

The Costs of Judicial Restraint: Forgone Opportunities to Limit America's Imprisonment Binge*

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Today there are over two million men and women in America's prisons and jails, and five million more on probation or parole.¹ Each of these numbers reflects at least a fourfold increase over the last twenty-five years.² One out of every thirty-one Americans endures some form of correctional supervision,³ and the United States—"the land of the free"—now has the highest per capita incarceration rate of any country in the world.⁴

If these facts about "Lockdown America"⁵ do not shock or dismay you—if you instead applaud the legislative actions over the last generation that have established draconian sentencing regimes for drug crimes and many other offenses⁶—there is no reason to read any further.⁷ But if you

* Thanks go to my colleagues Jamie Fox and Ellen Podgor for helpful comments.

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1. LAUREN E. GLAZE & SERI PALLA, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2004 at 1-2 (Nov. 2005), <http://www.ojp.usdoj.gov/bjs/pub/pdf/ppus04.pdf> (gives statistics for 2004; today's numbers are undoubtedly higher).

2. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, KEY FACTS AT A GLANCE: CORRECTIONAL POPULATIONS, <http://www.ojp.usdoj.gov/bjs/glance/tables/corr2tab.htm> (last rev. Nov. 2, 2005).

3. GLAZE & PALLA, *supra* note 1, at 1.

4. THE SENTENCING PROJECT, NEW INCARCERATION FIGURES: GROWTH IN POPULATION CONTINUES (2006), <http://www.sentencingproject.org/pdfs/1044.pdf>.

5. *See generally* CHRISTIAN PARENTI, LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS (1999).

6. *See generally* MARC MAUER, RACE TO INCARCERATE chs. 3-4 (2d ed. 2006).

7. Many readers will of course applaud the recent decline in the nation's crime rate, but there is growing evidence that America's stunning increase in imprisonment has made only a slight contribution to this decline. *See generally* FRANKLIN E. ZIMRING, THE GREAT AMERICAN CRIME DECLINE (2006), *previewed in* Franklin E. Zimring, The Great American

wonder how we might have avoided these distressing outcomes, the following essay discusses three chances the United States Supreme Court has had to limit the nation's "imprisonment binge,"⁸ each of which the Court largely forwent. In each case the reason cited for failing to act was judicial restraint, particularly that variant that counsels "a cautious or 'deferential' attitude toward voiding legislation on constitutional grounds."⁹

While "judicial activism" is currently out of favor,¹⁰ this essay speculates on how a mild dose of activism by the Supreme Court—in deciding *Powell v. Texas*,¹¹ in monitoring the allocation of the burden of persuasion and of fact-finding power in criminal cases, or in applying the proportionality principle of the Cruel and Unusual Punishment Clause—might have produced significantly lower incarceration rates,¹² thus constituting "judicial activism to be thankful for."¹³ While acknowledging the general wisdom of judicial restraint,¹⁴ this essay points out its costs, which regarding imprisonment now include the expense of incarceration¹⁵

Crime Decline: Potential and Current Limits for Comprehending Crime Trends, Address at the Annual Meeting of the Association of American Law Schools, Washington D.C. (Jan. 5, 2006).

8. See generally JOHN IRWIN & JAMES AUSTIN, *IT'S ABOUT TIME: AMERICA'S IMPRISONMENT BINGE* (3d ed. 2001).

9. David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449, 450 (1994). See also Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 308 (2005); Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1, 23 (2004). But cf. Erwin Chemerinsky, *The Rhetoric of Constitutional Law*, 100 MICH. L. REV. 2008, 2019 (2002) ("[T]he concepts of 'judicial activism' and 'judicial restraint' are never defined with any precision.").

10. See Martha Neil, *Half of U.S. Sees 'Judicial Activism Crisis'*, ABA J. EREPORT, <http://www.abanet.org/journal/redesign/s30survey.html> (Sept. 30, 2005).

11. 392 U.S. 514 (1968).

12. The idea for this essay came as I was browsing Joshua Dressler's *Kent Greenawalt, Criminal Responsibility, and the Supreme Court: How a Moderate Scholar Can Appear Immoderate Thirty Years Later*, 74 NOTRE DAME L. REV. 1507 (1999), which centers on *Powell v. Texas* but also briefly discusses the other lines of cases I consider. See *id.* at 1514-15.

13. Colbert I. King, *'Judicial Activism' to Be Thankful For*, WASH. POST, Oct. 29, 2005, at A23, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/28/AR2005102801812.html> (discussing the civil rights decisions of the Warren Court).

14. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (2d ed., Yale Univ. Press 1986) (1962).

15. See generally Judith Green & Vince Schiraldi, *Cutting Correctly: New Prison Policies for Times of Fiscal Crisis* (2002), <http://www.justicepolicy.org/article/downloads/CuttingCorrectly.pdf>.

and the pain it causes the imprisoned and his or her family members,¹⁶ multiplied by two million and counting.

Part I considers the Court's forgone opportunity in the 1960s to interpret the Cruel and Unusual Punishment Clause in a way that would have led to decriminalization of drug possession by those addicted to the drug possessed. Such a decision would have profoundly affected state treatment of all drug crimes, rendering it more therapeutic and less punitive. Part II first takes up, in subpart A, the Court's decisions, beginning in the 1970s, regarding allocation of the burden of persuasion under the Due Process Clause; the highly permissive stance ultimately taken by a majority of the justices in these cases opened the way for sentencing regimes that increased prison terms based on the trial judge's determination of various "sentencing factors" by a mere preponderance of the evidence. Subpart B discusses the Court's more recent effort to use the Sixth Amendment's jury trial right to curb excessive reliance on sentencing factors, noting that this now-weakened fit of activism has and will do little to lessen the scale of imprisonment in America. Part III considers the Supreme Court's abortive efforts from 1980 onward to find within the Eighth Amendment a meaningful proportionality limit on harsh sentences of imprisonment. Contrary decisions in this line of cases would obviously have prevented some of the lengthy sentences now so routinely handed down. The essay's brief conclusion pleads for greater judicial efforts to curtail our incarceration binge.

What follows makes no effort to exhaustively discuss the appropriate perimeters of judicial review or to delve in extensive detail into the constitutional issues mentioned above; other authors have done this work, and some of their scholarship is cited below. Rather, my purpose is to cut across a set of constitutional questions with an impact on incarceration, in order to show how too much judicial restraint has contributed to what has become an egregious social problem.

I.

The story of *Powell v. Texas* has been told many times before.¹⁷ A

16. See AYELET WALDMAN, *DAUGHTER'S KEEPER* (2004) for a fictional depiction of this experience.

17. See Dressler, *supra* note 12; see, e.g., Herbert Fingarette, *The Perils of Powell: In Search of a Factual Foundation for the "Disease Concept of Alcoholism,"* 83 HARV. L. REV. 793 (1970); Kent Greenawalt, "Uncontrollable" Actions and the Eighth Amendment: Implications of *Powell v. Texas*, 69 COLUM. L. REV. 927 (1969); David Robinson, Jr., *Powell v. Texas: The Case of the Intoxicated Shoeshine Man: Some Reflections a Generation Later by a Participant*, 26 AM. J. CRIM. L. 401 (1999); Mark V. Tushnet, *The Jurisprudence of Thurgood Marshall*, 1996 U. ILL. L. REV. 1129, 1142-45; Mark V. Tushnet, *Thurgood Marshall and the Brethren*, 80 GEO. L.J. 2109, 2116-18 (1992). My

shortened version would have as its prologue *Robinson v. California*, a 1962 Supreme Court decision holding that punishing a person for being addicted to narcotics violates the Eighth Amendment's Cruel and Unusual Punishment Clause.¹⁸ The rationale of the majority opinion in *Robinson* is unclear; it does not state whether criminalizing addiction is cruel and unusual because it punishes a status, as one concurring justice argues, or because it punishes involuntary conduct, as another concurring justice suggests.¹⁹

Powell v. Texas, which considered a public intoxication statute, fell precisely within this ambiguity. The holding of what proved to be the crucial bloc of four justices in this 1968 decision is that Powell's public drunkenness was conduct, for which he could constitutionally be punished (as opposed to Robinson's mere status as an addict, for which he could not be criminally liable).²⁰ Objecting to this reasoning, another bloc of four justices argues that Powell's chronic alcoholism rendered his intoxication involuntary, immunizing him from criminal liability under *Robinson*.²¹ The opinion of the ninth justice in *Powell* uses language that seems to accept the involuntariness argument: "If it cannot be a crime to have an irresistible compulsion to use narcotics, I do not see how it can constitutionally be a crime to yield to such a compulsion. . . . Similarly, the chronic alcoholic . . . should not be punishable for drinking or for being drunk."²² But this same justice votes to uphold Powell's conviction because he voluntarily appeared in public while drunk.²³ This vote makes the four-justice opinion holding that Powell's public drunkenness is conduct and not status, and thus punishable whether involuntary or not, the plurality opinion in the case. And by an alchemy I have railed against elsewhere, this plurality opinion has long since been accepted by the lower courts as the rule to be derived from *Powell v. Texas*.²⁴

One reason subsequent courts and commentators have embraced the

contribution appears in Robert Batey & Sandra Anderson Garcia, *Prosecution of the Pregnant Addict: Does the Cruel and Unusual Punishment Clause Apply?*, 27 CRIM. L. BULL. 99 (1991).

18. 370 U.S. 660 (1962).

19. Batey & Garcia, *supra* note 17, at 103-04 (discussing concurring opinions by Harlan and Douglas).

20. *Id.* at 105 (discussing Marshall's plurality opinion).

21. *Id.* (discussing Fortas's dissent).

22. *Powell v. Texas*, 392 U.S. at 548-49 (White, J., concurring in the result) (citation omitted); see Batey & Garcia, *supra* note 17, at 106.

23. Batey & Garcia, *supra* note 17, at 106.

24. *Id.* at 107-12. My 1991 coauthor, Dr. Sandra Anderson Garcia, of the University of South Florida, should not be held responsible for the more extreme statements in this portion of our article. She warned me against them, but I persisted.

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plurality opinion in *Powell* is that it is a paradigm of judicial restraint, explicitly refusing to intrude on the legislature's traditional power to define substantive criminal law:

Robinson so viewed [as preventing the criminalization of status only] brings this Court but a very small way into the substantive criminal law. And unless *Robinson* is so viewed it is difficult to see any limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country

. . . .

. . . . Ultimately, then, the most troubling aspects of this case, were *Robinson* to be extended to meet it, would be the scope and content of what could only be a constitutional doctrine of criminal responsibility.²⁵

From a contrary decision in *Powell* the plurality foresees intrusions on “[t]he doctrines of *actus reus*, *mens rea*, insanity, mistake, justification, and duress,” which would disturb the “fruitful experimentation, and . . . productive dialogue” taking place in state legislatures regarding the law of crimes, with its constant adjustment of that tension between “the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man.”²⁶

Commentators on the case have largely agreed. Soon after the decision, the philosopher Herbert Fingarette described “the perils of *Powell*,” i.e., the negative consequences of adopting the defendant's contentions;²⁷ thirty-five years later, scholars like Ronald J. Allen and Ethan A. Hastert can offhandedly refer to *Robinson* as a “blunder” that was corrected in *Powell*.²⁸ Even those who might have wished for a different outcome in *Powell* are respectful of the plurality's sense of restraint. In his 1999 retrospective on Kent Greenawalt's 1969 article on *Powell*,²⁹ Joshua Dressler appreciatively discusses the plurality's reasons for restraint (though he would have preferred more “activism”),³⁰ just as Greenawalt three decades earlier expressed his own respect for the plurality's

25. *Powell*, 392 U.S. at 532-34 (plurality opinion).

26. *Id.* at 536-37. A concurring opinion makes similar points with even greater force, contending that “[t]he rule of constitutional law urged upon us by appellant would have a revolutionary impact on the criminal law.” *Id.* at 544 (Black, J., concurring).

27. See Fingarette, *supra* note 17.

28. Ronald J. Allen & Ethan A. Hastert, *From Winship to Apprendi to Booker: Constitutional Command or Constitutional Blunder?*, 58 STAN. L. REV. 195, 196 (2005).

29. Greenawalt, *supra* note 17.

30. Dressler, *supra* note 12, at 1516-17.

sensibilities, by advocating what Dressler labels a “moderate” agenda for judicial reform of substantive criminal law.³¹

In response to this chorus in praise of restraint, one could ask what a contrary decision in *Powell* might have wrought. If the Supreme Court had reversed *Powell*’s public drunkenness conviction, chronic alcoholics across America would have had a defense to that charge, and jurisdictions would have been forced to find non-criminal solutions to the social problems posed by inebriates. Some states already had such solutions at hand, in the form of statutes allowing the civil commitment of those dangerous to themselves or others because of alcohol dependence,³² and states without such laws could easily have passed them. As noted by the *Powell* plurality, there would have been problems in obtaining adequate treatment and funding,³³ but those same problems existed, and continued to exist, when the criminal justice system dealt with chronic alcoholics.³⁴

In short, a contrary result in *Powell* would have largely decriminalized public drunkenness³⁵—only “largely,” because some public drunks would not have qualified as chronic alcoholics and therefore would not have benefited from the ruling. Far more importantly for my purposes, a contrary decision in *Powell* would have, as foreshadowed by its concurring opinion,³⁶ also largely decriminalized drug possession, by preventing conviction of those addicted to the drug possessed. If chronic alcoholics become drunk involuntarily and therefore cannot constitutionally be punished criminally for that conduct, drug addicts surely possess drugs involuntarily and should likewise be immune from criminal conviction for that conduct.³⁷

As with the imagined decriminalization of public drunkenness, this hypothesized decriminalization of drug possession would have forced jurisdictions to rely on non-criminal processes, most notably civil commitment, to deal with drug addiction. And as with public intoxication,

31. *Id.* at 1519-31.

32. *See Note, Alcohol Abuse and the Law*, 94 HARV. L. REV. 1660, 1665-74 (1981) (discussing criminal treatment and the non-criminal model).

33. 392 U.S. 514, 527-29 (plurality opinion).

34. *Id.* at 529. Reversing the plurality’s trope, the treatment and funding problems were the same regardless of which “sign” hung over the door, “jailhouse” or “hospital.”

35. Two courts had so held prior to the decision in *Powell*. *See Easter v. District of Columbia*, 361 F.2d 50 (D.C. Cir. 1966); *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966).

36. *See supra* text accompanying note 22.

37. Notwithstanding the actual result in *Powell*, one lower court came close to this conclusion, apparently relying on the similarity of the reasoning in the *Powell* dissent and concurrence. *See Watson v. United States*, 439 F.2d 442 (D.C. Cir. 1970). *Contra United States v. Moore*, 486 F.2d 1139 (D.C. Cir. 1973) (en banc) (5-4 decision).

there were statutory models that could have been followed.³⁸ So, another consequence of a contrary decision in *Powell* would have been to relocate the social response to drug addiction from the criminal justice system to a more therapeutic legal venue.³⁹

Consider the impact of this relocation on the dramatic upswing in drug crimes and in the penalties for those crimes that occurred in the years following 1968.⁴⁰ Possession is the basic building block of all drug offenses, which now range from simple misdemeanor possession through felonies like possession with intent to distribute, to even more serious crimes, such as trafficking and leading a continuing drug enterprise, which may carry penalties of life imprisonment.⁴¹ If the Supreme Court in *Powell* had given every drug addict a constitutional argument against an allegation of possession, legislators might have thought twice before using that act as the foundation for their elaborate systems of drug crimes. Some states might have chosen other conduct as the basic act required for a drug crime—perhaps transferring drugs from one person to another—while other jurisdictions might have opted to rely on possession even though a contrary decision in *Powell* would have required the prosecution to prove that the defendant was not an addict. But either way, it would have been more difficult to obtain a conviction than it is when all the state has to prove is the simple fact of possession.⁴²

A contrary decision in *Powell* would not have prevented the “War on Drugs,” but could have blunted it, resulting in fewer new crimes and

38. The Court in *Robinson v. California*, discusses California’s statutory scheme for such commitments, drily noting, “The record contains no explanation of why the civil procedures authorized by this legislation were not utilized in the present case.” 370 U.S. 660, 664-65 & n.7 (1962). Of course, any civil commitment process has the potential to imperil constitutional rights. *See generally* O’Connor v. Donaldson, 422 U.S. 563 (1975). But it seems likely that on the whole, addicts in possession would have fared better in a civil process than in the criminal system to which they have been relegated.

39. One can see the advent of drug courts as a latter-day attempt to achieve the same relocation. *See generally* JAMES L. NOLAN, JR., REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT (2001).

40. *See generally* STEVEN B. DUKE & ALBERT C. GROSS, AMERICA’S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS (1993); ARNOLD S. TREBACH, THE GREAT DRUG WAR (2d ed. 2005); STEVEN WISOTSKY, BEYOND THE WAR ON DRUGS (reprint ed. 1990).

41. *See, e.g.*, FLA. STAT. §§ 893.13-.20 (2005). Florida’s trafficking statute provides an extreme example of reliance on possession: proof of possession of a certain quantity of a specified drug triggers mandatory sentences escalating to life, without further proof of any intent to “traffic.” *Id.* § 893.135.

42. The principal reason possession is so popular as a basis for criminal liability is that it is so easy to prove. *See* PETER W. LOW ET AL., CRIMINAL LAW: CASES AND MATERIALS 144-46 (2d ed. 1986).

consequently fewer new penalties, and in fewer overall convictions. Because drug crimes account for such a large proportion of America's incarcerated,⁴³ the upshot of all of these developments would have been far fewer people in prison.

Attempting to counteract these substantial positive results from a little judicial activism in *Powell v. Texas*, champions of the plurality opinion in that case could parrot the "slippery slope" contention made there: that a Court that reversed Powell's conviction would have soon found itself rewriting most of American criminal law.⁴⁴ Though lawyers are quite fond of slippery slope arguments, most of the rest of the world deems them fallacious.⁴⁵ An evenhanded approach to such an argument would evaluate the difficulty of articulating a limiting principle that would stop any "slide" down the slope.⁴⁶ If the Court had decided *Powell* so as to largely decriminalize public drunkenness and drug possession, I think it would have had relatively little difficulty cabining that decision to manageable consequences by developing a limited definition of involuntariness.⁴⁷ Perhaps it might have been necessary in some subsequent case to establish constitutional minima regarding the defenses of insanity and duress,⁴⁸ but that would not necessarily have been a bad thing, as it might have avoided the country's flirtation in the 1980s with abolishing the insanity defense.⁴⁹ In any event, such decisions could justly be characterized, as the *Powell* plurality says in defense of *Robinson*, as carrying the Court "but a very small way into the substantive criminal law."⁵⁰

Powell v. Texas is now seen as an exercise in judicial restraint, but it was

43. See DAVID B. KOPEL, PRISON BLUES: HOW AMERICA'S FOOLISH SENTENCING POLICIES ENDANGER PUBLIC SAFETY (1994), <http://www.cato.org/pubs/pas/pa-208.html>.

44. See *supra* text accompanying notes 25-26.

45. See, e.g., Nizkor Project, Fallacy: Slippery Slope, <http://www.nizkor.org/features/fallacies/slippery-slope.html> (last visited Jan. 19, 2006); Fallacy Files, Logical Fallacy: Slippery Slope, <http://www.fallacyfiles.org/slipslop.html> (last visited Jan. 19, 2006).

46. See generally Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

47. What makes an act voluntary has proved remarkably difficult to define, see JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 83-86 (3d ed. 2001), but that may well be because the criminal courts have had few occasions to try to define it. A contrary decision in *Powell* would have committed the highest court in the land to that project, with results that I believe would have been edifying.

48. Some mentally ill persons might be found to have behaved involuntarily because of their illnesses, just as some persons' conduct under the extreme coercion of others might be seen as involuntary. But even these cases, which comprise only a small part of insanity and duress claims, are arguably distinguishable from a chronic alcoholic becoming drunk and a drug addict using the drug to which they are addicted.

49. See DRESSLER, *supra* note 47, at 358-59; see *infra* note 73.

50. *Powell*, 392 U.S. at 533 (plurality opinion).

a costly one. To forestall future developments that were otherwise easily avoidable, the Court forwent the opportunity largely to decriminalize drug possession. As a result, legislators felt free to use possession as the easy way to prove defendants guilty of the torrent of new drug crimes enacted in the decades immediately following *Powell*. The results of the license the Court thus gave our lawmakers can be seen in every overcrowded prison in the country.

II.

Until the 1970s, indeterminate sentencing, under which the trial judge has complete discretion to pick a term of imprisonment within a broad range set by the legislature, was virtually the exclusive sentencing method in the United States. In the last thirty years, however, many American jurisdictions have adopted more determinate schemes.⁵¹ The rise of sentencing guidelines, most notably in the federal system but in several states as well, and the use of mandatory minimum sentencing in virtually every state,⁵² have limited judicial discretion, thus rendering extremely important the determination of various facts that can lengthen the defendant's incarceration dramatically. Typically a judge, not a jury, performs this factfinding, and the typical burden of persuasion is by a preponderance of the evidence, rather than beyond a reasonable doubt.⁵³

The use of determinate sentencing has obviously contributed to the precipitous rise in the United States inmate population. By requiring lengthy incarceration in circumstances where the judge considers it unnecessary, sentencing guidelines⁵⁴ and mandatory minimums have clogged our prisons.⁵⁵ Greater procedural requirements for finding the facts that lead to higher sentences—such as proof beyond a reasonable doubt, found by a jury—would have limited this effect of the move to determinate sentencing. But the United States Supreme Court first spurned the opportunity to use the Due Process Clause to impose such a limit, and then quite belatedly, and rather half-heartedly, tried to use the jury trial right in the Sixth Amendment to achieve the same end, with disappointing results

51. See MICHAEL TONRY, SENTENCING MATTERS 6-13, 25-29 (1996).

52. See generally DRESSLER, *supra* note 47, at 24 n.56.

53. See TONRY, *supra* note 51, at 78. See generally NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES chs. 4-5 (2004).

54. All guidelines schemes do, of course, allow the judge to depart from them in appropriate cases. See TONRY, *supra* note 51, at 29. But, departures are typically subject to more stringent appellate review (especially downward departures), and judges are therefore at least somewhat reluctant to depart. See DEMLEITNER ET AL., *supra* note 53, at 162-63. So even though discretionary, guidelines have contributed to the increases in the average sentence and accordingly in the prison population.

55. See TONRY, *supra* note 51, at 78-79 (discussing federal sentences).

thus far.⁵⁶

Subpart A discusses the due process cases, which first arose in the 1970s. After they had run their totally ineffective course, the Court in the current decade turned to the Sixth Amendment; those cases are considered in subpart B. Despite the feint at judicial activism in the latter set of cases, both lines of judicial decisions disclose the self-imposed impotence of the Supreme Court in the face of an imprisonment crisis.

A.

In the 1970s the United States Supreme Court addressed the meaning of the requirement of proof beyond a reasonable doubt.⁵⁷ After holding in *In re Winship* that due process required proof beyond a reasonable doubt in criminal cases,⁵⁸ the Court soon confronted the difficult question of whether that requirement applied to each of the plethora of substantive issues that can arise in a prosecution; in other words, does the prosecution have to prove beyond a reasonable doubt that the elements of the offense exist, that no applicable defense applies, and that there are no facts that would mitigate the offense or modify the sentence? Or may the state articulate the burden of persuasion differently for some of these issues?⁵⁹

The specific issue with which the justices wrestled was the mitigation of murder to the lesser homicidal offense of manslaughter; the common law allows the lowering of an intentional killing, which would otherwise be murder, to manslaughter if the killing occurred in a heat of passion for which there was “adequate provocation” and insufficient time to cool off.⁶⁰ In its 1975 decision in *Mullaney v. Wilbur*, the Court unanimously held that Maine’s allocation of the burden of persuasion to the defendant on the mitigation of murder to manslaughter violates the rule announced in *Winship*.⁶¹ But just two years later, by a five-to-three vote in *Patterson v. New York*,⁶² the Court seriously undercut *Mullaney* by finding no constitutional violation in New York’s more generous law regarding the

56. On the relatedness of these two lines of cases, see Allen & Hastert, *supra* note 28, at 202-08.

57. See generally DRESSLER, *supra* note 47, at 66-72 (discussing burdens of proof and persuasion).

58. 397 U.S. 358 (1970) (holding that a statute setting burden of persuasion in a juvenile court adjudicatory hearing to a preponderance of the evidence standard violates due process).

59. See generally John Calvin Jeffries, Jr. & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979).

60. See generally DRESSLER, *supra* note 47, at 527-33.

61. *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975) (Powell, J.).

62. *Patterson v. New York*, 432 U.S. 197 (1977) (White, J., majority opinion).

mitigation of murder to manslaughter,⁶³ even though New York put exactly the same burden of persuasion on the defendant as Maine had.⁶⁴ The consequence of this constitutional U-turn was that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt only the elements of the offense, the actus reus and mens rea, while the states may articulate the burdens of persuasion on all other substantive issues in a criminal trial—such as affirmative defenses and any factors relating to sentencing—however they please.⁶⁵

The dissent in *Patterson* rightly characterized such a rule as an “arid formalit[y]”: “[A] state statute could pass muster under [this rule] if it defined murder as mere physical contact between the defendant and the victim leading to the victim’s death, but then set up an affirmative defense leaving it to the defendant to prove that he acted without culpable *mens rea*.”⁶⁶ Considering the pointlessness of such an approach, what reasons could the Court possibly have had thus to deprive both *Winship* and *Mullaney v. Wilbur* of almost all of their constitutional force? As in *Powell v. Texas*,⁶⁷ the answer lies in the concept of judicial restraint.

The *Patterson* majority professes worry about the potential impact of *Mullaney v. Wilbur* on substantive criminal law. The majority begins its legal analysis by deferring to state authority in this area: “It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States.”⁶⁸ The possible intrusion was on the legislatures’ creation or expansion of affirmative defenses: if due process required that every new or expanded affirmative defense or mitigation be

63. *Id.* at 202 (characterizing New York’s law as “a considerably expanded version of the common-law defense”).

64. There was a difference in terminology between Maine and New York law, and the *Patterson* Court seeks to use one aspect of this difference to distinguish *Mullaney v. Wilbur*. *Id.* at 212-16. But the author of the dissent in *Patterson*, who also wrote *Mullaney v. Wilbur*, is not at all convinced—“[The majority’s] explanation of the *Mullaney* holding bears little resemblance to the basic rationale of that decision,” which produces a result in *Patterson* that is “indefensibly formalistic,” *id.* at 222-23, 224 (Powell, J., dissenting)—and neither are most of the commentators on the case. *See, e.g.*, Allen & Hastert, *supra* note 28, at 204 (footnote omitted) (“The Court professed *Mullaney* still to be good law, but this is obvious nonsense.”).

65. *See, e.g.*, *Dixon v. United States*, 126 S. Ct. 2437 (2006) (burden of persuasion to prove duress defense may constitutionally be placed on the defendant); *Martin v. Ohio*, 480 U.S. 228 (1987) (state may require defendant to prove affirmative defense of self-defense by a preponderance of the evidence).

66. 432 U.S. at 224 & n.8 (Powell, J., dissenting).

67. *See supra* text accompanying notes 25-31.

68. 432 U.S. at 201 (citation omitted).

disproved by the state beyond a reasonable doubt, legislatures would be much more reluctant to change substantive criminal law in these ways. The Court sees such reluctance in New York's legislature:

[I]n revising its criminal code, New York provided . . . a substantially expanded version of the older heat-of-passion concept; but it was willing to do so only if the facts making out the defense were established by the defendant with sufficient certainty. The State was itself unwilling to undertake to establish the absence of those facts beyond a reasonable doubt, perhaps fearing that proof would be too difficult and that too many persons deserving treatment as murderers would escape that punishment if the evidence need merely raise a reasonable doubt about the defendant's emotional state.⁶⁹

Echoing some legal scholars, the *Patterson* majority implies that unrestrained application of *Mullaney v. Wilbur* would stunt the growth of affirmative defenses and other doctrines of mitigation not just in New York, but throughout the nation.⁷⁰

The *Patterson* majority all but overrules *Mullaney v. Wilbur*⁷¹ in order not to forestall legislative expansion of doctrines of mitigation. Unfortunately, this exercise in judicial restraint seems to have borne very little of the fruit anticipated by the Court. The last thirty years have seen no renaissance in the area of affirmative defenses, nor any burgeoning of mitigations from greater offenses to lesser. In fact, as crime became a more and more potent political issue,⁷² state and federal legislatures have tried to better one another in limiting affirmative defenses and restricting grounds of mitigation.⁷³

69. *Id.* at 207.

70. *See id.* n.10 (citing Peter W. Low & John C. Jeffries, Jr., *Constitutionalizing the Criminal Law?*, 29 VA. L. WKLY, No. 18, p. 1 (1977)). *See also id.* at 209 n.11 (citing Low & Jeffries, *supra*) ("Other writers have recognized the need for flexibility in allocating the burden of proof in order to enhance the potential for liberal legislative reforms."); *id.* at 214 n.15 (citing Low & Jeffries, *supra*) ("It is said that [an expansive reading of *Mullaney v. Wilbur*] would deprive legislatures of any discretion whatsoever in allocating the burden of proof, the practical effect of which might be to undermine legislative reform of our criminal justice system."). One surmises that this short article was drafted and rushed into print (in a law school newspaper principally designed for internal distribution) primarily so that it could be cited in the *Patterson* appeal.

71. 432 U.S. at 207.

72. *See generally* KATHERINE BECKETT, *MAKING CRIME PAY: LAW AND ORDER IN CONTEMPORARY AMERICAN POLITICS* (2d ed. 2000).

73. The most obvious example is the move to restrict the insanity defense in the wake of the not-guilty-by-reason-of-insanity verdict for John Hinckley in his trial for attempting to murder Ronald Reagan. Many American jurisdictions tightened their definitions of insanity, and a few abolished the defense completely. *See* DRESSLER, *supra* note 47, at 344.

The negligible achievements of *Patterson*'s exercise of judicial restraint have been far outweighed by the detriments it generated. Admittedly, few states have followed the model warned against in the *Patterson* dissent: lessening the burden of persuasion on the prosecution by characterizing the negation of elements of the offense as affirmative defenses.⁷⁴ But in a move spurred in part by *Patterson*, every jurisdiction has taken what were (or might have been) elements of the offense and converted them into "sentencing factors," facts that can or must raise the defendant's sentence, which are typically found by a preponderance of the evidence, not beyond a reasonable doubt, and by a judge, not a jury.⁷⁵ This use of sentencing factors in guidelines schemes and in mandatory minimums would have been highly suspect under *Winship* and *Mullaney v. Wilbur*,⁷⁶ but easily passed constitutional muster in *McMillan v. Pennsylvania*,⁷⁷ where the Court relied strongly on *Patterson*.

The statutory scheme at issue in *McMillan* imposed a five-year mandatory minimum sentence whenever the defendant committed one of a list of qualifying felonies while visibly possessing a firearm; the statute allowed the trial judge to find visible possession by a preponderance of the evidence. *McMillan* and three other Pennsylvania defendants argued that this scheme violated the Due Process Clause as interpreted in *Winship* and *Mullaney v. Wilbur*, and four members of the Court agreed.⁷⁸ But the majority differed, "believ[ing] that the present case is controlled by *Patterson*, our most recent pronouncement on this subject, rather than by

Another indicative trend is the growth of states according no defensive significance to the defendant's voluntary intoxication. *See generally* *Montana v. Egelhoff*, 518 U.S. 37 (1996) (finding no due process violation in such a rule); *id.* at 48 n.2 (counting jurisdictions).

The principal growth area in mitigation since *Patterson* has been in the right to use deadly force to protect oneself and one's habitation and to prevent the commission of dangerous felonies. *See, e.g.*, RICHARD J. BONNIE ET AL., CRIMINAL LAW 428-29 (2d ed. 2004) (discussing Colorado's "Make My Day" statute). It seems highly unlikely that a contrary decision in *Patterson* would have discouraged legislatures from passing these laws.

74. An arguable example of this shift is the rule followed in many states that if a defendant charged with a specific intent crime wishes to use his voluntary intoxication to disprove that mens rea, he must prove by a preponderance of the evidence that he was so intoxicated that he lacked the capacity to form a specific intent. *See generally* BONNIE ET AL., *supra* note 73, at 247-48. The constitutionality of this rule has been upheld. *See* U.S. *ex rel.* *Goodard v. Vaughn*, 614 F.2d 929, 936 (3d Cir. 1980).

75. *See* DEMLEITNER ET AL., *supra* note 53, chs. 4-5.

76. Because sentencing factors aggravate the defendant's sentence, they are even more susceptible to a due process challenge than the mitigation at issue in *Mullaney v. Wilbur*. For a discussion of this distinction, see *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (Stevens, J., dissenting).

77. *Id.* (Rehnquist, J., majority opinion).

78. *Id.* at 93 (Marshall, J., dissenting); *id.* at 96-99 & n.3 (Stevens, J., dissenting).

Mullaney”:

[T]he Pennsylvania Legislature has expressly provided that visible possession of a firearm is not an element of the crimes enumerated in the mandatory sentencing statute, but instead is a sentencing factor While visible possession might well have been included as an element of the enumerated offenses, Pennsylvania chose not to redefine those offenses in order to so include it, and *Patterson* teaches that we should hesitate to conclude that due process bars the State from pursuing its chosen course in the area of defining crimes and prescribing penalties.⁷⁹

Thus *Patterson* enabled the *McMillan* majority to give its imprimatur to the use of sentencing factors found by a judge by only a preponderance of the evidence. This ratified the extensive use of such factors in sentencing statutes, both mandatory minimums and guidelines schemes, that arose in the years preceding *McMillan* and proliferated after it.

The decision in *McMillan* obviously contributed to America’s incarceration binge. If factors that raise a defendant’s sentence would have required a jury finding beyond a reasonable doubt, fewer such factors would have been found, and shorter sentences would have been imposed. Less restraint in deciding *Patterson*, and *McMillan* in turn, would have been quite beneficial.

B.

The Supreme Court apparently had some doubts about the course followed in *Patterson* and *McMillan*, because beginning in 2000, it took some tentative steps to limit the use of sentencing factors, this time using the jury trial right in the Sixth Amendment, as well as due process, as the basis for its actions. But in its most recent decision, the Court has reneged on this commitment as well, once again succumbing to calls for judicial restraint.

The Court’s first unequivocal restriction on the use of sentencing factors came in its June 2000 decision in *Apprendi v. New Jersey*.⁸⁰ Pursuant to a state statute, the trial court had enhanced Apprendi’s sentence for two weapons possession convictions because he had acted with a purpose to

79. *Id.* at 85-86 (citation omitted).

80. 530 U.S. 466 (2000) (Stevens, J., majority opinion). *Jones v. United States*, 526 U.S. 227 (1999), prefigured *Apprendi*. In construing provisions in the federal carjacking statute to create elements of the offense, rather than sentencing factors, the *Jones* majority indicates that the alternate construction “would be open to constitutional doubt in light of a series of cases over the past quarter century.” *Id.* at 240 (discussing *Winship*, *Mullaney v. Wilbur*, *Patterson*, and *McMillan*; see *supra* text accompanying notes 57-79). The four-justice dissent in *Jones* criticizes the majority’s treatment of *Patterson* and *McMillan*. *Id.* at 265 (Kennedy, J., dissenting). See also *infra* note 82.

intimidate his victims based on their race. The judge made this finding at a post-trial hearing applying a preponderance of the evidence standard, and accordingly sentenced Apprendi to twelve years, two years more than the statutory maximum for either of the weapons offenses. In *Apprendi* a five-justice majority holds that this sentence violated the defendant's constitutional rights as reflected in both the Due Process Clause and the Sixth Amendment's guarantee of right to trial by jury,⁸¹ and adopts the following as its rule: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."⁸²

The *Apprendi* dissenters predict calamitous results from the decision,⁸³ which sent shock waves through the legal community.⁸⁴ But *Apprendi*'s precise impact on aspects of determinate sentencing such as mandatory minimums and sentencing guidelines remained unclear until the Court took up those more specific questions.

The Supreme Court resolved the meaning of *Apprendi* for mandatory minimum sentencing in 2002 in *Harris v. United States*.⁸⁵ The facts in *Harris* paralleled those of *McMillan*⁸⁶—the judge at Harris' sentencing hearing determined that he had brandished a firearm during his commission of drug trafficking, thus triggering a mandatory minimum sentence of seven years⁸⁷—and the Court succinctly states the question before it as "whether *McMillan* stands after *Apprendi*."⁸⁸

The Court in *Harris* concludes that *McMillan* remains good law despite the decision in *Apprendi*. A four-justice plurality (all but one of whom dissented in *Apprendi*) distinguishes facts that raise a defendant's minimum

81. 530 U.S. at 476-77.

82. *Id.* at 490. The prior conviction exception in *Apprendi*'s rule derives from *Almendarez-Torres v. United States*, 523 U.S. 224 (1998) (5-4 decision), which holds that a prior record could constitutionally be treated as a sentencing factor (i.e., found by a judge by a preponderance of the evidence). The dissent in *Jones* also relies heavily on *Almendarez-Torres*. See 526 U.S. at 265-66 (Kennedy, J., dissenting).

The *Apprendi* majority (as well as the majority in *Jones*, see 526 U.S. at 229) comprises the four dissenters in *Almendarez-Torres* and Justice Thomas, who suggests in *Apprendi* that two years later, he regrets his vote in *Almendarez-Torres*. 530 U.S. at 520-21 (Thomas, J., concurring).

83. 530 U.S. at 543-52 (O'Connor, J., dissenting).

84. Susan N. Herman, *Applying Apprendi to the Federal Sentencing Guidelines: You Say You Want a Revolution?*, 87 IOWA L. REV. 615, 616-17 (2002).

85. 536 U.S. 545 (2002). See generally Julie L. Hendrix, Supreme Court Review, *Harris v. United States: The Supreme Court's Latest Avoidance of Providing Constitutional Protection to Sentencing Factors*, 93 J. CRIM. L. & CRIMINOLOGY 947 (2003).

86. See *supra* text accompanying notes 78-79.

87. 536 U.S. at 550-51.

88. *Id.* at 550.

sentence from those that increase his sentence beyond the statutory maximum, reasoning that *Apprendi* allows the former (but not the latter) to be found by a judge, rather than by a jury.⁸⁹ The four dissenters (all of whom were in the *Apprendi* majority) reply that “[s]uch fine distinctions with regard to vital constitutional liberties cannot withstand close scrutiny.”⁹⁰ Justice Breyer (another *Apprendi* dissenter) casts the fifth vote to uphold *McMillan*, acknowledging that “I cannot easily distinguish *Apprendi* . . . from this case in terms of logic,” but reasserting his doubts about the former case: “I cannot yet accept its rule.”⁹¹

All five of the prevailing justices in *Harris* sound themes of judicial restraint in support of their result. Breyer complains that a contrary decision “would diminish further Congress’ otherwise broad constitutional authority to define crimes through the specification of elements, to shape criminal sentences through the specification of sentencing factors, and to limit judicial discretion in applying those factors in particular cases.”⁹² Similarly, the plurality, recognizing the widespread use of mandatory minimums after its decision in *McMillan*, emphasizes the need not to frustrate legislative reliance on that decision:

Within the range authorized by the jury’s verdict, . . . the political system may channel judicial discretion . . . by requiring defendants to serve minimum terms after judges make certain factual findings. It is critical not to abandon that understanding at this late date. Legislatures and their constituents have relied upon *McMillan* to exercise control over sentencing through dozens of statutes like the one the Court approved in that case. . . . We see no reason to overturn those statutes or cast uncertainty upon the sentences imposed under them.⁹³

Thus, both the *Harris* plurality and concurrence worry about judicial

89. *Id.* at 557 (Kennedy, J., plurality opinion).

90. *Id.* at 574 (Thomas, J., dissenting).

91. *Id.* at 569 (Breyer, J., concurring in part and in the judgment).

92. *Id.* at 572.

93. *Id.* at 567-68 (plurality opinion). One could conjecture that this consideration motivated the vote of Justice Scalia, the only justice on the prevailing sides in both *Apprendi* and *Harris*. Scalia wrote no opinion in *Harris*. In *Apprendi* his brief concurrence endorses the rule that “all the facts which must exist in order to subject the defendant to a legally prescribed punishment *must* be found by the jury,” 530 U.S. at 499 (Scalia, J., concurring), and he joins not only the majority opinion but also parts I and II of Justice Thomas’s concurrence, the logic of which parallels Thomas’s dissent in *Harris*. But significantly, in *Apprendi* Scalia failed to join part III of Thomas’s concurrence, in which he argued for overruling *McMillan*. Scalia may also have been responsible for the *Apprendi* majority’s footnote reference to “the likelihood that legislative decisions may have been made in reliance on *McMillan*” as a reason to defer reconsideration of that decision. *Id.* at 487 n.13 (majority opinion).

incursion on the power of the legislature to establish mandatory minimums.

The *Harris* dissent strongly questions the value of judicial restraint in this context—such “considerations . . . are at their nadir in cases involving procedural rules implicating fundamental constitutional protections afforded criminal defendants”⁹⁴—but it is the prevailing opinions themselves that most clearly show the wrongheadedness of their restraint. Both the Breyer concurrence and the plurality opinion strongly question the wisdom of the mandatory minimum sentencing they nevertheless uphold.

Citing several authorities, including three sitting Supreme Court justices, Breyer asserts, “During the past two decades, as mandatory minimum sentencing statutes have proliferated in number and importance, judges, legislators, lawyers, and commentators have criticized those statutes, arguing that they negatively affect the fair administration of the criminal law, a matter of concern to judges and to legislators alike.”⁹⁵ His syllabus of errors attributable to mandatory minimums is impressive:

Mandatory minimum statutes are fundamentally inconsistent with Congress’ simultaneous effort to create a fair, honest, and rational sentencing system through the use of Sentencing Guidelines. Unlike Guideline sentences, statutory mandatory minimums generally deny the judge the legal power to depart downward, no matter how unusual the special circumstances that call for leniency. They rarely reflect an effort to achieve sentencing proportionality—a key element of sentencing fairness that demands that the law punish a drug “kingpin” and a “mule” differently. They transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring, and who thereby have reintroduced much of the sentencing disparity that Congress created Guidelines to eliminate. They rarely are based upon empirical study. And there is evidence that they encourage subterfuge, leading to more frequent downward departures (on a random basis), thereby making them a comparatively ineffective means of guaranteeing tough sentences.⁹⁶

While not nearly so vigorous as Breyer, the *Harris* plurality expresses its disdain for mandatory minimums (in a portion of its opinion specifically joined by Breyer) by noting “many question the wisdom of mandatory minimum sentencing. Mandatory minimums, it is often said, fail to account for the unique circumstances of offenders who warrant a lesser penalty.

94. 536 U.S. at 572 (Thomas, J., dissenting). Justice Thomas’s specific reference is to considerations of *stare decisis*. *Id.* at 581-83. But *stare decisis* is here emblematic of judicial restraint more generally, both because it is a cardinal principle of such restraint and because the previous decision to which the Court adheres is itself an example of restraint.

95. *Id.* at 570 (Breyer, J., concurring in part and in the judgment).

96. *Id.* at 570-71 (citations omitted).

These criticisms may be sound”⁹⁷

Given the strength of the case against mandatory minimum sentencing,⁹⁸ departing from judicial restraint seems to have been warranted in *Harris*. Both the plurality and Breyer argue that a contrary decision in *Harris* would not have ended the use of mandatory minimums, because the facts triggering the minimum sentence could still be found by a jury beyond a reasonable doubt.⁹⁹ But this change certainly would have complicated, and likely would have curtailed, the use of mandatory minimums. Some juries would have been unable or unwilling to find the necessary facts, some prosecutors would have consequently chosen not to file some charges carrying a mandatory minimum, and some legislatures would have decided that some mandatory minimum provisions were just not worth the trouble. The consequent reductions in sentence lengths would have been well worth the asserted incursion on legislative prerogatives.¹⁰⁰

After determining in *Harris* that *Apprendi* would have little impact on mandatory minimum sentencing, the Court turned to that decision’s consequences on the use of sentencing guidelines. In 2004 the Court signaled in *Blakely v. Washington*¹⁰¹ that those consequences might be severe; however, seven months later the Court retreated from its commitment to *Apprendi* in *United States v. Booker*.¹⁰²

Both *Blakely* and *Booker* involved the use of sentencing factors, found by a judge by a preponderance of the evidence, to increase the range of the defendant’s guidelines-imposed sentence. In *Blakely*, Washington’s guidelines called for a sentence of forty-nine to fifty-three months for Blakely’s crime of second degree kidnaping involving domestic violence, but the sentencing judge found as an aggravating circumstance that Blakely committed the crime with “deliberate cruelty,” and raised his sentence to ninety months.¹⁰³ Similarly, in *Booker* the defendant’s crime of possession of 92.5 grams of cocaine base with intent to distribute yielded, for someone with his criminal history, a guidelines range of 210 to 262 months, but,

97. *Id.* at 568 (plurality opinion) (citations omitted).

98. See generally Robert Batey, *Mandatory Minimum Sentencing: A Failed Policy*, PHI KAPPA PHI F., Winter 2002, at 24, available at http://www.findarticles.com/p/articles/mi_qa4026/is_200201.

99. See 536 U.S. at 568; *id.* at 571 (Breyer, J., concurring in part and in the judgment).

100. See Robert Batey, *Two Recent Decisions Confirm Criminal Law’s ‘Pathological Politics’*, THE CHAMPION, Apr. 2003, at 26-27, available at [http://www.nacdl.org/public.nsf/\\$\\$searchChampion](http://www.nacdl.org/public.nsf/$$searchChampion) (search for “Pathological Politics”).

101. 542 U.S. 296 (2004) (Scalia, J., majority opinion).

102. 543 U.S. 220 (2005) (Stevens and Breyer, JJ., delivering the opinion of the Court in part). See generally Craig Green, *Booker and Fanfan: The Untimely Death (and Rebirth?) of the Federal Sentencing Guidelines*, 93 GEO. L.J. 395 (2005).

103. 542 U.S. at 298-300.

pursuant to the United States Sentencing Guidelines, Booker's sentence increased to 360 months once the judge found that Booker had possessed a second, more substantial quantity of cocaine and had also acted to obstruct justice.¹⁰⁴

In both cases the defendant's sentence was below the statutory maximum—ten years in *Blakely* and life imprisonment in *Booker*¹⁰⁵—which allowed the prosecution to argue that *Apprendi* did not apply. In both *Blakely* and *Booker* a five-justice majority (the same majority as *Apprendi*) rejects this contention: “[T]he ‘statutory maximum’ for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*”¹⁰⁶ Because the applicable sentencing guidelines indicate a sentence based on those jury-found or admitted facts—forty-nine to fifty-three months in *Blakely* and 210 to 262 months in *Booker*—any sentence above that range is unconstitutional.

This rule, if allowed its full impact, would have disabled judicial reliance on sentencing factors that increased the defendant's guidelines sentence, requiring instead that any such facts be found by a jury beyond a reasonable doubt. As mentioned previously, such a rule could well have reduced many sentences and consequently lowered the headcount in America's prisons.¹⁰⁷

But a separate five-justice majority in *Booker* (the four who dissented in *Apprendi* and *Blakely* and from the portion of *Booker* just discussed, plus Justice Ginsburg¹⁰⁸) deprived the rule of almost all its force through the

104. 543 U.S. at 227 (Stevens, J., delivering the opinion of the Court in part).

105. 542 U.S. at 303; 543 U.S. at 227-29 (Stevens, J., delivering the opinion of the Court in part).

106. *Blakely*, 542 U.S. at 303, *quoted in Booker*, 543 U.S. at 232 (Stevens, J., delivering the opinion of the Court in part). *Booker* restates the rule: “Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.” *Id.* at 244.

107. See text following note 79.

108. Thus only one justice agrees with both majority opinions, and she filed no opinion explaining a stance found inconsistent by all eight of her colleagues. One guess is that Justice Ginsburg (and perhaps others joining the second majority in *Booker*) feared Congress's reaction to requiring jury determinations of factors that raised a guidelines sentence. Cf. Frank O. Bowman, *Letter from Frank Bowman Concerning H.R. 1528*, 17 FED. SENT'G REP. 311 (2005) (describing and criticizing proposed legislation that would “transform[] the Federal Sentencing Guidelines into a complex system of mandatory minimum sentences.”). On the potential negative consequences of judicial activism, see Cass R. Sunstein, *Two Phone Calls*, 16 CONST. COMMENT. 595, 597 (1999) (hypothesizing a contrary decision in *Bowers v. Hardwick*, 478 U.S. 176 (1986), and then mentioning in passing the subsequent elections of “President Hatch” (for “two . . . terms”) and “President

simple device of construing the federal sentencing guidelines as advisory, rather than mandatory. This *Booker* majority accomplishes its result by “excis[ing]” two statutory provisions requiring application of the guidelines,¹⁰⁹ but leaving intact a separate statutory provision that renders the guidelines “effectively advisory,” in that it allows their consideration along with “other statutory concerns.”¹¹⁰

Quayle,” twenty years of “anti-gay violence,” and the “aboli[tion of] affirmative action”).

But even if Congress would have responded drastically to adoption of a different remedy in *Booker*, the Court would still have had the opportunity to react to that response; perhaps legislative adoption of an extensive set of mandatory minimums would have led the Court to reconsider *Harris*. See Sunstein, *supra* (in Sunstein’s hypothesized world, a Democrat eventually gets back into the White House after thirty-plus years of Republican rule, “now the Civil Rights Act bars discrimination on the basis of sexual orientation,” and the contrary decision in *Bowers v. Hardwick* “stands with *Brown* itself as a symbol of constitutional justice”).

109. 543 U.S. at 245-46 (Breyer, J., delivering the opinion of the Court in part) (voiding 18 U.S.C. §§ 3553(b)(1), 3742(e) (2000)); *see id.* at 259.

110. *Id.* at 245-246 (citing 18 U.S.C. § 3553(a) (2000 & Supp. 2006)); *see id.* at 259-60. The statute lists the following concerns:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range established for—
 - (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
 -
- (5) any pertinent policy statement—
 - (A) issued by the Sentencing Commission
 -
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a) (2000 & Supp. 2006).

After *Booker* federal judges once again have discretion to impose any sentence between any applicable mandatory minimum and the statutory maximum (a discretion they had lost under mandatory guidelines);¹¹¹ the only limitation on this discretion is appellate review of the “unreasonable[ness]” of the sentence.¹¹² Because of this renewed discretion, there can be no *Apprendi* violation in the judge’s consideration of factors that raise the defendant’s sentence within that range. Thus federal judges may continue to raise the defendant’s sentence based on sentencing factors found by the judge at the sentencing hearing by only a preponderance of the evidence.

The evidence since *Booker* suggests that the Court’s decision has done little to change the sentences imposed in federal court. In the vast majority of cases, judges continue to follow the guidelines, as if *Apprendi* and *Blakely* had never been decided.¹¹³ The potential created by those decisions to decrease sentences and imprisonment levels in the federal system remains almost entirely unrealized. While some states have responded to *Blakely* by modifying their guidelines schemes to require jury findings of sentencing factors beyond a reasonable doubt,¹¹⁴ several others have learned from the *Booker* example and found creative ways of construing state statutes in order to preserve the judge’s ability to find sentencing factors by a standard less exacting than proof beyond a reasonable doubt.¹¹⁵

111. 543 U.S. at 304-06 (Scalia, J., dissenting in part).

112. *Id.* at 260-61 (Breyer, J., delivering the opinion of the Court in part) (alteration in original) (quoting 18 U.S.C. § 3742(e)(3) (1994)).

113. U.S. SENT’G COMMISSION, REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING at vii (2006), available at http://www.ussc.gov/booker_report/Booker_Report.pdf (“The severity of sentences imposed has not changed substantially across time. The average sentence length after *Booker* has increased.”). For earlier assessments, see Correy E. Stephenson, *Experts Agree Little Has Changed in Sentencing Since Booker Decision*, K.C. DAILY REC., Nov. 19, 2005, available at 2005 WLNR 18885349; *U.S. Sentencing Commission Reports on Court Response to ‘Booker’ and ‘Fanfan’*, ROCHESTER [N.Y.] DAILY REC., Oct. 11, 2005, available at 2005 WLNR 16634169.

114. See generally Don Stemen & Daniel F. Wilhelm, *Finding the Jury: State Legislative Responses to Blakely v. Washington*, 18 FED. SENT’G REP. 7 (2005).

115. See, e.g., *People v. Black*, 113 P.3d 534 (Cal. 2005); *State v. Lopez*, 123 P.3d 754 (N.M. 2005); *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005). Stemen and Wilhelm distinguish the states’ reactions based on how likely courts in each state were to sentence above the guidelines’ presumptive range:

In several states—such as Minnesota, North Carolina, Oregon, and Washington—where very few sentences were regularly imposed above the presumptive sentences, . . . introduc[ing] jury fact-finding may well be [the] most appropriate [way] to address *Blakely*’s requirements. In Indiana and Tennessee—where historically, a majority of sentences appear to have been imposed above the

Consequently, the *Apprendi* line of cases appears fated to have only a negligible impact on sentences of imprisonment in the United States.¹¹⁶

In short, the statutory construction of one majority in *Booker* eviscerated the potential for reform in the constitutional conclusion of another majority in the same case. The reasons given for this statutory construction, while couched in the language of severability,¹¹⁷ resonate with concepts of judicial restraint. Construing the guidelines as advisory is necessary in order best to conform to the wishes of Congress, as the majority constantly reiterates:

We answer the remedial question by looking to legislative intent. We seek to determine what “Congress would have intended” in light of the Court’s constitutional holding.¹¹⁸

. . . .

. . . Congress’ basic goal in passing the Sentencing [Reform] Act [of 1984] was to move the sentencing system in the direction of increased uniformity. That uniformity does not consist simply of similar sentences for those convicted of violations of the same statute It consists, more importantly, of similar relationships between sentences and real conduct¹¹⁹

presumptive sentences—the more drastic response of changing the fundamental nature of sentencing philosophy may be a more practically appropriate reaction Other states—such as Alaska, Arizona, California, Colorado, New Jersey, New Mexico, and Ohio—are likely to engage in a similar balancing act.

Stemen & Wilhelm, *supra* note 114, at 10. So jury fact-finding will likely be avoided—through “*Booker*-ization,” Steven L. Chanenson & Daniel F. Wilhelm, *Evolution and Denial: State Sentencing After Blakely and Booker*, 18 FED. SENT’G. REP. 1, 1 (2005)—in precisely those states that need it the most.

The Supreme Court will review California’s version of *Booker*-ization in *Cunningham v. California*, 2006 WL 386377 (U.S. Feb. 21, 2006), *granting cert. to* 2005 WL 880983 (Cal. Ct. App. Apr. 18, 2005).

116. Curiously, the most significant impact of the *Apprendi* line of cases has been on capital sentencing. *See generally* Ring v. Arizona, 536 U.S. 584 (2002) (requiring a jury finding of any aggravating circumstance, other than prior record, that renders a defendant death-eligible).

117. 543 U.S. at 247-48 (Breyer, J., delivering the opinion of the Court in part).

118. *Id.* at 246 (citations omitted) (quoting Denv. Area Educ. Telecom. Consort. v. FCC, 518 U.S. 727, 767 (1996) (plurality opinion)).

119. *Id.* at 253-54 (citations omitted). The second *Booker* majority had already noted,

Judges have long looked to real conduct when sentencing. Federal judges have long relied upon a presentence report, prepared by a probation officer, for information (often unavailable until *after* the trial) relevant to the manner in which the convicted offender committed the crime of conviction.

....

... [T]he Act without its “mandatory” provision and related language remains consistent with Congress’ initial and basic sentencing intent. Congress sought to “provide certainty and fairness in meeting the purposes of sentencing, [while] avoiding unwarranted sentencing disparities... [and] maintaining sufficient flexibility to permit individualized sentences when warranted.”¹²⁰

Deference to Congress is the asserted lodestar of the second *Booker* majority. The dissenters to this aspect of *Booker* argue that their remedy—requiring jury findings beyond a reasonable doubt—is more consistent with congressional intent.¹²¹ A more forthright response from them, however, would have been that their approach does not render nugatory whatever had been achieved in *Apprendi* and *Blakely*.

For over thirty years the Supreme Court has struggled to effect constitutional limits on the allocation of fact-finding responsibility and burdens of persuasion. During those years, a dramatically increased use of sentencing factors, both in guidelines schemes and to trigger mandatory minimums, has made these issues far more significant. Yet at the end of the day, the Court has accomplished very little, and the reason usually given for its faintheartedness is judicial restraint. The consequences of this restraint are evident in our prisons, but one searches in vain for its achievements.

III.

Decriminalizing drug possession by addicts and requiring that juries find sentencing factors beyond a reasonable doubt would have been indirect means at best to control America’s burgeoning prison population. A far more direct method would have been to use the proportionality principle inherent in the Cruel and Unusual Punishment Clause to limit the length of sentences. The Supreme Court flirted with this approach in the 1980s but in the decades since has deprived it of almost all its force.¹²²

In *Rummel v. Estelle*,¹²³ a 1980 decision, the Court recognized that the

Congress expected this system to continue.

Id. at 250-51.

120. *Id.* at 264 (quoting 28 U.S.C. § 991(b)(1)(B) (2000)).

121. *Id.* at 273-74 (Stevens, J., dissenting in part); *id.* at 303-06 (Scalia, J., dissenting in part); *id.* at 323-25 (Thomas, J., dissenting in part).

122. See generally Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative To What?*, 89 MINN. L. REV. 571, 575 (2005).

123. 445 U.S. 263 (1980) (Rehnquist, J., majority opinion).

Eighth Amendment includes a proportionality principle applicable to sentences of imprisonment,¹²⁴ but found, five votes to four, that it was not offended by a life sentence given to a Texas recidivist on his third felony conviction.¹²⁵ Rummel's felonies were quite trivial, as the dissent points out,¹²⁶ but the majority was unwilling to intrude on the "legislative prerogative" to state the penalties for crime.¹²⁷ This obeisance to judicial restraint is underscored by a concurring justice's comment:

If the Constitution gave me a roving commission to impose upon the criminal courts of Texas my own notions of enlightened policy, I would not join the Court's opinion. For it is clear to me that the recidivist procedures adopted in recent years by many other States . . . are far superior to those utilized [here]. But the question for decision is not whether we applaud or even whether we personally approve the procedures followed in [this case]. The question is whether those procedures fall below the minimum level the [Constitution] will tolerate. Upon that question I am constrained to join the opinion and judgment of the Court.¹²⁸

The dissenters in *Rummel* attempt to respond to this concern by adumbrating a three-part test of "objective factors" by which to measure a sentence's proportionality, which would "minimize the risk of constitutionalizing the personal predilections of federal judges": "(i) the nature of the offense; (ii) the sentence imposed for commission of the same crime in other jurisdictions; and (iii) the sentence imposed upon other criminals in the same jurisdiction."¹²⁹

This three-part test would materialize three years later in the majority opinion in *Solem v. Helm*,¹³⁰ which disapproved a sentence of life without possibility of parole for a South Dakota recidivist with seven felony

124. *Id.* at 271-72, 274 n.11.

125. *Id.* at 285.

126. *Id.* at 286 (Powell, J., dissenting).

In 1964, petitioner was convicted for the felony of presenting a credit card with intent to defraud another of approximately \$80. In 1969, he was convicted for the felony of passing a forged check with a face value of \$28.36. In 1973, petitioner accepted payment in return for his promise to repair an air conditioner. The air conditioner was never repaired, and petitioner was indicted for the felony offense of obtaining \$120.75 under false pretenses.

Id.

127. *Id.* at 274 (majority opinion); *see id.* at 281-84.

128. *Id.* at 285 (Stewart, J., concurring) (omission and alterations in original) (quoting *Spencer v. Texas*, 385 U.S. 554, 569 (1967) (Stewart, J., concurring)).

129. *Id.* at 295 (Powell, J., dissenting) (citations omitted).

130. 463 U.S. 277 (1983) (Powell, J., majority opinion).

convictions.¹³¹ After establishing at length the constitutional pedigree of the “principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted,”¹³² the five-justice majority in *Solem v. Helm* applies the three-part test—with its first prong now restated as “the gravity of the offense and the harshness of the penalty”¹³³—and finds Helm’s sentence disproportionate.¹³⁴ The four dissenters thunder that the Court has thus overruled *Rummel v. Estelle*,¹³⁵ however, the majority distinguishes *Rummel*’s case because he was eligible for parole after serving twelve years of his life sentence, whereas Helm had no eligibility for parole.¹³⁶

The test approved in *Solem v. Helm* could have provided a much-needed brake on the increase in criminal sentences that was gathering steam in the 1980s, as jurisdictions adopted numerous mandatory minimum provisions as well as sentencing guidelines that scaled up from those minimums.¹³⁷ By assessing the gravity of the crime compared to the harshness of the sentence, and by comparing sentences for the same crime in other jurisdictions and for other crimes in the same jurisdiction, courts could have lowered many of the draconian penalties that have swelled our prison rolls.¹³⁸ But in subsequent decisions the Court has hobbled the three-part test, leaving it all but meaningless.

131. *Id.* at 279-81 (footnotes omitted).

In 1964, 1966, and 1969 Helm was convicted of third-degree burglary. In 1972 he was convicted of obtaining money under false pretenses. In 1973 he was convicted of grand larceny. And in 1975 he was convicted of third-offense driving while intoxicated

In 1979 Helm was charged with uttering a “no account” check for \$100.

Id.

132. *Id.* at 290.

133. *Id.* at 290-91. The *Solem v. Helm* majority also switches the order of the second and third prong. Compare *id.* at 291-92 with *Rummel v. Estelle*, 445 U.S. 263, 295 (1980).

134. *Solem v. Helm*, 463 U.S. 277, 299-300 (1983).

135. *Id.* at 304-12 (Burger, C.J., dissenting). The dissenters also find *Solem v. Helm* inconsistent with *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam) (upholding, per *Rummel*, a 40-year sentence for possessing less than nine ounces of marijuana).

136. *Id.* at 303 n.32 (majority opinion). This fact may have motivated Justice Blackmun, the only justice in the majorities in both *Rummel* and *Solem v. Helm*. (Between 1980 and 1983 Justice O’Connor replaced Justice Stewart, but her vote in *Helm* was consistent with his vote in *Rummel*.) Blackmun left his views unexplained, writing no opinion in either case.

137. MAUER, *supra* note 6, chs. 3-4.

138. *Cf.* *United States v. Ambrose*, 740 F.2d 505, 509-10 (7th Cir. 1984) (Posner, J.) (interpreting federal statute not to apply minimum sentence mandatory for drug kingpin to kingpin’s accomplices, because such a sentence might be disproportionate under *Solem v. Helm*).

One of the nation's most notorious mandatory minimum sentences came before the Court in 1991. *Harmelin v. Michigan*¹³⁹ considered that state's "650-Lifer" law, which mandated a sentence of life without possibility of parole for possession of 650 grams or more of cocaine.¹⁴⁰ In response to Harmelin's argument that his sentence failed the test enunciated in *Solem v. Helm*, four justices agreed.¹⁴¹ But a majority of the Court voted to uphold Harmelin's sentence: while two justices argued for overruling *Solem v. Helm* and its three-part test,¹⁴² three others chose to modify that test and found under their new test that life without possibility of parole is not constitutionally disproportionate to the crime of possessing a large quantity of cocaine.¹⁴³

This crucial bloc reaches its conclusion by emphasizing the first prong of the three-part test: "A better reading of our cases leads to the conclusion that intrajurisdictional and interjurisdictional analyses"—the second and third prongs—"are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."¹⁴⁴ These concurring justices emphasize the "rare[ness]" of a finding of such disproportionality by holding that "the pernicious effects of the drug epidemic in this country . . . demonstrate that . . . the threat posed to the individual and society by possession of this large an amount of cocaine . . . is momentous enough to warrant the deterrence and retribution of a life sentence without parole."¹⁴⁵ If life without possibility of parole is not grossly disproportionate to a first-time offender's mere possession of less than a pound and a half of cocaine,¹⁴⁶ very few—if any—sentences will meet this "threshold" test.

The five justices who thus eviscerate the three-part test cite judicial

139. 501 U.S. 957 (1991) (Scalia, J., plurality opinion).

140. See generally Brian M. Thomas, Recent Legislation, *Criminal Procedure—Parole Eligibility—Michigan Eliminates Mandatory Drug Sentences and Allows Parole for Possession of 650 or More Grams of Cocaine or Heroin*, 76 U. DET. MERCY L. REV. 679 (1999) (discussing the statute and its 1998 repeal).

141. 501 U.S. 957 (1991) (White, J., dissenting); *id.* (Marshall, J., dissenting); *id.* (Stevens, J., dissenting).

142. *Id.* at 965 (plurality opinion) ("*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee."). Though appearing in the "plurality" opinion, only two justices—Rehnquist and Scalia—signed this portion of the opinion. Curiously, Chief Justice Rehnquist's vote is inconsistent with dicta in his majority opinion in *Rummel*, *supra* text accompanying note 124, and with his vote in the Court's most recent application of the proportionality principle to sentences of imprisonment. See *infra* note 156.

143. See 501 U.S. 957 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

144. *Id.* at 1005.

145. *Id.* at 1003. *But cf. infra* note 149 and accompanying text.

146. See *Harmelin*, at 1021 (White, J., dissenting).

restraint as a primary reason for their actions. Those wishing to overrule *Solem v. Helm* would disallow any application of “the proportionality principle” to sentences of imprisonment because it “invit[es the] imposition of subjective values”—specifically, the subjective values of judges who disagree with the decisions of legislators.¹⁴⁷ This same concern animates the justices who modify the three-prong test rather than overruling it. These concurring justices set out as their first principle for interpreting the proportionality guarantee in the Cruel and Unusual Punishment Clause “the primacy of the legislature”:

[T]he fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is “properly within the province of legislatures, not courts.” . . . Thus, “[r]eviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes.”¹⁴⁸

While the concurring justices express doubts about the wisdom of Michigan’s “650-Lifer” law,¹⁴⁹ they defer to the legislature’s judgment and uphold its mandatory sentence of life without possibility of parole.

Harmelin’s disabling of the three-part test adopted in *Solem v. Helm* allowed America’s incarceration binge to proceed apace. Even in the face of lengthening sentences and mounting numbers of prisoners, a crucial bloc of justices continues to cling to the *Harmelin* concurrence’s ineffective version of the three-part test, as the 2003 decision in *Ewing v. California*¹⁵⁰ shows.

Under California’s “Three Strikes and You’re Out” law, the most frequently used state version of this increasingly popular form of statute,¹⁵¹ Ewing received a sentence of twenty-five years to life for stealing three golf clubs, because he had four previous felony convictions.¹⁵² Deeming

147. *Id.* at 986 (plurality opinion); *see id.* at 988 (“The members of the Michigan Legislature, and not we, know the situation on the streets of Detroit.”).

148. *Id.* at 998, 999 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Rummel v. Estelle*, 445 U.S. 263, 275-76 (1980); *Solem v. Helm*, 463 U.S. 277, 290 (1983)).

149. *Id.* at 1008 (“Mandatory sentencing schemes can be criticized for depriving judges of the power to exercise individual discretion when remorse and acknowledgment of guilt, or other extenuating facts, present what might seem a compelling case for departure from the maximum.”). *See id.* at 1007.

150. 538 U.S. 11 (2003) (O’Connor, J., plurality opinion). *See also* *Lockyer v. Andrade*, 538 U.S. 63 (2003) (companion case, applying a more permissive standard of review because Andrade sought habeas corpus relief).

151. *See generally* FRANKLIN E. ZIMRING ET AL., *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA* (2001).

152. 538 U.S. at 17-19 (plurality opinion).

this sentence “virtually unique in its harshness for his offense of conviction, and by a considerable degree,”¹⁵³ four justices would have found it cruel and unusual under the three-part test, both as originally outlined in *Solem v. Helm*¹⁵⁴ and as modified by the *Harmelin* concurrence.¹⁵⁵ Five justices upheld the sentence, however. As in *Harmelin*, two justices reiterated the argument that the Eighth Amendment contains no proportionality principle applicable to sentences of imprisonment,¹⁵⁶ while three justices found Ewing’s sentence proportionate under the test used by the concurring justices in *Harmelin*.¹⁵⁷ This pivotal group holds that in light of the defendant’s “long history of felony recidivism,”¹⁵⁸ “Ewing’s is not ‘the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.’”¹⁵⁹

The dissenters argue that the first prong of the *Harmelin* test as applied in *Ewing* has become “not . . . a *threshold* test but a *determinative*” one.¹⁶⁰ Indeed, a majority of the justices seems determined to limit the number of constitutionally disproportionate sentences of imprisonment to an infinitesimal few.¹⁶¹ Interpreted thusly, the Cruel and Unusual Punishment

153. *Id.* at 47 (Breyer, J., dissenting).

154. *Id.* at 32-36 (Stevens, J., dissenting). Justice Souter, who had joined the concurrence in *Harmelin*, concurred in Stevens’ dissent, thus apparently rejecting his previous position. *Id.*

155. *Id.* at 36 (Breyer, J., dissenting).

156. *Id.* at 31 (Scalia, J., concurring in the judgment); *id.* at 32 (Thomas, J., concurring in the judgment). Chief Justice Rehnquist, who had embraced this position in *Harmelin*, despite its inconsistency with what he had written in *Rummel*, switched positions yet again, voting in *Ewing* with those who saw a proportionality principle in the Eighth Amendment, but found it satisfied by Ewing’s sentence. Compare *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (plurality opinion) with *Ewing v. California*, 538 U.S. 11 (2003) (plurality opinion).

157. 538 U.S. at 23-24 (plurality opinion) (“The proportionality principles in our cases distilled in Justice Kennedy’s concurrence [in *Harmelin*] guide our application of the Eighth Amendment . . .”).

158. *Id.* at 29.

159. *Id.* at 30 (quoting *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment)).

160. *Id.* at 42 (Breyer, J., dissenting).

161. Some of those few in the post-*Ewing* era include *Ramirez v. Castro*, 365 F.3d 755 (9th Cir. 2004) (California three-strike sentence of 25 years to life for stealing a \$199 VCR after two previous shoplifting convictions held cruel and unusual), *Banyard v. Duncan*, 342 F. Supp. 2d 865 (C.D. Cal. 2004) (California three-strikes sentence of 25 years to life for possession of less than a gram of rock cocaine held cruel and unusual), *State v. Davis*, 79 P.3d 64 (Ariz. 2003) (sentence of 52 years without possibility of parole held cruel and unusual for four counts of sexual misconduct with a child). But one wonders whether any of these decisions would have survived Supreme Court review.

Clause can have no demonstrable limiting effect on the rising tide of imprisonment.

To their credit, the crucial bloc of justices in *Ewing* recognizes that their decision may produce unacceptable results,¹⁶² but they say this complaint is more “appropriately directed at the legislature, which has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme. We do not sit as a ‘superlegislature’ to second-guess these policy choices.”¹⁶³ Once again judicial unwillingness to intrude on the prerogatives of the legislature—that is, the notion of judicial restraint¹⁶⁴—prevents the Court from imposing any meaningful restriction on America’s race to incarcerate. As with *Powell v. Texas* and in its series of opinions dealing with burdens of persuasion and jury fact-finding, the Court, in applying the proportionality principle, fails to deploy a constitutional protection that might have reduced America’s prison population.

IV.

In the summer of 2003 in an address to the American Bar Association, Justice Anthony M. Kennedy ringingly deplored his country’s incarceration binge. After canvassing statistics on the extent and cost of imprisoning over two million men and women, Justice Kennedy bluntly concluded that “[o]ur resources are misspent, our punishments too severe, our sentences too long.”¹⁶⁵ He asserted that “[t]he Federal Sentencing Guidelines should be revised downward,” and asked the association to recommend that Congress “repeal federal mandatory minimums.”¹⁶⁶ His peroration on the

162. *Ewing v. California*, 538 U.S. at 27 (plurality opinion) (“To be sure, California’s three strikes law has sparked controversy. Critics have doubted the law’s wisdom, cost-efficiency, and effectiveness in reaching its goals.”).

163. *Id.* at 28.

164. *Id.* at 24 (“[O]ur tradition of deferring to state legislatures in making and implementing such important policy decisions is longstanding.”).

165. Anthony M. Kennedy, Assoc. Justice, Supreme Court of the United States, Speech at the American Bar Association Annual Meeting, San Francisco (Aug. 9, 2003), available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

166. *Id.* Justice Kennedy was particularly critical of mandatory minimum sentencing:

I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust.

Consider this case: A young man with no previous serious offense is stopped on the George Washington Memorial Parkway near Washington D. C. by United States Park Police. He is stopped for not wearing a seatbelt. A search of the car follows and leads to the discovery of just over 5 grams of crack cocaine in the trunk. The young man is indicted in federal court. He faces a mandatory minimum

sentencing issues he raised was particularly memorable: “A decent and free society, founded in respect for the individual, ought not to run a system with a sign at the entrance for inmates saying, ‘Abandon Hope, All Ye Who Enter Here.’”¹⁶⁷

Kennedy’s speech created quite a splash and led the ABA to form the “Justice Kennedy Commission,” which subsequently recommended major reforms in the nation’s approach to sentencing, along the lines he had suggested.¹⁶⁸ While the Justice deserves praise for spurring the development of these reforms, one could ask what else he might have done to limit America’s prison boom—recalling that he wrote the plurality opinion in *Harris v. United States*,¹⁶⁹ joined the five-justice majority that emasculated the constitutional rule adopted in *Blakely* and *Booker*,¹⁷⁰ authored the crucial concurrence upholding the sentence in *Harmelin*,¹⁷¹ and joined the similarly crucial plurality opinion in *Ewing v. California*.¹⁷² So Kennedy has had several occasions to right some of the sentencing wrongs against which he inveighed, each of which he forwent.

In his address to the bar association, Justice Kennedy implied a response to this criticism, devoting a paragraph to the contention, “It is a grave mistake to retain a policy just because a court finds it constitutional. Courts may conclude the legislature is permitted to choose long sentences, but that does not mean long sentences are wise or just.”¹⁷³ This distinction between legislative and judicial action invokes once again the notion of judicial restraint: while Citizen Kennedy disapproves of certain legislation, Justice

sentence of five years. If he had taken an exit and left the federal road, his sentence likely would have been measured in terms of months, not years.

Id. He also noted how mandatory minimums shift sentencing discretion from the judge to the prosecutor. *Id.*; see *supra* text accompanying note 96.

167. *Id.* (quoting, rather loosely, Dante’s *Inferno*, canto III, line 7). Kennedy also advocated greater use of the pardon power at both the federal and state levels and more emphasis on rehabilitation of the prison population. *Id.*

168. See generally Margaret Colgate Love, *The American Way of Punishment: ABA Justice Kennedy Commission Recommends Sweeping Changes*, CRIM. JUST., Winter 2005, at 32. The work of the Kennedy Commission will be carried forward by the ABA Commission on Effective Criminal Sanctions. See Am. Bar Ass’n, ABA Comm’n on Effective Criminal Sanctions, <http://www.abanet.org/dch/committee.cfm?com=CR209800> (last visited Mar. 14, 2006).

169. See *supra* text accompanying notes 89-93.

170. See *supra* text accompanying notes 108-21.

171. See *supra* text accompanying notes 139-49.

172. See *supra* text accompanying notes 156-64.

173. Kennedy, *supra* note 165. “Few misconceptions about government are more mischievous than the idea that a policy is sound simply because a court finds it permissible. A court decision does not excuse the political branches or the public from the responsibility for unjust laws.” *Id.*

Kennedy will not, because of a need to defer to the choices of the legislature.

But no judge always defers to the legislature¹⁷⁴—certainly not Justice Kennedy, as his opinions for the Court in *Lawrence v. Texas*¹⁷⁵ and *Roper v. Simmons*¹⁷⁶ show. The question, rather, is when restraint is appropriately overborne by the need to act.¹⁷⁷ Much ink has been spilled on this fundamental question about judicial review,¹⁷⁸ but the reality seems to be as Barry Friedman describes it: “Theories of judicial review must accept and find a role for a certain amount of ‘value-voting’ because that is what is going to happen.”¹⁷⁹ Contrary to Justice Kennedy’s implicit self-justification, the values reflected in his address to the American Bar Association have simply been insufficiently important to motivate him to put them into action. He has, of course, not been alone in this failing, as the previous pages demonstrate. But one hopes that at some point—when we get to 2,500,000 in prison, perhaps? or maybe at three million?—he and enough of his colleagues will be willing to transform their fine sentiments into meaningful judicial action.

174. Friedman, *supra* note 9, at 308 (footnote omitted): “[U]rging restraint tells courts little of what they should do. Taken to its extreme . . . restraint becomes a prescription for judicial passivity. Judicial review implies that courts do something . . .” See generally THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* (2004).

175. 539 U.S. 558 (2003) (invalidating Texas homosexual sodomy statute).

176. 543 U.S. 551 (2005) (invalidating Missouri statute allowing capital punishment of juveniles).

177. See generally Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401 (2001). Cf. Michael Kinsley, *What’s Too Conservative?*, WASH. POST, Nov. 4, 2005, at A23, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/03/AR2005110301739.html> (“Restraint isn’t always good, and activism isn’t always bad. Judicial power is like government spending: People hate it in the abstract but love it in the particular.”).

178. See generally Friedman, *supra* note 9, at 257-62 (discussing “normative” theories of judicial review and citing some of normativity’s leading exponents).

179. *Id.* at 332. See *id.* at 334 (“Warts and all, this is . . . the system of judicial review that actually exists.”). See also Richard A. Posner, *Foreword: A Political Court*, 119 HARV. L. REV. 31 (2005).

