When a Prison Sentence Becomes Unconstitutional

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Mass incarceration has many evils. One of them is the length and apparent fixedness of many criminal sentences—a relatively new development in the history of American criminal adjudication. Sympathetic system actors, concerned about this problem, often complain that they lack the ability to revisit sentences that have outlived commonsense value. This complaint has prompted incarcerated people, their families, attorneys, scholars, judges, and even many prosecutors to call for "second look" legislation that would create the authority they say is needed.

This Article argues that such legislation is unnecessary: the same authority should already exist, under current doctrine, in the Federal Due Process Clause and (or) its state analogues. Though the Supreme Court's approach to incarceration is anomalous as compared with other fundamental rights, the Court has made clear that substantive due process requires that criminal confinement satisfy rational basis scrutiny. In the context of civil confinement, that same due process right to bodily liberty applies throughout the duration of a detainee's confinement. Logic, along with the Court's discussions of actual innocence and substantive retroactivity, indicates that the same ongoing protection should apply in the context of criminal confinement.

Just as a sentence can be irrational from the moment of issuance (as with an actually innocent defendant), a sentence can also become irrational over time. And there can be no rational basis for continuing to imprison a person when the branch of government responsible for identifying such a basis expressly disclaims it. In other words, any prosecutor who recognizes a sentencing injustice should, at any point in time, be able to trigger second look resentencing—a conclusion that provides a previously unexplored doctrinal basis for what some federal courts informally call the "Holloway Doctrine."

Furthermore, just because a prosecutor asserts a rational basis does not mean that there is one. Rational basis scrutiny is forgiving, but it is not altogether toothless, and it offers additional values to social

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movements—including forcing adverse parties to give reasons for their actions. Incarceration must be supported by one of the recognized purposes of punishment, and there are instances in which none of those purposes meets the test. Courts themselves, therefore, have due process authority to release prisoners whose sentences have come to be irrational, regardless of the prosecutor's position. Finally, if the Court ever resolves its fundamental rights anomaly and subjects prison sentences to strict scrutiny, that scrutiny should apply with equal force to ongoing incarceration.

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INTRODUCTION

In a sense, as Abduel Poe's mother would later put it, two lives were lost the evening of July 22, 1995. The first life belonged to Abduel, who, twenty years old at the time, was gunned down in the parking lot of the Jug Liquor Store in Minneapolis, Minnesota, over $20,000 in cash and a pound of marijuana that had gone missing.[1] The second belonged to Jerome Nunn, the nineteen-year-old convicted of first-degree murder in the case arising from Abduel's death, who was sentenced to life imprisonment in the Minnesota Department of Corrections.[2]

1. State v. Nunn, 561 N.W.2d 902, 904 (Minn. 1997); Letter from Danielle Jones, Mother of Abduel Poe 1 (Oct. 26, 2021) [hereinafter Jones Letter], *in* Motion and Stipulation to Vacate Conviction, to Enter and Accept Plea, and for Sentence of Time Served at ex. 2, State v. Nunn, No. 27-CR-95-068982 (4th Jud. Dist. Ct. Dec. 23, 2021) (on file with author) [hereinafter Nunn Motion to Vacate Conviction].

2. 561 N.W.2d at 903–04; Nunn Motion to Vacate Conviction, *supra* note 1, at 1–2.

In a society that at any given time incarcerates approximately two million[3] of its citizens,[4] it is uncomfortable to dwell long on the sense in which Jerome Nunn also lost his life. Our prisons are full of people who made terrible mistakes around age nineteen yet who are perhaps, as Jerome Nunn now is, very different at age forty-five. Many expect, with reason, that they will die in prison;[5] Jerome Nunn long thought so.[6] This Article primarily contends that there is an unacknowledged constitutional right, under current doctrine, to have such sentences vacated when they no longer rationally advance a legitimate government interest.[7] Indeed, if the prosecutor agrees that such a point has come, that should be the end of the sentence.

The highly punitive nature of modern American sentencing may seem at odds with a culture that still celebrates outlaws[8] and redeemed sinners.[9] It may seem especially dissonant when we hear of draconian sentences for crimes involving "no identifiable victim"[10] or no particularly aggrieved one,[11] though this facet of mass incarceration is sometimes overstated.[12] Regardless, mass incarceration

3. *Growth in Mass Incarceration*, THE SENT'G PROJECT, https://www.sentencingproject.org/criminal-justice-facts/ [https://perma.cc/3Z6V-4ZZM] (last visited Oct. 28, 2022).

4. *See generally, e.g.*, Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 887–89 (2009) (discussing problems with American correctional facilities, including overcrowding; insufficient staff; increased risk of sexual and other physical violence; inadequate healthcare; and "preventable suffering and death" (quoting BENJAMIN FLEURY-STEINER WITH CARLA CROWDER, DYING INSIDE: THE HIV/AIDS WARD AT LIMESTONE PRISON 5 (2008))); *Prison Life: A Curated Collection of Links*, MARSHALL PROJECT, https://www.themarshallproject.org/records/579-prison-life [https://perma.cc/37YB-PEDS] (last visited Oct. 28, 2022) (collecting related reporting).

5. Roughly 200,000 people are currently serving life sentences. *See infra* note 29. While some of these people are eligible for parole, the likelihood of being granted parole varies dramatically from state to state, with some state boards granting parole at extremely low rates. *See infra* note 99.

6. Jones Letter, *supra* note 1.

7. This language is more commonly known as the "rational basis" test. I come back to it—and the debate over whether it is no more than a meaningless rubber stamp—below. *See infra* Section IV.A.

8. *See, e.g.*, Evan Andrews, *9 Things You May Not Know About Billy the Kid*, HISTORY.COM (Apr. 8, 2020), https://www.history.com/news/9-things-you-may-not-know-about-billy-the-kid [https://perma.cc/N2P9-6KLY]; Travis M. Andrews, *The Ballard of Omar Little, Michael K. Williams's Enduring Role*, WASH. POST (Sept. 6, 2021, 10:07 PM), https://www.washingtonpost.com/arts-entertainment/2021/09/06/michael-k-williams-omar-little-the-wire/; Wil Haygood, *A Story of Myth, Fame, Jesse James*, SEATTLE TIMES (Sept. 17, 2007, 2:03 AM), https://www.seattletimes.com/life/lifestyle/a-story-of-myth-fame-jesse-james/#:~:text=Rampaging%20myth&text=%E2%80%9CHe%20became%20famous%20before%20his,redeem%20their%20own%20lost%20pride; *cf. Exodus* 2:12 (Moses killing an Egyptian).

9. *See, e.g.*, *Acts* 7:56–59, 8:1–3, 22:4–5, 26:9–11 (Paul/Saul persecuting early Christians and acquiescing in imprisonment and killing); Daniel E. Slotnik, *Donnie Andrews, the Real-Life Omar Little, Dies at 58*, N.Y. TIMES (Dec. 14, 2012), https://www.nytimes.com/2012/12/15/us/donnie-andrews-basis-for-omar-of-the-wire-dies-at-58.html (obituary for the "reformed stickup man whose story inspired the character Omar Little"); Bryan Young, *The Best Scene in Star Wars Is Luke Unmasking Vader in Return of the Jedi*, SYFY (Dec. 6, 2019, 9:31 AM), https://www.syfy.com/syfy-wire/best-scene-in-star-wars-is-luke-unmasking-vader [https://perma.cc/JWH3-YETJ].

10. *E.g.*, 18 U.S.C. § 3663(c)(1) (convictions under the Controlled Substances Act).

11. *E.g.*, Ewing v. California, 538 U.S. 11, 18 (2003) (plurality opinion) (stealing three golf clubs); Lockyer v. Andrade, 538 U.S. 63, 66 (2003) (stealing $84.70 worth of videotapes from one Kmart and $68.84 from another).

12. Crimes like murder, robbery, and assault account for a substantial portion of the U.S. prison population. It is essentially impossible to rectify mass incarceration without addressing them. *See* JOHN

remains a glaring feature of twenty-first century American life. Although each case will yield its own moral, penological, and political disagreements about whether or how much grief is owed the punished offender, many lives have been cut short in the sense in which Jerome Nunn's was.

The truncation of Jerome Nunn's life leaps out from the sea of others because an unexpected person, in an act of striking emotional and intellectual courage, did grieve it: Abduel Poe's mother, Danielle Jones. In 2014, Ms. Jones wrote a letter in support of Jerome Nunn's release; she re-signed it seven years later, as part of a new court filing, because her feelings had not changed.[13] It is worth reproducing a substantial portion of Ms. Jones's letter:

> At the time of Jerome's conviction, I sat in the courtroom and listened to testimony concerning Jerome, and just like any man of 19 years old who was living the lifestyle that he was living at the time, I thought he thought he could get away with this crime without punishment. However, as I sat and listened, I prayed for justice for my son, and I prayed for Jerome because I saw a kid who had lost his way. I knew nothing about him other than what he was accused of and his age. I was very angry and sad.
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> I wanted justice for my son, because no one should be shot down and die on the streets. I was very angry. I thought about my son's children who will now be raised without a father and all of the family members who adored my son; most of them were present during the trial. I applauded the Minnesota Municipal and Justice System for bringing this case to an end in such a timely fashion.
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> Even though Jerome was found guilty and would spend the rest of his life in prison, it was not a closure for me. I couldn't stop thinking of this 19-year-old whose life was now over also. All I could do for days was to pray for him. I couldn't pray for my son anymore, but I could pray for someone's else's. When I was in the courtroom and laid my eyes on Jerome for the very first time, I wrote a prayer in the Bible I had with me, and I prayed that he would admit to this crime and that God would grant him peace. I also prayed that when he was found guilty and go to prison, that he would

F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION—AND HOW TO ACHIEVE REAL REFORM 185 (2017) (discussing the "third rail" of "violent offenses"). There are often better ways of acknowledging and responding to such harm than simply locking someone in prison for decades on end. *See generally, e.g.*, DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR (2019) (discussing restorative justice practices that work to repair harm between people who have been harmed and those who have harmed them).

13. Jones Letter, *supra* note 1. I became aware of Mr. Nunn's case because one of his attorneys for this later court filing, David Singleton, is the executive director of a nonprofit with which I was affiliated as litigation counsel at the time. Although I did not represent Mr. Nunn, I served as an informal consultant to his legal team following this later court filing and a subsequent hearing in December 2021.

> be protected. I kept looking at him as a kid who made some really bad choices.
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> I came back to Chicago and I went about my daily life, watching my grandchildren grow up, visiting them when I can. I thought about Jerome often. After five years, in the year 2000, when I became computer literate, I located Jerome on the Minnesota Correctional Inmate search engine. I had already forgiven him in my heart the very next day after the murder and long before I had ever laid eyes on him. So, when I found him, I was very eager to write him and let him know I forgave him. I didn't know how he would receive it, I was hoping for a good response. I received a letter from Jerome stating that he was happy to hear from me. After we exchanged a few letters he told me how sorry he was. I knew he was sincere. He shared with me how his faith has helped him cope day to day in prison and how it has helped him to mature as a man and look back at the wrong choices he had made. He said something to me that haunted me and I will never forget. He said, "I am going to die in prison." I was very saddened by this statement. Just like I didn't think my son should have died on the street, I also didn't think Jerome should die in prison. In the next letter, I officially adopted Jerome as my Spiritual Son, and I started ending all of my letters with Danielle, Your Spiritual Mom.[14]

Jerome Nunn and Danielle Jones have remained in contact to the present day.[15] The Jerome Nunn that Ms. Jones now knows has earned three college degrees (including an Associate of Arts degree with a concentration in Biblical Studies), has been ordained as a minister, and has helped launch a program called Restorative Justice 101 that has been adopted throughout the Minnesota prison system.[16] He has counseled innumerable incarcerated and formerly incarcerated men who, like him, made grave mistakes in their younger lives and sought to atone for those mistakes as best they could.[17] He has also served as a reading tutor and as a mentor to at-risk youth and incarcerated people dealing with mental health challenges.[18]

In addition to Ms. Jones, another unlikely advocate took notice of Mr. Nunn's story: Hennepin County Attorney Michael Freeman. Freeman and one of his assistant county attorneys, Jonathan Schmidt, recognized Mr. Nunn's rehabilitation and the appropriateness of his coming home.[19] The State agreed to join Ms. Jones in supporting Mr. Nunn's immediate release.

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14. *Id.* at 1–2.
15. *Id.* at 2.
16. *See* Nunn Motion to Vacate Conviction, *supra* note 1, at 2.
17. *Id.*
18. *Id.*
19. *See* Hearing Transcript at 5, State v. Nunn, No. 27-CR-95-068982 (4th Jud. Dist. Ct. Dec. 17, 2021) (on file with author) [hereinafter Hearing Transcript].

The problem was that, under the terms of Mr. Nunn's sentence at the time, the earliest Mr. Nunn could possibly earn parole was 2035.[20] Mr. Nunn, meanwhile, was not arguing to the court that there was anything wrong with his conviction or his sentence at the time it was imposed—or at least not anything that was legally cognizable twenty-six years later.[21] As the trial judge now assigned to Mr. Nunn's case observed at a December 2021 hearing, it was unclear—the justice of the matter aside—what legal authority existed to disturb Mr. Nunn's valid sentence and allow him to go home with time served.[22] The judge ultimately denied Mr. Nunn's postconviction petition in late January 2022, citing the importance of "finality"[23] and considering himself "bound by the sentence imposed"[24] in 1996, despite the parties having jointly presented an agreed-upon resolution that would have allowed Mr. Nunn to go free.[25] The judge acknowledged that the case might exemplify "the limitations of mandatory sentences or other limitations on the trial court," as well as "how individual prosecuting offices can obtain a conviction [and] a lawful sentence, . . . but then come to realize a different sentence may be appropriate."[26]

Mr. Nunn's case thus presents a poignant example of a long-remarked riddle: how can it be, in a nation that recognizes liberty as a fundamental right and whose courts often scrutinize deprivations of fundamental rights strictly, that a man can remain locked in prison for years even if none of the central actors—not the

20. *See* Nunn Motion to Vacate Conviction, *supra* note 1, at 1; *see also* MINN. STAT. §§ 244.05, 244.101 (sentencing and supervised release laws). In addition to his life sentence, Mr. Nunn's sentence included a consecutive fifteen-year sentence for the attempted murder of another individual who fortunately survived the shooting. Nunn Motion to Vacate Conviction, *supra* note 1, at 1. Although a form of executive clemency exists in Minnesota, it requires "a unanimous vote" by the Board of Pardons. *See* MINN. STAT. § 638.02; *see also* Shefa v. Ellison, 964 N.W.2d 157, 157 (Minn. 2021) (upholding the constitutionality of this statutory restriction). This requirement has sharply circumscribed the likelihood of any given prisoner receiving a commutation. *See* Andy Mannix & Briana Bierschbach, *Far from Grace: How Minnesota Radically Changed the Way It Forgives Criminals*, MINNPOST (July 30, 2015), https://www.minnpost.com/politics-policy/2015/07/far-grace-how-minnesota-radically-changed-way-it-forgives-criminals/ [https://perma.cc/2E34-H436] ("From 1940 to '89, the pardon board commuted 741 sentences: 84 percent of those considered. Today, the practice effectively doesn't exist. Over the last 25 years, Minnesota has granted zero commutations."). Minnesota is not the only state in which a Board of Pardons serves such a strict gatekeeping role. *E.g.*, *The Demise of Clemency for Lifers in Pennsylvania*, CTR. ON THE ADMIN. OF CRIM. L., N.Y.U. L., https://www.law.nyu.edu/sites/default/files/CACL%20Clemency%20PA_Accessible.pdf [https://perma.cc/A5KH-RRQV] (last visited Oct. 28, 2022) (explaining that a Pennsylvania prisoner serving a life sentence can receive a commutation only if the Board of Pardons votes unanimously in favor).

21. *See* Nunn Motion to Vacate Conviction, *supra* note 1, at 3.

22. This hearing occurred on December 17, 2021; I watched it over Zoom. *See* Hearing Transcript, *supra* note 19, at 24.

23. Order Denying Post-Conviction Petition and Denying Motion to Vacate Conviction, to Enter and Accept Plea, and for Sentence of Time Served at 7, State v. Nunn, No. 27-CR-95-068982 (4th Jud. Dist. Ct. Jan. 28, 2022) (on file with author) [hereinafter Order Denying Petition].

24. *Id.* at 10.

25. *Id.* at 5–6. Mr. Nunn's petition raised some of the arguments discussed in this Article. Although the State did not agree that Mr. Nunn's ongoing incarceration violated his rights to due process, it did file a letter affirming that it wished to settle his postconviction petition and avoid further litigation by letting Mr. Nunn replead to a lesser sentence and leave prison with time served. *Id.* at 6.

26. *Id.* at 10.

prosecutor, not the judge, not even a highly aggrieved victim (if the crime has an identifiable victim)—think that it is necessary to keep him there?[27] If Mr. Nunn had been ordered held in a government facility by reason of mental illness, a court would be obligated to take notice of his progress and to order his release if it was clear he had recovered.[28] Yet because he was ordered to be incarcerated by reason of a criminal conviction, the necessity (or even reasonableness) of his ongoing incarceration goes essentially unmonitored by the courts.

As should be apparent, the importance of this riddle extends far beyond Mr. Nunn's case. A recent report tallied over 200,000 Americans serving life sentences—one in every seven prisoners.[29] Nearly a third of these people are fifty-five years old or older.[30] Although life sentences usually stem from indisputably serious wrongdoing, that is not always the case,[31] and, regardless, they may underestimate an important truth: people change. Whether a judge or a legislative body is making the key decision, an estimation that a multidecade sentence will seem appropriate throughout its duration may thus underweigh the possibility that (as U.S. District Court Judge Richard Kopf later told former sentencee, now-law professor Shon Hopwood) one's sentencing instincts "suck."[32] Particularly because people (think of purposeful growth and the aging process) *and* societal attitudes (think of marijuana) can transform over time, we should be wary of "lock[ing] in the worst of our sentencing mistakes."[33]

A desire to avoid locking in sentencing mistakes has yielded calls for Congress and other lawmaking bodies to pass "second look" statutes: laws that would allow

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27. *See generally* Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781 (1994) (arguing for heightened scrutiny in this context); Salil Dudani, Note, *Unconstitutional Incarceration: Applying Strict Scrutiny to Criminal Sentences*, 129 YALE L.J. 2112 (2020) (same); Alec Karakatsanis, *Policing, Mass Imprisonment, and the Failure of American Lawyers*, 128 HARV. L. REV. F. 253 (2015) (describing the legal profession's failure to scrutinize mass incarceration); *see also* Douglas Husak, *Criminal Law Theory*, *in* THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 107, 117–19 (Martin P. Golding & William A. Edmundson eds., 2005) (arguing for heightened scrutiny in this context). I use male pronouns in light of the demographics of the U.S. prison population; I reflect on this and other linguistic choices in more depth in a previous piece. *See* Michael L. Zuckerman, *When the Conditions Are the Confinement: Eighth Amendment Habeas Claims During COVID-19*, 90 U. CIN. L. REV. 1, 3 n.7 (2021).

28. *See infra* Section II.C.

29. Ashley Nellis, *No End in Sight: America's Enduring Reliance on Life Sentences*, THE SENT'G PROJECT (Feb. 17, 2021), https://www.sentencingproject.org/publications/no-end-in-sight-americas-enduring-reliance-on-life-imprisonment/ [https://perma.cc/X7JX-F2LX].

30. *Id.*

31. *See, e.g.*, *supra* note 11.

32. Shon Hopwood, *Second Looks & Second Chances*, 41 CARDOZO L. REV. 83, 88 n.27 (2019). It may also overweigh the relevance of other traditional purposes of punishment—for example, deterrence. I discuss those purposes in Section IV.B, *infra*.

33. *See* Kevin R. Reitz, *Demographic Impact Statements, O'Connor's Warning, and the Mysteries of Prison Release: Topics from a Sentencing Reform Agenda*, 61 FLA. L. REV. 683, 706 (2009); *see also* Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL'Y 151, 170–73 (2014) (arguing in favor of subsequent review and reconsideration of sentences); Hopwood, *supra* note 32, at 89 & n.28 (describing how people can "age out of crime" and citing sources); *cf.* Graham v. Florida, 560 U.S. 48, 68 (2010) (discussing neuroscience regarding the unformed nature of adolescent brains).

someone, usually a judge and sometimes also a prosecutor, to reconsider a lengthy criminal sentence after a certain period of time has passed.[34] A handful of these efforts have succeeded at least in part.[35] But the vast majority of jurisdictions—and the vast majority of long-term prisoners—still lack such a statutory safety valve.

This Article argues that such legislation is unnecessary: the same authority should already exist in the Due Process Clause of the U.S. Constitution and (or) its state corollaries. At the very least, that is because, on the Supreme Court's own terms, there must be a rational basis for someone's incarceration, and there can be no rational basis for continuing to incarcerate someone when the branch of government responsible for asserting such a basis—the Executive Branch—expressly disclaims it. In other words, every prosecutor's office in America should be able to act as a "second look sentencer" today.[36] And even if the prosecutor's office declines to support resentencing (that is, if they believe that there remains a rational basis for the sentence), that is no different from any other litigant deciding to fight rather than concede or resolve a claim: courts should recognize their own authority to vacate a sentence that is no longer reasonable.

The Article proceeds in four parts. Part I discusses the historical tradition of non-finality in criminal sentences. It shows that there has never been, until recently, a strong expectation of finality in a fixed prison term.

Part II rehearses the different types of challenges that defendants can level against criminal punishment, distinguishing attacks against ongoing punishment from the more common types of challenges. Part II then establishes that the substantive due process right to bodily liberty applies in the context of criminal as

34. *E.g.*, Second Look Act of 2019, S. 2146, 116th Cong. (2019); Second Look Act of 2019, H.R. 3795, 116th Cong. (2019); Douglas Berman, *Afternoon Keynote Address: Encouraging (and Even Requiring) Prosecutors to Be Second-Look Sentencers*, 19 TEMP. POL. & C.R. L. REV. 429, 435 (2010); Richard S. Frase, *Second Look Provisions in the Proposed Model Penal Code Revisions*, 21 FED. SENT'G REP. 194, 195 (2009); Hopwood, *supra* note 32, at 111–13; Margaret Colgate Love & Cecelia Klingele, *First Thoughts About "Second Look" and Other Sentence Reduction Provisions of the Model Penal Code: Sentencing Revision*, 42 U. TOL. L. REV. 859, 868–76 (2011); Margaret Colgate Love, *Sentence Reduction Mechanisms in a Determinate Sentencing System: Report of the Second Look Roundtable*, 21 FED. SENT'G REP. 211, 212–18 (2009); Michael Serota, *Second Looks & Criminal Legislation*, 17 OHIO ST. J. CRIM. L. 495, 515–23 (2020). *See generally* NAZGOL GHANDNOOSH, THE SENT'G PROJECT, A SECOND LOOK AT INJUSTICE (2021), https://www.sentencingproject.org/publications/a-second-look-at-injustice/ [https://perma.cc/P8ZL-P8B4] (surveying arguments and efforts at reform at state and federal levels); *Second Look Sentencing*, FAMM, https://famm.org/secondlook/ [https://perma.cc/UZ43-JSMW] (last visited Oct. 28, 2022) (explaining the concept of "second look sentencing" and noting recent legislative efforts).

35. *See* 725 ILL. COMP. STAT. 5/122-9; WASH. REV. CODE § 36.27.130; GHANDNOOSH, *supra* note 34, at 18–21, 24–27 (noting California and Washington, D.C.); Jonathan Levinson, *Multnomah County DA Revisits Past Convictions Under Program to Right Previous Wrongs*, OPB (Aug. 14, 2022, 9:00 AM), https://www.opb.org/article/2022/08/14/multnomah-county-da-revisits-past-convictions-under-program-to-right-previous-wrongs [https://perma.cc/X62S-4JVJ] (discussing Oregon).

36. *Cf.* Berman, *supra* note 34 (arguing that second look sentencing should be "built into modern sentencing systems" and that "prosecutors should be given the power and a formal responsibility to engage in some type of formalized second-look sentencing decision-making").

well as civil confinement,[37] though it triggers only rational basis scrutiny in the criminal context. Part II then argues that, just as this due process right extends throughout civil confinement, it should also apply for the duration of criminal confinement—a conclusion that is buttressed not only by logic but also by the Court's own statements with regard to actual innocence and substantive retroactivity.

Part III observes that, given the availability of rational basis review, a prosecutor who agrees that a particular sentence has outlived its justification should be able to obtain the defendant's release under either the Federal Due Process Clause or a state analogue. That is because a prison sentence, like any other government action, can become irrational over time. It is for the government, meanwhile, to articulate what the government's own basis is. If the government stipulates that it lacks a rational basis, that should in all (or virtually all) cases be the end of the story—an account that doctrinally fortifies what is known as the "*Holloway* Doctrine"[38] in federal district courts. Part III concludes by noting that state courts can adopt this approach under their own state constitutions' due process clauses.

Part IV then argues that courts can, under this same approach, release prisoners whose sentences no longer satisfy rational basis scrutiny regardless of whether the prosecutor agrees. It begins by observing that the canonical reports of rational basis scrutiny's dead-endedness are greatly exaggerated. It then explains that a prison sentence must rationally serve at least one of the traditional purposes of punishment and discusses scenarios in which none of those traditional purposes would provide a rational basis. Finally, it notes that if courts ever do heed scholarly calls to subject prison sentences to strict scrutiny (thus resolving the doctrinal anomaly noted above), that scrutiny should apply as well to ongoing incarceration.

The Article concludes by summarizing why this approach can assist prosecutors and judges who fear they cannot redress sentences that have come to seem too harsh and by discussing the potential impact of adopting this approach. Given the size of the U.S. prison population—and the number of people serving life sentences—even a limited application of this approach could give thousands of people a chance to return home.

I. THE HISTORICAL TRADITION OF SENTENCE NON-FINALITY

The idea that people convicted of crimes should be sentenced to lengthy, unchangeable terms of incarceration is a recent one. Recent, in part, because incarceration has not always been common. Recent, as well, because for most of the history of American incarceration, clemency or parole made it much less likely that a given defendant would serve a definite term of years. This historical

37. By "civil confinement" (also known as "civil commitment"), I mean the detention of people in government facilities pursuant to civil adjudications assessing the degree to which they endanger the well-being of themselves or others. *E.g.*, Kansas v. Hendricks, 521 U.S. 346, 357 (1997) (discussing historical use of civil confinement in response to people with serious mental illnesses).

38. *See infra* notes 108–14 and accompanying text.

context is worth appreciating because the ordinary rule is that the Due Process Clause incorporates rights that are "fundamental" to the United States' "scheme of ordered liberty"[39] or otherwise "deeply rooted in this Nation's history and tradition."[40] If a right is "fundamental," it usually triggers strict scrutiny.[41] If it is not, it triggers only rational basis review.[42]

It should not be controversial to recognize that liberty, so to speak, is fundamental to a scheme of ordered liberty. And as this Part demonstrates, what a history-minded jurist might look to as "the political and intellectual atmosphere of the time"[43] indicates that for most of American history, prison sentences were often revisited.[44]

That being said, federal courts, including the Supreme Court, have treated freedom from physical confinement as a fundamental right without engaging in an in-depth historical analysis.[45] And regardless, this Article takes as a given that strict scrutiny does not apply to incarceration, despite the logical and doctrinal arguments that it should.[46] Nevertheless, the historical background is important for showing that any prosecutor or judge who adopts the approach suggested in Parts III and IV would be in step with most of American history—though perhaps out of step with the punitive, inflexible turn of the past fifty years.

A. THE COLONIAL AND FOUNDING ERAS

There is a limit to how probative early American practice can be for revisiting lengthy prison sentences, given that prison was not a mainstay of colonial and early American punishments.[47] Much more common were fines and exactions of pain or shame from the offender—for example, through corporal punishment or placing him in the stocks.[48] And, of course, there was execution, which was at

39. McDonald v. City of Chicago, 561 U.S. 742, 767 (2010) (quoting Duncan v. Louisiana, 391 U.S. 145, 149 & n.14 (1968)).

40. *Id.* (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

41. *E.g.*, Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 457 (1988).

42. *E.g.*, Harris v. McRae, 448 U.S. 297, 324 (1980); *see also* Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 311–16 (2015) (noting that courts sometimes misunderstand this rule and wrongly believe that the Due Process Clause protects only fundamental rights).

43. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989).

44. History-based methodologies have significant shortcomings—particularly when criminal adjudication is at issue. *See, e.g.*, Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 47–51 (1998); Carol S. Steiker, *"First Principles" of Constitutional Criminal Procedure: A Mistake?*, 112 HARV. L. REV. 680, 690 (1999) (reviewing AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES (1997)). It is important to look to history, however, both because of the number of jurists who use these methodologies and because the Due Process Clause looks to history and tradition for its meaning, particularly when it comes to fundamental rights. *See, e.g.*, *Glucksberg*, 521 U.S. at 720–21.

45. *See* Dudani, *supra* note 27, at 2165 (making this point); *see also infra* Sections II.B, II.C.

46. *See infra* notes 150–55, 162.

47. *See* STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE 9–11, 20–23 (2012); Note, *The Eighth Amendment, Proportionality, and the Changing Meaning of "Punishments,"* 122 HARV. L. REV. 960, 967–75 (2009).

48. BIBAS, *supra* note 47, at 9.

times ostensibly mandatory,[49] although the northern colonies did less executing than the word "mandatory" makes it sound.[50] In any event, there was not always an ongoing punishment to revisit: for someone who has already been executed or whipped, there's no ongoing punishment to undo.[51]

At the same time, there was, as (now-Judge) Stephanos Bibas notes, "plenty of room for mercy"[52]—not just via the possibility of jury nullification, which was considerable,[53] but also through mercy subsequent to a conviction and sentence. For one, there "was the legal fiction known as benefit of clergy," which allowed a first-time offender sentenced to death to save his life by reading the first lines of Psalm 51.[54] Judges evidently exercised discretion over this practice, "interpret[ing] literacy loosely" or "overlook[ing] a prior conviction for sympathetic defendants."[55]

In addition, there was executive clemency, which sentencing judges often recommended. Clemency after the Revolution was a British holdover: it made the leap from monarchical prerogative to constitutional guarantee in state and federal constitutions.[56] And early governors used this once-royal power with gusto. In Pennsylvania, for example, for roughly the half-century following 1790, more than one hundred gubernatorial pardons were issued per year[57]—a sizable number given the Founding Era's much smaller criminal justice system. As Doug Berman has observed, preserving the pardon power—along with the Framers' care for protecting habeas review and ensuring appellate review—illustrated a structural concern that criminal punishment not be too fixed.[58]

Judges also sometimes exercised significant discretion in sentencing. In colonial New York, Carolyn Strange notes, judges would not only suspend or delay sentences at their outsets but also pardon offenders under some circumstances.[59]

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49. *See* Harmelin v. Michigan, 501 U.S. 957, 995 (1991).

50. Prior to the Revolution, for example, Pennsylvania averaged fewer than two capital sentences per year and roughly one actual execution. *See* BIBAS, *supra* note 47, at 7; *see also* CAROLYN STRANGE, DISCRETIONARY JUSTICE: PARDON AND PAROLE IN NEW YORK FROM THE REVOLUTION TO THE DEPRESSION 18 (2016) ("By the close of the eighteenth century the customary penalty of death for property crimes came under scrutiny in New York as Enlightenment aspirations and humanitarian ideals won converts, including the governor."). "The great blot upon this lenient picture," of course, is southern slavery. BIBAS, *supra* note 47, at 6.

51. Berman, *supra* note 33, at 156.

52. BIBAS, *supra* note 47, at 7.

53. *See, e.g.*, Dudani, *supra* note 27, at 2166.

54. BIBAS, *supra* note 47, at 7.

55. *Id.* at 8; *see also id.* at 7 (noting that illiterate offenders often memorized and recited this passage to escape execution).

56. *See* Hoffa v. Saxbe, 378 F. Supp. 1221, 1228, 1230–31 (D.D.C. 1974); Paul J. Larkin, Jr., *Clemency, Parole, Good-Time Credits, and Crowded Prisons: Reconsidering Early Release*, 11 GEO. J.L. & PUB. POL'Y 1, 5 (2013).

57. BIBAS, *supra* note 47, at 24.

58. *See* Berman, *supra* note 33, at 155; *see also* Hopwood, *supra* note 32, at 91 (noting "there was little debate over the [Pardon] Clause during ratification"). Not all of these mechanisms existed across the pond: "there was no appeal from a criminal conviction in England until 1907." Martinez v. Ct. of App. of Cal., 528 U.S. 152, 153 (2000).

59. STRANGE, *supra* note 50, at 21.

In 1773, for example, state high court Justice Robert Livingston informed New York's last Colonial Era governor that he had pardoned a counterfeiter on the understanding that the counterfeiter would turn state's evidence.[60]

In keeping with this merciful approach, Bibas argues, the overriding spirit of much colonial and early American punishment was reintegrative: "The point was to make the wrongdoer remorseful and get him to make amends, so the victim and community would forgive him and welcome him back into the community."[61] Though the punishments themselves were painful and humiliating, their publicity offered a redemptive bridge: "[h]aving seen justice done," community members "were more ready to forgive" than we are today.[62] Remorse occupied a particularly central role, and thus "the colonists left plenty of time between sentence and execution for repentance."[63] In other words, early American justice acknowledged that, although the facts of a crime would not change, facts about the defendant—such as his remorse regarding the crime—could. When they did, the sentence could change with those facts.

B. THE PRE-PROGRESSIVE NINETEENTH CENTURY

Though Pennsylvanians were already experimenting with penal incarceration around the time of the Founding, punishing criminal offenses by sending the offenders to jail or prison did not reach wide-scale acceptance until the early nineteenth century.[64] Many early prisons, such as New York's Auburn Prison (opened in 1816) and Pennsylvania's Eastern State Penitentiary (opened in 1829), were also geared toward rehabilitation, though in a tragically misguided way—isolating prisoners from each other and imposing strict discipline through physical labor.[65]

Some of these early carceral facilities proved unwieldy. At Newgate Prison in New York (opened in 1797), the combination of internal disorder and overpopulation (by early-1800s standards) led to a rapid acceleration in clemency.[66]

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60. *Id.*

61. BIBAS, *supra* note 47, at 9.

62. *Id.* at 11. Not all contemporary onlookers were so sanguine. Physician, penal theorist, and signer of the Declaration of Independence Benjamin Rush, for example, believed that "public punishments, such as floggings, failed to rehabilitate offenders and kindled in them a 'spirit of revenge against the whole community'" while also corrupting spectators. Michael J. Millender, *The Road to Eastern State: Liberalism, the Public Sphere, and the Origins of the American Penitentiary*, 10 YALE J.L. & HUMANS. 163, 170 (1998) (reviewing MICHAEL MERANZE, LABORATORIES OF VIRTUE: PUNISHMENT, REVOLUTION, AND AUTHORITY IN PHILADELPHIA, 1760–1835 (1996)); *see* Erin E. Braatz, *The Eighth Amendment's Milieu: Penal Reform in the Late Eighteenth Century*, 106 J. CRIM. L. & CRIMINOLOGY 405, 448 (2016). Rush's own penological track record, however, was far from spotless: he was a driving force behind early Pennsylvanian experiments with solitary confinement and (unsuccessfully) advocated concealing the duration of prison sentences from prisoners. Christopher Seeds, *Historical Modes of Perpetual Penal Confinement: Theories and Practices Before Life Without Parole*, 44 L. & SOC. INQUIRY 305, 314 (2019).

63. BIBAS, *supra* note 47, at 9.

64. Note, *supra* note 47, at 967 & n.45, 972–74.

65. *See* BIBAS, *supra* note 47, at 20–21; STRANGE, *supra* note 50, at 45, 62; Sally Mann Romano, Comment, *If the SHU Fits: Cruel and Unusual Punishment at California's Pelican Bay State Prison*, 45 EMORY L.J. 1089, 1096 (1996).

66. STRANGE, *supra* note 50, at 41–43.

Although only 3 out of 121 Newgate prisoners were pardoned in 1797, that number rose in the following years and gave way to "virtually indiscriminate pardoning" after 1807.[67] Carolyn Strange reports that as the carceral population rose above 700 prisoners (in excess of its maximum of 400), governors began holding "semiannual pardon seasons," with one governor pardoning 75 prisoners (that is, more than 10% of the total carceral population!) in a single day.[68] One state senate report found that between 1812 and 1816, only 77 prisoners were released because their sentences had expired whereas a whopping 740 were released as a result of pardons.[69] A later government study found that nearly 56% (2,819) of the 5,069 people imprisoned between 1799 and 1821 had received pardons.[70]

The broader rise of incarceration in the nineteenth century accompanied a relative drop in mercy in at least some states. Clemency rates decreased in Pennsylvania, Bibas notes, from "well over a hundred times per year" between 1790 and 1837 to an average of 26 per year between 1839 and 1861.[71] In New York too, clemency rates began to fall after William H. Seward—a noted abolitionist and later Secretary of State under President Lincoln—became Governor in 1839.[72] The shift was not reactionary; many early Progressives were sour on pardons, urging a rehabilitation-oriented model of "managing" prisoners through a techno-bureaucratic process that would eventually evolve into parole.[73]

That said, the overall baseline in the nineteenth century remained higher than today's. Just as in the eighteenth century, both state and federal chief executives were much more likely to grant clemency than they are today.[74] Prior to 1870, for example, as former U.S. Pardon Attorney Margaret Love has noted, "Presidents granted clemency to a high percentage of those who asked for it, forestalling or halting prosecutions, cutting short prison sentences or remitting them entirely, forgiving fines and forfeitures, and occasionally restoring citizenship rights lost as a result of conviction."[75]

C. FROM THE PROGRESSIVE ERA TO THE WAR ON CRIME

The Progressive Movement brought rehabilitation back to the penological fore—and with it came the rise of parole. New York was the first jurisdiction to a create a parole system, spurred by Zebulon Brockway's innovation at New York's

67. *Id*. at 42–43 (citation omitted).

68. *Id*. at 43 (internal citation omitted).

69. *Id*.

70. *Id*. at 66.

71. BIBAS, *supra* note 47, at 24.

72. STRANGE, *supra* note 50, at 76 (noting that Governor Marcy pardoned 158 people in 1838 whereas Seward pardoned only 64 in 1839 and 85 in 1840).

73. *See id*. at 96–114 (detailing this movement in New York State).

74. *See id*. at 138–39; Larkin, Jr., *supra* note 56, at 34. New York State passed its first indeterminate sentencing law in 1870. STRANGE, *supra* note 50, at 138.

75. Margaret Colgate Love, *The Twilight of the Pardon Power*, 100 J. CRIM. L. & CRIMINOLOGY 1169, 1175 (2010). Indeed, President Lincoln—Seward's later boss—was a prolific pardoner. *See id*. at 1178.

Elmira Reformatory, which opened in 1876.[76] Indeterminate sentencing had spread as far as Michigan and Minnesota by 1889,[77] Congress created the federal parole system in 1910,[78] and nearly every state had followed suit by the 1920s.[79] The "rehabilitative ideal" of parole remained strong for much of the twentieth century, allowing state and federal trial judges to exercise broad discretion with regard to prison terms and parole boards to wield equally broad discretion with regard to actual release dates.[80]

More concretely, as Berman explains:

> This rehabilitative model of sentencing and corrections was avowedly disinterested and arguably disdainful of sentencing finality, at least with respect to the traditional sentences of prison and probation. After a sentencing judge had imposed a prison term, which sometimes would be set in a range as broad as one year to life, prison and parole officials were expected and instructed to consistently review offenders' behavior in prison to determine if and when they should be released to the community. All imprisoned defendants would have regular parole hearings at which time their sentence terms were, formally and functionally, subject to review and reconsideration by corrections officials. Even after officials decided to set free a prisoner on parole, or if a defendant was sentenced to probation rather than prison in the first instance, correctional supervisors still kept close watch on offenders to assess their behavior in the community again with an eye toward reviewing and modifying sanctions as needed to fit the needs of the offender and society.[81]

Ascendant by the early 1900s, the parole model soared for most of the twentieth century.[82] But parole's stock began to crash in the 1970s, beset by disenchantment about the possibility of rehabilitation, anxieties stemming from rising crime, and critiques regarding its legitimacy from both liberals and conservatives.[83] As Paul Larkin notes, conservatives argued that parole was unfair and counterproductive—that it "coddled criminals."[84] Liberals saw it as "an instrument of coercion, oppression, and injustice."[85] Critics across the spectrum bemoaned its unpredictability.[86]

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76. *See* Paul J. Larkin, Jr., *Parole: Corpse or Phoenix?*, 50 AM. CRIM. L. REV. 303, 307 & n.17 (2013).

77. *See* STRANGE, *supra* note 50, at 147.

78. Larkin, Jr., *supra* note 76, at 308.

79. *See* Berman, *supra* note 33, at 158–59.

80. *See id.* at 157; *see also, e.g.*, Mistretta v. United States, 488 U.S. 361, 363 (1989) ("For almost a century, the Federal Government employed in criminal cases a system of indeterminate sentencing.").

81. Berman, *supra* note 33, at 159 (footnotes omitted).

82. *E.g.*, Larkin, Jr., *supra* note 56, at 7–10.

83. *See* Berman, *supra* note 33, at 161; Larkin, Jr., *supra* note 76, at 312–15. *See generally* Robert Martinson, *What Works?—Questions and Answers About Prison Reform*, 35 PUB. INT. 22 (1974) (famously (or infamously) casting doubt on the possibility of rehabilitation).

84. Larkin, Jr., *supra* note 76, at 313.

85. *Id.*

86. *See id.* at 313–14.

Consequently, in the 1970s and 1980s, most jurisdictions either sharply cabined parole or did away with it entirely.[87] Around the same time, legislatures embraced mandatory sentences and "truth-in-sentencing" laws,[88] and the Supreme Court elevated "finality" as a polestar in postconviction doctrine.[89] Meanwhile, clemency, which had already been replaced in large measure by parole,[90] continued its freefall.[91] These shifts helped lock in place the system of mass incarceration that we have today.

D. MASS INCARCERATION AND THE (LIMITED) POSSIBILITIES FOR REVISITING SENTENCES TODAY

Incarceration exploded in the final decades of the twentieth century, with the country's imprisonment rate more than quintupling between the early 1970s and the early 2010s.[92] Though the prison population has declined a bit in the past decade, it grew nearly 700% between 1972 and 2009.[93] As noted above, there are roughly two million Americans locked in prison or jail at any given moment,[94] and as Berman puts it, "the phenomenon of distinctly harsh prison sentences and huge numbers of incarcerated individuals now serves as the defining and most distinguishing characteristic of U.S. criminal justice . . . ."[95]

Long sentences play an outsized role in driving (and ossifying) this trend. As also noted above, roughly one in seven Americans in prison is serving a life sentence.[96] That is 200,000 people—more, as one report notes, than the total number of "people in prison serving *any sentence* in 1970."[97] And while people "incarcerated in 1970 could take comfort in the then-prevailing reality that the duration of and justification for their ongoing prison terms would be regularly reviewed and

87. *See* Berman, *supra* note 33, at 161–62; Larkin, Jr., *supra* note 76, at 315; *see also* Tapia v. United States, 564 U.S. 319, 324 (2011) (describing historical loss of "faith in rehabilitation" and indeterminate sentencing's slide into "disfavor").

88. BIBAS, *supra* note 47, at 25; Berman, *supra* note 33, at 162.

89. *See, e.g.*, Teague v. Lane, 489 U.S. 288, 308–09 (1989); Wainwright v. Sykes, 433 U.S. 72, 88 (1977); Stone v. Powell, 428 U.S. 465, 491 n.31 (1976).

90. Love, *supra* note 75, at 1189.

91. *See* BIBAS, *supra* note 47, at 24; Larkin, Jr., *supra* note 56, at 7.

92. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 244 (2011).

93. NAZGOL GHANDNOOSH, THE SENT'G PROJECT, U.S. PRISON POPULATION TRENDS: MASSIVE BUILDUP AND MODEST DECLINE 1 (2019), https://www.sentencingproject.org/wp-content/uploads/2019/09/U.S.-Prison-Population-Trends.pdf [https://perma.cc/P5RK-T7TS].

94. *Growth in Mass Incarceration*, *supra* note 3. Though the terms are often used interchangeably in conversation, jail populations are composed of people detained pretrial, held for alleged violations of probation or parole, or serving relatively short sentences (typically less than one year), whereas prison populations are composed of people who have been convicted of crimes and are serving longer sentences. *See, e.g.*, Jenny E. Carroll, *Pretrial Detention in the Time of COVID-19*, 115 NW. U. L. REV. ONLINE 59, 73 (2020); Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1579 n.76 (2003).

95. *See* Berman, *supra* note 33, at 163; *see also* Dudani, *supra* note 27, at 2166–67 ("Prison sentences of contemporary length are historically unprecedented, as is the prevalence of mandatory sentences." (footnote omitted)).

96. Nellis, *supra* note 29.

97. *Id.* (emphasis added).

reconsidered" under the parole system, most incarcerated people today "must cope with the now-prevailing reality that their prison sentences are fixed and final and not subject to any regularized means of review or reconsideration for any purposes."[98]

Nevertheless, some channels for reconsideration remain. First, while parole is a shadow of its former self, it stills exists in some form in most states.[99] Second, clemency remains a possibility, albeit a dim one in light of relatively low enthusiasm from the relevant decisionmakers.[100] Third, some states have mechanisms for early release for shorter or nonmandatory sentences, whether these mechanisms are called shock probation, judicial release, or something else.[101] Fourth, a few jurisdictions have limited second look mechanisms: for people who committed their crimes as youths or young adults in Washington, D.C., for example, and when initiated by the prosecution in California.[102]

On the federal side, which gets much of the attention despite incarcerating only eleven percent of the nation's prisoners and detainees,[103] there are a few mechanisms as well. First, there is compassionate release under 18 U.S.C. § 3582(c).[104] Though the Federal Bureau of Prisons (BOP) long controlled access to this remedy, rendering it essentially null save for cases of terminal illness, the First Step Act eliminated the BOP's effective veto.[105] Federal judges can now determine

98. Berman, *supra* note 33, at 164–65.

99. *See* Larkin, Jr., *supra* note 56, at 9–10. There is "tremendous variation[] in the rate at which states grant parole at parole hearings." JORGE RENAUD, PRISON POL'Y INITIATIVE, EIGHT KEYS TO MERCY: HOW TO SHORTEN EXCESSIVE PRISON SENTENCES (2018), https://www.prisonpolicy.org/reports/longsentences.html [https://perma.cc/Y69N-WEHG] (discussing data collected by the Robina Institute in MARIEL E. ALPER, ROBINA INST. OF CRIM. L. & CRIM. JUST., BY THE NUMBERS: PAROLE RELEASE AND REVOCATION ACROSS 50 STATES (2016), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/2022-02/parole_by_the_numbers_updated.pdf [https://perma.cc/PMH8-8L4Y]). Rates "vary from a high of 87% in Nebraska to a low of 7% in Ohio, with many states granting parole to just 20% to 30% of the individuals who are eligible." *Id.*

100. *E.g.*, Larkin, Jr., *supra* note 56, at 7; Hopwood, *supra* note 32, at 116–17; Love, *supra* note 75, at 1193–95.

101. For example, in Ohio, "judicial release" is available to prisoners serving nonmandatory terms after they have served a certain portion of their sentences, graduated by sentence length. *See* OHIO REV. CODE ANN. § 2929.20.

102. *See* GHANDNOOSH, *supra* note 34, at 18–19, 24–27; *see also* Hillary Blout, Opinion, *Thousands of Incarcerated People Deserve to Come Home. Here's How Prosecutors Can Help.*, WASH. POST (Dec. 13, 2021, 8:00 AM), https://www.washingtonpost.com/opinions/2021/12/13/prosecutor-initiated-resentencing-early-release-incarcerated-california/ (discussing prosecutor-initiated resentencing); *supra* note 35 (citing Illinois, Washington State, and Oregon as well).

103. WENDY SAWYER & PETER WAGNER, PRISON POL'Y INITIATIVE, MASS INCARCERATION: THE WHOLE PIE 2022 (2022), https://www.prisonpolicy.org/reports/pie2022.html [https://perma.cc/S3SM-RMKB].

104. *See infra* note 106 and accompanying text.

105. *See* First Step Act of 2018, Pub. L. No. 115-391, § 603, 132 Stat. 5194, 5238–41; *see also* Hopwood, *supra* note 32, at 100–09 (describing the history of the BOP's veto and the prerogative of defendants to move for compassionate release under the First Step Act).

whether "extraordinary and compelling reasons" justify relief,[106] but with one significant statutory catch: "Rehabilitation of the defendant alone shall not be considered an extraordinary and compelling reason."[107]

Second, in some jurisdictions, federal prosecutors can dismiss long-final convictions outright under the procedure used in *United States v. Holloway*, otherwise known as the "*Holloway* Doctrine."[108] In *Holloway*, the defendant had rejected a plea offer and ended up with a nearly sixty-year sentence after he was convicted at trial—a "trial penalty" of forty-two years.[109] Twenty years later, that sentence had outlived common sense: at fifty-seven years old, Mr. Holloway was eminently rehabilitated.[110] District Judge John Gleeson urged then-U.S. Attorney Loretta Lynch to "exercis[e] her discretion to agree to an order vacating two or more of Holloway's . . . convictions so he could face a more just resentencing."[111] She agreed.[112]

In his memorandum opinion, Judge Gleeson applauded the Department of Justice's approach to the case, observing that it "demonstrate[d] the difference between a Department of Prosecutions and a Department of *Justice*" and showed that the Department "has the power to walk into courtrooms and ask judges to remedy injustices."[113] The case also showed, Judge Gleeson added, that "[a] prosecutor who says nothing can be done about an unjust sentence because all appeals and collateral challenges have been exhausted is actually *choosing* to do nothing about the unjust sentence."[114]

Holloway is laudable, controversial, and doctrinally vague. Judge Gleeson did not spell out the jurisdictional basis or statutory authority for vacating Mr. Holloway's "excessive sentence" and indeed—as other courts have noted[115]—observed that there were "no legal avenues or bases for vacating it."[116] It has been met with mixed reactions across the district courts[117] and has not yet been adopted

106. 18 U.S.C. § 3582(c)(1)(A)(i).

107. *See* 28 U.S.C. § 994(t); *see also* Hopwood, *supra* note 32, at 109–11 (discussing issues with the application of this statutory text).

108. 68 F. Supp. 3d 310 (E.D.N.Y. 2014); *see* Hopwood, *supra* note 32, at 113–16.

109. *Holloway*, 68 F. Supp. 3d at 312–13.

110. *See id.* at 314 (describing Mr. Holloway's achievements while incarcerated, including completing programs in wellness, parenting, culinary arts, and preparation for release and winning recognition for songwriting and his work as a unit aide).

111. *Id.* at 311, 314.

112. *Id.* at 315.

113. *Id.* at 316.

114. *Id.* at 317.

115. *E.g.*, United States v. Brewer, No. CR 696-004, 2017 WL 1407651, at *1 (S.D. Ga. Apr. 19, 2017).

116. *Holloway*, 68 F. Supp. 3d at 314.

117. *Compare, e.g.*, United States v. Stoddard, No. 1:14-cr-76, 2021 WL 2379568, at *4 n.10 (E.D. Va. June 9, 2021) ("In *Holloway*, the district judge pressured the U.S. Attorney's Office to agree to vacate two of the Defendant's charges."), *and* Wright v. United States, Nos. 4:95-cr-39, 4:95-cr-44, 2018 WL 4854081, at *2 (E.D. Va. Oct. 5, 2018) ("Out of the seventy-one district court decisions this Court could find, each court has denied the petitioner's motion, mainly because the Government has opposed vacatur. . . . Many of the decisions after *Holloway* have questioned the authority federal courts have to order the Department of Justice to consider vacating convictions."), *and* United States v. Lewis, No. CR 05-07-H, 2018 WL 4775504, at *1 (D. Mont. Apr. 17, 2018) ("The so-called 'Holloway

(or discussed at length) by an appellate court.[118] Indeed, as one federal appellate court recently put it:

> [T]he "*Holloway* Doctrine" is not so much a doctrine but rather a single case carrying no precedential weight on this court: The United States' action in *Holloway* was the result of the decision of one former United States Attorney, who acknowledged that the decision did not "reflect[] a broader view," and attempts to repeat that former United States Attorney's action in other cases and other districts have been nearly universally rejected.[119]

In short, though there are excellent pragmatic reasons to support it,[120] *Holloway* itself offers at best a stable-enough limb in the handful of federal courts that have applied it—and a shaky one in federal courtrooms that hew toward formalism.[121]

Doctrine' is not actually a doctrine but a single case and decision of a district court in the Eastern District of New York. The *Holloway* decision is neither binding nor precedental [sic] in this case." (citation omitted)), *and* United States v. Rodriguez-Mendez, No. 4:02-CR-3020, 2018 WL 1767852, at *1 n.1 (D. Neb. Apr. 12, 2018) ("The *Holloway* court's solution to that problem, while well-intentioned, seems to rest on the assumption that the Court can assert authority so long as no one objects. This Court is not comfortable with that assumption. The limitation period on the Court's authority to modify a sentence is jurisdictional. And jurisdiction cannot be conferred by consent." (citations omitted)), *and Brewer*, 2017 WL 1407651, at *2 ("[T]he Court is constrained to note that *Holloway* is a district court decision and has no binding effect on this Court. Nor did *Holloway* create an actionable new right under federal law. The Eleventh Circuit has not even addressed the so-called *Holloway* Doctrine. Simply put, *Holloway* in no way controls this Court's ability or inclination to reduce Brewer's sentence."), *and* United States v. Horton, No. 12-CR-00007-F1, 2016 U.S. Dist. LEXIS 78611, at *3 (E.D.N.C. June 16, 2016) (similar), *and* Wade v. United States, No. JKB-77-0565, 2015 WL 7732834, at *2 (D. Md. Nov. 30, 2015) ("While the *Holloway* ruling is educational and the court is sympathetic to Wade's documented medical situation, it finds no basis to apply the benefits of the *Holloway* decision, a New York federal district court ruling, to Wade's criminal cases."), *with* United States v. Ezell, No. 02-815-01, 2015 U.S. Dist. LEXIS 109814, at *39 (E.D. Pa. Aug. 18, 2015) (stating that the "power" to "ensure that justice is done" "lies with the prosecutors involved in this case" and calling "on the Government to consider pursuing a joint motion of the parties to reduce Ezell's sentence . . . that would better serve the interests of justice"), *and* United States v. Trader, No. 04-680-06, 2015 WL 4941820, at *16 (E.D. Pa. Aug. 19, 2015) (similar), *and* United States v. Egipciaco, No. 05 Cr. 202, 2016 WL 11592139, at *2 (S. D.N.Y. Jan. 15, 2016) ("request[ing]" that the Government "review the case to consider exercising its considerable discretion to agree to a procedural means to reduce the twenty-five year mandatory minimum sentence of imprisonment in this case" and citing *Holloway*). *See generally Wright*, 2018 WL 4854081, at *2 (collecting cases in which "the Government has opposed vacatur" and citing cases criticizing *Holloway*); Gatica-Rodriguez v. United States, No. 09-CR-060, 2017 WL 1944111, at *3–4 (E.D. Okla. May 10, 2017) (discussing reception to *Holloway* and declining to apply the doctrine).

118. *See, e.g.*, United States v. Burton, 771 F. App'x 813, 814 (9th Cir. 2019) (noting briefly that the Ninth Circuit has not adopted the *Holloway* Doctrine); United States v. Clarke, Nos. 4:92cr4013, 4:17cv184, 2019 WL 551202, at *2 (N.D. Fla. Feb. 12, 2019) ("The Eleventh Circuit has not endorsed (nor has any other circuit court of appeals endorsed) the so-called '*Holloway* Doctrine,' and district courts around the country have uniformly declined to follow the New York judge's lead[.]").

119. United States v. Barrio, No. 21-6103, 2022 WL 898764, at *6 (10th Cir. Mar. 28, 2022) (quoting *Holloway*, 68 F. Supp. 3d at 315).

120. *See, e.g.*, Hopwood, *supra* note 32, at 114–16 (laying out arguments and addressing counterarguments).

121. As I discuss below, the argument developed in this Article provides a doctrinal underpinning for *Holloway* and other scenarios in which the prosecution and defense agree that a defendant's ongoing incarceration is unjust. *See infra* Part III.

Understandably, then, calls continue to go out for legislative bodies to pass, in Hopwood's words, "true second look provision[s]."[122] The tools that currently exist, though valuable, appear insufficient. And there are prosecutors who recognize the existence of injustice yet feel they are powerless to do anything about it—as one might infer then-U.S. Attorney Lynch felt in *Holloway*, before being prompted vigorously by Judge Gleeson.[123]

As the foregoing shows, this perceived powerlessness is new. For much of American history, it would have made little sense to call so many prison sentences unshakeable. Not until the 1970s and 1980s—two centuries after the Founding and less than fifty years ago—did draconian, determinate sentencing regimes become the norm.[124]

Part III will pick up on this thread to argue that there is a firm doctrinal basis, rooted in the Due Process Clause, enabling second look resentencing today—in fact, it should be a clear-cut case if the prosecutor stipulates that the government lacks a rational basis in continuing to enforce the sentence. And Part IV will explain why courts might release prisoners whose sentences no longer serve a rational basis even when the government disagrees. But first, Part II sets in place some pieces that are important for understanding why Part III and Part IV hold up: specifically, that there is an anomaly in the Court's due process doctrine that is often seen as foreclosing challenges to incarceration but that, taken on its own terms, actually enables the approach I suggest.

II. SCRUTINIZING ONGOING PHYSICAL CONFINEMENT

Though most constitutional challenges to a sentence focus on whether that sentence is (or was) constitutional on the day it was handed down, the day of sentencing is not the only day of constitutional importance. Courts also have authority to scrutinize the ongoing punishment of an individual—and this Article argues that they should engage in that scrutiny much more often than they do. I begin this Part by distinguishing different ways in which a criminal punishment might be challenged. In the remaining Sections, I explain why it makes doctrinal sense for courts to scrutinize, under substantive due process, whether a punishment handed down years ago still makes rational sense today.

To do so, I first note that substantive due process protects against unlawful physical confinement, whether civil or criminal, though the standard of review for criminal confinement is weaker than the standard for civil confinement. I then explain that this due process right undeniably extends throughout the duration of

122. Hopwood, *supra* note 32, at 111. For a collection of legislative proposals and calls for legislative action, see *supra* note 34.

123. *See* United States v. Holloway, 68 F. Supp. 3d 310, 314–15 (E.D.N.Y. 2014). The number of prosecutors eager for a way to remedy such injustices is likely higher now than at any point in past decades. *See* Rebecca Goldstein, *The Politics of Decarceration*, 129 YALE L.J. 446, 466–471 (2019) (reviewing RACHEL ELISE BARKOW, PRISONERS OF POLITICS: BREAKING THE CYCLE OF MASS INCARCERATION (2019)) (noting the rise of reform-minded prosecutors in jurisdictions around the country).

124. *See supra* notes 87–95.

civil confinement. Because one can still argue that criminal confinement should be treated differently, I then discuss the doctrinal basis for concluding that substantive due process protection applies throughout ongoing criminal punishment too.

A. DIFFERENT WAYS IN WHICH COURTS CAN SCRUTINIZE PUNISHMENT

There are four main ways in which a court might scrutinize a criminal punishment governed by an otherwise-valid legal judgment: (1) criminalization of the act; (2) legislatively prescribed punishment for the act; (3) court-prescribed (ab initio) punishment for the person found guilty of doing the act; and (4) ongoing punishment of that person.[125] These types of inquiries run roughly from more general to more particularized;[126] the first and second involve legislative judgments and thus have nothing to do with defendant-specific considerations, while the third and fourth involve judicial decisions in which individualized considerations are always at least morally relevant.[127] Whereas a canvass of well-known Supreme Court decisions suggests that most constitutional attacks on criminal punishments fall within the first three categories, the type of second look challenge on which this Article focuses falls under the fourth.

1. Criminalization of the Act

Courts often deal with whether conduct can be criminalized in the first place. If a state wants to prohibit me from using contraception,[128] or marrying someone of another race,[129] or refusing to salute the flag during the Pledge of Allegiance,[130] the state will lose that fight under the Constitution (at least as currently understood), regardless of any specific facts about me or about the punishment. The relevant constitutional provision would vary, but even if I were a terrible reprobate and the state wished to fine me only five dollars for engaging in any of those activities, it would still lose.[131]

125. I am leaving aside attacks on unconstitutional treatment (or non-treatment) of prisoners, which is not proximately caused by a court's sentencing entry, though in a sense these harms have also been situated doctrinally as a form of punishment. *See, e.g.*, Farmer v. Brennan, 511 U.S. 825, 834 (1994) (discussing "the principle that only the unnecessary and wanton infliction of pain implicates the Eighth Amendment." (internal quotation marks and citation omitted)).

126. That is: (1) can the legislature outlaw X?; (2) can the legislature require that people be sent to prison for up to fifty years for having done X?; (3) can a court sentence person A to prison for fifty years for having done X?; (4) twenty-five years later, does it still make sense to keep A in prison for having done X?

127. Individualized considerations are usually legally relevant, too, but are not cognizable in all situations—most notably, under a mandatory sentencing scheme.

128. Griswold v. Connecticut, 381 U.S. 479, 481–86 (1965).

129. Loving v. Virginia, 388 U.S. 1, 4–12 (1967).

130. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

131. *See supra* notes 128–30.

2. The Legislatively Prescribed Punishment

Courts also deal with attacks on the punishment prescribed for a given act.[132] If a state wanted to prescribe the death penalty or forced sterilization for a parking ticket, it would also lose.[133] If it wanted to prescribe life in prison without parole for stealing anything worth more than $1,000 after previously being convicted of a felony, however, it might well win.[134] Here, the punishment that the legislature has prescribed is the relevant question (no one disputes that the act can be criminalized), but, as with criminalization, nothing subjective or unique about the offender is relevant. The asserted constitutional infirmity could turn on whether the legislature overreacted in prescribing thirty to forty years in prison for simple possession of a controlled substance, but—unlike the next two issues—it has nothing to do with whether a certain defendant is also a really mean guy or is a beloved member of the local community, or anything in between.

3. The Punishment Imposed on the Individual by the Court

Here, courts have to look at specific facts about the defendant and ask whether the punishment is disproportionate as applied to this particular person, as a "uniquely individual human being[]."[135] For example, it may be permissible in a general sense to sentence someone to eight years in prison for selling heroin, but what if the defendant was addicted and sold only small quantities to feed his habit?[136] This type of individualized claim has been most successful in the capital context, in which the Court has "held that states may not preclude the sentencer from considering as a mitigating factor 'any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'"[137] That said, it has also been occasionally successful in attacking longer-than-necessary prison sentences under state constitutions.[138]

132. The "act" may include certain facts about the offense, for example, that the victim was a police officer. *E.g.*, Roberts v. Louisiana, 431 U.S. 633, 636 (1977) (per curiam). Or about the defendant, including that he had previously been convicted of other crimes. *E.g.*, Ewing v. California, 538 U.S. 11, 18–19 (2003) (plurality opinion).

133. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 599 (1977) (holding that the death penalty for rape is constitutionally disproportionate); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 536–37, 541 (1942) (striking down law providing for forced sterilization of "habitual criminal[s]").

134. *Cf. Ewing*, 538 U.S. at 18, 28–31 (upholding life sentence for defendant convicted of stealing roughly $1,200 worth of golf clubs under California's "three strikes" law).

135. Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion).

136. *See* Huff v. State, 568 P.2d 1014, 1015–17, 1020 (Alaska 1977) (holding that eight-year sentence for defendant who was addicted to heroin and sold drugs only to feed his addiction was excessive under the Alaska Constitution).

137. *See* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1154 (2009) (emphasis omitted) (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion)); *see also* Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) (explaining "that the individual [must] be given his due").

138. *See generally* William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 AM. CRIM. L. REV. 1627, 1653–55 (2021) (collecting and detailing cases).

It is possible to attack federal sentences in this way under 18 U.S.C. § 3553(a),[139] though review under that provision has been highly deferential.[140]

Like the others, this type of challenge is not exclusive of other types. One can argue that it violates the Eighth Amendment to both punish possession of cocaine with mandatory life in prison without parole *and* that it violates the Eighth Amendment to do so when the defendant was a first-time offender who was not convicted of intent to distribute and who, common sense would dictate, was at worst a small fish in a large trafficking operation.[141]

4. The Ongoing Punishment of the Individual

There is much well-known doctrine concerning each of the preceding three types of attacks. There is less concerning this fourth, which addresses the type of situation on which this Article focuses: situations in which it made sense to punish someone to a lengthy prison term twenty or thirty years ago but no longer makes sense today.

There are multiple reasons why such a shift could have occurred. Perhaps most apparent, the evidence at the time could have suggested that the person was guilty, but now we know that he wasn't.[142] In addition, social views could have evolved, as they have with marijuana-related crimes and offenses committed by human trafficking survivors against their traffickers.[143]

The person, too, could have changed. I began this Article with the story of Jerome Nunn, who has taken responsibility for his crime and whose transformation has been recognized by both the prosecutor's office and the mother of the person whose life he took.[144] Mr. Nunn's story, though striking, is not a one-off.[145]

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139. *See* Gall v. United States, 552 U.S. 38, 51 (2007) (directing courts to review federal sentences for "substantive reasonableness . . . under an abuse-of-discretion standard").

140. *See* Note, *More than a Formality: The Case for Meaningful Substantive Reasonableness Review*, 127 HARV. L. REV. 951, 958–64 (2014); Dudani, *supra* note 27, at 2130.

141. *Cf.* Harmelin v. Michigan, 501 U.S. 957, 1025 (1991) (White, J., dissenting) (noting that the State had chosen "not to prosecute Harmelin under the statute prohibiting possession with intent to deliver, because it was 'not necessary and not prudent to make it more difficult for us to win a prosecution'" (quoting Transcript of Oral Argument at 30–31, Harmelin v. Michigan, 501 U.S. 957 (1991) (No. 89-7272))).

142. I explain in Section II.D, *infra*, why innocence is a paradigmatic case for the argument I develop.

143. Berman, *supra* note 33, at 170; Hopwood, *supra* note 32, at 110; *cf.* Jessica Contrera, *The State of Ohio vs. a Sex-Trafficked Teenager*, WASH. POST (June 1, 2021), https://www.washingtonpost.com/dc-md-va/interactive/2021/child-sex-trafficking-alexis-martin-ohio/ (child-sex-trafficking survivor convicted of murder and sentenced to life in prison but later granted gubernatorial clemency).

144. *See supra* notes 1–2, 13–26, and accompanying text.

145. *See, e.g.*, Hopwood, *supra* note 32, at 84–89 (discussing stories of Matthew Charles and Alice Marie Johnson); *id.* at 119 ("Character is not static, people change, and the law must recognize this reality."); Berman, *supra* note 34, at 436–37 ("Even assuming that prosecutors can and do make sound, sober, and sensible 'first-look' sentencing decisions in 99 out of every 100 cases, that still means thousands of cases every year are in need of another sound, sober, and sensible sentencing look. And, with now nearly 2.5 million persons incarcerated in the United States . . . even a ninety-nine percent prosecutor sentencing 'success' rate would suggest that 25,000 incarcerated individuals . . . should be able to reasonably benefit from a sound, sober, and sensible sentencing second look." (footnote omitted)).

Arguably, this fourth question is the same as the third question ("how much punishment is appropriate for this person?"), just at a different moment in time. Unless the interval is negligibly short, however, that difference is likely to be significant. It is significant because the ab initio sentencing decision is a guess about the future: it attempts, based on what is currently known about the defendant, the crime, and others who have committed the crime, to divine what would be appropriate.[146]

The question at some significantly later moment—"is that full amount still appropriate?"—includes all that original data, but it also includes the data from all the years already served, so it is a better-informed guess. In addition, it lowers the stakes from the government's perspective, not only because people tend to "age out of crime"[147] but also because the defendant has already undergone a significant amount of the punishment. In other words, the later-in-time question is not just a rerun of the ab initio question, but rather, from the defendant's perspective, a lighter ask with heavier support.

That this type of attack is less common than the other three should not stand in the way of a successful claim. The norm until a little less than fifty years ago, after all, was that sentences could be revisited.[148] In the next Section, I outline the due process right to bodily liberty before discussing the case law demonstrating that this right does not yield to finality.[149] In Parts III and IV, I turn to what that all means for prosecutors and judges who are troubled by punishments that no longer seem rational.

B. SUBSTANTIVE DUE PROCESS PROTECTS BODILY LIBERTY, THOUGH ONLY RATIONAL BASIS SCRUTINY APPLIES IN THE CRIMINAL CONTEXT

Start with a doctrinal riddle:

- deprivations of fundamental rights receive strict scrutiny under the substantive component of the Federal Due Process Clause;[150]
- freedom from physical confinement is a fundamental right;[151] but

146. This is why judges talk about the quality of their "sentencing instincts." *See supra* note 32 and accompanying text. In the mandatory-sentencing context, the punishment may also reflect a legislature's broad-brush sense that a crime is so serious that it merits a particular sentence regardless of defendant-specific facts. As discussed below, there are limits to this predominantly retribution-based approach. *See infra* Section IV.B.

147. *See, e.g.*, Hopwood, *supra* note 32, at 89 & n.28 (citing sources).

148. *See supra* Part I.

149. *See infra* Sections II.C–II.D.

150. *E.g.*, Reno v. Flores, 507 U.S. 292, 302 (1993). Strict scrutiny asks whether a particular government act is "'necessary' or 'narrowly tailored' to promote a 'compelling' governmental interest." *See* Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268 (2007); *see also Flores*, 507 U.S. at 301–02 (explaining that the substantive component of the Due Process Clause "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest").

151. *E.g.*, Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."); O'Connor v. Donaldson, 422 U.S. 563, 573 n.8 (1975) ("That a wholly sane and innocent

- courts do not apply strict scrutiny to deprivations of liberty caused by prison sentences.[152]

The riddle was first treated in-depth by Sherry Colb in a (masterfully titled) 1994 article,[153] and it has rankled law students and advocates since.[154] If, as Colb notes, John Doe was caught eating a hashish brownie in the hypothetical State of Ames, the State could (under the usual doctrinal approach) have him sentenced to whatever prison term it wanted—so long as it satisfied all of his procedural trial rights—without ever proving that there is a compelling state interest in forbidding hashish-brownie eating.[155]

While scholars have offered well-reasoned critiques of this anomaly, I accept it as a given here. The important upshot, for this Article's purposes, is that the substantive due process right to bodily liberty still applies in the context of civil and criminal confinement alike, albeit with different standards of review.

The Supreme Court has never fully explained why incarceration does not trigger strict scrutiny, though it did briefly address the question in *Chapman v. United States*.[156] In *Chapman*, three defendants were convicted of selling LSD and punished according to the total weight not only of the LSD itself but also of the blotter paper that carried it.[157] In response to the argument that the right to bodily liberty is fundamental and should be restricted only if the restriction meets strict scrutiny,[158] the Court responded:

> [W]e have never subjected the criminal process to this sort of truncated analysis, and we decline to do so now. Every person has a fundamental right to liberty in the sense that the Government may not punish him unless and until it proves his guilt beyond a reasonable doubt at a criminal trial conducted in accordance with the relevant constitutional guarantees. But a person who *has*

person has a constitutional right not to be physically confined by the State when his freedom will pose a danger neither to himself nor to others cannot be seriously doubted.").

152. *See* Chapman v. United States, 500 U.S. 453, 464–65 (1991); *see also Foucha*, 504 U.S. at 80 ("A State, pursuant to its police power, may of course imprison convicted criminals for the purposes of deterrence and retribution."). Though various types of "intermediate scrutiny" exist, the main foil to strict scrutiny is rational basis review, which asks whether a government act is "rationally related to a legitimate governmental interest." Fallon, Jr., *supra* note 150, at 1274, 1298. This test applies to nonfundamental rights or privileges challenged under the Due Process Clause. *See id.* at 1285, 1293. Some scholars (and law professors) often describe rational basis review as a rubber stamp, though other scholars, particularly Katie Eyer, have illuminatingly complicated this narrative. *See, e.g.*, Katie R. Eyer, *The Canon of Rational Basis Review*, 93 NOTRE DAME L. REV. 1317 (2018); *see also* Bambauer & Massaro, *supra* note 42, at 284–85 (noting that rational basis "is enjoying a bit of a comeback" and "is tolerated across the ideological spectrum"). I offer two cheers for rational basis review in Section IV.A, *infra*.

153. *See* Colb, *supra* note 27, at 785–94. For those who don't want to scroll back to note 27, the article's title is: *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*.

154. *See, e.g.*, Dudani, *supra* note 27, at 2121–33; Eric S. Janus, *Beyond Strict Scrutiny: Forbidden Purpose and the "Civil Commitment" Power*, 21 NEW CRIM. L. REV. 345, 365 (2018); Karakatsanis, *supra* note 27, at 256–62.

155. Colb, *supra* note 27, at 793.

156. 500 U.S. 453, 464–65 (1991).

157. *Id.* at 453–56.

158. *Id.* at 464–65.

> been so convicted is eligible for, and the court may impose, whatever punishment is authorized by statute for his offense, so long as that penalty is not cruel and unusual, and so long as the penalty is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment.[159]

The Court then concluded "that Congress had a rational basis for its choice of penalties for LSD distribution" and that counting the blotter paper as part of the total weight betokened "a rational sentencing scheme."[160] In other words, it applied rational basis scrutiny—implicitly rejecting the proposition that a valid criminal conviction simply extinguishes the substantive due process right to bodily liberty altogether.[161]

This is an important point, and scholars such as Colb and Salil Dudani have made forceful doctrinal and justice-based arguments that strict scrutiny would be the appropriate standard to apply.[162] Here, however, I accept that those arguments are foreclosed by precedent. Instead, I highlight that the Court did not say that *no* scrutiny applied; it said that rational basis scrutiny applied.[163] In other words, freedom from criminal incarceration falls inside the due process umbrella—it just doesn't garner the heightened standard of review normally reserved for fundamental rights.[164]

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159. *Id.* at 465 (citations omitted).

160. *Id.*

161. *See* Dudani, *supra* note 27, at 2131; *see also supra* note 152 (describing rational basis scrutiny). *Contra* Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981); Vitek v. Jones, 445 U.S. 480, 493–95 (1980); Greenholtz v. Inmates of the Neb. Penal & Corr. Complex, 442 U.S. 1, 7 (1979).

162. For example, as Colb notes, the Court's explanation suffers from a false-equivalency problem: prohibiting something is not the same thing as incarcerating someone for doing it. *See* Colb, *supra* note 27, at 806. Colb hypothesizes a prison sentence for possessing a fictional fruit called "megafruit," *id.* at 803–05, but her point may become even clearer if you consider a real-world example, such as parking in a place zoned no-parking. No one seriously disputes that the government can tow your car, but to say that the government can do that is not to concede that the government can also send you to prison. *Cf.* Rummel v. Estelle, 445 U.S. 263, 274 n.11 (1980) (indicating that Eighth Amendment proportionality might well "come into play . . . if a legislature made overtime parking a felony punishable by life imprisonment").

Colb also refutes the implication in *Chapman* that procedural protections alone ensure no unnecessary incarceration. *See* 500 U.S. at 465. After all, if the government imprisons you for having megafruit or parking your car in a no-parking zone, all the procedure in the world would not redress the obvious problem you would wish to raise. *See* Colb, *supra* note 27, at 816; *see also* Dudani, *supra* note 27, at 2170–71 (noting that the Court has not considered procedure so much as the substance of "whether confinement was warranted" in civil confinement cases). "Procedure," Colb puts it, "cannot serve as a proper surrogate for substance." Colb, *supra* note 27, at 816.

163. *See Chapman*, 500 U.S. at 465.

164. *See, e.g.*, Bambauer & Massaro, *supra* note 42, at 312 ("[T]he fact that an asserted liberty interest lacks fundamental right status does not mean it is nonexistent. Instead, it means it triggers only rational basis review, with a strong presumption in favor of government."); *id.* at 313–16 (explaining that courts sometimes make this mistake). The Court has, in earlier decisions, referred to a valid conviction and sentence as "extinguish[ing]" the right to liberty for the duration of the sentence. *See Dumschat*, 452 U.S. at 464 (quoting *Greenholtz*, 442 U.S. at 7) (discussing commutation procedures); *Vitek*, 445 U.S. at 493–95 (discussing prison transfers); *Greenholtz*, 442 U.S. at 7–8 (discussing parole procedures). However, these statements are better read in their own contexts as explaining that there is no right to be housed at a particular prison or to a particular procedural mechanism for securing early release. As I explain in Section II.D, moreover, there are some situations—for example, actual

This watered-down preservation of a fundamental right shows up in other carceral contexts too. The Court has never suggested that a valid conviction extinguishes other fundamental rights—instead, it has shown that it dampens them, reducing the level of scrutiny that the Court applies. For example, there is a fundamental right to marry,[165] and under noncarceral circumstances, an infringement on that right would receive strict scrutiny.[166] In *Turner v. Safley*,[167] the Court dealt with a carceral restriction on marriage that allowed prisoners to marry "only with the permission of the superintendent of the prison," which would be granted only for "compelling reasons."[168] In addressing this policy, the Court expressly rejected the prison's argument that prisoners did not have the same fundamental right to marry as nonprisoners,[169] and it struck down the regulation.[170]

This victory for the prisoners, however, was incomplete: the Court held that "[t]he right to marry, like many other rights," was still "subject to substantial restrictions as a result of incarceration."[171] Accordingly, the Court applied a form of rational basis scrutiny—a "reasonable relationship test"—that asked whether the regulation was "reasonably related to" the government's asserted "penological interests."[172] As in *Chapman*, in other words, the Court did not say that no scrutiny was necessary because the claimant had been convicted; rather, it said that *less* scrutiny was required, but a form of rational basis review would still apply.[173] And indeed in *Safley*, unlike in *Chapman*, the governmental policy failed that form of review, showing that rational basis, although a forgiving form of review, is not a pure rubber stamp.[174]

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innocence—in which incarceration is irrational, and these statements do not (and did not) foreclose a freestanding actual-innocence claim. *See* House v. Bell, 547 U.S. 518, 555 (2006); Herrera v. Collins, 506 U.S. 390, 417 (1993) (assuming but not deciding that a freestanding innocence claim exists).

165. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967).

166. *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 387–88 (1978).

167. 482 U.S. 78 (1987).

168. *Id.* at 82.

169. *Id.* at 95.

170. *Id.* at 99. This holding also shows that while due process challenges are often leveled at legislation, they can just as validly be targeted at executive action. In *Safley*, the "litigation focused . . . on practices at the Renz Correctional Institution" pursuant to state prison regulations. *See id.* at 81; *see also* Bambauer & Massaro, *supra* note 42, at 308 (noting that "the rational basis test has been used in land use cases to review municipal executive conduct").

171. *Safley*, 482 U.S. at 95.

172. *Id.* at 97.

173. *See, e.g.*, Wolff v. McDonnell, 418 U.S. 539, 556 (1974) ("[T]he fact that prisoners retain rights under the Due Process Clause in no way implies that these rights are not subject to restrictions imposed by the nature of the regime to which they have been lawfully committed.").

174. *See infra* Section IV.A (developing this argument). Though rational basis is not a rubber stamp, this disparate approach to fundamental rights in the prison context, as noted above, is nevertheless logically strained. *See, e.g.*, Colb, *supra* note 27, at 793–94, 802–03, 802 n.90; Dudani, *supra* note 27, at 2169 & n.302; *see also* Alan C. Michaels, *Constitutional Innocence*, 112 HARV. L. REV. 828, 864 n.200 (1999); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1485–86 (1989); *supra* notes 150–55, 162 and accompanying text. Indeed, as Dudani notes, "the Court's first-ever use of strict scrutiny in response to a deprivation of a fundamental right was to invalidate a policy applied to convicted criminals." Dudani, *supra* note 27, at 2164 n.279 (citing Skinner v. Oklahoma, 316 U.S. 535 (1942)).

One might wonder, however, whether it makes sense for substantive due process to apply to criminal incarceration when there is already another constitutional provision that applies: the Eighth Amendment. While that Amendment has been understood to provide scant protection against harsh prison sentences,[175] it does provide *some* protection, so a concern about overlapping constitutional protections is not unreasonable. Nevertheless, the fact that the Eighth Amendment applies in one way does not mean that the Due Process Clause cannot apply in another. To start, the provisions have different language; one prohibits states from "depriv[ing] any person of life, liberty, or property, without due process of law,"[176] while the other prohibits the infliction of "cruel and unusual punishments."[177] And as Colb points out, there is no logical or doctrinal reason that one should foreclose the other in this context.[178] After all, there are punishments that could violate one provision without violating the other,[179] and multiple constitutional provisions can address the same basic topic (for example, limb removal) without meaning the same thing.[180] Most importantly, though the Court has sent one mixed signal in a related context,[181] it has more recently "rejected the view

175. Put briefly, for certain types of challenges—essentially, challenges to the death penalty and life in prison without parole for offenses committed as a youth—the Court conducts a two-part proportionality analysis to assess whether the punishment violates "evolving standards of decency." *See, e.g.*, Graham v. Florida, 560 U.S. 48, 58, 60–61 (2010); *see also* Berry III, *supra* note 138, at 1631–32 (describing the two parts of the proportionality test). By contrast, in basically every other context, the Court provides the most minimalistic form of gross-disproportionality review. *Id.* at 1633–36; *see* Ewing v. California, 538 U.S. 11, 20 (2003) (plurality opinion); *see also* Lockyer v. Andrade, 538 U.S. 63, 77 (2003) (upholding consecutive sentences of twenty-five years to life for repeat offender who stole roughly $150 worth of videotapes); Harmelin v. Michigan, 501 U.S. 957, 996 (1991) (upholding life without parole for first-time offender who possessed roughly two-thirds of a kilogram of cocaine). Further discussion is outside the scope of this Article, but for valuable writing on the question, see, for example, Barkow, *supra* note 137; Berry III, *supra* note 138; Guyora Binder & Ben Notterman, *Penal Incapacitation: A Situationist Critique*, 54 AM. CRIM. L. REV. 1 (2017); Alexander A. Reinert, *Reconceptualizing the Eighth Amendment: Slaves, Prisoners, and "Cruel and Unusual" Punishment*, 94 N.C. L. REV. 817 (2016).

176. U.S. CONST. amend. XIV, § 1.

177. U.S. CONST. amend. VIII.

178. Colb, *supra* note 27, at 810–13.

179. Colb posits "a crime that the state has a compelling interest in preventing but that could only be addressed effectively by public mutilation." *Id.* at 810. *Compare* McGautha v. California, 402 U.S. 183, 221–22 (1971) (upholding the death penalty against due process challenge), *with* Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam) (striking down the death penalty the next year under the Eighth and Fourteenth Amendments).

180. Colb, *supra*, note 27, at 811. *Compare* U.S. CONST. amend. VIII (prohibiting the infliction of "cruel and unusual punishments"), *with* U.S. CONST. amend. V (prohibiting putting any person "twice . . . in jeopardy of life or limb" for the same crime).

181. *See* Graham v. Connor, 490 U.S. 386, 395 (1989) ("Because the Fourth Amendment provides an explicit textual source of constitutional protection against this sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,' must be the guide for analyzing [excessive force] claims."). *But see* Bambauer & Massaro, *supra* note 42, at 320–21 (noting that *Graham*'s ruling on this point is confusing, unsound, and "heeded inconsistently, even by the Supreme Court" (citing County of Sacramento v. Lewis, 523 U.S. 833, 845–46 (1998))). In any event, on its own terms, *Graham*'s rule applies only to excessive-force claims; it does not state that all claims that could implicate multiple rights must only be analyzed under one, more specific enumerated right. *See Graham*, 490 U.S. at 395 & n.10.

that the applicability of one constitutional amendment pre-empts the guarantees of another."[182] In short, while the Eighth Amendment as currently interpreted is highly unlikely to provide a basis for revisiting a prison sentence, the Due Process Clause still can.

All of which is to say, substantive due process applies to deprivations of bodily liberty pursuant to a criminal conviction. It applies, however, with a highly deferential standard of review—criminal confinement is subject to only minimum-tier, rational basis scrutiny. The question that follows is whether that scrutiny applies throughout a person's prison sentence.

C. THE SUBSTANTIVE DUE PROCESS RIGHT TO BODILY LIBERTY EXTENDS THROUGHOUT AT LEAST CIVIL CONFINEMENT

In the last Section, I explained that criminal confinement is subject to rational basis scrutiny (rather than no scrutiny at all) under substantive due process. The next question is whether that due process protection is a one-time ticket that applies only at the moment of issuance or whether it extends throughout the duration of criminal confinement. I wade into that question first through the related issue of civil commitment, in which it is doctrinally clear that the due process right against unlawful confinement applies throughout the detainee's confinement. I then address in the next Section whether the same rule should apply to criminal confinement as well.

In the civil confinement context, a hallmark case is *Foucha v. Louisiana*.[183] The defendant, Terry Foucha, had originally been charged with aggravated burglary and illegal discharge of a firearm,[184] but after being examined by two court-appointed doctors, he was found not guilty by reason of insanity.[185]

Pursuant to a Louisiana statute, Foucha was then civilly committed to a psychiatric facility.[186] He remained there for several years—even after the superintendent of the facility and a separate panel recommended that he be released *and* after the two court-appointed doctors from his criminal case reexamined him and reported that he showed no current signs of mental illness.[187]

Foucha remained confined, in essence, because Louisiana law at the time required insanity acquittees to prove that they were no longer dangerous, regardless of whether they were still mentally ill.[188] The trial court concluded that Foucha had not met his burden under the Louisiana statute.[189] Foucha appealed, claiming that this continued confinement violated his due process rights.[190]

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182. *See* United States v. James Daniel Good Real Prop., 510 U.S. 43, 49 (1993); *see also* Colb, *supra* note 27, at 811–12 (making this point).

183. 504 U.S. 71 (1992).

184. *Id.* at 73.

185. *Id.* at 73–74.

186. *See id.* at 74 & n.1.

187. *Id.* at 74–75.

188. *See id.* at 73.

189. *See id.* at 75.

190. *Id.* at 73.

The U.S. Supreme Court agreed with Foucha.[191] Drawing on prior precedent, the Court explained that, although there is no constitutional problem with civilly committing someone who has been found not guilty by reason of insanity, such a person may be confined only "as long as he is both mentally ill *and* dangerous, but no longer."[192] Because Louisiana conceded that Foucha was no longer mentally ill, "the basis for holding Foucha in a psychiatric facility as an insanity acquittee ha[d] disappeared";[193] the State's system of "indefinite detention" was not the kind of "carefully limited exception" to "the norm" of liberty that the Court would uphold.[194] While the Court did not come out and name the type of scrutiny it was applying—Justice Thomas chided the majority for this conspicuous omission—it called the right "fundamental" and certainly appeared to apply more than minimum-tier review.[195]

Louisiana, for its part, had perhaps been confused by the Court's prior decision in *Jones v. United States*.[196] In *Jones*, the Court upheld the confinement of a man who had been acquitted of attempted petit larceny by reason of insanity yet had been confined longer than the maximum prison term he would have faced had he been convicted.[197] In upholding the continued confinement, the Court stated that being found not guilty by reason of insanity in a criminal trial was "sufficiently probative of mental illness and dangerousness to justify commitment."[198]

But as Dudani has noted, *Jones* is really the "exception that proves the rule."[199] That is because the statute at issue in *Jones* was carefully crafted to protect against unnecessary *ongoing* deprivations of liberty. As the Court explained:

> The statute provides several ways of obtaining release. Within 50 days of commitment the acquittee is entitled to a judicial hearing to determine his eligibility for release, at which he has the burden of proving by a preponderance of the evidence that he is no longer mentally ill or dangerous. If he fails to meet this burden at the 50-day hearing, the committed acquittee subsequently may be released, with court approval, upon certification of his recovery by the hospital chief of service. Alternatively, the acquittee is entitled to a judicial hearing every six months at which he may establish by a preponderance of the evidence that he is entitled to release.[200]

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191. *Id.* at 86.

192. *Id.* at 77 (emphasis added) (citing Jones v. United States, 463 U.S. 354, 368 (1983)).

193. *Id.* at 78.

194. *Id.* at 83 (quoting United States v. Salerno, 481 U.S. 739, 755 (1987)).

195. *See id.* at 80, 83; *id.* at 115–16 (Thomas, J., dissenting); *see also* Dudani, *supra* note 27, at 2133 (making this point).

196. 463 U.S. 354 (1983).

197. *Id.* at 359–60.

198. *Id.* at 363, 366. Having committed a criminal act and having been found not guilty by reason of insanity, the Court reasoned, indicated both dangerousness and ongoing mental illness, respectively. *Id.* at 364–66.

199. Dudani, *supra* note 27, at 2126.

200. *Jones*, 463 U.S. at 356–58 (footnotes omitted) (citations omitted).

In other words, the detainee could not simply be allowed to languish longer than was necessary just because he had been found not guilty by reason of insanity once upon a time. There were protections in place to ensure that the confinement lasted no longer than necessary.[201] Any reliance on finality was incompatible with the fundamental right to bodily liberty.[202]

So, in brief, the due process right to bodily liberty extends at least throughout all civil confinement. Does it likewise extend throughout criminal confinement? The next Section takes that question up.

D. (MINIMAL) PROTECTION UNDER SUBSTANTIVE DUE PROCESS MUST CONTINUE THROUGHOUT CRIMINAL INCARCERATION, TOO

It makes a certain amount of logical sense that if the due process right to bodily liberty applies throughout civil confinement, it ought to apply throughout criminal confinement too. After all, the right safeguards freedom from physical confinement, full stop, and one's body is equally confined regardless of whether the judicial order prescribing that confinement is styled as a civil or a criminal judgment.[203]

Still, there are differences. Perhaps most importantly, although the two types of detention share a common justification in incapacitation (and sometimes rehabilitation),[204] criminal punishment can have other justifications as well—specifically, retribution and deterrence.[205] These latter two justifications—especially retribution[206]—are not subject to prospective "treatment" in the way that the first two are. It is natural to talk about curing someone's mental illness; it is less natural to talk about curing someone's retributive just deserts.[207]

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201. *See id.* at 366 ("Because a hearing is provided within 50 days of the commitment, there is assurance that every acquittee has prompt opportunity to obtain release if he has recovered."); Dudani, *supra* note 27, at 2126.

202. As I discuss below, the Court has rather suggested that criminal punishment must be justified by one of the traditional purposes of punishment (of which finality is not one). *See infra* Section IV.B.

203. Indeed, these two types of judgments are often similar. *See* Kansas v. Hendricks, 521 U.S. 346, 379–80 (1997) (Breyer, J., dissenting) (naming similarities between Kansas's civil commitment statute and "traditional criminal punishments," including mode (incarceration), purpose (incapacitation), threshold requirement (commission of a criminal offense), personnel (prosecutors), procedural protections, and standard of proof).

204. *See id.* at 379–80; *see also* Foucha v. Louisiana, 504 U.S. 71, 99 (1992) (Kennedy, J., dissenting).

205. *See Hendricks*, 521 U.S. at 379–80; *see also* United States v. Brown, 381 U.S. 437, 458 (1965). Some criminal sentences also have stated endpoints, although life and life without parole sentences do not. And just because a sentence has an endpoint, of course, does not mean that endpoint remains rational.

206. By "retribution," I mean the philosophical principle that punishment is justified as a response to the defendant's wrongdoing, "[w]hether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim." *See* Roper v. Simmons, 543 U.S. 551, 571 (2005); *see also, e.g.*, Elizabeth Rapaport, *Retribution and Redemption in the Operation of Executive Clemency*, 74 CHI.-KENT L. REV. 1501, 1511–12 (2000) (describing the history of retributive philosophy from Ancient Greece to the mid-1970s).

207. *But see* SERED, *supra* note 12 (advancing a method of restorative justice founded on accountability as an alternative to traditional, punitive incarceration).

Although these differences explain why the basis for civil commitment might evaporate more often or more quickly over time, they do not mean that the basis for criminal incarceration can *never* evaporate over time. Rather, as I explain in Section IV.B, a sentence must be justified by one or more of these traditional purposes of punishment, and there are situations in which none of the four still provides a rational basis (even if one or more once did).[208] Neither type of detention is inherently ageless.

More importantly, existing doctrine suggests that this substantive due process protection extends throughout criminal incarceration. I focus here on two areas of doctrine that point toward this conclusion: actual innocence and substantive retroactivity. And although the Court has made clear that a valid conviction extinguishes *procedural* rights against ongoing incarceration, the authority I discuss underscores that its cases point in the opposite direction with regard to substantive challenges.[209]

1. Actual Innocence

Although they are not the focus of this piece given the much higher number of people who appear to be overpunished rather than wrongfully convicted,[210] one group whose prison sentences are plainly irrational are the factually innocent. While it is still doctrinally uncertain whether the Federal Due Process Clause would prohibit the execution of a factually innocent person, the Court has assumed so "for the sake of argument"[211] and has more recently come even closer to recognizing the right by referring to the question as one of sufficient proof rather than possibility[212] and by requiring an evidentiary hearing as to innocence

208. As Guyora Binder and Ben Notterman point out, more recent precedent concerning the related question of sentence proportionality "requires consideration of all four penological goals," in contrast to older precedent, "which required only that one justification be advanced." Binder & Notterman, *supra* note 175, at 51 (first citing Graham v. Florida, 560 U.S. 48, 71–74 (2010); and then citing Ewing v. California, 538 U.S. 11, 30 (2003) (plurality opinion)). By analogy, this shift offers an additional method of concluding that a given sentence has outlived its justification before it has been fully served. Nevertheless, given the deferential nature of rational basis, I assume here that even a single purpose of punishment, if rationally related to a legitimate government interest, would suffice. *See, e.g.*, *supra* note 152.

209. *See supra* note 164. The Court's cases discussing convictions as extinguishing procedural due process rights predate substantive decisions like the ones I discuss in this Section. *See, e.g.*, Montgomery v. Louisiana, 577 U.S. 190 (2016); House v. Bell, 547 U.S. 518 (2006). For these subsequent decisions to make sense, the Court's more categorical statements in the procedural context, including Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 464 (1981) (clemency); Vitek v. Jones, 445 U.S. 480, 493–94 (1980) (involuntary transfer to psychiatric hospital); Greenholtz v. Inmates of the Neb. Penal & Corr. Complex, 442 U.S. 1, 7–8 (1979) (parole); and Ohio Adult Parole Authority v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring in part and concurring in the judgment) (clemency), must apply only in that context.

210. *See, e.g.*, ABBE SMITH, GUILTY PEOPLE 3–4 (2020); Morris B. Hoffman, *The Myth of Factual Innocence*, 82 CHI.-KENT L. REV. 663, 672–73 (2007); Abbe Smith, *In Praise of the Guilty Project: A Criminal Defense Lawyer's Growing Anxiety About Innocence Projects*, 13 U. PA. J.L. & SOC. CHANGE 315, 323–24 (2010).

211. Herrera v. Collins, 506 U.S. 390, 417 (1993).

212. *See House*, 547 U.S. at 555 ("We conclude here, much as in *Herrera*, that whatever burden a hypothetical freestanding innocence claim would require, this petitioner has not satisfied it.").

in a lower court.[213] On top of these positive indications, state courts have identified this "freestanding" right either in the federal clause itself[214] or else under their own state constitutional counterparts.[215]

Some resistance to such freestanding innocence claims may stem from skepticism about the merits, which likely explains why the Court dodged the broader question in *Herrera v. Collins* and "assumed" that the right exists yet rejected the defendant's claim.[216] Yet if the prosecutor's office *agrees* that a given defendant is actually innocent, it should be axiomatic that there is no rational basis for that person's continued incarceration (or execution)—indeed, there never was, though the prosecution once mistakenly thought that there was. Innocence, in other words, should be the easy case in which the sentence undeniably fails the rational basis test—which could be crucial if there is no statutory basis to raise an innocence claim[217] and clemency is not forthcoming.[218]

The only way such a claim would be cognizable, however, is if substantive due process retains some ongoing vitality throughout a person's prison sentence. Accordingly, this line of cases, which suggests that the Court would formally recognize a due process right in a compelling case of actual innocence, supports the inference that substantive due process remains operative (albeit minimally operative) throughout the length of a criminal sentence.

2. Substantive Retroactivity

Another doctrine also suggests that substantive due process provides protection throughout a prison sentence: the doctrine requiring retroactive application of new substantive rules. Because this doctrine would also make little sense if the Due Process Clause did not provide protection throughout a sentence, it follows that the Due Process Clause does in fact do so.

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213. *See In re* Davis, 557 U.S. 952 (2009). There is at least divergence, if not an outright split, among the circuit courts on this question. *See* John M. Leventhal, *A Survey of Federal and State Courts' Approaches to a Constitutional Right of Actual Innocence: Is There a Need for a State Constitutional Right in New York in the Aftermath of CPL § 440.10(G-1)?*, 76 ALB. L. REV. 1453, 1464–66 (2013).

214. *See Ex parte* Tuley, 109 S.W.3d 388, 390 (Tex. Crim. App. 2002).

215. Schmidt v. State, 909 N.W.2d 778, 795 (Iowa 2018); Montoya v. Ulibarri, 163 P.3d 476, 484 (N.M. 2007); People v. Washington, 665 N.E.2d 1330, 1337 (Ill. 1996); *see also* People v. Hamilton, 979 N.Y.S.2d 97, 108 (App. Div. 2014) (holding that, "because punishing an actually innocent person" violates the Due Process Clause of the New York Constitution, "a freestanding claim of actual innocence" is available under New York statutory law). Other states have addressed the problem by statute. *See generally* Leventhal, *supra* note 213, at 1477–81 (surveying states that have provided for freestanding actual-innocence claims, including through postconviction statutes).

216. *See* 506 U.S. 390, 419 (1993); *see also id.* (O'Connor, J., concurring) ("I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution. . . . Dispositive to this case, however, is an equally fundamental fact: Petitioner is not innocent, in any sense of the word.").

217. *Cf. id.* at 410–11 (majority opinion) (noting differentiation among states in allowing motions for new trial based on newly discovered evidence).

218. Clemency is not always a realistic option in light of political or procedural barriers. *See, e.g.*, *supra* note 20 (noting how such structural barriers in Minnesota and Pennsylvania have effectively rendered the commutation power a nullity).

In *Teague v. Lane*, the Supreme Court (drawing on an earlier opinion by Justice Harlan) recognized a dichotomy between new substantive rules and new procedural rules.[219] A substantive rule, as initially defined, was one that "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.'"[220] The Court later clarified that this definition applied to punishment as well as conduct.[221] Thus, today, a substantive rule is one that places a law or a punishment "altogether beyond the State's power to impose."[222]

In *Montgomery v. Louisiana*, the Court held that the Constitution itself—as opposed to statutory habeas law—requires states "to give retroactive effect to" newly recognized substantive rules.[223] Though the dissenters charged the majority with failing to identify what constitutional provision imposes that requirement,[224] the most compelling answer is the substantive component of the Due Process Clause.[225] If that is so, then that is further evidence that substantive due process protection extends throughout a criminal sentence.

To see why this makes sense, consider that the relevant upshot of *Teague* is that "finality" cannot stand in the way of a newly recognized substantive rule. Put another way, the *Teague* line (as extended by *Montgomery*) recognizes that some constitutional provision requires finality to yield to newly recognized substantive constitutional rules (though not newly recognized procedural rules).[226] The Due Process Clause is a natural home for this requirement because, when a court recognizes that the Constitution places a law or punishment "altogether beyond the State's power to impose," it follows that there is no legitimate state interest in continuing to enforce that law or punishment.[227] To continue to execute the sentence would be irrational, regardless of when the defendant's conviction became final.

It is worth adding that finality also has limited logical power in this context. That is because, although "finality" has become a watchword of postconviction law in the past half century (thanks in part to other aspects of *Teague*),[228] finality

219. *See* 489 U.S. 288, 311 (1989).

220. *Id.* (quoting Mackey v. United States, 401 U.S. 667, 692 (1971) (Harlan, J., concurring in the judgments in part and dissenting in part)).

221. *See* Penry v. Lynaugh, 492 U.S. 302, 330 (1989).

222. Montgomery v. Louisiana, 577 U.S. 190, 201 (2016).

223. *Id.* at 205.

224. *See id.* at 221 (Scalia, J., dissenting).

225. *See* Griffith v. Kentucky, 479 U.S. 314, 322–23 (1987) (explaining that the right to equal application of settled law to all cases pending on direct review—that is, the other side of the *Teague* coin—stems from "basic norms of constitutional adjudication" and "the principle of treating similarly situated defendants the same"); *see also* Brief for Amici Curiae Ohio Justice & Policy Center and Roderick & Solange MacArthur Justice Center in Support of Petitioner at 8–14, Cruz v. Arizona, 142 S. Ct. 1412 (2022) (mem.) (No. 21-846), 2022 WL 2288292, at *8–14 (developing this argument in more depth).

226. *See Montgomery*, 577 U.S. at 205; *see also Edwards v. Vannoy*, 141 S. Ct. 1547, 1560 (2021) (holding that there is not even a "watershed exception" for particularly momentous procedural rules).

227. *See Montgomery*, 577 U.S. at 201; *see also supra* note 225 (citing language from *Griffith* bolstering this rule that also sounds in due process).

228. *See supra* note 89 and accompanying text; Berman, *supra* note 33, at 152.

concerns are much weaker as applied to sentences than convictions. After all, as Berman points out, "[c]riminal trials are inherently backward-looking, offense-oriented events" geared toward "binary factual determinations about legal guilt," whereas sentencings "involve assessing the future treatment and legal fate" of the defendant, which virtually always involves looking to "a defendant's personal history and characteristics to make a forward-looking prediction."[229] Indeed, as Berman notes, "when a defendant is still serving time in prison or otherwise still having his freedom directly restricted by the state . . . , arguably his sentence is not yet really even final because the state's criminal justice power is still actively controlling the defendant's life, liberty, and pursuit of happiness."[230] These reasons, too, support the commonsense conclusion that the substantive due process protection against irrational confinement applies throughout a criminal sentence and not just at its outset.

* * *

In this Part, I distinguished different types of challenges to incarceration, focusing attention on the least common type: challenges to ongoing incarceration. I explained that defendants have a substantive due process right against irrational incarceration as recognized by the Supreme Court in *Chapman* and that both logic and doctrine indicate that this right extends throughout a criminal sentence, much as it undeniably does throughout civil confinement. In Part III, I discuss how these background rules enable prosecutors to initiate second look sentencing under the Due Process Clause without any new statutory enactments—a recognition that is already reflected, though not doctrinally explained, in the *Holloway* Doctrine discussed above.

III. WHY PROSECUTORS CAN BE SECOND LOOK SENTENCERS TODAY

While scholars reasonably question why the Court applies minimum-rationality review to criminal confinement (in contrast both to its treatment of other fundamental rights and to its capital jurisprudence), this less-exacting test still requires a rational basis. In other words, the government action "must be rationally related to a legitimate governmental purpose."[231] And as just discussed, existing doctrine suggests that this protection extends throughout a defendant's incarceration.

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229. Berman, *supra* note 33, at 167–69.

230. *Id*. at 170; *see also id*. at 171 (noting that while a defendant disputing guilt necessarily seeks "a do-over for a prior determination of guilt," a defendant whose sentence has outlived its usefulness is seeking simply "a new and fresh assessment of an on-going legal concern in light of changed legal or factual circumstances"). To the extent the line between facial and as-applied challenges is legally significant in this context, such challenges would necessarily be as-applied challenges to the defendant's continued incarceration, not facial challenges to the sentencing scheme as a whole. *Cf*. Citizens United v. FEC, 558 U.S. 310, 331 (2010) (stating that "the distinction between facial and as-applied challenges is not so well defined that it . . . must always control the pleadings and disposition in every case involving a constitutional challenge").

231. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 446 (1985).

As I argue in this Part, if the key actors agree that a sentence no longer makes sense—that it is irrational—it should violate the minimal due process standard that applies. Some cases fit this description. Though courts often invent justifications for legislatures in other contexts, that approach is less defensible where the government itself expressly concedes it lacks a rational basis. Finally, this approach is equally viable under state constitutions, many of which have due process clauses that exceed the federal version.

A. PROSECUTORS CAN CONCEDE THAT A CRIMINAL SENTENCE HAS BECOME IRRATIONAL EVEN IF IT WAS RATIONAL AT THE TIME OF ISSUANCE

As in Jerome Nunn's case, with which this Article began, there are situations in which the prosecutor and the defense agree that it no longer makes sense to keep a person incarcerated. This reality has prompted prosecutors to push for express second look statutes, such as California's procedure for "Prosecutor-Initiated Resentencing."[232] But under existing due process doctrine, there should be no need for these statutes. Rather, the prisoner's continued incarceration should be understood as no longer "rationally related to a legitimate governmental purpose."[233] Just because it was at one point does not mean that it is today.

Indeed, as *Foucha* and the other civil commitment cases demonstrate,[234] due process makes particular sense for this kind of later-in-time challenge: it is the right to substantive due process that ensures that the insanity acquittee, for example, "may be held as long as he is both mentally ill and dangerous, but no longer."[235] It did not matter that Louisiana could constitutionally confine Terry Foucha for some period of time following his acquittal—once he was no longer mentally ill, it had to let him go.[236] A key condition had changed.

As noted above, key conditions can change during a prison term too.[237] Society, for example, can come to view the crime differently (as with marijuana).[238] A court can declare a substantive criminal law or punishment unconstitutional.[239] A prisoner can transform himself.[240]

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232. *See* Blout, *supra* note 102.

233. *Cleburne*, 473 U.S. at 446.

234. *See supra* Section II.C.

235. Foucha v. Louisiana, 504 U.S. 71, 77 (1992).

236. *See id.*

237. *See supra* notes 142–45 and accompanying text.

238. *See supra* note 143 and accompanying text; *infra* note 349 and accompanying text.

239. *See supra* notes 128–30, 220–22 and accompanying text.

240. There are other potential reasons for keeping a person incarcerated besides the perceived need to rehabilitate, incapacitate, or specifically deter him—namely, retribution and general deterrence. I discuss those purposes in more depth in Section IV.B and explain why there are situations in which none of these rationales are sufficient to justify ongoing imprisonment (recognizing that there remains room for debate about how frequently such situation arise). I note here, however, that the Court and modern punishers have sometimes relied on incapacitation alone to justify extreme sentences. *See* Ewing v. California, 538 U.S. 11, 26–30 (2003) (plurality opinion); Binder & Notterman, *supra* note 175, at 5–16.

Changed conditions often form the basis for attacking judgments or policies that were valid at the time of issuance.[241] A prison rule preventing prisoners from seeing their spouses or children in person might pass muster while the nation is in the grip of a pandemic but become unreasonable once the pandemic abates.[242] A "change in the applicable legal context" can allow relitigation of issues that would otherwise be precluded by the outcomes of prior litigation involving the parties.[243] An otherwise-valid death sentence can become unconstitutional to carry out if the defendant has lost the ability to "comprehend the reasons for his punishment."[244]

Similarly, just because there was a rational basis to sentence someone to a lengthy term of years at the time of sentencing does not mean that it remains rational to keep that person incarcerated years or decades later.[245] This common-sensical idea is reflected in existing "second look" statutes and in the *Holloway* Doctrine discussed above.[246] The approach advanced in this Article helps explain why the former is unnecessary and provides a doctrinal underpinning for the latter. Prosecutors and defense attorneys should be able to raise these claims jointly and directly, presumably via a postconviction or habeas filing in the relevant jurisdiction.[247]

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241. It is also clear from the Court's precedents that the constitutionality of a statute can change as conditions change. *See* Shelby County v. Holder, 570 U.S. 529, 557 (2013) (striking down the Voting Rights Act's existing coverage formula based on changed circumstances and holding that any new formula must be "based on current conditions"); Kennedy v. Louisiana, 554 U.S. 407, 419–21 (2008) (noting that the Eighth Amendment shifts with "evolving standards of decency," informed in part by recent legislative trends, international norms, and sentencing decisions (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion))); McGowan v. Maryland, 366 U.S. 420, 451 (1961) (upholding Sunday closing laws based in part on the ground that "the first day of the week has come to have special significance as a rest day in this country"); *see also* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (arguing that many statutes have become obsolete and discussing how the law should respond); Maria Ponomarenko, Note, *Changed Circumstances and Judicial Review*, 89 N.Y.U. L. REV. 1419 (2014) (considering when changed circumstances should justify judges striking down otherwise-valid laws). Whether the Court's perception of the ostensible change at issue is accurate, of course, is a different question. *See, e.g.*, *Shelby County*, 570 U.S. at 563–66 (Ginsburg, J., dissenting). In any event, it is far less disruptive—from both a pragmatic and a separation-of-powers perspective—for a court to vacate a prior sentencing judgment than to strike down a validly enacted law.

242. *Cf.* Overton v. Bazzetta, 539 U.S. 126, 133 (2003) (upholding visitation exclusion of "minor nieces and nephews and children as to whom parental rights have been terminated" while noting that policy allows visits with "those children closest to" the prisoner).

243. *See* Herrera v. Wyoming, 139 S. Ct. 1686, 1697 (2019) (citations, alterations, and internal quotation marks omitted).

244. Madison v. Alabama, 139 S. Ct. 718, 723 (2019).

245. The history of sentence non-finality discussed in Part I demonstrates that government decisionmakers have long appreciated this truth.

246. *See supra* notes 108–23 and accompanying text.

247. *See* 28 U.S.C. § 2241(c)(3) (authority to grant writ for anyone "in custody in violation of the Constitution or laws or treaties of the United States"); *see also, e.g.*, MINN. STAT. § 590.01 (allowing postconviction petition for anyone claiming a constitutional violation in their conviction, sentence, or "other disposition" at any time that is "not frivolous and is in the interests of justice"); *infra* Section III.C (discussing state analogues). Where limitation periods apply, a claim would presumably arise (and could re-arise) at whatever time some significant new development—for example, a prosecutor's agreement that the defendant's ongoing incarceration is irrational—becomes known to the defendant. *See, e.g.*,

It is also worth noting that the only prudential concern raised by scholars who have considered the possibility of individualized due process attacks on incarceration is judicial economy. Colb, most centrally, suggests that strict scrutiny of sentences under the Due Process Clause could (or perhaps should) "take place on a categorical rather than an individual, case-by-case basis."[248] Yet Colb makes clear that this suggestion is based not on doctrinal misgivings but rather on an (understandable) anticipation of floodgates objections.[249] And while judicial economy may be important in many contexts, it is not one of the recognized purposes of criminal punishment.[250]

Floodgates objections to the heightened, defendant-initiated scrutiny that Colb and Dudani urge are inevitable. But those objections would make little sense as applied to agreements between the prosecution and the defense that a current sentence is no longer supported by a legitimate state interest. Judge Gleeson dismissed this exact fear in his opinion in the *Holloway* case, observing that "[t]he use of this power poses no threat to the rule of finality" and that "[t]here are no floodgates to worry about; the authority exercised in this case will be used only as often as the Department of Justice itself chooses to exercise it, which will no doubt be sparingly."[251]

Sparingly or not, it is hard to imagine an overwhelming crush of such cases. And even a large number should be manageable, given that the parties would be approaching the courts in agreement, limiting the need for intensive trial-level litigation and essentially removing the possibility of an appeal.

B. COURTS SHOULD NOT MAKE UP A RATIONAL BASIS WHEN THE GOVERNMENT EXPRESSLY DISCLAIMS ONE

Who speaks for the government (and, by extension, its people) in a criminal proceeding? The prosecution. For that reason, if the government—via the designated prosecutor—stipulates that there is no rational basis for a person's continued incarceration, that should be the end of the due process inquiry.[252] There is no

28 U.S.C. § 2244(d)(1)(D) (imposing one-year period of limitations running from discoverability of new factual predicate); MINN. STAT. § 590.01 (imposing two-year period of limitations from "date the claim arises").

248. Colb, *supra* note 27, at 823.

249. "[O]ne might understandably express alarm at the prospect of having the courts apply strict scrutiny to every single criminal prosecution seeking a penalty of incarceration. Such a requirement might appear at first glance to present an excessive burden upon an already taxed criminal justice system." *Id.* Dudani's approach goes further, and he critiques Colb's approach (published, for what it's worth, during an earlier time in the nation's criminal-justice discourse) for stopping short of the argument's logical conclusion. *See* Dudani, *supra* note 27, at 2135 n.137.

250. *See infra* note 339 and accompanying text. There are other reasons not to worry about judicial economy as well. For one, keeping people needlessly incarcerated is hardly a wise use of public resources. And more fundamentally, it is hard to see why "administrative convenience" should trump a person's right to be free from physical confinement. Dudani, *supra* note 27, at 2175. Courts are busy, but they are not too busy to ensure that people are not wrongly incarcerated.

251. United States v. Holloway, 68 F. Supp. 3d 310, 316 (E.D.N.Y. 2014).

252. An exception might be made in the exceedingly rare case of suspected prosecutorial corruption. *Cf.* Brief for Court-Appointed *Amicus Curiae* at 2–3, United States v. Flynn, No. 17-cr-232 (D.D.C.

rational basis if the government itself expressly disclaims one.[253]

Every student of constitutional law learns that courts can make up their own rational bases for legislation, even if the government has not put one forward. Perhaps most famously, in *Williamson v. Lee Optical of Oklahoma, Inc.*,[254] the Court upheld an Oklahoma law that prohibited opticians "from fitting or duplicating lenses without a prescription from an ophthalmologist or optometrist."[255] The law, the Court acknowledged, may have been "a needless, wasteful requirement in many cases" (and surely was if someone simply needed to replace a pair of glasses that had broken), yet the Court still upheld it, positing a number of reasons that "[t]he legislature might have concluded" it was good policy.[256] "It is enough," the Court said, "that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[257]

The Court has, in recent years, put the point more bluntly: a government "need not articulate its reasoning at the moment a particular decision is made."[258] Rather, the plaintiff must negate "any reasonably conceivable state of facts that could provide a rational basis."[259] In light of this seemingly indulgent test, it is widely thought, to adapt an old saw, that a government can get a ham sandwich to pass rational basis review.[260]

June 10, 2020) (brief of retired Judge Gleeson (of *Holloway* fame) urging the District Court to deny the government's request to dismiss a charge against former National Security Advisor and retired General Michael Flynn because of "pretext[]" and "gross abuse of prosecutorial power"). That said, the danger in the mine-run criminal case is overreach rather than underreach. *See generally, e.g.*, BARKOW, *supra* note 123, at 105–38 (discussing prosecutorial incentives and the politics of punishment); PFAFF, *supra* note 12, at 127–84 (2017) (same). The overwhelming presumption in the law is one of prosecutorial regularity. *See infra* note 272 and accompanying text. Consequently, I focus on the ordinary case and do not delve into the potential ramifications of apparent corruption in prosecutorial decisionmaking. *But see infra* note 271 (describing hypothetical bad-faith bargaining by prosecutors).

253. In conceding that it lacks a rational basis, the government could focus on either the "legitimate government interest" prong of the test, the "rationally related" prong of the test, or both. I discuss below how a sentence could fail either or both prongs of the test. *See infra* Section IV.B; *see also supra* note 152. The former seems more naturally like the kind of factual issue that the government (like any litigant) should have final say on—much as if a city chose to stipulate that it adopted its zoning ordinances because it is prejudiced against people with intellectual disabilities. That would be a surprising litigation move, but it is hard to see how a court could reasonably respond, "No, you didn't."

254. 348 U.S. 483 (1955).

255. *Id.* at 486.

256. *Id.* at 487.

257. *Id.* at 488.

258. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 367 (2001).

259. *Id.* (quoting Heller v. Doe, 509 U.S. 312, 320 (1993) (stating rule in equal protection context)).

260. *See, e.g.*, Bambauer & Massaro, *supra* note 42, at 283, 297 (describing the rational basis test as "hard for the government to flunk" and being "so deferential that it has confused some courts into wrongly assuming that *only* fundamental rights trigger substantive due process"); Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1713 (1984); *see also* Adam Lamparello & Charles E. MacLean, *It's the People's Constitution, Stupid: Two Liberals Pay Tribute to Antonin Scalia's Legacy*, 45 U. MEM. L. REV. 281, 296 (2014) (also making the ham sandwich joke). The original ham sandwich adage is "that a good prosecutor can persuade a grand jury to indict a ham sandwich." Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything Is a Crime*, 113 COLUM. L. REV. SIDEBAR 102, 106 (2013). "The phrase, made famous in

This canonically weak test is not, however, a rubber stamp. First, as I discuss more below,[261] several scholars, particularly Katie Eyer, have convincingly argued that the canonical account is overstated. Although rational basis review is "often highly deferential," Eyer observes, it is "not exclusively so," and "both the Supreme Court, and perhaps more importantly the lower and state courts, have often applied meaningful review in minimum tier/rational basis contexts."[262]

Second, in even the canonically weak rational basis cases such as *Lee Optical*, the government can at least be assumed, as Cass Sunstein characterizes it, to be "invok[ing] some public value"[263] rather than actively disclaiming one. (Indeed, in keeping with Eyer's point, the Court has struck down regulations when the government is unable to do so.[264]) If the government expressly disclaims such an interest and concedes that the disputed action or policy is irrational, there is no public value to be found—it cannot "be thought that the particular legislative measure" is rationally related to a legitimate government interest.[265] Had the Oklahoma legislature in *Lee Optical* conceded that its restrictions on opticians were totally arbitrary,[266] *Lee Optical* should have been an easy case the other way.[267]

Courts should accept a government's stipulation that it lacks a rational basis for several reasons. To begin with, the alternative—invoking government

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Tom Wolfe's novel, *The Bonfire of the Vanities*, apparently originates with New York City federal judge Sol Wachtler in a lunchtime interview with a reporter from the *New York Daily News*." *Id.* at 106 n.15 (citing Barry Popik, *Indict a Ham Sandwich*, BIG APPLE (July 15, 2004), http://www.barrypopik.com/index.php/new_york_city/entry/indict_a_ham_sandwich/ [https://perma.cc/9PDT-PKWN]).

261. *See infra* Section IV.A.

262. Eyer, *supra* note 152, at 1365–66.

263. *See* Sunstein, *supra* note 260.

264. *Id.* (first citing Zobel v. Williams, 457 U.S. 55 (1982); and then citing U.S. Dep't of Agric. v. Moreno, 413 U.S. 528 (1973)).

265. *Cf.* Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488 (1955) ("It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.").

266. Had they simply conceded that the purpose was economic protectionism, they might have prompted an early answer to a question that today is the subject of a circuit split. *See* Joshua Park, Note, *Economic Protectionism: Irrationally Constitutional*, 45 PEPP. L. REV. 149, 162–66 (2018). Because I focus on bodily liberty in this Article, I do not further address economic regulation here. For a related discussion in the context of regulatory restrictions imposed on employment, housing, and other components of people's lives as a result of past convictions, see Michael L. Zuckerman, *Irrational Collateral Sanctions*, 20 OHIO ST. J. CRIM. L. (forthcoming 2022).

267. Courts will also sometimes suss out a lack of rational basis even when the government has offered ostensible reasons. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985) (striking down zoning ordinance that "appear[ed] . . . to rest on an irrational prejudice against" people with intellectual disabilities). Scholars have dubbed this approach "rational basis with bite." *See* Gayle Lynn Pettinga, Note, *Rational Basis with Bite: Intermediate Scrutiny by Any Other Name*, 62 IND. L.J. 779 (1987). *But see* Eyer, *supra* note 152, at 1339–40, 1356–64 (criticizing scholars' tendency to marginalize or oversimplify these cases). In any event, to the extent that *Cleburne* is an outlier, *see* Pettinga, *supra*, at 794; *see also Cleburne*, 473 U.S. at 456 (Marshall, J., concurring in the judgment in part and dissenting in part) (characterizing it that way), this exception further supports the point above. That is because *Cleburne*'s perceived-outlier status stems from the city's having put forward reasons and the Court's having rejected them (unlike in *Lee Optical*). *See, e.g.*, *id.* at 456–59. Had Cleburne's attorneys simply conceded that the city and its residents harbored irrational prejudices about people with intellectual disabilities, it is hard to see how *Cleburne* could have been anything but an easy case.

interests that the government expressly disclaims—raises separation of powers concerns. Our criminal system is an adversarial one in which the power to speak for the people is expressly delegated to the relevant prosecuting attorney.

The Court made this crystal clear with regard to selective prosecution claims against federal prosecutors in *United States v. Armstrong*.[268] There, it wrote:

> A selective-prosecution claim asks a court to exercise judicial power over a "special province" of the Executive. The Attorney General and United States Attorneys retain "'broad discretion'" to enforce the Nation's criminal laws. They have this latitude because they are designated by statute as the President's delegates to help him discharge his constitutional responsibility to "take Care that the Laws be faithfully executed." As a result, "[t]he presumption of regularity supports" their prosecutorial decisions and, "in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."[269]

In other words, the government, through its prosecuting attorney, speaks and makes decisions on behalf of the people in criminal proceedings, which courts in turn adjudicate by taking in the facts and interpreting and applying the law. Although courts can (and should) probe for animus hidden behind assertions of a rational basis,[270] any bona fide statement by the government that it lacks a legitimate interest should be the final word on the matter.[271]

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268. 517 U.S. 456 (1996). Although federal prosecutors are appointed members of a unified Executive Branch, the point holds true—or perhaps is even stronger—for county prosecutors in state systems whose authority is set out in state law. For example, in Ohio, each county's prosecuting attorney is expressly authorized to "prosecute, on behalf of the state, all complaints, suits, and controversies in which the state is a party" in the relevant trial and intermediate appellate courts. OHIO REV. CODE ANN. § 309.08(A). Thus, whereas an Assistant U.S. Attorney is often speaking for the whole federal Executive Branch as a legal fiction, a county prosecutor in Cleveland is speaking for the State of Ohio by express statutory directive.

269. *Armstrong*, 517 U.S. at 464 (citations omitted); *see also* Berger v. United States, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done."); United States v. Batchelder, 442 U.S. 114, 124 (1979) ("Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion."); Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 380 (2d Cir. 1973) (discussing why "the problems inherent in the task of supervising prosecutorial decisions do not lend themselves to resolution by the judiciary"); Hall v. United States, 419 F.2d 582, 588 (5th Cir. 1969) (discussing "the unseen presence in the courtroom of our great and powerful government with its counsel and its voice in the person of the United States Attorney"); *cf.* United States v. Giannattasio, 979 F.2d 98, 100 (7th Cir. 1992) ("Prosecutorial discretion resides in the executive, not in the judicial, branch, and that discretion, though subject of course to judicial review to protect constitutional rights, is not reviewable for a simple abuse of discretion.").

270. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 632 (1996); *Cleburne*, 473 U.S at 448.

271. This approach, it bears noting, is symmetrical. If a court had cause to believe that the prosecutor's office was disclaiming a rational basis in bad faith—for example, to dole out a favor to a political crony—it would be justified in rejecting that concession, just as the Court rejected the governmental assertions in *Cleburne* and *Romer*. *Cf.* Sunstein, *supra* note 260, at 1717–18 (describing the Court's inquiry into the actual rationale underlying statutes); *see also supra* note 252 (describing

To the extent this sounds like an expansion of prosecutorial power, it isn't. Prosecutorial decisionmaking is already graced with a strong presumption of regularity on the punishment side,[272] rendering prosecutors arguably the most powerful actors in shaping sentences.[273] Against that backdrop, it follows logically, particularly where liberty is supposed to be "the norm,"[274] that prosecutorial mercy should also have wide latitude.[275] If anything, it may feel like a cruel joke that prosecutors have great latitude in shaping punishment yet are sometimes told—as in Jerome Nunn's case[276]—that they are unable to fix a manifest injustice.

A potential counterargument is that the court, in propounding a rational basis that the prosecution disclaims, would not really be stepping on the Executive Branch's toes but rather standing up for the Legislative Branch. After all, when the legislature prescribes or authorizes a lengthy sentence, it may well foresee that people (and perhaps even societal attitudes) will change as time goes by yet still believe that a harsh punishment is warranted.

There are a few responses to this counterargument. To begin with, it is in tension with the nature of prosecutorial discretion. Prosecutors, after all, are almost always allowed to make judgments about when and to what degree it is appropriate to enforce the criminal laws,[277] in addition to when it might be appropriate to tweak the proper punishment for someone who has broken those laws (sometimes well after sentencing).[278] Legislative prescriptions, in other words, are inherently

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cases of prosecutorial corruption). On the other hand, if the government's concession is plausible, it should be presumed valid and accepted, much as assertions of a rational basis often are. *See, e.g.*, FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314 (1993) ("On rational-basis review, a classification in a statute such as the Cable Act comes to us bearing a strong presumption of validity . . . ."). This is, of course, the ordinary case for all litigation: a party usually has wide latitude to concede a particular point, but disputing a different point does not guarantee victory.

272. *See Armstrong*, 517 U.S. at 464; United States v. Chem. Found., Inc., 272 U.S. 1, 14–15 (1926).

273. *See, e.g.*, Berman, *supra* note 34, at 429–30; Bennett L. Gershman, *The Most Fundamental Change in the Criminal Justice System: The Role of the Prosecutor in Sentence Reduction*, CRIM. JUST., Fall 1990, at 2, 3 ("As every lawyer knows, the prosecutor is the most powerful figure in the American criminal justice system."); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1430–31 (2008); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 506 (2001) (describing prosecutors as "the criminal justice system's real lawmakers").

274. United States v. Salerno, 481 U.S. 739, 755 (1987).

275. *Cf.* Heffernan v. City of Paterson, 136 S. Ct. 1412, 1418 (2016) ("After all, in the law, what is sauce for the goose is normally sauce for the gander.").

276. *See supra* notes 23–25 and accompanying text.

277. *See supra* note 269 and accompanying text. *But see, e.g.*, Kalyani Robbins, *No-Drop Prosecution of Domestic Violence: Just Good Policy, or Equal Protection Mandate?*, 52 STAN. L. REV. 205, 216–17 (1999) (describing "no-drop" policies that would require prosecutors not to drop domestic violence cases once filed unless to protect the survivor's safety).

278. *See, e.g.*, 18 U.S.C. § 3553(e) (giving courts authority, after prosecutorial motion, to impose a sentence below the mandatory minimum when a defendant assists in another investigation); U.S. SENT'G GUIDELINES MANUAL § 5K1.1 (U.S. SENT'G COMM'N 2021) (allowing the government to request a downward departure on the basis of "substantial assistance in the investigation or prosecution of another person who has committed an offense"); FED. R. CRIM. P. 35(b) (allowing sentencing reductions for substantial assistance one or more years after sentencing); Ewing v. California, 538 U.S. 11, 17 (2003) (plurality opinion) (discussing California prosecutors' discretion to charge "wobbler" offenses as either felonies or misdemeanors, thus providing an opportunity to avert a mandatory three-strikes sentence).

generalized; it is the Executive Branch that ordinarily decides whether it is in the public's interest to enforce them against any specific person.

That argument alone may not carry the day, given that prosecutorial discretion is not absolute.[279] In fact, there are separation of powers reasons to *reject* absolute prosecutorial discretion when it comes to disputes over what the law says:[280] the legislature writes the law and the judiciary interprets it, so there is no reason that the Executive Branch, in enforcing the law, would have a superior claim to understanding what that law says. This distribution of responsibilities may help explain why courts are not obligated to accept prosecutorial concessions of error in legal disputes:[281] the prosecutor cannot bind the court into reading a statute differently than the court reads it.

But the rational basis scenario presented here is different. It is different because it hinges at least in part on a factual question: What interest is the government pursuing (and is it doing so reasonably) by continuing to incarcerate the defendant?[282] When a prosecutor represents that there is no government interest, that is akin to a factual stipulation, which, as the Court has already noted in a different context, is a "formal concession[]" that has "the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact," thus being "conclusive in the case."[283] Although courts are responsible for interpreting the law, courts are not responsible for defining the government's (or any party's) interest. The government (or that private party) is.

This Article therefore does not advocate granting prosecutors a "new power" but rather recognizing—and giving logical effect to—an unremarkable option that they, like all litigants, already have.[284] Indeed, few litigants consider it a great power to be able to settle a case favorably to the other side or to be able to stipulate to a disadvantageous fact; mostly, they try *not* to do those things. Of course, most litigants are trying to win a case, whereas a prosecutor is uniquely charged

279. *See, e.g.*, Andrew B. Loewenstein, Note, *Judicial Review and the Limits of Prosecutorial Discretion*, 38 AM. CRIM. L. REV. 351, 369–72 (2001).

280. *See, e.g.*, *id.*

281. *See* Renico v. Lett, 559 U.S. 766, 778 n.3 (2010).

282. *Cf., e.g.*, Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 366–67 (2001) (stating that burden for plaintiff is to negate "any reasonably conceivable state of facts that could provide a rational basis" (internal quotation mark and citation omitted)); Lewis v. Ascension Par. Sch. Bd., 662 F.3d 343, 352 (5th Cir. 2011) (reversing grant of summary judgment on ground that standard of review "turn[ed] on the factual questions of discriminatory motive and impact"); Eastman v. Univ. of Mich., 30 F.3d 670, 674 (6th Cir. 1994) (reversing summary judgment on ground that resolution of rational basis inquiry required factual determinations); Ballard v. Rockville Ctr. Hous. Auth., 605 F.2d 1283, 1290 (2d Cir. 1979) (reversing summary judgment on ground that "factual issues must be resolved before a determination [could] be made as to whether a rational basis exist[ed]").

283. *See* Christian Legal Soc'y v. Martinez, 561 U.S. 661, 677–78 (2010) (quoting another source); *see also* H. Hackfeld & Co. v. United States, 197 U.S. 442, 447 (1905) ("[T]he parties were entitled to have this case tried upon the assumption that these ultimate facts, stipulated into the record, were established, no less than the specific facts recited.").

284. As I explain in Part IV, a prosecutor's unwillingness to concede that a sentence lacks a rational basis should merely mean that a court must then analyze the question, like any other contested legal question. It should not count against the defendant any more than any other party's opposition in ordinary litigation.

with seeking justice rather than victory.[285] That is why, among other public-minded reasons,[286] a prosecutor might well agree to stipulate that the government lacks a rational basis—in contrast to ordinary litigants, who try to avoid giving away the case.[287] But, for what it's worth, other nongovernmental litigants also have that "power."

Giving the government primacy in asserting its interest in a particular sentence also accords with institutional democratic values. As Richard Bierschbach and Stephanos Bibas note, criminal adjudication in a democracy requires the accommodation of "a wide array of competing values," and a more individualized approach that accounts for such values (as opposed to a "blanket rule[]") is a more "democratically legitimate and responsive" approach.[288] When it comes to asserting the government's interest with regard to a particular defendant, meanwhile, the legislature is a sledgehammer, while the prosecutor is a scalpel.[289] Although there are reasons to question whether either is sufficiently responsive,[290] looking to the prosecutor—usually a locally elected actor (or reporting to one)—to assert the government's basis (or concede a lack of basis) for keeping a specific person incarcerated offers greater democratic responsiveness than harkening back to a blanket rule handed down by a legislature and imputing a purpose to it. The legislature can imagine, at the moment of enactment, that the defendant will change or societal attitudes may shift in some fuzzy, generalized way, but a prosecutor and judge reviewing the case today can respond to those changes with particularity. They, unlike the legislature, have the actual defendant and the facts of the case before them.

In any event, while there are valid reasons to allow the government substantial leeway to exercise its discretion as a litigant in the direction of mercy in this context, a court could always stop short of adopting this subsidiary argument and still hold a hearing to probe the prosecutor's reasons for conceding a lack of a rational

285. Berger v. United States, 295 U.S. 78, 88 (1935).

286. *See infra* note 306 and accompanying text.

287. Litigants also have a personal stake in the outcome, such that they will lose freedom, money, or something else of value if they lose the case. The prosecutor, by contrast, litigates on behalf of the people, and releasing someone from prison who does not need to be there is, to say the least, a significant financial *benefit* to the people, along with its other potential benefits. Taxpayers would not need to worry about being on the hook for wrongful imprisonment damages, it bears noting, because conceding that there is no longer a rational basis for someone's incarceration does not call into question the initial validity of the conviction or sentence. *See* Heck v. Humphrey, 512 U.S. 477, 487 (1994).

288. Richard A. Bierschbach & Stephanos Bibas, *Constitutionally Tailoring Punishment*, 112 MICH. L. REV. 397, 427–28 (2013).

289. *See, e.g.*, Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1328 (1998) ("Legislative primacy further presupposes that institutional discretionary mechanisms—chiefly prosecutorial discretion, jury discretion, and sentencing discretion, though the occasional grant of clemency should not be forgotten—will stand as meaningful safeguards against the 'recalcitrant experiences' that overinclusive, morally imprecise laws can generate in particular cases.").

290. *See e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 160 (10th anniversary ed. 2020); BARKOW, *supra* note 123, at 38–55, 106–19; STUNTZ, *supra* note 92, at 6–7, 32, 64–66, 192–93.

basis. As I discuss more below,[291] there are cases in which none of the traditional purposes of punishment—neither retribution nor general deterrence, and certainly not specific deterrence, incapacitation, or rehabilitation—can justify the defendant's continued incarceration. While the government's stipulation that it lacks a rational basis should be the end of the matter given the government's (like any litigant's) ability to concede a disadvantageous fact, a court that disagreed on that relatively minor point could simply hold a hearing to check the government's work.[292]

Last, while the prosecutor's concession of a lack of a rational basis may seem especially probative when a key victim or victims agree,[293] victim preferences should not dictate the outcome. It is understandable, as a matter of common sense, how that could happen—it is hard not to focus, as a human being, on Danielle Jones's extraordinary act of forgiveness when it comes to Jerome Nunn, the man convicted of participating in the murder of her son, rather than the prosecutor's position. Even so, criminal proceedings are prosecuted on behalf of the people as a whole rather than the individual victims, and as already explained, it is the prosecutor who speaks for the government (and through it, the people).[294] Criminal law is not tort law,[295] and when the matter before the court is a criminal proceeding, the prosecution's concession that the government lacks a rational basis should—at least in the absence of apparent corruption—be dispositive, even if a victim or victims disagree.

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291. *See infra* Section IV.B.

292. *See supra* notes 252, 271 (discussing instances of suspected corruption). In jurisdictions in which judges and prosecutors are both elected, judges—who are often more vulnerable to accusations of being "soft on crime"—may actually prefer a decisional rule that requires them to accept the government's concession. *Cf., e.g.*, JON ELSTER, ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS 150–53 (2000) (discussing separation of powers as a form of precommitment device); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989) (discussing how clear legal rules can buoy judges who might otherwise be tempted to rule against a defendant "who is the object of widespread hatred").

293. *Cf.* Berman, *supra* note 33, at 175 (noting that victims of "serious violent intentional crimes" may have particular interests in "personal repose and psychic peace" that "may only be well served by bestowing sentences with heightened certainty and predictability").

294. *See, e.g.*, United States v. Brown, 744 F.2d 905, 910 (2d Cir. 1984) ("[U]nlike a civil suit, the victim is not a party to a sentencing hearing and therefore has only a limited ability to influence the outcome."); People v. Eubanks, 927 P.2d 310, 315 (Cal. 1997) ("The nature of the impartiality required of the public prosecutor follows from the prosecutor's role as representative of the People as a body, rather than as individuals."); *see also supra* note 269 and accompanying text (describing the presumption of regularity in reviewing prosecutorial decisions). Victims may, however, have special rights to be informed or to be heard under state law. *See, e.g.*, David R. Friedman & Jackie M. Robinson, Note, *Rebutting the Presumption: An Empirical Analysis of Parole Deferrals Under Marsy's Law*, 66 STAN. L. REV. 173, 184 (2014); Katie Meyer, *Marsy's Law Explained*, WITF (Nov. 5, 2019, 8:40 AM), https://www.witf.org/2019/10/28/marsys-law-explained/ [https://perma.cc/78FE-RFF4].

295. *Cf.* Christine Rua, Note, *Lawyers for #UsToo: An Analysis of the Challenges Posed by the Contingent Fee System in Tort Cases for Sexual Assault*, 51 COLUM. HUM. RTS. L. REV. 723, 729–40 (2020) (discussing the "benefits and barriers" of tort law for survivors of sexual assault, as compared to criminal law).

C. STATE COURTS CAN ALWAYS ADOPT THIS APPROACH UNDER STATE CONSTITUTIONAL ANALOGUES

While this Article contends that the approach just described is doctrinally sound under the Federal Due Process Clause, there is no reason it should *require* raising a federal due process claim. First, similar relief may already be available in federal court, at least in some circumstances or some jurisdictions, under 18 U.S.C. § 3582(c) or the *Holloway* Doctrine (for which my argument in this Part provides a constitutional basis). That said, as noted above, these opportunities are spotty (not all jurisdictions accept *Holloway*), restricted (there are limits on compassionate release), and tenuous (*Holloway* does not otherwise have a clear doctrinal basis).[296]

Second, and more to the point, state courts can interpret their own state constitutional guarantees to due process in a way that conforms with this approach, even if that means going above the federal floor. There has been a drumbeat for nearly fifty years encouraging states to interpret even identical state constitutional language to be more protective than its federal counterpart, sounding from diverse corners of academia and the federal bench.[297] So far, only a few states have taken clear steps in this direction with regard to confinement, but their approaches can light the way for others.[298]

Indeed, as Jerome Nunn's lawyers pointed out to the Minnesota trial judge in his case, Minnesota courts are authorized to interpret Minnesota's due process clause "to afford greater protections of individual civil and political rights," regardless of its identical wording, if "federal precedent does not adequately protect [Minnesota's] citizens' basic rights and liberties."[299] Minnesota courts have

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296. *See supra* notes 103–21 and accompanying text.

297. For examples from a few prominent jurists, see Brigham City v. Stuart, 547 U.S. 398, 409 (2006) (Stevens, J., concurring); JEFFREY S. SUTTON, WHO DECIDES?: STATES AS LABORATORIES OF CONSTITUTIONAL EXPERIMENTATION (2022); JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018); 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 (1986); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). For examples from academia, see, for example, Ronald K.L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317 (1986); Paul W. Kahn, Commentary, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147 (1993); Symposium, *The Emergence of State Constitutional Law*, 63 TEX. L. REV. 959 (1985); Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859 (2021); *see also* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 762–63 nn.5–7 (1992) (collecting notable sources); Erwin Chemerinsky, Essay, *Two Cheers for State Constitutional Law*, 62 STAN. L. REV. 1695, 1696 (2010) (concluding that "state constitutional law is a necessary, but inadequate second best to advancing individual liberties when that cannot be accomplished under the United States Constitution").

298. *See* Dudani, *supra* note 27, at 2124 & n.62, 2176–77 (citing a few examples and making this argument); *supra* note 215 (states recognizing freestanding actual-innocence claims under their constitutions). States could also potentially adopt this approach under their Eighth Amendment corollaries, some of which include express proportionality guarantees or have been otherwise interpreted to exceed the Eighth Amendment floor. *See* Berry III, *supra* note 138, at 1642–52.

299. Kahn v. Griffin, 701 N.W.2d 815, 828 (Minn. 2005).

done that under the state constitution in the past, including with regard to unjustified incarceration. In 1991, for example, the Minnesota Supreme Court struck down Minnesota's crack-cocaine law under rational basis scrutiny in light of its unsupported justifications and the law's racially discriminatory operation.[300] Its ruling had ripple effects outside Minnesota too: the U.S. Sentencing Commission's first consideration of the crack/powder disparity came in the aftermath of the Minnesota Supreme Court's pathbreaking decision.[301]

As Eyer notes, canonical accounts of rational basis review often overlook such progress by focusing on the federal courts—especially the Supreme Court.[302] Yet state courts are crucial forums for the types of claims discussed in this Article, given that the vast majority of incarcerated people are held in state facilities.[303] And to the extent federal precedent is not understood to enable the approach outlined here, then it may well fail to adequately protect those people's rights from unnecessary incarceration.[304] State prosecutors and postconviction attorneys who identify cases of manifestly unjust overpunishment—sentences that no longer serve a rational basis—can ask state trial courts to rectify those injustices using the same doctrinal approach just elaborated.

* * *

As I explained in this Part, (a) there must at least be a rational basis for incarceration; (b) incarceration, like any government action, can start out rational and become irrational; (c) the government should have final (or at least near-final) say in stipulating that it lacks a rational basis to continue incarcerating someone, given the factual, separation of powers, and democratic dimensions involved in this concession; and (d) even if federal courts do not adopt this approach, state courts can do so under their own state constitutions. Practically speaking, it is hard to imagine such a decision being appealed, given that the parties would be approaching the court in agreement.[305]

This recognition alone can yield a powerful remedy for overpunished people. The scope of this impact is likely to grow as more people recognize the ills of mass incarceration, a change reflected in the rise of "progressive prosecutors" as well as open-minded decisionmakers who resist this label.[306] As both public

300. State v. Russell, 477 N.W.2d 886, 889–91 (Minn. 1991).

301. Eyer, *supra* note 152, at 1350 n.145.

302. *See id.* at 1346–51 (discussing inattentiveness to non–Supreme Court rational basis victories involving criminal law specifically).

303. *See* SAWYER & WAGNER, *supra* note 103.

304. *See supra* Sections I.D (especially discussing the limited uptake of the *Holloway* Doctrine) and II.B (discussing the watered-down approach that courts have taken to rational basis review of criminal sentences).

305. This reality presumably explains why appellate courts have had limited opportunities to weigh in on the *Holloway* Doctrine. *See supra* note 118 and accompanying text. The only scenario in which I can imagine an appeal would be one in which there is a sudden change in personnel in a prosecutor's office.

306. *See* Goldstein, *supra* note 123. In Ohio, where I previously practiced, some prosecutors that I can think of would be highly unlikely to call themselves "progressive" yet still recognize when there is manifest injustice in a given person's case.

opinion and political dynamics shift—and they are certainly shifting[307]—increasing awareness of sentencing injustices will impel decisionmakers to address those injustices, whether because it is what the voters to whom they are accountable want, because it just feels like the right thing to do, or both. The ascendancy of "conviction integrity units" is one leading indicator of this trend,[308] and projects focused on people who have been overpunished are beginning to follow.[309]

Nevertheless, the impact of the approach I have outlined in this Part is cabined by its reliance on the prosecutor's willingness to concede a key point. Although there will be instances in which the prosecution agrees that a person's continued incarceration is needless, there will also be nonfrivolous cases in which they see it differently.[310] Part IV discusses what should follow.

IV. COURTS CAN BE SECOND LOOK SENTENCERS TOO

As with any other fact-inscribed dispute, just because the government asserts a rational basis does not mean that there is one. I argued in Section III.B why a prosecutor's concession that the government lacks a rational basis should be dispositive (or near dispositive), based mostly on the factual nature of the concession, as well as the separation of powers and democratic legitimacy factors at play. But while a factual stipulation should have binding (or near-binding) effect,[311] a refusal to stipulate is never dispositive. If a city stipulates that its zoning decisions are motivated by animus against people with intellectual disabilities, that should be the functional end of the case. If not, not.

Consequently, courts have authority under the Due Process Clause to order the release of anyone incarcerated in the absence of a rational basis, regardless of whether the prosecutor agrees. In addressing when that might be the case, this Part first discusses the degree to which rational basis scrutiny is less milquetoast

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307. *Id.* at 460–80 (describing changes in both the national political parties and public opinion).

308. *See, e.g.*, Elizabeth Webster, *Postconviction Innocence Review in the Age of Progressive Prosecution*, 83 ALB. L. REV. 989, 990 (2020).

309. *See, e.g.*, OFF. OF MINN. ATT'Y GEN. KEITH ELLISON, MINNESOTA CONVICTION REVIEW UNIT CHARTER 1, https://www.ag.state.mn.us/Office/CRU/Charter.pdf [https://perma.cc/P3KK-JYYM] (last visited Nov. 4, 2022) (stating that the unit will "conduct extrajudicial review of juvenile adjudications, criminal convictions, and sentences in cases with plausible allegations of actual innocence or manifest injustice" (footnote omitted)); *see also UH Legal Clinic to Help Contest Unjust Sentencing*, UNIV. OF HAW. NEWS (Oct. 18, 2021), https://www.hawaii.edu/news/2021/10/18/legal-clinic-unjust-sentencing/ [https://perma.cc/A27P-GZQM] (describing new legal clinic focusing on assisting those "unfairly or overly sentenced").

310. That may be because of differences of opinion on any number of inherently subjective factors, such as the degree to which the defendant has rehabilitated, the seriousness of the crime, or the degree to which different purposes of punishment matter. *Cf.* Thomas Ward Frampton, Essay, *The Dangerous Few: Taking Seriously Prison Abolition and Its Skeptics*, 135 HARV. L. REV. 2013, 2021, 2026, 2029–37 (2022) (discussing divergence in conceiving of who qualifies as "the dangerous few" for whom some form of incarceration is most necessary under current conditions). Just because a team of defense attorneys reasonably believe that it is irrational for the government to continue incarcerating their client does not mean that a prosecutor, who approaches the question from a different set of professional experiences and obligations, will agree.

311. *See supra* note 283 and accompanying text.

than canonically assumed. It then discusses potential situations in which none of the traditionally recognized purposes of punishment would provide a rational basis. Finally, it notes that if courts ever do heed scholars' calls to apply strict scrutiny to sentencing laws and ab initio prison sentences, that scrutiny should apply equally to ongoing incarceration.

A. THE RATIONAL BASIS TEST IS NOT TOOTHLESS

As noted above, the canonical wisdom regarding rational basis review is that it is rational in theory and a fantasy in fact.[312] But the Supreme Court itself has said that the standard, though limited, is "not a toothless one."[313] And as scholars like Eyer have pointed out, the Court is not misrepresenting itself: the standard is not as toothless as the canonical account suggests.[314]

First, canonical treatment of Supreme Court doctrine itself is oversimplified. In the equal protection context, scholars often overlook the rational basis victories—for example, the early wins in sex-discrimination cases[315]—or else remember them "as 'really' about heightened review."[316] Indeed, the Supreme Court has at times engaged in "meaningful rational basis review,"[317] requiring the government, as Sunstein puts it, "to invoke a plausible public value justification."[318]

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312. *See supra* notes 254–60.

313. Schweiker v. Wilson, 450 U.S. 221, 234 (1981) (quoting Mathews v. Lucas, 427 U.S. 495, 510 (1976)).

314. *See* Eyer, *supra* note 152, at 1354–55; *see also* Bambauer & Massaro, *supra* note 42, at 285 (noting that "the rational basis test is tolerated across the ideological spectrum and is well poised for a modest resurgence"). *See generally* Katie R. Eyer, *Protected Class Rational Basis Review*, 95 N.C. L. REV. 975 (2017) (arguing that rational basis claims hold underappreciated promise for future race and gender equity claims); Katie R. Eyer, *Constitutional Crossroads and the Canon of Rational Basis Review*, 48 U.C. DAVIS L. REV. 527 (2014) (arguing that canonical narratives about rational basis understate the scrutiny that the Court applies in civil rights cases); Katie R. Eyer, *Animus Trouble*, 48 STETSON L. REV. 215 (2019) [hereinafter Eyer, *Animus Trouble*] (arguing in favor of rational basis challenges and raising concerns about animus-based challenges).

315. Eyer, *supra* note 152, at 1327–29 (discussing Reed v. Reed, 404 U.S. 71 (1971), and Craig v. Boren, 429 U.S. 190 (1976)). I analogize here and elsewhere to equal-protection irrationality on the ground that the differences between it and due process irrationality are "mostly illusory." Bambauer & Massaro, *supra* note 42, at 316; *see also id.* at 317–18 (developing this point and noting that courts and scholars typically treat the two types of challenges "as functionally identical").

316. *See* Eyer, *Animus Trouble*, *supra* note 314, at 224; *see also id.* at 222–24 (collecting numerous "forgotten" cases); Eyer, *supra* note 152, at 1336–39 (collecting cases that are either ignored or "referred to as only 'purporting' to apply rational basis review"). Among the cases Eyer cites are *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Papasan v. Allain*, 478 U.S. 265 (1986); and *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973). For additional cases, see Bambauer & Massaro, *supra* note 42, at 303–04 & n.125 (noting Schware v. Bd. of Bar Exam'rs of N.M., 353 U.S. 232 (1957), and Plyler v. Doe, 457 U.S. 202 (1982)). As noted above, I would add *Turner v. Safley*, 482 U.S. 78 (1987), which is all the more relevant in this context, given that it's a prisoners' rights case. *See supra* notes 167–74.

317. Eyer, *supra* note 152, at 1335.

318. *See* Sunstein, *supra* note 260, at 1713 (first citing Zobel v. Williams, 457 U.S. 55 (1982); and then citing *Moreno*, 413 U.S. 528); *see also* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 310 (1993) (synthesizing the doctrine as providing that "government officials must act on public spirited rather than self-interested or invidious motivations, and there must be a 'rational' or reasonable relationship between government's ends and its means").

Second, the canonical account is Supreme Court-centric. In focusing on the Court, the account overlooks the "vast majority of constitutional litigation, which goes on in the lower and state courts."[319] It thus ignores "the rich array of ways that rational basis review has been used to spur constitutional change outside of the Supreme Court,"[320] including the foothold it has provided for multiple social movements.[321]

The gay rights movement is a particularly strong example. As Jane Bambauer and Toni Massaro note, using rational basis to attack discrimination on the basis of sexual orientation proved a clever approach that "allowed courts to proceed incrementally and contextually" and, importantly, to "put pressure on government to explain *why* sexual orientation distinctions make sense, on a case-by-case basis."[322] In other words, it "put on public display the states' inability to assert a single objectively reasonable, secular and constitutionally adequate basis for discriminating against same-sex couples."[323] And "[t]he strategy worked."[324]

These victories illustrate broader advantages in the much-maligned doctrine. For one, the incremental, fact-specific nature of the doctrine allows courts to experiment—to go out on a limb in particular cases without issuing a sweeping ruling that would require heightened scrutiny across the board (and thus massive changes and likely appellate reversal).[325] More concretely: though I can imagine some judges being willing to hold that it violates due process to continue to incarcerate someone like Jerome Nunn, I can imagine few judges ready to hold that all incarceration requires strict scrutiny.[326]

In addition, rational basis challenges force a "public airing" of government policy, requiring government lawyers and courts to articulate reasons undergirding policy choices and requiring consideration of whether those reasons hold up.[327] In Jerome Nunn's case, for example, the prosecution agreed that he should be released, and the judge articulated only one reason for denying Mr. Nunn's release: "finality."[328] If "finality" is all that is needed to justify potentially lifelong incarceration, that is at least worth making plain.[329]

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319. Eyer, *supra* note 152, at 1321.

320. *Id.* at 1341.

321. *Id.* at 1319–20.

322. Bambauer & Massaro, *supra* note 42, at 300.

323. *Id.*

324. *Id.* at 301.

325. *See, e.g.*, *id.* at 287 ("[T]he very flexibility that critics abhor allows the floor tests to promote justice in modest steps while maintaining the analytical coherence of the rest of the Constitution. The vagueness of the doctrines requires courts to limit their holdings and reasoning to the facts before them and to leave other rights to expand slowly and deliberately, if at all."); *id.* at 340 ("[The floor tests] provide a means of experimentation that relieves courts from the anxiety of forming permanent constitutional rules."); *see also id.* at 300–01, 328, 340.

326. See *supra* note 162 for further discussion on this point.

327. Bambauer & Massaro, *supra* note 42, at 338; *see id.* at 300–01.

328. *See* Order Denying Petition, *supra* note 23.

329. *Cf.* HANNAH ARENDT, *Thinking and Moral Consideration*, *in* RESPONSIBILITY AND JUDGMENT 159, 164 (Jerome Kohn ed., 2003) (theorizing that "the ability to tell right from wrong" derives from the "ability to think" and thus that "we must be able to 'demand' its exercise in every sane person no matter

And as victories accrue—and the sky does not fall—they can help build a momentum that allows courts to learn from and build on prior decisions.[330] A world in which more judges are exposed to stories like Jerome Nunn's could become a world in which more powerful decisionmakers understand the need to replace the dominant approach to punishment with something better.[331]

It is particularly relevant here that, as Eyer notes, where advocates have successfully attacked criminal law issues, "it has often been rational basis review that has helped pave the way."[332] Indeed, though their rulings have not always been upheld on appeal, "lower and state court judges . . . have embraced rational basis arguments" leveled against collateral consequences to employment, the crack/powder cocaine disparity, and local bail systems.[333] As noted above,[334] these victories can have ripple effects: the U.S. Sentencing Commission first considered the crack/powder disparity after the Minnesota Supreme Court struck down the state's crack-cocaine sentencing statute under rational basis scrutiny.[335] But because these victories occur outside the Supreme Court, we often hear "an all or nothing tale" in which social movements must either achieve the right to argue under heightened scrutiny or lose.[336]

In short, when the Supreme Court instructs courts applying federal law to ask whether a particular law or government action is "a rational effort to deal with" a legitimate government interest,[337] we should understand the Court to mean what it says. And though such an inquiry is not the same as heightened scrutiny, it is also not a nullity; used creatively, the test's weakness can be a strength.[338] Though rational basis challenges will not end mass incarceration, that does not mean that they cannot serve as meaningful vehicles for rectifying injustices.

B. A PRISON SENTENCE IS IRRATIONAL WHEN IT NO LONGER SERVES AN ACKNOWLEDGED PURPOSE OF PUNISHMENT

When would a prison sentence lack a rational basis? The Court has explained that sentences can be justified by any of the traditional purposes of punishment: retribution, deterrence, incapacitation, and rehabilitation.[339] Notably, the Court

how erudite or ignorant"); HANNAH ARENDT, *Some Questions of Moral Philosophy*, *in* RESPONSIBILITY AND JUDGMENT, *supra*, at 49, 146 (criticizing the "widespread tendency to refuse to judge at all" as allowing evil outcomes to abide among people who have no intention of doing evil).

330. *See* Bambauer & Massaro, *supra* note 42, at 300–01, 328–30.

331. *See* Sarah French Russell, *Second Looks at Sentences Under the First Step Act*, 32 FED. SENT'G REP. 76, 79–80 (2019) (arguing that second look procedures help to educate judges who otherwise may have a distorted view of how defendants fare after sentencing, given that judges are much more likely to see "failures" through supervised-release violations than success stories).

332. Eyer, *supra* note 152, at 1346.

333. *See id.* at 1347–48 & nn.136, 140–42 (collecting cases).

334. *See supra* notes 300–01, 315–24 and accompanying text.

335. *See* Eyer, *supra* note 152, at 1350 n.145.

336. *Id.* at 1355.

337. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 536 (1973).

338. Bambauer & Massaro, *supra* note 42, at 300.

339. Graham v. Florida, 560 U.S. 48, 71–73 (2010). Although rehabilitation is a traditional purpose, it is not a cognizable one under some sentencing schemes, including the federal one. Tapia v. United States, 564 U.S. 319, 332 (2011).

has not cited finality as an independent basis for justifying a sentence—and, as noted above, substantive retroactivity doctrine indicates that finality is *not* a sufficient basis once a given law or punishment has been deemed unconstitutional.[340]

As I discuss in this Section, there are situations—such as some of the examples noted above[341]—in which none of these four traditional purposes offers an ongoing rational basis, even if one or more once did.[342] In such circumstances, criminal-constitutional doctrine should embrace the idea that a manifestly unjust sentence is an irrational one.

1. Retribution

Retribution likely presents the hardest challenge from the defense perspective. After all, most proponents of retributivism focus retrospectively on the relationship between the punishment and the offense,[343] and the offense does not change with time. Yet there are at least three types of cases in which retribution can fail to provide a valid interest: (1) cases in which it never could (what defense attorneys and prosecutors might call "ticky-tack crimes"); (2) cases in which society's attitude toward the offense has liberalized; and (3) cases in which the offense was evidently the result of youth, immaturity, or some other mutable aspect of the offender's character.

Ticky-Tack Crimes—The first is the most straightforward: some people are serving lengthy sentences for crimes that are extremely hard to defend from a retributivist perspective. The Supreme Court upheld Gary Ewing's twenty-five-years-to-life sentence for stealing three fancy golf clubs and Leandro Andrade's fifty-years-to-life sentence for stealing roughly $150 worth of videotapes, but it never pretended that retribution justified those sentences.[344] The State, likewise, hardly seems to have pressed the point.[345] Similarly, most would agree that drug-possession crimes, which can likewise trigger lengthy sentences, do not raise the

340. *See supra* notes 223–24 and accompanying text.

341. *See supra* note 145 and accompanying text (mentioning some eminently rehabilitated people). *Cf. Graham*, 560 U.S. at 71 ("A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense.").

342. Factual innocence, as I note above, would be the most obvious case, but I focus here on the larger number of situations in which factual guilt is not disputed. *See supra* notes 210–17 and accompanying text. As noted above, given the nature of rational basis review, I assume that even a single purpose would suffice if rationally related to the ongoing incarceration. *See supra* note 208. *But cf. Graham*, 560 U.S. at 71–74 (assessing all four traditional justifications together and noting that "[i]ncapacitation cannot override all other considerations"); Binder & Notterman, *supra* note 175, at 51 (highlighting *Graham*'s departure from *Ewing v. California*, which required only one justification).

343. *See, e.g.*, Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 862–63 (2002).

344. *See* Ewing v. California, 538 U.S. 11, 26–30 (2003) (discussing deterrence and, especially, incapacitation) (plurality opinion); Lockyer v. Andrade, 538 U.S. 63, 76–77 (2003) (discussing § 2254(d) deference and, at least obliquely, incapacitation given the recidivism factor).

345. *See Ewing*, 538 U.S. at 51–52 (Breyer, J., dissenting) ("No one argues for Ewing's inclusion within the ambit of the three strikes statute on grounds of 'retribution.'" (citation omitted)); *Andrade*, 538 U.S. at 80 (Souter, J., dissenting) ("Although the State alludes in passing to retribution or deterrence, its only serious justification for the 25-year minimum treats the sentence as a way to incapacitate a given defendant from further crime . . . ." (citation omitted)).

same retributive interests that crimes like murder or rape raise.[346] Lengthy punishments for more minor crimes—those with either no identifiable victim or else no particularly aggrieved victim—may be justifiable on some basis, but retribution is unlikely to provide that basis.[347]

Evolving Attitudes—Whereas some crimes will presumably always seem grave, society sometimes comes to think of a particular crime as either not as serious as it was once thought or as not even a crime. An example in the former category is crack cocaine, which was long subject to a starkly disparate (and starkly racially disparate) sentencing regime as compared with powder cocaine—which is, chemically speaking, essentially the same drug.[348] An example in the latter category is marijuana, which is now legal under a number of state laws (albeit not the Federal Controlled Substances Act).[349]

For those types of offenses, it will be harder to argue *today* that retribution justifies the sentence, though society may remember why judges *thought* it did at the time. It is appropriate in such cases to give essentially retroactive effect to contemporary thinking, recognizing that retribution cannot in fact justify the harsh sentence handed down, even if society previously thought it could. As noted above,[350] this account accords with—and offers a firmer doctrinal home for—the constitutional rule, beginning with *Teague v. Lane*,[351] that requires courts "to give retroactive effect to a substantive constitutional right"[352] even on collateral appeal, regardless of the finality interests at stake.[353]

Though *Teague* does not sweep this far, the same logic could—and should—provide grounds for seeking retroactive effect (whether formally or functionally) from changes in sentencing schemes.[354] If a legislature reduces the maximum sentence for marijuana possession from ten years to ten days, it follows that the

346. *See, e.g.*, Christopher, *supra* note 343, at 895.

347. *See supra* note 175 and accompanying text; Berry III, *supra* note 138, at 1633–36; Binder & Notterman, *supra* note 175, at 15–16; Nellis, *supra* note 29; *cf., e.g.*, Colb, *supra* note 27, at 820 (opining that society criminalizes drugs like marijuana because of fears about "diminished productivity, potential health risks, and perhaps [a] moral judgment" about the appropriate "pursuit of pleasure").

348. *See* United States v. Then, 56 F.3d 464, 467 (2d Cir. 1995) (Calabresi, J., concurring) ("[W]hat is known today about the effects of crack and cocaine, and about the impact that the crack/cocaine sentencing rules have on minority groups, is significantly different from what was known when the 100–to–1 ratio was adopted. As a result, constitutional arguments that were unavailing in the past may not be foreclosed in the future."). *See generally* William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1257–58 (1996) (explaining chemical similarities and differences among various forms of cocaine, including crack and powder cocaine).

349. *See, e.g.*, Mary A. Celeste & Melia Thompson-Dudiak, *Has the Marijuana Classification Under the Controlled Substances Act Outlived Its Definition?*, 20 CONN. PUB. INT. L.J. 18, 19 (2020).

350. *See supra* notes 223–27 and accompanying text.

351. 489 U.S. 288 (1989).

352. Montgomery v. Louisiana, 577 U.S. 190, 205 (2016) (explaining that this right flows from the Constitution).

353. *See, e.g.*, *Teague*, 489 U.S. at 308–09.

354. The current federal rule presumes sentencing changes to apply only prospectively in the absence of an express statement or "fair implication" to the contrary. *See* Dorsey v. United States, 567 U.S. 260, 273 (2012); *see also* Harold J. Krent, *Retroactivity and Crack Sentencing Reform*, 47 U. MICH. J.L. REFORM 53 (2013) (criticizing this presumption).

legislature itself has indicated that there is no retribution-based rationale—and perhaps no rational basis at all—for continuing to incarcerate someone for possessing marijuana past the ten-day mark.

Unformed Defendants—Retributivists have a stronger argument when the defendant did something that society did, does, and presumably always will treat as grievous. These cases will be especially difficult when the victims oppose release, given that retribution may in part reflect a rational basis in protecting victims' psychological peace and avoiding vigilantism and "self-help" remedies.[355] But apart from victim-specific concerns (and as Mr. Nunn's case illustrates, victims do sometimes agree that a sentence has outlived its value), the nub for most retributivists is philosophical: the arguments for retribution look backward at what happened *then*, regardless of what the defendant is like today.[356]

A doctrinal answer to this objection is that the Supreme Court has provided its own theory of retribution. It has expressed its theory mostly through its Eighth Amendment cases,[357] and its theory differs slightly from the standard philosophical account. "The heart of the retribution rationale," in the Court's words, "is that a criminal sentence must be directly related to the personal culpability of the criminal offender."[358] The Court has linked culpability, meanwhile, not only to the offense and the person's own fixed qualities, such as having an intellectual disability,[359] but also to the person's capacity to change. That is why the death penalty is retributively disproportionate as applied to people who committed terrible crimes as children: their "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."[360] It is likewise why juvenile life without parole (JLWOP) is retributively disproportionate for nonhomicide crimes,[361] and why mandatory JLWOP is retributively disproportionate for homicides.[362]

The Court in these cases draws a categorical line regarding retribution (and the punishment at issue more broadly), explaining that it is disproportionate as applied to certain classes of offenders. But the upshot of treating youth as categorically diminishing culpability (for retributivist purposes) on the grounds that children's characters are inherently mutable is that mutability must then also diminish culpability to some degree for other people whose characters are also mutable.

In the case of someone like Jerome Nunn, who committed a crime at age nineteen and is eminently transformed today, the best evidence that his crime, too,

355. *Cf.* Berman, *supra* note 33, at 175 (noting that these interests may weigh especially in favor of "sentences with heightened certainty and predictability").

356. *See* Christopher, *supra* note 343, at 861–62.

357. My argument concerns due process, of course, but there is no reason to believe the Court's thinking on retributivism would change from amendment to amendment.

358. Tison v. Arizona, 481 U.S. 137, 149 (1987).

359. *See* Atkins v. Virginia, 536 U.S. 304, 319 (2002).

360. Roper v. Simmons, 543 U.S. 551, 571 (2005)

361. Graham v. Florida, 560 U.S. 48, 71 (2010).

362. Miller v. Alabama, 567 U.S. 460, 472 (2012).

was the product of a young, immature character is that his character is in fact strikingly different today.[363] That does not mean that a life sentence is categorically disproportionate as applied to first-degree murder, but it does mean that retribution can be disproportionate as applied to a specific person whose "culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity."[364] And it, by extension, suggests that someone who committed a crime at or after age eighteen can be one of those people.

Nor is retribution logically disproportionate only as applied to certain people who were just over eighteen and thus had prefrontal cortices that were essentially as undeveloped as those of their seventeen-year-old near-peers.[365] While it is certainly true that one does not become significantly more culpable just by virtue of having passed one's eighteenth birthday,[366] there are other ways in which one's culpability can be diminished by a factor that is both mutable and outside one's control. To refer back to the civil commitment cases, imagine a defendant who has developed a temporary mental illness. If a jury concludes that his illness meets the extremely high bar of the insanity defense,[367] he will be civilly committed but then released if or when he recovers. If a jury concludes that he fails to meet that bar, however, he may be sentenced to die in prison. There may be rational bases for such incarceration—for example, incapacitation as long as his mental illness continues—but it is unlikely that retribution would justify such a sentence in *all* cases. Given the Court's discussion of the issue, retribution's value should diminish if the defendant can sufficiently show that the crime was a function of his then-unwell mental state.[368]

2. General Deterrence

The three other traditional purposes of punishment—deterrence, incapacitation, and rehabilitation—are more likely to have dissipated in an appropriate case because they do not anchor so strongly on the moral fact of the crime itself. Rather, each requires some forward-looking justification involving the punishment's ongoing consequentialist value.[369] Still, deterrence is more complicated than the other two, primarily because it comes in two types: general and specific

363. *See supra* notes 1–18 and accompanying text.

364. *Roper*, 543 U.S. at 571.

365. *See* Alexandra O. Cohen, Richard J. Bonnie, Kim Taylor-Thompson & BJ Casey, *When Does a Juvenile Become an Adult? Implications for Law and Policy*, 88 TEMP. L. REV. 769, 783–87 (2016).

366. *See, e.g.*, *id.*; Madison Ard, Note, *Coming of Age: Modern Neuroscience and the Expansion of Juvenile Sentencing Protections*, 72 ALA. L. REV. 511, 513 (2020).

367. *See supra* Section II.C; *see also* Melinda Carrido, Comment, *Revisiting the Insanity Defense: A Case for Resurrecting the Volitional Prong of the Insanity Defense in Light of Neuroscientific Advances*, 41 SW. L. REV. 309, 311, 319 (2012) (noting that states significantly cabined the insanity defense in the wake of the verdict in John Hinckley's trial for the attempted assassination of President Reagan).

368. *Cf. Roper*, 543 U.S. at 571 ("Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished . . . ."); Atkins v. Virginia, 536 U.S. 304, 319 (2002) (concluding that retribution does not justify capital punishment for people with intellectual disabilities because their culpability is lower).

369. *E.g.*, Christopher, *supra* note 343, at 848–49.

deterrence.[370] And because general deterrence looks to the punishment's effects on others rather than on the defendant himself, it offers a more defensible reason for ongoing punishment than the need to specifically deter a rehabilitated defendant does.

Nevertheless, general deterrence will not always provide a rational basis. One significant barrier to concluding that general deterrence can justify ongoing punishment (in at least some cases) is the existing data. According to a 2003 meta-analysis, "[a] reasonable assessment of the research to date—with a particular focus on studies conducted in the past decade—is that sentence severity has no effect on the level of crime in society."[371] There is even evidence suggesting that longer sentences *increase* recidivism[372]—the essence of an irrational approach to a problem. This evidence makes sense when one considers the choices facing people currently serving long sentences who will still eventually come home: if you take away any hope of nearer-term relief, you take away an important incentive to focus on self-improvement while incarcerated.[373]

There are also commonsense limits on the rational value of deterrence. At extreme levels, some punishments cannot be rational lest the prisoner become a literal scapegoat.[374] After all, society could surely deter golf-club-stealing by executing anyone convicted of golf-club theft, but that would not render such a law *rationally related to* the legitimate government interest in deterring golf-club theft. The interest is legitimate, but executing people is not "a rational effort to deal with"[375] that interest. It is, of course, disproportionate, but it is also irrational in the same way that burning down your house because you found ants on the kitchen counter is irrational. It's rational to want to get rid of the ants, but it's not rational to get rid of them that way.[376]

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370. Meghan J. Ryan, *Judging Cruelty*, 44 U.C. DAVIS L. REV. 81, 108 (2010) ("General deterrence is the concept that punishing an offender will deter other would-be offenders from committing such crimes and, thus, reduce crime overall. Specific deterrence is the notion that punishing an offender will deter that specific offender from committing crimes in the future." (footnote omitted)).

371. Anthony N. Doob & Cheryl Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, 30 CRIME & JUST. 143, 143 (2003).

372. *See* Binder & Notterman, *supra* note 175, at 14–15 & nn.107–08 (citing VALERIE WRIGHT, THE SENT'G PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT 6 (2010), [https://perma.cc/E2V2-5PNE]; Jalila Jefferson-Bullock, *The Time Is Ripe to Include Considerations of the Effects on Families and Communities of Excessively Long Sentences*, 83 UMKC L. REV. 73, 76 (2014)).

373. *Cf., e.g.*, Hopwood, *supra* note 32, at 97 ("If second looks became the norm, those in federal prison would be incentivized to start compiling a record of rehabilitation, including compliance with BOP rules and norms.").

374. *See Leviticus* 16:8–10.

375. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 535–36 (1973).

376. *Cf., e.g.*, Farmer v. Brennan, 511 U.S. 825, 833 (1994) ("[G]ratuitously allowing the beating or rape of one prisoner by another serves no legitimate penological objective" (citation, alteration, and internal quotation marks omitted)). Admittedly, *Farmer*'s statement is imprecise. *See* Ben Gifford, *Prison Crime and the Economics of Incarceration*, 71 STAN. L. REV. 71, 116 (2019) (noting that the threat of violent crime could "serve significant, legitimate penological objectives, such as . . . deterrence," yet still be morally impermissible). What it lacks, however, is simply the caveat that

At less extreme levels, too, ongoing incarceration can fail to be rationally related to the government's legitimate goal of general crime deterrence. That is because, as Carol Steiker argues in a related context, "there are always alternative means to prevent such future harms, including policing initiatives and other direct community interventions in the short term, and funding for social programs such as education, health care, mental health services, and drug treatment in the medium and long term."[377] There are also even closer alternatives, such as shorter sentences.[378]

This is a further upshot of the ants hypothetical: the reason it is irrational to burn down your house is not only because that is such an extreme reaction but also because there are many other, less extreme alternatives available. On rational basis review, of course, the government does not need to pick the best possible alternative; it can choose any reasonable approach.[379] But an approach is not reasonable if it is significantly more burdensome than plenty of other, easily implementable alternatives.[380]

Finally, general deterrence will fail as applied to at least some individual defendants who have already served long sentences simply because the marginal effect on general deterrence will be vanishingly small. Take Jerome Nunn, who is not a household name and who has already been incarcerated for twenty-six years. Granting for the sake of argument that life sentences in general deter violent crime,[381] it is hard to imagine that keeping Mr. Nunn locked up for another ten, twenty, or thirty years is going to have even the smallest marginal effect on crime rates. That is true for two reasons. First, few people have ever even heard of Mr. Nunn, so whether he is released will have essentially no effect.[382] Second, even among those who have heard of Mr. Nunn, it is virtually impossible to imagine any person's choice to

allowing the beating or rape of prisoners is not rationally related to any legitimate penological goal. Crime is a problem, but committing further crimes is not how reasonable people address the problem.

377. Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 784 (2005) (footnote omitted).

378. *See* Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 981 (2003) (noting that "there is considerable crime-reducing potential in a distribution of punishment that tracks the principles of justice shared by the community," which operates through informal social pressures and norms).

379. *E.g.*, Schweiker v. Wilson, 450 U.S. 221, 234 (1981) (explaining that courts must not "substitute [their] personal notions of good public policy" for the legislature's).

380. *Cf., e.g.*, Barletta v. Rilling, 973 F. Supp. 2d 132, 137 (D. Conn. 2013) (striking down categorical ban on precious-metals licensure for people with felonies under rational basis review and noting that while the State's goals of preventing crime were "legitimate," the ban was "so far-reaching that its service of these goals [was] diluted to the point of coincidence").

381. *But see supra* notes 371–72 and accompanying text (discussing lack of empirical evidence that sentence severity deters crime and noting some findings suggesting that it actually increases recidivism).

382. *See* JAMES Q. WILSON, THINKING ABOUT CRIME 133 (rev. ed. 2013) ("[D]eterrence works only if people take into account the costs and benefits of alternative courses of action and choose that which confers the largest net benefit (or the smallest net cost).").

commit murder hinging on the cost–benefit differential between a twenty-six-year sentence and thirty-six-, forty-six-, or fifty-six-year sentence.[383]

3. Specific Deterrence, Incapacitation, and Rehabilitation

With regard to specific deterrence, incapacitation, and rehabilitation (to the extent it is cognizable), the irrationality of ongoing incarceration can be much more obvious. After all, these are defendant-specific purposes of punishment, and they make sense only if the person in question would potentially pose a risk of recidivism upon release. But there is no need to deter or incapacitate—and there is no way to rehabilitate—someone who has already been rehabilitated.[384] We may overlook this progress, as Guyora Binder and Ben Notterman have noted, because as humans we tend "to underestimate the power of situational factors and overemphasize disposition or personality."[385] But the Court has recognized that people have the "capacity for change,"[386] and those who have proven that they have changed deserve to be allowed to come home if there is no fair reason to keep them locked up. If a judge is unwilling to call ongoing incarceration just, there is no reason that the judge should be forced to call it rational. And if the judge cannot call it rational, then it cannot be constitutional.

C. IF COURTS EVER APPLY STRICT SCRUTINY IN THE SENTENCING CONTEXT, THEY SHOULD APPLY IT TO ONGOING INCARCERATION AS WELL

As discussed above, strict scrutiny is not the standard when it comes to incarceration and fundamental rights jurisprudence. Yet as multiple scholars and practitioners have pointed out, there are arguments that it should be.[387] The scholars who have critiqued this apparent doctrinal inconsistency have focused on courts' unwillingness to strictly scrutinize sentencing laws and sentences handed down to specific defendants at the time of issuance.[388] But there is no reason why the scrutiny should stop there. It should violate the due process right that these scholars have emphasized just as much to keep someone incarcerated long after his sentence has outlived any usefulness.

I explained in Section IV.B why a sentence might no longer serve a rational basis; it is of course true by an even stronger logic that it may no longer be the least restrictive means to serve a compelling government interest. As

383. *See, e.g.*, Robinson & Darley, *supra* note 378, at 953 (reporting that "social science literature suggests that potential offenders commonly do not know the law, do not perceive an expected cost for a violation that outweighs the expected gain, and do not make rational self-interest choices"); *id.* at 955 (noting that "the imagined horribleness of a prison sentence" is what keeps first-time offenders from committing crimes); *id.* at 977–980 (detailing the volume and complexity of information required for a meaningful cost-benefit analysis).

384. *Cf.* Graham v. Florida, 560 U.S. 48, 72 (2010) ("To justify life without parole on the assumption that the juvenile offender forever will be a danger to society requires the sentencer to make a judgment that the juvenile is incorrigible.").

385. Binder & Notterman, *supra* note 175, at 3, 30 (noting how this Fundamental Attribution Error promotes overreliance on incapacitation).

386. Miller v. Alabama, 567 U.S. 460, 473 (2012) (referring to this capacity in young people).

387. *See, e.g.*, *supra* note 162 and accompanying text.

388. *See supra* notes 150–55 and accompanying text.

explained above, this Article's approach takes existing doctrine at its own words and points out that, even on that minimum-tier standard, there should be a valid legal basis to vacate a sentence that no longer makes any sense. But if one accepts Colb's and Dudani's critique of the law as it is, that criticism would apply equally to ongoing-punishment cases. And of course, if Colb and Dudani are correct that the law should change to require strict scrutiny of incarceration rather than rational basis review, then many more sentences would fail this test.[389]

When we incarcerate someone even though it is no longer the least restrictive means of serving a compelling government interest, we are taking away what is, in Colb's words, someone's "most prized freedom—their liberty from confinement."[390] In that scenario, we are doing so for what is, in lay terms, not a very good reason. But a nation that "pledges 'liberty and justice for all'"[391] should lock people in prisons only for very good reasons. And it is as much a problem to no longer have a good reason as it is to have lacked one from the start.

CONCLUSION

As Robert Cover detailed almost fifty years ago, the antislavery judges who saw themselves as bound by unjust proslavery laws in the antebellum period—including Herman Melville's father-in-law Lemuel Shaw, Chief Justice of the Massachusetts Supreme Judicial Court—were, in Cover's poignant phrase, "intensely uncomfortable in hanging Billy Budd."[392] But though they "squirmed," Cover ruefully reports, "they did the job."[393]

So too, today, with an increasing number of judges and prosecutors who believe that mass incarceration is both a general injustice and a specific injustice as applied to particular people whom they see no good reason to keep incarcerated. Some have spoken out about these injustices,[394] some have resigned rather than remain instruments of them,[395] and some have sought to improve the system from within.[396]

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389. *See, e.g.*, Fallon, Jr., *supra* note 150, at 1304 (discussing indications that strict scrutiny is "fatal in fact," though elsewhere complicating the simplicity of this axiom).

390. *See* Colb, *supra* note 27, at 820.

391. *See* Berman, *supra* note 33, at 177 (making this point).

392. ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 7 (1975). Billy Budd is the morally innocent, legally guilty, and conspicuously allegorical protagonist from Melville's novella of the same name. *See id.* at 2–6; *see also* Steven L. Winter, *Melville, Slavery, and the Failure of the Judicial Process*, 26 CARDOZO L. REV. 2471, 2471, 2473 (2005) (describing the backstory of *Billy Budd* and arguing that it is "at its heart" about a specific Massachusetts judge and the broader "failure of the judicial process in confronting slavery and other forms of state sanctioned violence").

393. COVER, *supra* note 392.

394. *E.g.*, Nancy Gertner, *Unfinished Business*, INQUEST (Aug. 3, 2021), https://inquest.org/nancy-gertner-unfinished-business/ [https://perma.cc/FN3L-6GAG].

395. *E.g.*, Stacey Barchenger, *Why Federal Judge Kevin Sharp Left the Bench in Nashville After Chris Young Sentencing*, TENNESSEAN (Sept. 5, 2018, 11:10 AM), https://www.tennessean.com/story/news/2017/04/17/why-federal-judge-kevin-sharp-left-bench-nashville/100419782/ [https://perma.cc/LP2C-435V].

396. *E.g.*, Miriam Aroni Krinsky, *How (Some) Prosecutors Changed the Face of Justice in 2021*, CRIME REP. (Dec. 7, 2021), https://thecrimereport.org/2021/12/07/memo-to-biden-establish-a-task-force-on-21st-century-prosecution/ [https://perma.cc/ZSR4-Y4JK].

Most, however, believe they lack the ability to do anything about a sentence that strikes them as failing the test of common sense, even if they bemoan it. In this Article, I have argued that they do have the ability to do something about it, under a properly understood version of the Due Process Clause or a state analogue.

To the extent that it is relevant, there is no significant history or tradition of long, unchangeable prison terms in this country. If anything, the tradition runs in the other direction: clemency was common in the early days (including sometimes directly from judges), and indeterminate sentencing was the norm until the 1970s and 1980s. The rise of draconian sentencing and the elevation of finality as a core value are, like mass incarceration itself, developments of the past half-century.

There are many ways in which punishment can be attacked, but one that often gets lost in the shuffle—and for which due process is a natural vehicle—is the ongoing punishment of a defendant long after the defendant's sentence was issued. In a curious doctrinal riddle, courts apply only rational basis scrutiny when it comes to prison sentences for criminal convictions, despite acknowledging that bodily liberty is a fundamental right and applying strict scrutiny to other deprivations of fundamental rights. In any event, that means that due process *does* apply, albeit subject only to rational basis scrutiny. U.S. Supreme Court decisions, meanwhile, indicate that this protection should apply throughout criminal confinement, just as it does for civil confinement. Two areas point strongly in this direction: actual innocence cases and substantive retroactivity cases.

Changed facts about a defendant can also render a sentence irrational at a later point in time, much like changed conditions can alter the ongoing validity of other government acts or court judgments. And if the government stipulates that it no longer has a rational basis, a court should have no trouble concluding that the continued execution of the sentence violates due process, even if the sentence was wholly rational when first handed down. Though courts sometimes impute unasserted rational bases to the government, that would be inappropriate in all or nearly all cases in which the government has (like any litigant) availed itself of its right to concede a disadvantageous fact. Even if courts disagree on this minor point, meanwhile, they can simply hold a hearing to assess the question independently. And even if federal courts do not adopt this approach under the Federal Due Process Clause, state courts can do so under their own state constitutions' corollaries.

While a prosecutor's concession that the government lacks a rational basis should be the functional end of the sentence, the lack of such a concession should operate no differently than any other party's decision to continue disputing a key point. Accordingly, judges can, and should, find a due process violation if (under their analysis) a rational basis does not exist. This may not happen every day, but it is not fantastical. Rather, rational basis review, though deferential, still has real meaning: it can both yield case-by-case corrections of injustice *and* force litigants and judges to think about what reasons, if any, actually support the challenged

action. A sentence is irrational when it does not rationally serve any of the traditional purposes of punishment, and some sentences can no longer pass that test. Meanwhile, should courts ever adopt scholars' calls for strict scrutiny of prison sentences, that approach should apply equally to ongoing punishment.

With more than two million people currently incarcerated at any given time,[397] and more than 200,000 serving life sentences,[398] the impact of prosecutors and courts adopting this approach is potentially significant.[399] Even giving the status quo the benefit of the doubt on ninety-nine percent of sentencing decisions, that still works out to at least thousands of people who at any given time would benefit immensely from the commonsense recognition that it should violate the constitutional guarantees of a liberty-and-justice oriented society (and a reason-giving profession) to keep them locked in prison without a good reason.[400]

The law is constructed by humans, and humans are often bad at recognizing other humans' capacity for change.[401] But lawyers and judges pride themselves on thinking analytically and critically, and sober reflection and open-minded experience confirm that people can change—and that our instincts about what to do in the wake of a bad act sometimes look less reasonable decades later. Jerome Nunn is just one example. If Abduel Poe's mother, Danielle Jones, had the intellectual and emotional courage to recognize that truth, what kind of constitutional fidelity could fail to do the same?

397. *Growth in Mass Incarceration*, *supra* note 3.
398. Nellis, *supra* note 29.
399. *See* Goldstein, *supra* note 123 (discussing the rise of reform-oriented prosecutors).
400. *See supra* note 145.
401. *See supra* note 385 and accompanying text.