for the Sixth Circuit. Judge Sutton, a Republican appointee to the federal bench, has led the call for "a healthy system of judicial federalism"[172] and warned of "the risks of relying too heavily on the U.S. Supreme Court as the guardian of our rights."[173] Judge Sutton calls attention to "a chronic underappreciation of state constitutional law [that] has been hurtful to state and federal law and the proper balance between state and federal courts in protecting individual liberty."[174] "For too long," Judge Sutton writes, "we have lived in a top-down constitutional world, in which the U.S. Supreme Court announces a ruling, and the state supreme courts move in lockstep in construing the counterpart guarantees of their own constitutions."[175] For Judge Sutton, "local language, context, and history"[176] pervades state constitutions and demands independent analysis of state constitutional provisions regardless of how facially similar they are to provisions in the federal constitution.

Judge Sutton's arguments are echoed by leading liberal Justice Goodwin Liu, an Associate Justice of the California Supreme Court. Like Judge Sutton, Justice Liu believes in the promise of empowering "[s]tate courts [to act] as . . . 'first responders in addressing innovative rights claims,'" instead of relying on the U.S. Supreme Court to adjudge and federalize the scope of rights.[177] However, Justice Liu is less enamored than Judge Sutton with local variation as a basis for supporting state constitutionalism. For Liu, "The sine qua non of independence in state constitutional interpretation is not reliance on state-specific reasoning; it is analytical independence, as opposed to a posture of

170. Liu, *supra* note 25, at 1322.

171. Larry Catá Backer, *From Constitution to Constitutionalism: A Global Framework for Legitimate Public Power Systems*, 113 PENN ST. L. REV. 671, 676–79, 724 (2009) ("[C]onstitutionalism . . . serv[es] as a means of evaluating the form, substance, and legitimacy of the former." Constitutionalism captures the "ideology of substan[ce] and process limitations on state power." Constitutionalism is "to be used to determine the legitimacy of the constitutional system as conceived or as implemented.").

172. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 2, at 81; *see also* Liu, *supra* note 25, at 1317.

173. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 2, at 190; *see also* Liu, *supra* note 25, at 1309.

174. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 2, at 174 (emphasis omitted); *see also* Liu, *supra* note 25, at 1309.

175. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 2, at 20.

176. *Id.*

177. Liu, *supra* note 25, at 1323 (footnote omitted); *see also* SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 2, at 208.

deference, in evaluating whatever materials are brought to bear on a particular issue."[178] In other words, "A state court should give respectful consideration to federal precedent as well as decisions of other state courts, but it must decide for itself what approach is most persuasive and worthy of adoption as a matter of state constitutional law."[179] As this tension in the approach of Liu and Sutton highlight, there is significant diversity within the camp of those who argue for a more robust state constitutionalism. Indeed, Justice Liu believes it a credit to state constitutionalism that it is both supported by, and offers benefits to, adherents of various interpretive approaches including originalism, textualism, and pragmatism.[180]

It is the focus on constitutional structure and interpretive independence, rather than ideologically or partisan driven outcome preferences, that differentiates the new state constitutionalism from an earlier call for judicial federalism in the 1960s and 1970s. Justice Brennan's motivation in urging a robust state constitutionalism was an attempt to protect the legacy of the Warren Court, of which Justice Brennan was a member of the prevailing liberal majority. In stating "that . . . decisions of the [U.S. Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law,"[181] Justice Brennan was overtly responding to the growing contraction of federal constitutional rights under the judicial leadership of Chief Justice Burger. Justice Brennan, then, did not view state constitutionalism as inherently good and correct, but rather "a second-best corrective for U.S. Supreme Court decisions that fail to properly vindicate individual rights."[182] Ultimately, as a consequence of its partisan nature, Brennan's state constitutionalism movement failed to shift the overall balance of rights protection between state and federal constitutions.[183] Today's focus on the structural benefits of state constitutionalism, and the ideological and partisanship diversity among its adherents, makes the enterprise less fragile.

With the new state constitutionalism movement divorced from partisanship, then, there appears to be three principles driving the contemporary move to state constitutionalism. The first is the valuing of federalism and the critical

178. Liu, *supra* note 25, at 1331 (emphasis omitted).

179. *Id.*

180. *Id.* at 1323–24; *see also* SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 2, at 211.

181. Brennan, *State Constitutions and the Protection of Individual Rights, supra* note 26, at 502 (footnote omitted).

182. Liu, *supra* note 25, at 1322.

183. Although, importantly, buoyed by Justice Brennan, a small number of state courts, including the supreme courts of Oregon, Maine, and New Hampshire, rejected lockstepping and instead adopted a "primacy approach" to state constitutional interpretation, resolving state claims prior to federal claims. *See* Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 135 (1970) ("Claims raised under the state constitution should always be dealt with and disposed of before reaching a fourteenth amendment claim of deprivation of due process or equal protection." (emphasis omitted)).

role of state courts in developing constitutional dialogue between the states, between state courts and federal courts, and between state courts and localities within each state. In *New State Ice Co. v. Liebmann*, Justice Brandeis articulated a clear rationale for this commitment, stating that "[i]t is one of the happy incidents of the federal system that a single courageous [S]tate may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[184] These experiments, which include the real-world effects of judicial decisions interpreting the scope of individual rights, which allows other courts to make more informed decisions in the future. As Judge Sutton argues:

> There will never be a healthy "discourse" between state and federal judges about the meaning of core guarantees in our American constitutions if the state judges merely take sides on the federal debates and federal authorities, as opposed to marshaling the distinct state texts and histories and drawing their own conclusions from them.[185]

For example, Professor Joseph Blocher has described how the U.S. Supreme Court, in the context of a Fourth Amendment challenge, drew on a precedent from the California Supreme Court's interpretation of a similar provision in the California Constitution.[186] As Blocher argues, "The Court followed the California Supreme Court's conclusion not necessarily out of respect for state sovereignty, but because the state had hands-on experience with a specific problem and had, in its role as a laboratory, settled on a solution."[187] This approach, then, situates state court interpretation of state constitutional provisions as "part of the same general research institution as the Supreme Court" meaning that the decisions of state courts later can become an important "factor in shaping the Court's own federal constitutional jurisprudence."[188]

Similarly, localism supports the new state constitutionalism. This holds that state constitutional interpretation can better embrace local values, experience, and opinions. In several contexts, federal constitutional doctrine asks courts to survey and account for state policies and practices in setting constitutional standards. This is true when the U.S. Supreme Court assesses "evolving standards of decency" and the proportionality of punishments. But what about local laws and values that deviate from state legislation? If state

184. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 491 (1954) ("Nowhere is the theory and practice of American federalism more significantly revealed than in the constitutions of the states."); Blocher, *supra* note 2, at 342–43 (discussing every state's role as a laboratory in American federalism).

185. SUTTON, 51 IMPERFECT SOLUTIONS, *supra* note 2, at 177 (footnotes omitted).

186. Blocher, *supra* note 2, at 343.

187. *Id.*

188. *Id.* at 343–44 (footnotes omitted).

courts blindly follow federal doctrine, then such local preferences are completely excluded from constitutionalism.

Instead, localism ensures that the benefits of state experimentation adhere not just between states or between states and federal courts, but also to intra-state courts. That is, a robust state constitutionalism also facilitates a healthy dialogue between states and the cities and counties that those states encompass. This dialogue benefits the state supreme courts by allowing the justices to glean more information about contemporary standards in the state.

For example, when a city council passes a resolution at the local level to not spend their local resources making arrests for marijuana possession, that sends a signal to the state supreme court that there is countervailing pressure on the facial appearance that punishing marijuana possession with a prison sentence is proportionate because the state legislature authorizes the punishment. The same is true when a local prosecutor chooses not to seek the death penalty. Similarly, localism enables differences in states conditions to be met with state-appropriate solutions. Why should, for example, the Alaska Supreme Court treat its state experience with life sentences as if it were the same as the experience in California. In California, almost 34,000 people—about one-third of the prison population—are serving a life sentence.[189] Meanwhile, in Alaska, *zero* people are serving either life-*with*- or life-*without*-parole sentences.[190]

The second principle driving the new state constitutionalism is the value of democracy. Some commentators support state constitutionalism because state constitutions tend to be more democratic, containing provisions that facilitate popular rule.[191] For example, many states allow for laws and even constitutional amendments to be passed through ballot measures.[192] Yet, on its face, these pro-majoritarian features seemingly make it more difficult to insulate anti-majoritarian rights protecting state supreme court decisions.[193] As Jessica Bulman-Pozen notes, "those who have studied the state judiciary identify an opposing fear [to the traditional counter-majoritarian difficulty]—that of the 'majoritarian difficulty,' or judging by elected officials who imperil unpopular minorities."[194]

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189. *See, e.g.*, NELLIS, *supra* note 64, at 10.

190. SENT'G PROJECT: CAMPAIGN TO END LIFE IMPRISONMENT, VIRTUAL LIFE SENTENCES 1 (2019), https://www.sentencingproject.org/publications/virtual-life-sentences [https://perma.cc/RJX5-PGYF].

191. Bulman-Pozen & Seifter, *supra* note 2, at 904 ("In the context of judicial review, decades of scholarship have feared and attempted to rebut a 'counter-majoritarian difficulty' raised by unelected judges reviewing the decisions of elected officials. But those who have studied the state judiciary identify an opposing fear—that of the 'majoritarian difficulty,' or judging by elected officials who imperil unpopular minorities." (footnotes omitted)).

192. *See, e.g.*, NEB. CONST. art. III, § 2.

193. *See* Bulman-Pozen & Seifter, *supra* note 2, at 878.

194. *Id.* at 904 (footnote omitted).

There are examples that support the concern. For instance, after the California Supreme Court held that their state constitution guaranteed marriage equality, voters passed Proposition 8 to reverse the decision and define marriage in the California Constitution as between one man and one woman.[195] The fact that many state constitutions also call for judicial elections also places pressure on the anti-majoritarian role that judges play when deciding individual rights cases.[196] Using another example from California, after the California Supreme Court reversed several death penalty sentences at the height of the death penalty's popularity, voters ousted Chief Justice Rose Bird.[197] These structural impediments to anti-majoritarian decision-making contribute to Dean Erwin Chemerinsky's assessment that the push for a more robust state constitutionalism only deserves "two cheers."[198]

These concerns are, we think, overstated. In the first instance, as we noted in Part II above, the practical effect of incorporation was that any independent interpretation of state constitutional provisions could not fall below the floor set by the federal constitutional standard. While state courts could in theory interpret their state provisions more narrowly than the federal doctrinal standard, the result would be the same, and the state law would be unconstitutional under the federal constitution. Practically, this means that state courts largely only exercise independent interpretive authority over their constitutions when they seek to expand the protections offered by the federal constitution.[199] The concerns of majoritarianism, then, are limited by the existence of dual protections for minority rights claims. But more importantly, the unique doctrinal approach embedded in a consensus approach to excessive punishment claims provides protection for judges against majoritarian backlash. As we previously outlined, a consensus approach requires judges to

195. *See* William N. Eskridge, Jr., *The California Proposition 8 Case: What Is a Constitution for?*, 98 CALIF. L. REV. 1235, 1235 (2010).

196. Bulman-Pozen & Seifter, *supra* note 2, at 885–86 ("Elected judiciaries became the norm as well: after Mississippi adopted an entirely elective judiciary in 1832, every state entering the United States in the second half of the nineteenth century popularly elected its judges, and in short order a majority of states so provided. . . . Convention delegates likewise sought to make elected judiciaries more responsive to the people, for instance by adopting recall provisions." (footnotes omitted)).

197. *See generally* John H. Culver & John T. Wold, *Rose Bird and the Politics of Judicial Accountability in California,* 70 JUDICATURE 81 (1986) (describing the campaign to defeat Justice Rose Bird in the 1986 California judicial elections).

198. *See generally* Chemerinsky, *supra* note 2 (arguing that state courts are not the best avenue to pursue civil rights as they cannot be decided under the U.S. Constitution).

199. Paulsen, *supra* note 118, at 642 ("Although state constitutions contain full statements of our civil liberties, . . . [o]nly occasionally do state cases concerned with freedom of press, speech, assembly and worship take a position protecting the freedoms beyond what has been required by the United States Supreme Court."); Blocher, *supra* note 2, at 334 ("As a doctrinal matter, the most important starting point is the fact that state courts have final authority in construing state charters, just as the Supreme Court bears ultimate power over the federal Constitution." (footnote omitted)).

examine contemporary community standards. At the state level, as we discuss in Part IV, this means judges will examine community standards within their own state; that is, the standards of the very electorate to which they are politically accountable. This investigation, then, builds in a strong connection to the people that functions to insulate them against majoritarian backlash.[200]

The third principle that is animating the new state constitutionalism is a reinvigorated state court commitment to constitutional liberty.

> [C]onstitutional liberty . . . refer[s] to the core of the deep values undergirding constitutional rights . . . . A "spacious phrase," liberty includes the freedom to maintain "a zone of liberty, a zone of protection, a line that is drawn where the individual can tell the Government: Beyond this line you may not go."[201]

Constitutional liberty can be seen in core aspects of the U.S. Supreme Court's rights jurisprudence, including its Eighth Amendment jurisprudence. For example, the Court in *Foucha v. Louisiana*, explained that "Freedom from bodily restraint has always been at the core of the liberty" interests that the Constitution protects.[202] This is so because when a person is confined, especially for decades or for their whole life, that person is deprived of liberty in the most fundamental sense—unable to roam outside the prison walls, embrace or even converse freely with loved ones, or exist without the unrelenting watchful eye of the government.

Just as the U.S. Supreme Court recognized that "it is the role of the judiciary to interpret what the value of liberty means today as applied to contemporary practices and mores,"[203] state supreme courts have equally recognized that state constitutions protect liberty, and that state judges have the primary role of curbing majoritarian encroachment on liberty interests. Texas Supreme Court Justice Don Willett wrote that just as the U.S. "Constitution . . . [declares] in the first sentence of the Preamble" that "its [aim is] to secure the Blessings of Liberty," "[t]he Texas Constitution likewise wastes no time, stating up front in the Bill of Rights its paramount aim to recognize and establish 'the general, great and essential principles of liberty and free government.'"[204] Describing the importance of guarding the right to

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200. G. Alan Tarr, *For the People: Direct Democracy in the State Constitutional Tradition*, *in* DEMOCRACY: HOW DIRECT? 87, 94 (Elliott Abrams ed., 2002) ("Popular election not only ensured accountability, but it also allowed executive officials and judges to claim that they had just as strong a connection to the people, the source of all political authority, as did legislators.").

201. Smith & Robinson, *supra* note 31, at 457–58 (footnote omitted).

202. Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (citation omitted); *see also* Roper v. Simmons, 543 U.S. 551, 578 (2005) (noting that the Constitution includes "broad provisions to secure individual freedom and preserve human dignity," amongst those provisions the Eighth Amendment prohibition on cruel and unusual punishments).

203. Smith & Robinson, *supra* note 31, at 464 (footnote omitted).

204. Patel v. Tex. Dep't of Licensing and Regulation, 469 S.W.3d 69, 92 (2015) (Willett, J., concurring) (quoting U.S. CONST. pmbl) (footnotes omitted).

liberty in all its forms, for example, Justice Willett labeled as "corrosive" what he described as "judicial passivism" practiced by judges "not active in preserving the liberties, and the limits, our Framers actually enshrined."[205]

Similarly, the New Jersey Constitution declares up front that "[a]ll persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty."[206] Last year, the New Jersey Supreme Court, in a decision that provided more protection than the federal constitution requires, wrote, "[o]ur State Constitution is a separate source of liberty, and we must apply it."[207] That court explained that it is not only appropriate for a state court interpreting its own constitution to depart from federal interpretation of analogue federal "[a]mendment[s], but [in fact,] it is necessary to give effect to the" "greater constitutional guarantees of individual liberty" in the New Jersey constitution.[208]

Very recently, several state courts have started to import the U.S. Supreme Court's categorical ban framework—a doctrine enriched by a deep commitment to enforcing constitutional liberty—when deciding cases under their respective state constitutions. This new approach reflects a growing openness to a more vigorous role for state judges in protecting against excessive punishment. For example, the Iowa Supreme Court, in holding that "juvenile offenders cannot be mandatorily sentenced under a mandatory minimum sentencing scheme,"[209] "follow[ed] the federal analytical framework in deciding th[e] case, but ultimately use[d] our own judgment in giving meaning to our prohibition against cruel and unusual punishment in reaching our conclusion."[210] That court said "that we would abdicate our duty to interpret the Iowa Constitution" by relying solely on the national context.[211] Part of its duty to examine the state constitution on its own merits is because "Iowans have generally enjoyed a greater degree of liberty" than if the court had "relied exclusively on the presence or absence of a national consensus regarding a certain punishment."[212] In declaring its "independent authority to interpret the [Iowa] [C]onstitution"[213] in ways that "depart from existing federal precedent,"[214] the Iowa Supreme Court has explained that it has "not

205. *Id.* at 119 (emphasis omitted).

206. N.J. CONST., art. I, § 1.

207. State v. Caronna, 265 A.3d 1249, 1261 (N.J. Super. Ct. App. Div. 2021).

208. *Id.*

209. State v. Lyle, 854 N.W.2d 378, 381 (Iowa 2014).

210. *Id.* at 384 (citing State v. Kern, 831 N.W.2d 149, 174 (Iowa 2013)).

211. *Id.* at 387.

212. *Id.*

213. State v. Baldon, 829 N.W.2d 785, 825 (Iowa 2013) (Appel, J., concurring) (footnote omitted).

214. *Id.* at 815 (Appel, J., concurring) (footnote omitted).

hesitated to do so" when "we have determined the liberty and equality of Iowans is better served by departing from the federal rule."[215]

This is not an isolated example. Several state courts have started to import this categorical ban framework when deciding cases under their respective state constitutions. For example, the Connecticut and Washington Supreme Courts both held that their respective state constitutions categorically bar capital punishment while the Oregon Supreme Court severely curbed its potential usage.[216] The highest courts in five states—Iowa, Massachusetts, New Jersey, and Washington—categorically banned life without parole sentences for juveniles.[217] Each of these courts, save Massachusetts, later also held that *de facto* life sentences for juveniles also violate their state constitution. And earlier this year, the New Jersey Supreme Court took a further step, holding that juveniles must be eligible for release from prison after twenty years,[218] and the Washington Supreme Court held that *mandatory* life without parole sentences are constitutionally impermissible for a person under twenty-one years of age.[219]

The fact that a handful of state courts are interpreting their state constitutions using the categorical framework is a promising development. However, in their concern for constitutional liberty, many state courts have failed to account for federalism values in the application of the framework, failing to localize the framework for the specific circumstances of their state. Moreover, some state supreme courts still struggle with whether and when to

215. *Lyle*, 854 N.W.2d at 383 n.2 (citations omitted).

216. State v. Santiago, 122 A.3d 1, 86 (Conn. 2015) (holding that "Connecticut's capital punishment scheme no longer comports with our state's contemporary standards of decency" and "therefore offends the state constitutional prohibition against excessive and disproportionate punishment" (footnotes omitted)); State v. Gregory, 427 P.3d 621, 627 (Wash. 2018) ("The death penalty, as administered in our state, fails to serve any legitimate penological goal; thus, it violates article I, section 14 of our state constitution."); State v. Bartol, 496 P.3d 1013, 1029 (Or. 2021) (striking down a death sentence on state constitutional grounds after the legislature severely restricted the death penalty in future cases, holding that the "death sentence would allow the execution of a person for conduct that the legislature has determined no longer justifies that unique and ultimate punishment, and it would allow the execution of a person for conduct that the legislature has determined is no more culpable than conduct that should not result in death").

217. State v. Zuber, 152 A.3d 197, 201 (N.J. 2017) (holding under both the federal and the New Jersey constitutions that sixty-eight and fifty-five year sentences with no possibility of release until ages eighty-five and seventy-two, respectively "are the [functional] equivalent of life without parole").

218. State v. Comer, 266 A.3d 374, 399 (N.J. 2022) (holding that under Article I, Paragraph 12 of the New Jersey Constitution, which prohibits cruel and unusual punishment, anyone sentenced to prison as a juvenile is eligible "for a review of their sentence after having spent [twenty] years in jail").

219. *In re* Monschke, 482 P.3d 276, 280 (Wash. 2021).

apply the gross disproportionality framework versus the categorical ban framework.[220]

While the recent state constitutional developments are promising after a long period of state courts deferring to federal approaches and interpretations even when interpreting their own constitutions, we argue that state courts continue to underpower their independence and analysis in the context of state claims relating to excessive punishment. In Part IV, we explain how state courts can take advantage of both the push for a more robust state constitutionalism and the growing cultural awareness of mass incarceration. We show how state courts can take the lead in developing and implementing a doctrine that meaningfully curbs the incarceration crisis in their respective states and live up to the power and responsibility that their state constitutions entrust them with.

IV. A STATE-FOCUSED FRAMEWORK FOR CURBING EXCESSIVE PUNISHMENT

This Part considers both the possibilities and limitations of a robust state constitutionalism that meaningfully curbs the mass incarceration crisis. To that end, in Section A we sketch a framework that lays out the doctrinal minimum for localized assessments of punishment. Our claim is that even state courts that interpret their Eighth Amendment analogue as co-extensive with the federal provision should follow this framework. A state court analyzing its own state constitution, but following the U.S. Supreme Court's evolving categorical ban framework (outlined in Part II), should conduct a state-specific consensus analysis and exercise localized independent judgment. In mapping a trajectory of state excessive punishment jurisprudence, our goal is not to predict the outcome of any particular challenge to a punishment practice, or even to argue that any particular practice is unconstitutional. Rather, our goal is to make more tangible where recent state constitutionalism moves could lead in practice.

In Section B, we highlight those states with Eighth Amendment analogues that are distinct from their federal counterpart. While Section A sketches a doctrinal framework as a floor for state courts to follow, in Section B we examine those state constitutional provisions that provide a textual, structural, or historical basis for maximizing constitutional protections. In these states, the constitutional text or the history leading up to the enactment of the provision prescribes greater limitations on the punishment that a state can impose on its population for a crime. These differences amplify the possibility

220. *See., e.g.*, *Bartol*, 496 P.3d at 1022 (where the Oregon Supreme Court openly questioned whether the gross disproportionality test would still command a majority of the U.S. Supreme Court. The Court noted that while it is clear that the U.S. Supreme Court would compare "the gravity of the crime" with "the severity of the sentence." *Id.* It is now unclear whether a majority of the Court would examine "the sentences imposed on other criminals in the same jurisdiction; and . . . the sentences imposed for commission of the same crime in other jurisdictions." Solem v. Helm, 463 U.S. 277, 292 (1983)).

of heightened protection against excessive punishment and constitutionally limit the scope of a court's inquiry under the consensus framework outlined in Section A.

A. SKETCHING THE DOCTRINAL MINIMUM FOR LOCALIZED EXCESSIVE PUNISHMENT PROTECTION

In designing a doctrinal framework for analyzing excessive punishment claims, we are not proposing an abstract or novel approach. Instead, we follow the handful of states that are actively engaged in state constitutionalism and suggest that the categorical ban framework is the approach that best fits with the power and responsibility of state courts interpreting their own constitution. As we outlined above, several state courts have begun to import the categorical ban framework in lieu of the U.S. Supreme Court's gross disproportionality test when deciding challenges under their state constitution's prohibition against excessive punishment.[221] To the extent that the goal of this paper is to provide pragmatic guidance to state court judges, it is important that we both take direction from the states themselves and provide an analytical framework that is immediately workable.

Importantly, given the significant concerns about the gross disproportionality test, we reject the continued applicability of this frame for analysis of state constitutional claims relating to excessive punishment.[222] As outlined in Part II the gross disproportionality test ultimately results in significant deference to state legislatures that, while plausibly justifiable by the federal courts as a requirement of federalism, is inapposite in the state context. Further, the gross disproportionality test results in a narrow and ultimately subjective inquiry, focusing heavily on legislative judgment of the appropriateness of the sanction.

Conversely, the categorical framework relies on a much richer set of indicators that collectively give courts a richer picture of the state's knowledge, experience, and support for a punishment practice. The categorical framework has two broad components: a consensus analysis and independent judgment.[223] The consensus analysis relies on objective indicators to assess whether there is a societal consensus in favor of or against the challenged punishment practice.[224] These indicators are broadly categorized in three buckets: legislative authorization, usage, and public and professional opinion.[225] The independent judgment component requires courts to evaluate whether the challenged punishment practice meaningfully serves a legitimate purpose of punishment (e.g., deterrence, retribution, etc.), or if a less severe punishment would

221. *See supra* notes 126–54 and accompanying text.
222. *See supra* notes 126–54 and accompanying text.
223. Smith & Robinson, *supra* note 31, at 482.
224. *Id.*
225. *Id.* at 483–84.

suffice.[226] In so doing, state courts interrogate how and upon whom the punishment is imposed in practice. In theory, the punishment is excessive if it fails *either* the consensus component or the independent judgment component.[227] However in practice, if there is a consensus *for* the punishment practice, a court generally affirms the sentence.[228] If there is a clear consensus against the punishment practice, a court generally invalidates the sentence.[229] If there is no clear consensus either way, the independent judgment component magnifies in importance.[230]

The categorical framework, then, ultimately refocuses judicial attention to a broader set of sources. When judges do consider whether a punishment is disproportionate to the crime, the opinions as to the proportionality of the punishment include, for example, professional organizations and the scientific community, relevant empirical studies, and other real-world characteristics about the punishment practice.[231] This wider array of sources shifts the inquiry from a purely subjective one, to an inquiry that is significantly closer to objective. Further, and importantly, the categorical framework requires judges to inquire about contemporary standards. For a number of structural reasons described in Part I, needlessly harsh punishments stay frozen into laws long after societal views change, with legislation a lagging indicator of contemporary standards of decency.[232] By considering a wider array of data, including public opinion, actual usage, and other factors, courts applying the categorical approach capture an accurate sense of contemporary societal standards. As the Michigan Supreme Court has noted, "[t]he very purpose of a constitution is to subject the passing judgments of temporary legislative or political majorities to the deeper, more profound judgment of the people reflected in the constitution . . . ."[233] The categorical framework facilitates the judicial role in ensuring that the will of historic legislative judgment does not supersede that of the people of the state.

Further, applied properly, a categorical framework directs state courts to consider the conditions and standards of decency within their own state. The text, history, experiences, and contemporary opinions of the people vary from state to state. As we outlined above, why should the Alaska Supreme Court treat its state experience with life without parole sentences as if it were the same as the experience in California, when in Alaska *zero* people are serving life sentences,[234] and in California, about one-third of the prison population

226. *Id.* at 484.
227. *Id.*
228. *Id.*
229. *See id.*
230. *See id.*
231. *Id.*
232. *See supra* notes 42–43 and accompanying text.
233. People v. Bullock, 485 N.W.2d 866, 877 (Mich. 1992) (footnote omitted).
234. *See* SENT'G PROJECT: CAMPAIGN TO END LIFE IMPRISONMENT, *supra* note 190, at 1.

is.[235] Ultimately, the categorical framework facilitates localized judgments on a localized political solution, and its deployment encourages state courts to do justice *to its own state* by analyzing the challenged punishment practice within the context and experience of its own state borders.

Yet, even among the small number of state courts that have applied a categorical framework there remains a misunderstanding of the power of the analytical tool for localized analysis. For example, in *Commonwealth v. Batts*, the Pennsylvania Supreme Court rejected a challenge under its state constitution to life without parole sentences for juveniles who commit murder.[236] The Court applied the categorical bar framework to the excessive punishment claim. However, rather than adapt the framework for local conditions, the Court held that the state constitution does not "require[] a broader approach to proportionality vis-á-vis juveniles than is reflected in prevailing United States Supreme Court jurisprudence."[237] Consequently, the Court underpowered their analysis by examining national indicators of consensus and failing to look inward at state-specific history, usage, and penological justifications for juvenile life without parole.

In the following Sub-Section, we develop a map outlining how state courts can best deploy the categorical framework, whether the state court interprets its state constitution to provide coextensive protections with the Eighth Amendment, or whether the state exercises the judicial independence granted to it under the state constitution.[238]

1. Consensus Analysis in State Courts

As noted above, there are three constituent parts to the consensus analysis—legislative authorization, usage, and public and professional opinion. Below, we sketch how each could be approached through a state-centered lens.

i. Legislative Authorization

At the federal level, legislative authorization involves judges counting how many states have a statute on the books that allow the challenged punishment to be imposed. The U.S. Supreme Court has said that the number of states that authorize a challenged punishment is relevant to its analysis because "the legislative judgment weighs heavily in ascertaining such standards"

235. NELLIS, *supra* note 64, at 10.

236. Commonwealth v. Batts, 163 A.3d 410, 459 (Pa. 2017), *abrogated on other grounds by* Jones v. Mississippi, 141 S. Ct. 1307 (2021) (holding that a sentencing judge may discretionarily sentence a juvenile who has committed homicide to life without parole without making separate factual findings).

237. Commonwealth v. Batts, 66 A.3d 286, 299 (Pa. 2013) (footnote omitted).

238. Even the Florida Supreme Court, which is bound to interpret a constitution that affirmatively requires lockstepping with the U.S. Supreme Court, could improve the quality of its analysis by applying this approach. *See, e.g.*, Bowles v. State, 276 So.3d 791, 796 (Fla. 2019).

of decency.[239] This mode of analysis may seem difficult to translate to a state level, because if a state court is analyzing a challenge to a state punishment practice under its state constitution, then almost by definition the punishment is authorized by the state legislature. This in and of itself does not preclude a deep analysis by state courts. Where legislative authorization exists, this fact alone does not prevent state courts from examining the context and discussion of that legislation. For example, Nevada passed its death penalty legislation in 1973, and this legislative enactment is still in effect in 2022.[240] A Nevada court today, tasked with examining a challenge to Nevada's death penalty, would be remiss in failing to examine contemporaneous legislative developments within the state in the intervening period. In 2021, for example, one chamber of the Nevada legislature voted to repeal the death penalty *and* commute all existing death sentences to life without parole,[241] and the Nevada Governor explicitly voiced his own opposition to the death penalty.[242] While the Nevada Senate majority leader, who also serves as a full-time district attorney in Las Vegas, ultimately refused to put the legislation to a vote in the Senate, the legislative development provides important data for courts assessing Nevadan consensus as it relates to whether the death penalty is considered excessive punishment.[243]

In addition to examining contemporaneous legislative developments at the state legislative level, state judges can also examine local level developments, including ballot and legislative acts of cities and counties within the state, even if state law preempts the local law from taking effect. For example, in 2019, voters in Denver, Colorado, passed Initiative 301, a ballot measure to (in effect) decriminalize psilocybin, the active ingredient in "magic mushrooms."[244] Although the measure passed, its scope was limited: Colorado still bans possession of the drug, so the local measure assigns "the lowest level of law enforcement priority" and directs that no resources be spent enforcing the state law.[245] However, state court examination of these local measures are critical for two reasons. First, local measures are indicative of contemporary standards of decency in the state locality where the measure passed. Indeed, it might be that voters that constitute a majority of the state live in localities that passed such laws, but that gerrymandering in the state legislature makes

239. Gregg v. Georgia, 428 U.S. 153, 175 (1976).

240. *State and Federal Info: Nevada*, DEATH PENALTY INFO. CTR. (2022), https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/nevada [https://perma.cc/NEP4-C6WT].

241. A.B. 395, Comm. on Judiciary (Nev. 2021).

242. *See, e.g.*, Michelle Rindels, *Sisolak, Democrats Spike Efforts to Repeal the Death Penalty in Nevada*, NEV. INDEP. (May 13, 2021, 1:09 PM), https://thenevadaindependent.com/article/sisolak-democrats-spike-efforts-to-repeal-the-death-penalty-in-nevada [https://perma.cc/8XKN-KK58].

243. *Id.*

244. *See, e.g.*, *Denver, Colorado, Initiated Ordinance 301, Psilocybin Mushroom Initiative (May 2019)*, BALLOTOPEDIA, https://ballotpedia.org/Denver,_Colorado,_Initiated_Ordinance_301_Psilocybin_Mushroom_Initiative (May 2019) [https://perma.cc/FAR4-LPJX].

245. *Id.* (footnote omitted).

it impossible to pass a bill that most of the state's population supports. Second, these local measures operate as laboratories of democracy in the same way that state laws (including state constitutional rulings banning an excessive punishment) serve as a rich source of information for the U.S. Supreme Court in terms of contemporary standards and experience.

Turning outward, state courts can also examine legislative trends nationally as persuasive authority akin to how the U.S. Supreme Court assesses the international landscape. When undertaking the consensus analysis at the federal level, the U.S. Supreme Court looks to both the absolute number of states that prohibit the punishment and the direction of change toward and away from the punishment.[246] Pivoting to the state level, state courts should examine the approach of its state counterparts to the punishment being challenged. Some state courts have already begun engaging in this form of state-level comparison.

For example, when holding that juvenile life without parole no longer comports with its state constitution, the Washington Supreme Court noted the absolute number of states that barred the practice and also the speed of change.[247] It stated

> that the direction of change in this country is unmistakably and steadily moving toward abandoning the practice of putting child offenders in prison for their entire lives. As of January 2018, 20 states and the District of Columbia have abolished life without parole for juveniles. This trend has occurred rapidly since [2012], before which only 4 states banned juvenile life without parole.[248]

While typically a part of federal analysis, state courts have also begun to examine international trends in their consensus analysis of the constitutionality of a punishment practice under the state constitution. For example, in its decision abolishing the death penalty, the Connecticut Supreme Court noted that "[g]lobally, 98 countries have now formally abolished the death penalty for all crimes, up from just 16 countries in 1977, and 140 countries effectively have renounced the death penalty by law or practice."[249]

Examining legislative authorization through a state-centric lens, then, highlights the various possibilities available for state judges engaging in consensus analysis that is fit for a local-level purpose.

ii. Usage

In addition to legislative enactments, consensus analysis relies on examination of the frequency of its usage by prosecutors, judges, and juries. As Justice Brennan explained: "The acceptability of a severe punishment is

246. Gregg v. Georgia, 428 U.S. 153, 179–184 (1976).
247. State v. Bassett, 428 P.3d 343, 352 (Wash. 2018).
248. *Id.* (footnotes omitted).
249. State v. Santiago, 122 A.3d 1, 50 (Conn. 2015) (footnote omitted).

measured, not by its availability, for it might become so offensive to society as never to be inflicted, but by its use."[250] That is why, in the federal context, the U.S. Supreme Court found a consensus against juvenile life without parole for non-homicide crimes.[251] Even though three-quarters of the states in the country authorized the punishment, the Court found that the fact that, of the thousands of juveniles eligible for a life sentence, "only 129 juvenile offenders were under a sentence of LWOP" illustrated "a consensus against its use."[252]

The question of usage is valuable for state courts, too. For example, in the context of capital punishment, a state court can ask how infrequently death sentences and executions are carried out across the state. Returning to the Nevada example above, although Nevada endured nearly 850 murders in the past five years,[253] it imposed only five death sentences over the same time period, all of which came from a single county.[254] Further, Nevada has only carried out a dozen executions in the past *fifty years*, and not a single execution in the past fifteen years.[255] Thus, despite the fact that Nevada has a state law authorizing the punishment, the fact that in practice the punishment is rarely imposed, and even more rarely carried out, suggests an on-the-ground consensus against its use. It also strongly suggests that the punishment does not meaningfully serve a purpose of punishment (because, if it served a needed purpose, prosecutors and juries would choose to impose it with regularity).

Similar to legislative enactment, states can also look at usage trends in other states as persuasive authority. Indeed, some states already examine the usage of other states in making determinations of constitutionality. For example, the New Jersey Supreme Court held under the state constitution that juveniles are entitled to a sentencing rehearing after no longer than twenty years.[256] In doing so, the Court found it persuasive that since 2016—after the U.S. Supreme Court required re-sentencing hearings for juveniles serving life without parole for murder convictions—"approximately 1,300 juvenile offenders serving life without parole throughout the nation have had their sentences reduced to a median term of '25 years before parole or release eligibility.'"[257]

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250. Furman v. Georgia, 408 U.S. 238, 279 (1972) (Brennan, J., concurring).

251. *See* Graham v. Florida, 560 U.S. 48, 62 (2010).

252. Robert J. Smith, Bidish J. Sarma & Sophie Cull, *The Way the Court Gauges Consensus (and How to Do It Better)*, 35 CARDOZO L. REV. 2397, 2413 (2014) (second quote quoting *Graham*, 560 U.S. at 62).

253. *Violent Crime 2021: Clark County*, NEV. CRIME STATS., https://nevadacrimestats.nv.gov/tops/report/violent-crimes/clark-county/2021 [https://perma.cc/MGT4-RZBT].

254. *Id.*

255. *State and Federal Info: Nevada*, *supra* note 240.

256. State v. Comer, 266 A.3d 374, 396 (N.J. 2022).

257. *Id.* (citation omitted); *see, e.g.*, Josh Rovner, *Juvenile Life Without Parole: An Overview*, SENT'G PROJECT (May 24, 2021), https://www.sentencingproject.org/app/uploads/2022/08/Juvenile-Life-Without-Parole.pdf [https://perma.cc/Q5KU-K6M2].

iii. Public Opinion

State courts should look to a variety of secondary indicators to glean current public opinion of societal consensus within their state. In addition to public opinion surveys, these indicators could include social and professional organizations, such as relevant bar associations, medical professionals, scholars, and prosecutor and defender associations.

Public opinion polling is one such indicator. For example, in *Atkins v. Virginia*, the U.S. Supreme Court decision barring imposition of the death penalty upon the intellectually disabled, the Court emphasized that "polling data shows a widespread consensus among Americans, even those who support the death penalty, that executing the [intellectually disabled] is wrong."[258] At the state level, polling data can serve as a key source of public opinion. For example, should the Texas Court of Criminal Appeals—the highest court in the state that hears criminal cases—be asked to glean whether imprisonment for marijuana possession violates its state constitution, it would be informative for that court to consider survey research reflecting how Texans view the issue.[259] A recent poll from the University of Houston shows that more than two-thirds of Texans, including most Republicans, support legalizing it.[260] Moreover, a Texas politics tracking poll from the University of Texas shows that a majority of Texans have supported legalization since 2010, and the number of Texans who oppose legalization in any form has decreased by half over the same time period.[261]

Other sources of public opinion can include social and professional organizations, such as relevant bar associations, medical professionals, scholars, and prosecutor and defender associations. For example, in *Atkins v. Virginia*, the U.S. Supreme Court considered "[a]dditional evidence" that "makes it clear that this legislative judgment reflects a much broader social and professional consensus," including the fact that "organizations with germane expertise"—groups such as the American Psychological Association, the American Association on Intellectual and Developmental Disabilities, and the United States Catholic Conference—"have adopted official positions opposing the imposition of the death penalty upon [an intellectually disabled] offender."[262] State courts, too, have relied upon the views of relevant professional and social organizations. For example, in holding that its state constitution requires that juveniles receive an opportunity for release after twenty years, the New Jersey Supreme Court considered the recommendations

258. Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002) (citation omitted).

259. See, e.g., *Marijuana Legalization Trend*, TEX. POLS. PROJECT, https://texaspolitics.utexas.edu/set/marijuana-legalization-trend [https://perma.cc/N8HM-AA6V].

260. BARBARA JORDAN & MICKEY LELAND, UNIV. OF HOUS., & TEX. S. UNIV.: HOBBY SCHOOL OF PUB. AFFS., TEXAS TRENDS SURVEY 2021: CRIMINAL JUSTICE REFORMS 8, https://uh.edu/hobby/txtrends/txtrends2021_report3.pdf [https://perma.cc/4SCP-7Z3P].

261. *Marijuana Legalization Trend*, *supra* note 259.

262. *Atkins*, 536 U.S. at 316 n.21 (citation omitted).

of an expert commission comprised of "representatives of the Governor and the Legislature, the Attorney General and the Public Defender, and the Parole Board and Department of Corrections, among others,"[263] which made a unanimous recommendation that children sentenced as adults "be entitled to apply to the court for resentencing after serving 20 years."[264]

Taken together, these various secondary factors—e.g., public opinion, professional and social organizations, the scholarly community—are not as vital as how a punishment is actually used in practice, but they serve a crucial role. By drawing upon empirical data into the views of the public and gleaning knowledge from those who have most studied and experienced the relevant information, courts can get a fuller picture of contemporary standards of decency.

2. Independent State Judicial Judgment

Once a court has a thorough understanding of contemporary knowledge and experience on the challenged punishment practice, a court must ultimately bring its own independent judgment to bear on the question of whether the punishment is excessive and therefore barred by the state constitution.[265]

In the context of an independent assessment of whether a punishment is excessive, the U.S. Supreme Court starts from the recognized purposes of punishment: retribution, deterrence, incapacitation, and rehabilitation. To determine whether the challenged punishment practice meaningfully serves one or more of those purposes, courts focus on the severity of the crime relative to the harshness of the punishment imposed and whether the diminished culpability of discrete classes of people subjected to the punishment bar its application against that group of people.[266]

To guide the assessment, courts consider a variety of indicators, including the views of the relevant scientific community, empirical research, and other scholarship and professional analysis.[267] For example, in a decision barring mandatory minimum sentences for juveniles, the Iowa Supreme Court explained that "scientific data and the opinions of medical experts provide a compelling and increasingly ineluctable case that from a neurodevelopment standpoint, juvenile culpability does not rise to the adult-like standard the mandatory minimum provision of [the state code] presupposes."[268] In other

263. State v. Comer, 266 A.3d 374, 400 (N.J. 2022) (discussing the composition of the New Jersey Criminal Sentencing and Disposition Commission) (citation omitted).

264. N.J. CRIM. SENT'G & DISPOSITION COMM'N, ANNUAL REPORT 29 (2019), https://dspace.njstatelib.org/xmlui/bitstream/handle/10929/57490/c9292019.pdf?sequence=1&isAllowedy [https://perma.cc/57F4-3Q89] (making a unanimous recommendation that children sentenced as adults "be entitled to apply to the court for resentencing after serving 20 years").

265. *Atkins*, 536 U.S. at 312–13.

266. *Id.*

267. *Id.* at 312.

268. State v. Lyle, 854 N.W.2d 378, 398 (Iowa 2014).

words, whatever retributive force mandatory minimum sentences serve for adults, the relevant scientific literature suggests that it applies with significantly lesser force for children. Moreover, "attempting to mete out a given punishment to a juvenile for retributive purposes irrespective of an individualized analysis of the juvenile's categorically diminished culpability is an irrational exercise."[269]

Courts also should look at whether the punishment practice is applied routinely and evenly across the people subjected to the punishment. If a punishment is imposed very rarely relative to its availability as a potential punishment, or if there are marked racial or geographic disparities in how the punishment is imposed, it raises the inference that the punishment is not meaningfully serving a purpose of punishment that a less harsh sanction could not adequately fulfill. If a punishment served a real purpose, prosecutors, judges, and juries would use it regularly and evenly. The Washington Supreme Court, for example, relied on the fact that "the [state's] use of the death penalty is unequally applied—sometimes by where the crime took place, or the county of residence, or the available budgetary resources at any given point in time, or the race of the defendant," to ban capital punishment under the state constitution because its arbitrary use proved that it did not meaningfully serve any legitimate purpose of punishment.[270]

B. EXCEEDING THE MINIMUM: MAXIMIZED STATE PROTECTIONS AGAINST EXCESSIVE PUNISHMENT

While Section A sketches a general doctrinal framework for states to follow in order to maximize the power of their state provisions, in this Section we explore some of the specific distinctions between state provisions and the Eighth Amendment—such as textual differences and unique history—that provide a basis for enhanced constitutional protections. In these states, the constitutional text or the history leading up to the enactment of the provision prescribes greater limitations on the punishment that a state can impose on its population for a crime. For example, in Michigan, the Michigan Supreme Court found that the disjunctive language in its constitution—cruel *or* unusual—was purposeful and suggests that a broader range of punishments are excessive under the Michigan Constitution than the U.S. Constitution.[271] The more textually robust Illinois Constitution requires that penalties for crimes be linked not only to the seriousness of an offense, but also have "the objective of restoring the offender to useful citizenship."[272] And the history of the Pennsylvania Constitution reflects a deep concern among its framers that

269. *Id.* at 399 (citation omitted).

270. State v. Gregory, 427 P.3d 621, 627 (Wash. 2018).

271. *Id.* at 631; *see also* People v. Bullock, 485 N.W.2d 866, 872 (Mich. 1992); People v. Clemons, 968 N.E.2d 1046, 1056 (Ill. 2012).

272. ILL. CONST. art. 1, § 11.

punishment be more moderate and not be imposed on the basis of retribution.[273] Practically, then, the state constitutions that enshrine heightened protections against excessive punishment necessarily dampen the deference that state courts give to legislative determinations of the proportionality of a particular punishment.

In the Subsections below, we sketch the possibilities suggested by the diverse text and history in various state constitutions, as recently highlighted by state courts.

1. Textual Maximization of Protections Against Excessive Punishment

When a state constitution's text is different from the Eighth Amendment, state courts can use that distinction to provide greater individual rights protection. Even small differences in text and meaning can lead to more searching inquiries. For example, the language "cruel or unusual" or "cruel punishment" instead of the Eighth Amendment's "cruel and unusual" language, differences in the evolution of state's disproportionality clause, or other textual differences from the Eighth Amendment provide opportunities for state courts to carve out their own state constitutional jurisprudence.

The impact of these textual differences as between the Eighth Amendment and their state constitutional analogue has been emphasized by some state courts. For example, the California Constitution proscribes "cruel or unusual punishments." [274] Interpreting that provision, the California Supreme Court rejected the notion "that the use of the disjunctive form in the latter is insignificant."[275] After conducting a history of the provision, that court concluded "that the delegates to the Constitutional Convention . . . were aware of the significance of the disjunctive form and that its use was purposeful."[276] Indeed, "the delegates modified the California provision before adoption to substitute the disjunctive 'or' for the conjunctive 'and' in order to establish their intent that both cruel punishments and unusual punishments be outlawed in this state."[277]

The Michigan Supreme Court similarly concluded that the disjunctive "cruel or unusual" language in the Michigan Constitution "does not appear to be accidental or inadvertent."[278] The first Michigan Constitution barred "cruel and unjust punishments."[279] But then delegates at a subsequent

273. Kevin Bendesky, "The Key-Stone to the Arch": Unlocking Section 13's Original Meaning 3 (Dec. 11, 2022) (arguing that the Pennsylvania's constitution is not coexistent with the United States Constitution) (unpublished manuscript) (on file with author).

274. People v. Anderson, 493 P.2d 880, 883–86 (Cal. 1972).

275. *Id.* at 883 (footnote omitted).

276. *Id.*

277. *Id.* at 885 (footnotes omitted).

278. People v. Bullock, 485 N.W.2d 866, 872 (Mich. 1992) (emphasis omitted) (footnote omitted).

279. *Id.* (emphasis omitted).

constitutional convention adopted the disjunctive language instead, and that updated language survives in today's document.[280] The Michigan Supreme Court found that "this difference in phraseology . . . might well lead to different results with regard to allegedly disproportionate prison terms."[281] More specifically, that court explained, "[t]he prohibition of punishment that is unusual but not necessarily cruel carries an implication that unusually excessive imprisonment is included in that prohibition,"[282] and such "a 'significant textual difference [] between parallel provisions of the state and federal constitutions'" could be a "compelling reason" for the court to reach "a different and broader interpretation of the state provision."[283]

When state courts interpret a disjunctive provision to be purposefully different from the Eighth Amendment's conjunction formulation, there is necessarily a more limited zone of judicial deference to legislative judgements. But the fact that punishments need not be *unusual* in states like California or Michigan, where the highest state courts find that these textual differences matter, does not obviate the need for the state court to engage in the consensus prong of the categorical analysis. The information that a court gleans from absorbing objective indicators does not simply reveal whether a punishment is "unusual," it can also *inform* the court's independent judgment about whether a punishment meaningfully serves a legitimate purpose of punishment. For example, understanding from usage patterns that an extreme punishment such as the death penalty is rarely used, but when it is imposed, it is imposed disproportionality on the severely mentally ill, could help a court determine that the punishment is imposed not on the most culpable, but on the most impaired.

2. Structural Maximization of Protections Against Excessive Punishment

In a number of state constitutions there are specific clauses that go beyond the prohibition against "cruel and unusual punishment" contained in the U.S. Constitution. For example, the Illinois Constitution, as amended in 1970,[284] states that "[a]ll penalties shall be determined both according to the seriousness of the offense *and with the objective of restoring the offender to useful citizenship*."[285] The sponsor of the amendment, Leonard Foster, explained that

280. *Id.* at 885–87 (Riley, J., concurring).

281. *Id.* at 872.

282. *Id.* (citation omitted).

283. *Id.* (alteration in original).

284. Prior to the 1970 amendments, Article 1 defined the boundaries and jurisdiction of the state of Illinois, and Article II delineated the Bill of Rights, with Section 11 of the Bill of Rights constituting the state analogue to the Eighth Amendment's cruel and unusual punishment clause. *See* ILL. CONST. art. 1, § 11.

285. Andrea D. Lyon & Hannah J. Brooks, *Stepping Towards Justice: The Case for the Illinois Constitution Requiring More Protection Than Not Falling Below "Cruel and Unusual" Punishment*, 41 N. ILL. U. L. REV. 47, 49 (2021) (citing ILL. CONST. art. 1, § 11).

the purpose of the new language was that "in addition to looking to the act that the person committed, we also should look at the person who committed the act and determine to what extent he can be restored to useful citizenship."[286] Moreover, "in December 1970, an explanatory note to [the proposed amendment] advised voters that the amended language 'adds the requirement that penalties be determined with the objective of rehabilitating the offender and in accordance with the seriousness of the offense.'"[287]

Ratified by Illinois voters, these amendments were intentionally made to ensure that courts take rehabilitative possibilities into consideration when sentencing and that failure to consider rehabilitation "might be successfully challenged as unconstitutional."[288] As Professors Lyon and Brooks have explained, "once the rehabilitative prong of the proportionate penalties clause was added to the Illinois Constitution, courts started to take into consideration the effects of trauma, poverty, mental health, and physical health in assessing the appropriateness of a punishment."[289] The Illinois Supreme Court recently concluded that the Illinois analogue to the Eighth Amendment is broader and affirms more protection for individual liberty, specifically holding "that the limitation on penalties set forth in the second clause of article I, section 11, which focuses on the objective of rehabilitation, went beyond the framers' understanding of the [E]ighth [A]mendment and is not synonymous with that provision."[290]

To consider the potential of the rehabilitation clause in reducing excessive punishment, consider mandatory minimum sentences generally, and life without parole specifically. For example, if the Illinois Supreme Court exercises its independent judgment to conclude that a life-without-parole sentence meaningfully serves a purpose of punishment such as retribution or deterrence, the punishment might still violate the Illinois Constitution because it provides no opportunity for rehabilitation. No matter how much the person changes while inside prison walls—*getting treatment for a mental illness, completing a GED or even finishing college, or serving as a mentor for other incarcerated people*—a life-without-parole sentence stamps out all hope. It is a punishment that inherently discards "the objective of rehabilitating the offender."[291] A court might look at these factors, and nonetheless conclude that even after

286. 3 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 1391 (1972).

287. Lyon & Brooks, *supra* note 285, at 54 (citing 7 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 2685 (1972)).

288. *See* Roy W. Hardin, *Section 11 of the Bill of Rights: Rehabilitation Potential and Sentencing*, 8 J. MARSHALL J. PRAC. & PROC. 269, 269, 273 (1975) ("Section 11 was intended to place a direct constitutional limitation on a judge who is exercising those functions of the legislative power of sentencing which have been delegated to the judicial branch. Failure of a judge to take rehabilitative possibilities into consideration is a violation of that limitation, and consequently, a violation of defendant's constitutional right under section 11.").

289. Lyon & Brooks, *supra* note 285, at 54.

290. People v. Clemons, 968 N.E.2d 1046, 1057 (Ill. 2012).

291. *Id.* (citation omitted).

considering the importance of rehabilitation, the punishment is necessary and proportionate, but certainly the presence of the rehabilitation clause shifts the calculus relative to the Eighth Amendment.

Montana provides another illustration. The Montana Constitution contains both an Eighth Amendment analogue that prohibits "cruel and unusual punishments,"[292] as well as a separate provision that proclaims "that all human beings have the right to individual dignity."[293] The Montana Supreme Court "read[s] together Montana's constitutional right to individual dignity and the right to be free from cruel and unusual punishment when both constitutional provisions are implicated."[294] Given that the U.S. Constitution contains no express right to individual dignity, the Montana Supreme Court has interpreted its state constitution "to provide Montana citizens greater protections from cruel and unusual punishment than does the federal constitution."[295] James Park Taylor, the Managing Attorney for a Tribal Prosecutor's Office in Montana, wrote that because "the right to dignity was a re-envisioning of the concept of equal protection and was adopted by the 1972 Constitutional Convention based on a provision in the Puerto Rico Constitution,"[296] which in turn borrowed from the concept of dignity in the German Constitution, "a strong argument can be made to look to the law of other nations in determining the meaning of the right to dignity in any particular context."[297] If the Montana Supreme Court looked to Germany's interpretation of its dignity provision as a persuasive opinion, it would find that the German Supreme Court barred life sentences unless there exists "a concrete and principally attainable possibility to regain freedom at a later point in time."[298] The German Supreme Court found death-in-prison sentences "incompatible with the human dignity clause of Article 1.1. of the Basic Law"[299] because "the core of human dignity is struck if the convicted criminal has to give up any hope of regaining his freedom no matter how his personality develops."[300]

The Arizona Constitution provides a final example. There, in addition to an Eighth Amendment analogue that "bar[s] . . . cruel and unusual

292. MONT. CONST. art. II, § 22.

293. Wilson v. State, 249 P.3d 28, 33 (Mont. 2010) (citing MONT. CONST. art. II, § 4).

294. *Id.* (citing Walker v. State, 68 P.3d 872, 883 (Mont. 2003)).

295. *Id.* (quoting *Walker*, 68 P.3d at 883).

296. James Taylor, State Bar of Mont., *Cruel & Unusual Punishment Clause Examined Through the Lens of the Right to Dignity*, ISSUU (Montana Lawyer Feb.–Mar. 2021), https://issuu.com/statebarmt/docs/final/s/11899697 [https://perma.cc/SC4L-WRTG].

297. *Id.*

298. Bundesverfassungsgerichtsentscheidung [BverfGE] [Federal Constitutinoal Court], June 21, 1977, 45 BVerfGE 187, 187 (Ger.), http://www.hrcr.org/safrica/dignity/45bverfge187.html [https://perma.cc/EGQ2-BH7A].

299. *Id.*

300. *Id.*

punishment,"[301] the constitution contains a separate provision that makes "[i]t . . . unlawful to confine any [children] under the age of eighteen years, accused or convicted of crime, in the same section of any jail or prison in which adult prisoners are confined."[302] Pointing to "the juvenile detention provision,"[303] John Mills and Aliya Sternstein have argued that "the . . . cruel and unusual punishment clause must be interpreted in harmony with the entire text of the state constitution, the clause as part of the whole."[304]

To arrive at this conclusion, Mills and Sternstein turn to founding-era views.[305] For example, George W.P. Hunt served as the president of the Arizona constitutional convention and also the state's first governor.[306] Addressing the first legislature, Hunt said of "[t]he [state] constitution, among its many splendid provisions, has few better than that one which throws a protecting arm about dependent, neglected, incorrigible or delinquent children, and children accused of crime, under the age of eighteen years."[307] He also described the constitution as "a 'shield' between 'the young boys and girls whose unhappy environment, parentage or misfortune' and the 'heartlessness of a system containing no thought of humanity.'"[308] Foreshadowing the U.S. Supreme Court's logic in *Graham v. Florida*,[309] decided nearly a century later, Hunt explained "that 'few children are naturally criminal, even though they may have committed some criminal act . . . .'"[310] Taking stock of this history, Mills and Sternstein conclude that there clearly is an overriding aim in the state constitution to provide children with an opportunity to grow and change, and this history should be reflected in deliberations of the Arizona Supreme Court when weighing whether life and long sentences for children are disproportionate.[311]

3. Local History and Purpose as Maximizing Protections Against Excessive Punishment

The historical circumstances surrounding the adoption of a constitutional provision help to shed light on the intended purpose of that provision, which in turn, shapes how courts give effect to its protections. For example,

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301. John Mills & Aliya Sternstein, *New Originalism: Arizona's Founding Progressives on Extreme Punishment*, 64 ARIZ. L. REV. 733, 733 (2022).

302. *Id.* at 759.

303. *Id.* at 760.

304. *Id.* (footnote omitted).

305. *Id.*

306. *Id.*

307. *Id.* at 759–60 (citation omitted).

308. *Id.* at 760 (citation omitted).

309. *See generally* Graham v. Florida, 560 U.S. 48 (2010) (explaining to the defendant that he received a chance to show he is not a criminal and has now repeated his criminal behavior).

310. Mills & Sternstein, *supra* note 301 (citation omitted).

311. *See id.*

Pennsylvania's Eighth Amendment analogue contains the language "cruel punishment[]," [312] and there is evidence that its framers had a particular conception of cruelty in mind.[313] Influenced by criminologist Cesare Beccaria, a number of extremely influential delegates intended to craft a provision that rendered it "'cruel' to punish anyone more severely than necessary to deter crime and rehabilitate offenders." [314]

Summarizing the intellectual atmosphere around the time the "cruel punishment" provision was enacted, Kevin Bendesky, wrote that "the Commonwealth led the country and indeed the world in penal reform" [315] and

> [i]ts founding thinkers were students of the Enlightenment who believed that the purpose of punishment was to deter and reform; those punishments ought to be proportional to crimes; and, most importantly, that no punishment was permissible unless it was 'necessary' for these purposes.[316] Indeed, just three years after the "cruel punishment" provision was ratified, "the state's first governor and chairman of the 1790 constitutional convention" reminded legislators that "'every punishment, which is not absolutely necessary for [deterrence], is an act of tyranny and cruelty.'" [317]

These differences offer distinct inroads for the Pennsylvania Supreme Court to interpret its own state constitution to provide greater protection against excessive punishments, especially in light of observations that this historical distinction has never been fully briefed for the court's review.[318] At a minimum, this history has practical import for the Pennsylvania Supreme Court when determining if a practice "meaningfully serves" a legitimate purpose of punishment. Even if the punishment serves the value of retribution, it could still be disproportionate unless it also serves a deterrent or incapacitation purpose.

Connecticut is another state with a historical record that clearly reflects the framers' intentions to create a more restrained punishment system in the state. The Connecticut Supreme Court recently surveyed this history, finding

> it . . . clear that, from the earliest days of the colonies, and extending until the adoption of the state constitution in 1818, the people of Connecticut saw themselves as enjoying significant freedoms from cruel and unusual punishment, freedoms that were safeguarded by

312. PA. CONST. art. I, § 13 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted.").

313. Bendesky, *supra* note 273, at 3.

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

> our courts and enshrined in our state's pre-constitutional statutory and common law.[319]

According to the Court, this reflected both a desire to "enforce[] [the law] without needless cruelty" and an "[. . . unmistakable] tendency toward judicial moderation in the use of physical punishment[]."[320] Ultimately, in light of this "unique historical and legal landscape" the Connecticut Supreme Court held that that "th[e] state's death penalty no longer comports with contemporary standards of decency and no longer serves any legitimate penological purpose."[321] More broadly, this history of moderation could inform the court's independent judgment by narrowing the zone of deference that the court affords to legislation that imposes disproportionate punishments.

The categorical ban analysis serves as a solid baseline for state courts assessing excessive punishment claims under their respective state constitutions. However, since every constitution is different, state courts should analyze the text, history, and structure of their constitution to determine whether it differs from the federal constitutional prohibition on cruel and unusual punishment in meaningful ways. When a state constitution provides more expansive protections, courts should still apply both prongs of the consensus analysis. After all, objective indicators inform whether a punishment is disproportionate as it operates in practice. However, when courts consult their own independent judgment, these differences in text, history, and structure could shrink the zone of deference afforded to the legislatively authorized punishment.

C. Promising Areas and Extensions for State Courts

The previous two Sections provided a roadmap for state courts tasked with deciding whether a challenged punishment practice is excessive in violation of their respective state constitutions. In this Section, we provide a high-level overview of topics that are ripe for a healthy dose of state constitutionalism, including urging state courts to take to reconsider whether their Eighth Amendment analogues are more protective than their federal counterpart.

1. Juveniles

Most recent state court decisions barring excessive punishment involve life sentences for juveniles.[322] There are at least four areas of juvenile punishment that are ripe for state constitutional review. One area ripe for consideration is life without parole sentence for juveniles who commit murder. The 2018 Washington Supreme Court decision striking down life without

319. State v. Santiago, 122 A.3d 1, 26–27 (Conn. 2015) (footnote omitted).

320. *Id.* at 22 (third brackets in original).

321. *Id.* at 9.

322. *See* Rovner, *supra* note 257.

parole for juveniles who commit murder is a good example.[323] With few exceptions, a state supreme court looking at usage *within its own borders* as an objective factor would find that the punishment is rarely used in practice in relation to its availability.[324] Moreover, looking to the national context as persuasive authority, a court would find that nine out of the forty-two states that had permitted juvenile life without parole changed their minds between 2013 and 2017, deciding to ban it.[325] Even among states that retain life without parole for juveniles, "[f]ive [of those] states have imposed either zero or one life without parole sentence[] upon a juvenile since 2011."[326] These examples show how some states have begun to eliminate life-without-parole sentences for juveniles who commit murder through nonuse, perhaps as a first step toward eradicating such sentences altogether.

Three other areas that are ripe for future consideration are categorical exemptions, mandatory-minimum sentences, and expanding the effectiveness and timing of parole hearings. Categorical exemptions are particularly ripe for future consideration, especially expanding the category of juveniles to young adults. The Washington Supreme Court's decision holding that people under the age of twenty-one are ineligible for mandatory life-without-parole sentences is one such example.[327] Similarly, the question of whether *any* mandatory-minimum prison sentence can be imposed upon a juvenile is also ripe for consideration, as the Iowa Supreme Court did in *Lyle*.[328] And last but not least, the maximum time after which there must be a parole eligibility hearing for juveniles serving life and other long sentences is yet another example of an area ripe for consideration, as exemplified by the New Jersey Supreme Court's holding that resentencing hearings must occur after twenty years.[329]

2. Life Without Parole for Adults

Life-without-parole sentences for adults is another broad topic that warrants more state court scrutiny. Today, there are roughly 200,000 people serving whole or de facto life sentences in America; of those people, about

323. *Washington Supreme Court Rules Juvenile Life Without Parole Violates the State Constitution*, WASH. DEF. ASS'N (Oct. 19, 2018), https://defensenet.org/washington-supreme-court-rules-juvenile-life-without-parole-violates-the-state-constitution [https://perma.cc/NKF5-V2ED].

324. John R. Mills, Anna M. Dorn & Amelia Courtney Hritz, *Juvenile Life Without Parole in Law and Practice: Chronicling the Rapid Change Underway*, 65 AM. U. L. REV. 535, 560–68 (2016) (explaining how two-thirds of all juvenile life without parole cases come from five states).

325. Smith & Robinson, *supra* note 31, at 470; *see also* Mills et al., *supra* note 324, at 560–68 (detailing legislative enactments and declining usage of juvenile life without parole).

326. Smith & Robinson, *supra* note 31, at 470–71; *see also* Mills et al., *supra* note 324, at 560–68.

327. State v. Bassett, 428 P.3d 343, 346 (Wash. 2018).

328. State v. Lyle, 854 N.W.2d 378, 381 (Iowa 2014).

329. *See* State v. Comer, 266 A.3d 374, 401 (N.J. 2022).

one-quarter of them have no opportunity to earn release.[330] State courts could significantly reduce this number if they found life-without-parole sentences disproportionate for certain classes of people or for certain types of crimes.

State courts should consider whether death-in-prison sentences are disproportionate as applied to certain classes of adults. For example, people who struggle with serious mental illness or substance use disorders who get treatment and heal. The illness could operate to seriously diminish a person's culpability while at the same time rendering it impossible to accurately predict the likelihood of rehabilitation decades into the future. In barring life without parole for juveniles who commit non-homicide offenses, the U.S. Supreme Court observed "that 'developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds.'"[331] The Court went on to observe that juveniles' "lack of maturity and . . . underdeveloped sense of responsibility . . . often result in impetuous and ill-considered actions and decisions."[332] There are important distinctions between juvenile and adults brains, of course, but the spirit of the Court's logic—that kids grow and change over time—also applies to adults. The reality is that all people can grow and change as years—and decades—pass. It rarely makes sense to determine whether someone will be dangerous or rehabilitated thirty years into the future.

State courts could also consider whether death-in-prison sentences are disproportionate when handed down for the commission of certain crimes, for example for non-homicide offenses. It is worth noting that there is some *low hanging fruit*. For example, in 2015, the Chief Justice of the Alabama Supreme Court wrote a concurring opinion urging the legislature to take a second look at whether requiring a life sentence "for a nonviolent, drug-related crime"—even for a habitual offender—still "serves an appropriate purpose."[333] The Chief Justice wrote that, in his view, such a "sentence is excessive and unjustified."[334] In *most* states, life without parole for a drug crime is rare or nonexistent. For instance, "twenty-two states and the federal government authorize life without parole for non-violent drug offenses,"[335] but the degree to which the states and federal government use this punishment tells a different story: "While approximately 80% of life without parole sentences for non-violent drug offenses occur at the federal level, there are people serving life without parole for drug offenses in as few as eight and as

330. *See* NELLIS, *supra* note 64, at 8, 11.

331. Miller v. Alabama, 567 U.S. 460, 471–72 (2012) (citation omitted).

332. *See, e.g.*, Johnson v. Texas, 509 U.S. 350, 367 (1993).

333. *Ex parte* Brooker, 192 So. 3d 1, 2 (Ala. 2015) (mem.) (Moore, C.J., concurring).

334. *Id.*

335. Smith & Robinson, *supra* note 31, at 474 (citing Bidish J. Sarma & Sophie Cull, *The Emerging Eighth Amendment Consensus Against Life Without Parole Sentences for Nonviolent Offenses*, 66 CASE W. L. REV. 525, 561 (2015)).

many as eleven states."[336] To be clear, the points we make above do not apply only to life sentences. A decade-long sentence for most nonviolent drug crimes could also be ripe for consideration.

3. Individualization

For life (and also for other long) sentences, state courts could require individualized sentencing as is required in the context of the death penalty and juvenile life-without-parole for homicide offenses. For example, the Iowa Supreme Court recently "h[eld] [that] juvenile offenders cannot be mandatorily sentenced under a mandatory minimum sentencing scheme."[337] This standard reaches beyond that of the U.S. Supreme Court in *Miller v. Alabama*, which held that sentencing juveniles to life-without-parole through a mandatory sentencing process—without a sentencing hearing where courts would have a meaningful opportunity to understand the child's life history and potential for rehabilitation—constituted cruel and unusual punishment.[338]

Individualization serves two purposes. First, for sentences where only a narrow band of the most culpable people who commit the crime deserve the punishment, individualized sentencing allows the sentencer to better assess culpability by providing information about both the crime and the person who committed it. Second, individualization better enables appellate courts to determine if a punishment practice is excessive. If most sentencers (juries or judges) decide not to impose the punishment after learning about the facts of the specific crime committed by a specific person, that is a valuable window through which to view contemporary standards of decency. Moreover, if the people who get the punishment after discretionary review are not the most culpable, but rather the most impaired, that could suggest that the punishment does not meaningfully serve a purpose of punishment (for, if it did, we would expect that the most culpable people would get it most of the time).

4. Retroactivity

When state legislatures act to reform criminal law, state courts should respond by scrutinizing the constitutionality of existing sentences in light of the new developments. The Connecticut and Oregon Supreme Courts have done just that. After the Connecticut legislature abolished the death penalty for future crimes, the people left on death row in the state still faced execution. The Connecticut Supreme Court later barred those executions from taking place, ruling that the death penalty no longer comports with the state's standards of decency. Similarly, after the Oregon legislature narrowed

336. Smith & Robinson, *supra* note 31, at 470–74 (footnote omitted).

337. State v. Lyle, 854 N.W.2d 378, 381 (Iowa 2014).

338. *See* Miller v. Alabama, 567 U.S. 460, 489 (2012).

the death-eligibility, the Oregon Supreme Court held that similarly situated people currently on death row in the state could not be executed.

Thousands of people are serving extremely long sentences for drug crimes in numerous states. Yet, "two-thirds of state legislatures have reduced the punishments for various drug offenses."[339] Tens of thousands of people are serving mandatory minimum sentences or decades-long sentences with no chance for parole. These harsh sentences, many of which were enacted in moments of societal panic, should be reformed. Not all prospective-only legislation will render existing sentences constitutionally excessive and out of keeping with contemporary norms. But when legislatures make those reforms, it should serve as a strong signal to state courts to reevaluate whether the punishment meaningfully serves a legitimate purpose of punishment or comports with contemporary standards of decency.

5. Reconsideration

Due to differences in text, history, and structure, state constitutions can be more expansive and afforded greater protection from excessive punishment than the Eighth Amendment. Yet, despite even stark textual differences, some state courts treat their Eighth Amendment analogues as coextensive with the federal provision. For example, Delaware's analogue prohibits the infliction of "cruel punishments" without mentioning the word unusual.[340] The Delaware Supreme Court found these textual differences of "little or no significance."[341] Yet, the current text is an amendment to the original Delaware constitution which barred "cruel and unusual" punishment.[342] As Casey Adams put it, "[t]h[e] . . . refusal to give meaning to a deliberate alteration in constitutional language runs afoul of the normal rules of construction in Delaware and elsewhere."[343] Nearly six decades have passed since the Delaware Supreme Court issued that decision. Given the far more recent reckoning with mass incarceration in the states, and the burgeoning movement for a more robust state constitutionalism, it would make sense for the Delaware Supreme Court (and others in a similar situation) to revisit the scope of their Eighth Amendment analogues. For instance, the Illinois Supreme Court recently explained that its state analogue does provide more protection than the Eighth Amendment, even though it had previously found that it did not. In reversing the older decision where it found the clauses to be "synonymous," the court called its original analysis "an overstatement."[344]

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339. Smith & Robinson, *supra* note 31, at 473 (footnote omitted).

340. *See* DEL. CONST. art. 1, § 11.

341. *See* Casey Adams, *Banishing the Ghost of Red Hannah: Proportionality, Originalism, and the Living Constitution in Delaware*, 27 WIDENER L. REV. 23, 43 (2021) (footnote omitted).

342. *See id.* at 41–43.

343. *Id.* at 43.

344. *See* People v. Clemons, 968 N.E.2d 1046, 1057 (Ill. 2012).

The common thread between these different subject areas is that they are each areas where state courts are able to interpret their own state constitutions to afford broader liberty principles than their federal counterparts. As this Article has explained, such analyses could apply both broadly and deeply through nuanced interpretations of state analogues to the Eighth Amendment.

CONCLUSION

This Article has argued that mass incarceration in the United States is more than a national issue; it is a critical local issue calling for robust local intervention. Given that states are responsible for the vast majority of criminal justice policy and its implementation, the Article asserted that local solutions are imperative to address the excessive punishment crisis. Recent developments have begun to unlock the potential for addressing mass incarceration from the bottom up with, for example, more elected public officials committed to shrinking the criminal legal system, and state legislatures and state ballot initiatives passing reform-oriented laws. While necessary, these efforts are not sufficient in themselves. Long-term fundamental reform cannot rely on affecting change through majoritarian institutions that largely generated the mass incarceration crisis in the first place.

Drawing on the growing new state constitutionalism movement, where noted scholars and judges from across the political spectrum have begun to reinvigorate the push for robust state constitutionalism, the Article explored how state courts and state constitutionalism offer promising possibilities for counter-majoritarian balancing of majoritarian excess in the context of mass incarceration. State courts have been long absent in the mass incarceration crisis, having tied the interpretation of their state constitutional prohibitions against excessive punishment to the U.S. Supreme Court's interpretation of the Eighth Amendment. Fortunately, though state courts have long hesitated to remove the question of excess punishment from the rough-and-tumble of majoritarian politics, state judges have begun to exert their independence in interpreting state constitutional rights generally, and prohibitions against excessive punishment specifically, in ways that could foretell a more robust jurisprudence.

Specifically, a growing number of state courts have begun to use the U.S. Supreme Court's categorical framework to assess whether a punishment is excessive under their state constitution's Eighth Amendment analogue. As this Article outlined, even in those states willing to exert interpretive independence, courts appear reluctant to adapt this analytical framework to local conditions, thereby undermining its potency and power to examine whether a punishment is excessive under a state constitution. This Article sketched a framework for state courts to apply the categorical exemption framework in a way that is sensitive to local conditions. Severed from the federalism concerns animating the U.S. Supreme Court while it develops and applies Eighth Amendment doctrine, state courts have the potential to craft a

truly local jurisprudence that reflects societal consensus within each unique jurisdiction. The Article also highlighted states with constitutional provisions that promise heightened protections against excessive punishment. Ultimately the Article showed the promise of state constitutionalism as a strong and potentially enduring limitation on mass incarceration within the United States.