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SALIL DUDANI

Unconstitutional Incarceration: Applying Strict Scrutiny to Criminal Sentences

ABSTRACT. The deprivation of a fundamental right triggers strict scrutiny, and freedom from physical restraint is a fundamental right. Indeed, the right to be free from physical restraint lies at the very core of the liberty protected by the Due Process Clause. In the contexts of pretrial detention and civil commitment, courts hold that due process prohibits unnecessary incarceration and requires the government to prove the necessity of incarceration in each individual case. Without explanation, courts do not apply these same principles to criminal sentences, which just as surely infringe on physical liberty. This Note argues that they should: there is no good reason to exempt sentences of confinement from the fundamental due-process right to freedom from physical restraint. If the government cannot prove that a criminal sentence is necessary to achieve a compelling state interest, the sentence is unconstitutional, even when it is purportedly required by a statute establishing a "mandatory minimum sentence" for the crime of conviction. The Note discusses how courts should implement this scrutiny and suggests that state courts should lead the way in doing so.

AUTHOR. Yale Law School, J.D. 2019; Trial Attorney, Federal Defenders of San Diego. For their invaluable feedback, I am indebted to Sebastian Brady, Stephen Bright, Eric Fish, Miriam Gohara, Katie Hurrelbrink, Alec Karakatsanis, Gabe Newland, Cody Poplin, Kelley Schiffman, Christopher Tutunjian, Max Schoening, and Matt Wasserman, and the editors of the *Yale Law Journal*, particularly Rosa Hayes, Briana Clark, Peter Kallis, Josh Blecher-Cohen, and Ela Leshem. I owe special thanks to Alec; his ideas inspired this Note and his support has been indispensable.

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INTRODUCTION

At the age of fifteen, a doctor prescribed Paul Houser hydrocodone for a hurt back, launching a lifetime of addiction.[1] Three decades later, police arrested him for buying batteries and cold medicine—ingredients for methamphetamine—from a grocery store. Because of his two prior drug convictions, he faced a mandatory sentence of sixty years of prison with no possibility of parole. It did not matter whether the sentencing court believed that sixty years of confinement furthered the aims of punishment.[2] Houser was forty-four years old when the judge imposed the sentence in 2007. He will be dead on his release date in 2067, and his grandson will be fifty-eight years old.[3]

As far as the federal courts can see, this sentence does not offend the Constitution. In fact, according to the U.S. Supreme Court, the Constitution has almost nothing to say about mass incarceration.[4] The Court has upheld as constitutional a life sentence for stealing $120.75;[5] a life sentence without the possibility of parole for possessing cocaine;[6] a forty-year sentence for selling marijuana;[7] a sentence of twenty-five years to life for stealing three golf clubs;[8] and two consecutive sentences of twenty-five years to life for stealing videotapes worth $150.[9] It has held an adult's prison sentence cruel and unusual just once,[10] only to disavow

1. *Paul Houser: A Sentence That's "Just Not Right,"* FAMM, https://famm.org/stories/paul-houser-a-sentence-thats-just-not-right [https://perma.cc/Y3ZL-U56M].
2. Mallory Simon & Sara Sidner, *The Judge Who Says He's Part of the Gravest Injustice in America*, CNN (June 3, 2017, 7:52 AM ET), https://www.cnn.com/2017/06/02/politics/mandatory-minimum-sentencing-sessions [https://perma.cc/86F6-ALDY].
3. FAMM, *supra* note 1 ("Kyler visits his Paw Paw when he can and they talk about hunting and fishing . . . . [Kyler] knows it's not right.").
4. More precisely, the Court does not take the Constitution to say much of anything *substantive* about sentences of criminal incarceration. Instead, the constitutional jurisprudence largely concerns preconviction procedural protections. *See infra* Section III.B.2 (discussing the inadequacy of procedure).
5. Rummel v. Estelle, 445 U.S. 263 (1980).
6. Harmelin v. Michigan, 501 U.S. 957 (1991).
7. Hutto v. Davis, 454 U.S. 370 (1982). Davis received two consecutive terms of twenty years' imprisonment for possession of nine ounces of marijuana with intent to distribute and for distribution of the same. The prosecutor in Davis's case later called that sentence "grossly unjust." *Id.* at 385 n.3 (Brennan, J., dissenting).
8. Ewing v. California, 538 U.S. 11 (2003).
9. Lockyer v. Andrade, 538 U.S. 63 (2003).
10. Solem v. Helm, 463 U.S. 277 (1983) (invalidating a life-without-parole sentence for a seventh nonviolent felony—passing a worthless check).

this holding in short order[11] on the theory that under the Eighth Amendment "the length of the sentence imposed is purely a matter of legislative prerogative."[12] To ensure "proportionality," the Supreme Court has held that the Constitution requires some meaningful scrutiny of every form of punishment—including monetary fines,[13] death sentences,[14] and even civil punitive damages[15]—*except for incarceration*.[16] Unlike with dollars, the Court perceives no "constitutional distinction between one term of years and a shorter or longer term of years."[17]

At any given time, 2.3 million people, either awaiting trial or punishment or serving a sentence, are confined to jail cells in the United States.[18] This population now exceeds the population of fourteen states.[19] One of every nine people

11. Harmelin v. Michigan, 501 U.S. 957, 1018 (1991) (White, J., dissenting) (arguing that the *Harmelin* ruling "eviscerate[s]" *Solem*).

12. *Id.* at 962 (majority opinion) (quoting Rummel v. Estelle, 445 U.S. 263, 274 (1980)).

13. United States v. Bajakajian, 524 U.S. 321, 336 (1998) (holding that monetary fines are reviewed for "gross disproportionality" under the Eighth Amendment).

14. Capital sentences have been overturned on several occasions under this doctrine. *See, e.g.*, Hall v. Florida, 572 U.S. 701 (2014); Kennedy v. Louisiana, 554 U.S. 407 (2008); Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002); Coker v. Georgia, 433 U.S. 584 (1977).

15. Under a substantive-due-process theory, the Court has reduced punitive damages awarded against large corporations as "grossly excessive" more than once. *See, e.g.*, Philip Morris USA v. Williams, 549 U.S. 346 (2007); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996); Honda Motor Co. v. Oberg, 512 U.S. 415 (1994).

16. The Court has expressly stated that "successful challenges to the proportionality of particular sentences should be exceedingly rare," Ewing v. California, 538 U.S. 11, 21 (2003) (quoting Rummel v. Estelle, 445 U.S. 263, 272 (1980)), although prison sentences are formally subject to Eighth Amendment review for "gross disproportionality," *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring). The Court has assured us that while it does not consider a life sentence for stealing $120.75 constitutionally offensive, it *might* view a life sentence for a parking violation as grossly disproportional. *Rummel*, 445 U.S. at 274 n.11.

17. Hutto v. Davis, 454 U.S. 370, 373 (1982) (quoting *Rummel*, 445 U.S. at 275). *Cf.* Judith Resnik, *(Un)constitutional Punishments: Eighth Amendment Silos, Penological Purposes, and People's "Ruin,"* 129 YALE L.J.F. 365, 392 (2020) (noting that "some civil and criminal sanctions remain in silos, even as they have much in common analytically and experientially").

18. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON POL'Y INITIATIVE (Mar. 19, 2019), https://www.prisonpolicy.org/reports/pie2019.html [https://perma.cc/4Z6Y-XDHX].

19. United States Census Bureau, *2018 National and State Population Estimates: Table 1* (Dec. 19, 2018), https://www.census.gov/newsroom/press-kits/2018/pop-estimates-national-state.html [https://perma.cc/QH2M-L7JQ].

in prison is sentenced to die there.[20] One in seven is either sentenced to die in prison or—like Houser—serving a sentence of fifty years or longer.[21] The Court's Constitution is indifferent.

Legal challenges to this state of affairs have relied on the Eighth Amendment's prohibition on cruel and unusual punishments.[22] But a different constitutional problem has gone largely unnoticed, even by the Court itself: the Court's approach to sentencing breaks from how it generally treats deprivations of fundamental liberties such as physical freedom. Courts subject *noncriminal* ("civil" or "regulatory") confinement, such as the civil commitment of people suffering psychiatric disorders or the pretrial detention of criminal defendants, to exacting oversight.[23] A few *days* of civil confinement are constitutionally intolerable, unless the government can prove that confinement is necessary to meet compelling government interests.[24] Legislatures cannot override this right to judicial scrutiny.[25] Courts have concluded that the gravity of an individual's inter-

20. *Still Life: America's Increasing Use of Life and Long-Term Sentences*, SENT'G PROJECT 5 (2017), https://www.sentencingproject.org/wp-content/uploads/2017/05/Still-Life.pdf [https://perma.cc/68B4-3G3W].

21. *Id.*

22. *See, e.g.*, Ewing v. California, 538 U.S. 11, 33-34 (2003) (Stevens, J., dissenting) (citing BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (1996)); James J. Brennan, *The Supreme Court's Excessive Deference to Legislative Bodies Under Eighth Amendment Sentencing Review*, 94 J. CRIM. L. & CRIMINOLOGY 551 (2004); Erwin Chemerinsky, *Life in Prison for Shoplifting: Cruel and Unusual Punishment*, 31 HUM. RTS. 11 (2004); Erwin Chemerinsky, *Cruel and Unusual: The Story of Leandro Andrade*, 52 DRAKE L. REV. 1 (2003); Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39 (2008); Rachel A. Van Cleave, "*Death Is Different," Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages—Shifting Constitutional Paradigms for Assessing Proportionality*, 12 S. CAL. INTERDISC. L.J. 217 (2003).

23. *See infra* Section I.B-C; *see also* Addington v. Texas, 441 U.S. 418, 427 (1979) (holding that due process requires the government to prove that an individual's civil commitment is warranted by clear and convincing evidence because of the "weight and gravity" of that individual's liberty). For the proposition that pretrial detention is regulatory, not punitive, see, for example, *Bell v. Wolfish*, 441 U.S. 520, 536-37 (1979). An exceptional case is immigration detention; courts relax their oversight to the extent that they accept that "in the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens." Demore v. Kim, 538 U.S. 510, 522 (citing Mathews v. Diaz, 426 U.S. 67, 79-80 (1976)).

24. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 747 (1987) (upholding a federal pretrial detention policy in part because it provided "prompt" individualized hearings).

25. *See, e.g.*, Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 784-85 (9th Cir. 2014) (noting that the Constitution generally requires "case-by-case determinations of the need for pretrial detention"); State v. Wein, 417 P.3d 787, 789 (Ariz. 2018) (invalidating a policy requiring the pretrial

est in physical liberty demands no less. Yet a *lifetime* of confinement in an institution called a "prison" requires no such justification. So long as the government is punishing a person convicted of a crime, the right against unwarranted confinement is suspended entirely.[26]

The Supreme Court has never explained why. This Note argues that there is no good explanation: criminal confinement should not be exempted from the fundamental due-process right against unwarranted confinement. A criminal conviction cannot justifiably be viewed as extinguishing a person's right against unwarranted confinement; the commission of a crime may warrant confinement of some length, but it does not erase an individual's right against *unwarranted* confinement. Thus, criminal confinement that is not necessary to serve a compelling government interest violates due process.

In its cases on pretrial detention and civil commitment, the Supreme Court has defined the right burdened by regulatory confinement broadly, alternately terming it "freedom from physical restraint"[27] or from "commitment,"[28] an "individual's liberty interest,"[29] the right to "freedom from bodily constraint,"[30] and the "constitutional right to freedom."[31] This right is not absolute, since both civil commitment and pretrial detention are constitutional under appropriate circumstances. This Note thus calls the constitutional principle "the right against unwarranted confinement."[32]

The right against unwarranted confinement first requires that a person's confinement be justified by compelling purposes. The Supreme Court has determined that containing dangerousness caused by mental illness warrants civil commitment and that containing flight risk or dangerousness warrants pretrial detention.[33] In the context of criminal sentences of confinement, this Note will

detention of defendants charged with sexual assault because courts are constitutionally required to "make an individualized bail determination before ordering pretrial detention").

26. United States v. Chapman, 500 U.S. 453, 464 (1991).

27. Reno v. Flores, 507 U.S. 292, 302 (1993); Foucha v. Louisiana, 504 U.S. 71, 86 (1992).

28. *Foucha*, 504 U.S. at 80.

29. *Salerno*, 481 U.S. at 748.

30. *Foucha*, 504 U.S. at 116 (Thomas, J., dissenting).

31. O'Connor v. Donaldson, 422 U.S. 563, 576 (1975).

32. This name is analytically equivalent to those used by the Court but specifies that the right concerns freedom *from confinement* and makes clear that it does not proscribe *all* confinement. Rather, the right only guards against *unwarranted* confinement: confinement that a court would deem unlawful upon applying due-process scrutiny.

33. *Compare Salerno*, 481 U.S. at 746-47 (authorizing pretrial detention of a dangerous person), *with Donaldson*, 422 U.S. 563 (refusing to authorize civil commitment of a nondangerous per-

assume that any one of the traditional legal justifications of punishment—incapacitation, deterrence, and retribution—is adequately compelling to warrant confinement under due process.[34] The right against unwarranted confinement further requires that confinement be "narrowly focused"[35]: it must be *necessary*—and must *last no longer than necessary*—to achieve its purposes.[36] Therefore, where alternatives to confinement would suffice to meet the government's interests, confinement is unconstitutional. This Note argues that due process imposes this same rule of necessity on criminal sentences of confinement.

Whether this simple argument succeeds is of enormous significance. Where the right against unwarranted confinement applies, it entitles individuals to a judicial determination that confinement is necessary—that there is no alternative way of achieving the constitutionally adequate purposes of confinement. Nothing excuses courts from heeding this constitutional right when imposing criminal confinement. Two important consequences follow. First, the right renders minimum sentences presumptively unconstitutional. Courts cannot constitutionally condemn people like Houser to die in prison automatically, without regard to whether it is necessary in each case. Second, in *all* sentencing—whether mandatory (that is, mandated by a legislature) or discretionary (that is, determined by a judge)—courts may not impose imprisonment to the extent that an alternative punishment would meet the lawful purposes of punishment.

This Note proceeds in three parts. Part I summarizes the due-process case law recognizing a right against unwarranted confinement, focusing on civil commitment and pretrial detention.

Part II considers the upshot for criminal confinement. It discusses the Court's unexplained refusal to apply substantive-due-process scrutiny to criminal sentences in *Chapman v. United States*[37] and explains how courts *should* scrutinize criminal confinement to comply with due process. Congress has long required federal sentencing courts to impose prison sentences "not greater than

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son), *Foucha*, 504 U.S. at 80 (refusing to authorize civil commitment of a person who recovered from mental illness), *and* Kansas v. Crane, 534 U.S. 407 (2002) (refusing to authorize commitment of a person determined by the Court to not be mentally ill). Preventing the defendant from obstructing justice is presumably an additional compelling basis for pretrial detention, *see, e.g.*, 8 U.S.C. § 3142(f)(2)(B), but for simplicity I will refer to flight risk and dangerousness only.

34. In fact, there are substantial questions about the adequacy of retribution. *See infra* Section II.C.1.a. Rehabilitation is left off the list because it is usually not a justification for incarceration. *See infra* note 138 and accompanying text.

35. *Salerno*, 481 U.S. at 750; *Foucha*, 504 U.S. at 81, 83 (citing *Salerno*, 481 U.S. at 750).

36. *See infra* Part I.

37. 500 U.S. 453 (1991).

necessary" to meet the aims of sentencing[38]—but this is a statutory rather than a constitutional rule of necessity, and it applies to federal courts only. To constitutionalize this rule, courts should draw on existing "proportionality" doctrines to gauge the extent to which a given order of confinement is warranted for the sake of retribution. But to faithfully implement the due-process rule of necessity, they should scrutinize confinement's retributive value with less deference to the legislature than proportionality doctrines recommend. As for the nonretributive "utilitarian" aims of punishment—incapacitation and deterrence—sentencing courts must only impose sentences based on empirically defensible premises, as modeled in the case law on pretrial detention. In particular, courts must not indulge the theory of general deterrence without empirical proof. Under this scrutiny, current mandatory minimum sentences would be impermissible, and sentences would be reviewed for compliance with due process de novo on appeal.

Part III addresses likely objections to recognizing the right against unwarranted confinement in the context of criminal confinement, none of which succeeds in distinguishing criminal confinement as unworthy of due-process scrutiny. First, one might think there are special reasons to defer to legislative judgments regarding punishment: institutional competence, democratic legitimacy, and historical practice. But judicial incompetence is an unpersuasive ground on which to justify a special exclusion of judicial review, because courts have unique *expertise* in criminal sentencing. Legislatures' special democratic legitimacy in the area of punishment is also an unpersuasive ground, because majoritarian policy-making has left our criminal system bloated, brutal, racially biased, and class-biased. As for the arguable historical practice of deferring to legislatures, the right against unwarranted confinement in the civil context is rooted in the inherent importance of physical freedom, not in any historical practice; physical freedom is equally important in the criminal context.

Second, people who have been convicted of crimes might be viewed as having forfeited their right against unwarranted confinement through their criminal acts. But the bare fact of a conviction does not constitutionally warrant a particular punishment. Instead, a criminal conviction empowers the state to confine a person only to the extent that her case warrants confinement.

Third, the fact that people have unique *procedural* protections in the criminal process does not diminish what their *substantive* rights regarding their sentence should be. These unique procedural protections are irrelevant because they primarily relate to trial, not sentencing. In any event, procedural and substantive protections vindicate different values. No amount of pretrial procedure would have spared Houser from his sixty-year drug sentence.

38. 18 U.S.C. § 3553(a) (2018).

Fourth, the Eighth Amendment's Cruel and Unusual Punishments Clause does not shut the door on substantive due process. The Supreme Court has repeatedly explained that different constitutional provisions may create overlapping rights, and the Due Process Clause and the Eighth Amendment promote different constitutional values. Substantive due process prohibits all unwarranted infringements on liberty, usual and unusual alike.

Finally, constitutionalizing sentencing challenges of the kind that already occur pursuant to statutory protections is unlikely to overwhelm judicial resources. Regardless, the administrative inconvenience of asking whether a sentence is constitutionally warranted is not an appropriate basis on which to let people endure years in prison.

The Note concludes by suggesting that state courts can and should lead the way in applying due-process scrutiny to sentences of confinement, offering Massachusetts as an example.

I. THE RIGHT AGAINST UNWARRANTED CONFINEMENT

Under existing case law, due process prohibits civil confinement except to the extent that it is necessary to achieve its lawful purposes. This rule of necessity is rooted in two areas of law. First, in the Supreme Court's "fundamental rights" jurisprudence, due process requires that deprivations of any fundamental liberty satisfy the rule of necessity.[39] Since the Court has held that the right against unwarranted confinement is "fundamental," the rule of necessity follows. The Court itself has strongly implied — and several state courts have expressly held — as much.[40]

Fundamental-rights law aside, the Court's reasoning in its confinement cases suggests that a rule of necessity is at work. In its leading case on pretrial detention, the Court emphasized that a key feature of the challenged statute that made it constitutional was its requirement that detention be necessary to meet the government's interests.[41] The Court has likewise held that the availability of alternatives undermines the government's power to civilly commit people.[42] These

39. The case law traditionally refers to this requirement as "narrow tailoring." Reno v. Flores, 507 U.S. 292, 302 (1993).

40. *See infra* notes 60-66 and accompanying text.

41. *Flores*, 507 U.S. at 301-302 (citing *Salerno* as part of its "line of cases which interprets . . . 'due process of law' to . . . forbid[] the government [from] infring[ing] certain 'fundamental' liberty interests . . . unless the infringement is narrowly tailored to serve a compelling state interest"); United States v. Salerno, 481 U.S. 739, 747 (1987).

42. O'Connor v. Donaldson, 422 U.S. 563, 576 (1975).

cases further suggest that confinement must be imposed on an individualized basis. Applying the law of confinement to criminal sentencing would therefore mean forbidding sentences of imprisonment where less restrictive responses would meet the aims of punishment in the case at hand.

A. Freedom from Confinement as a Fundamental Right

Under the Due Process Clause of the U.S. Constitution, the government may not "deprive any person of life, *liberty*, or property, without due process of law."[43] Courts have interpreted this guarantee as "forbid[ding] the government to infringe certain 'fundamental' liberty interests *at all* . . . unless the infringement is narrowly tailored to serve a compelling state interest."[44] Thus, courts only permit infringements of fundamental liberties upon robust justification.[45]

"Fundamental" due-process liberties are those "fundamental to our scheme of ordered liberty" or "deeply rooted in this Nation's history and tradition."[46] They include liberties expressly protected by the Bill of Rights,[47] such as owning a gun[48] and expressing one's views,[49] and certain "intimate" personal rights such as marrying the person one chooses,[50] associating with family members,[51] and

43. U.S. CONST. amend. XIV, § 1 (emphasis added) (requiring state governments to respect due-process protections); *see also id.* amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .").

44. *Flores*, 507 U.S. at 302 (first citing Collins v. Harker Heights, 503 U.S. 115, 125 (1992); then citing United States v. Salerno, 481 U.S. 739, 746 (1987) (recognizing a pretrial defendant's fundamental right to physical liberty); and then citing Bowers v. Hardwick, 478 U.S. 186, 191 (1986)).

45. Equal protection imposes this same constraint on government action. *See, e.g.*, Chapman v. United States, 500 U.S. 453, 465 (1991) ("In this context . . . an argument based on equal protection essentially duplicates an argument based on due process." (citing Jones v. United States, 463 U.S. 354, 362 n.10 (1983))).

46. McDonald v. City of Chicago, 561 U.S. 742, 767 (2010) (emphasis removed) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

47. Obergefell v. Hodges, 135 S. Ct. 2584, 2597 (2015).

48. *McDonald*, 561 U.S. at 767-78.

49. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638-39 (1943).

50. *Obergefell*, 135 S. Ct. at 2597.

51. Moore v. City of East Cleveland, 431 U.S. 494, 505-06 (1977).

accessing contraception[52] and abortion.[53] Certainly, physical liberty—the plainest meaning of "liberty"—is also a fundamental due-process liberty.[54] The Supreme Court has many times confirmed that freedom from physical restraint lies at the very "core" of the liberty that the Due Process Clause protects.[55]

Under the principle of "strict scrutiny," courts invalidate such infringements unless they are "narrowly tailored" to promote a "compelling state interest."[56] Since this Note assumes that any of the traditional legal justifications of punishment are "compelling," the urgent question is what "narrow tailoring" means. An infringement of a fundamental right is narrowly tailored, and thus constitutional, only if it is "necessary to achieve the articulated state goal"[57]—or, as the Court has also put it, if the infringement is the "least restrictive alternative" for achieving the relevant goal.[58] If any less restrictive alternative exists, the infringement is unlawful. In short, "narrowly tailored" means "necessary."[59] These fundamental-rights principles unequivocally imply that infringements on bodily liberty demand strict scrutiny and thus that confinement is only lawful when necessary. Fundamentality triggers strict scrutiny, and physical liberty has been deemed fundamental; thus, its deprivation should be subject to strict scrutiny.

The Court has come close to stating this explicitly. For example, when discussing "freedom from physical restraint" in *Reno v. Flores*, the Court cited bodily liberty as an example of a "fundamental" right triggering the "narrowly tailored to serve a compelling state interest" test.[60] One would think, then, that strict

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52. Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

53. Roe v. Wade, 410 U.S. 113, 155 (1973).

54. United States v. Salerno, 481 U.S. 739, 746 (1987).

55. Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (citing Youngberg v. Romeo, 457 U.S. 307, 316 (1982)) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."); *accord* Turner v. Rogers, 564 U.S. 431, 445 (2011); Zadvydas v. Davis, 533 U.S. 678, 690 (2001); Kansas v. Hendricks, 521 U.S. 346, 356 (1997).

56. *See, e.g.*, Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268-69 (2007).

57. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 632 (1969); *accord* Republican Party of Minn. v. White, 536 U.S. 765, 775 (2002) (quoting Brown v. Hartlage, 456 U.S. 45, 54 (1982)).

58. Fallon, *supra* note 56, at 1326 & n.324.

59. Apart from necessity, the Court also refers to "overbreadth" (a notion similar, but not necessarily identical, to necessity) and "underinclusiveness" as measures of narrow tailoring, but the Supreme Court cases on confinement do not appear to apply them. *See id.* at 1328 (explaining that the prohibition of "overinclusive" regulations as not narrowly tailored "probably only repeats the demand that any permissible regulation of protected rights must be necessary or the least restrictive alternative").

60. Reno v. Flores, 507 U.S. 292, 302 (1993) (citing United States v. Salerno, 481 U.S. 739, 746 (1987)).

scrutiny applies to deprivations of bodily liberty under the Court's precedents. Justices Thomas, Scalia, and Rehnquist expressly concluded as much,[61] as have the Ninth Circuit and several state courts.[62] Justices O'Connor and Souter endorsed a very similar standard.[63]

Yet the Court has not expressly held that "strict scrutiny" applies to confinement. It has further confused matters by replacing the term "narrowly tailored" with "narrowly" or "sharply" "focused" in its cases on confinement.[64] Ultimately, however, applying a "strict scrutiny"/"narrow tailoring" label is less important than applying the correct substantive standard. It is necessary, then, to examine the substantive due-process case law on confinement and infer the relevant principles. The following two sections analyze the case law on psychiatric civil commitment and pretrial detention, and conclude that these cases support the rule that confinement must be necessary and proven necessary on an individualized basis.

B. Civil Commitment

Due process permits the government to confine a person via "civil commitment," without initiating criminal proceedings, when it can prove by clear and convincing evidence that the person poses an unmanageable danger because of mental illness.[65] In analyzing civil commitment's constitutional prerequisites, the Court has not always announced "precise bright-line rules."[66] Even so, these cases reveal important principles about the right against unwarranted confinement. First, confinement must be "sharply focused" on and "carefully limited" to the achievement of the constitutional aims of confinement – and is prohibited

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61. Foucha v. Louisiana, 504 U.S. 71, 117 (1992) (Thomas, J., dissenting) (suggesting, in a civil-commitment case, that "the Court invalidates the Louisiana scheme on the ground that it violates some general substantive due process right to 'freedom from bodily restraint' that triggers strict scrutiny").

62. Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 780 (9th Cir. 2014) (en banc); *In re* Humphrey, 228 Cal. Rptr. 3d 513, 525-26 (Ct. App. 2018); Eric S. Janus, *Beyond Strict Scrutiny: Forbidden Purpose and the "Civil Commitment" Power*, 21 NEW CRIM. L. REV. 345, 364 n.77 (2018) (citing cases from Minnesota, Missouri, Washington, and Wisconsin).

63. *Flores*, 507 U.S. at 316 (O'Connor, J., concurring) ("The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny.").

64. *Foucha*, 504 U.S. at 81 ("Unlike the sharply focused scheme at issue in *Salerno*, the Louisiana scheme of confinement is not carefully limited.").

65. Addington v. Texas, 441 U.S. 418, 427 (1979).

66. Kansas v. Crane, 534 U.S. 407, 412-13 (2002). By contrast, several state courts have followed the due-process fundamental-rights principles to their logical conclusion and have straightforwardly held that civil-commitment policies are subject to strict scrutiny. *See supra* note 62.

where a less restrictive alternative would adequately meet them. Second, a court must render an individualized determination of necessity. When it does so, it must conduct its own inquiry, not rely on generalized legislative determinations.

The Supreme Court first recognized a substantive-due-process right against unwarranted civil commitment in *O'Connor v. Donaldson*.[67] In *Donaldson*, the Supreme Court held that the government may civilly commit people experiencing mental illness only if they would present a danger to themselves or others at liberty. Absent dangerousness, the state lacks "a constitutionally adequate purpose" for confinement.[68] In view of an individual's "constitutional right to freedom,"[69] the Court held, "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."[70] The existence of an adequate alternative, the Court reasoned, undermined the government's constitutional authority to confine.

More than a decade after *Donaldson*, the Court addressed the other substantive requirement for civil commitment, "mental illness," as well as the necessity standard governing civil commitment. In *Foucha v. Louisiana*, the Court invalidated the confinement of a person who had been acquitted at a criminal trial on the basis of insanity but who the state conceded was no longer mentally ill.[71] *Donaldson* had held that proof of dangerousness was required, a requirement that the policy in *Foucha* satisfied.[72] But Louisiana's policy required that commitment automatically follow an insanity acquittal—without allowing the acquittee any opportunity to secure release upon a showing of sanity.[73] This policy violated due process because it required permanent civil commitment without regard to the presence or absence of mental illness.[74] This legislative scheme fell far short of the standard to which the Court held it: it had to be "carefully limited" and "sharply focused" on controlling danger caused by mental illness.[75]

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67. 422 U.S. 563 (1975).

68. *Id.* at 574. The State of Florida had confined Kenneth Donaldson, who suffered from paranoid schizophrenia, in a state hospital against his will for fifteen years—even though he "had posed no danger to others during his long confinement, or indeed at any point in his life." *Id.* at 568.

69. *Id.* at 576.

70. *Id.* The state statute at issue purported to authorize such detention. *Id.* at 574.

71. 504 U.S. 71, 76-77 n.4 (1992) (noting the state's concession).

72. *Id.* at 73.

73. *Id.*

74. *Id.* at 73, 78.

75. *Id.* at 81.

To satisfy this principle, must the government prove necessity in each individual case? Yes, with an exception that proves the rule. This exception concerns insanity acquittals. In *Jones v. United States*, the Court upheld a federal statute mandating the temporary confinement of people acquitted of criminal charges by reason of insanity in the District of Columbia.[76] Within fifty days of commitment, the government had to prove the individual's mental illness and dangerousness (with periodic review of confinement thereafter).[77] Thus, the statute permitted an initial several-week period of confinement on the basis of the jury's insanity acquittal alone. Because of two characteristics unique to insanity acquittals, the Court held that an insanity acquittal carries sufficient "evidentiary force" as to the suitability of confinement for this temporary period.[78] First, the risk of an erroneous deprivation of liberty is diminished: the insanity acquittee *himself* argues at trial that he has committed a crime on account of mental illness.[79] Second, the state has an interest against relitigating the defendant's mental illness, a resource-intensive determination requiring expert testimony.[80] The state is automatically empowered to confine a person who has committed a crime, but only temporarily, only if the person herself concedes that she suffered "insanity" causing the crime, and only if the contrary rule would be extraordinarily costly. The Court's careful justification of this narrow exception underscores that, under ordinary circumstances, confinement requires proof of necessity.

In rendering individualized determinations of necessity, courts must not defer to the generalized determinations of legislatures. Two cases out of Kansas illustrate this point. In 1994, the state passed the Sexually Violent Predator Act to facilitate long-term confinement for "extremely dangerous sexually violent predators."[81] In *Kansas v. Hendricks*, the Supreme Court held that a jury's determination that Hendricks "suffer[ed] from a mental abnormality" making him "likely to engage in . . . sexual violence" qualified as dangerousness caused by

76. 463 U.S. 354 (1983).

77. *Id.* at 357-58.

78. *Id.* at 366.

79. *Id.* at 367.

80. *Id.* at 366.

81. The Act defined a "sexually violent predator" as "any person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence." Kansas v. Hendricks, 521 U.S. 346, 350, 352 (1997) (quoting KAN. STAT. ANN. § 59-29a02(a) (1994)).

mental illness.[82] Five years later, in *Kansas v. Crane*, the Court held that due process required Kansas to make individualized determinations of "lack of control" in order to satisfy the "mental illness" prerequisite—even though the Kansas statute had specified no such requirement.[83] Neither *Hendricks* nor *Crane* relied on the legislature's findings that sexually violent predators pose unique dangers that make long-term confinement suitable;[84] in both cases, the Court gave no deference to the state's legislative judgment that the qualifying "mental abnormalities" warranted confinement for reasons of public safety. Instead, it determined for itself whether the substantive determination prescribed by the statute was sufficient to warrant confinement as a matter of due process. Due process required an adequate and individualized determination of necessity in each case, regardless of the legislature's preference to impose confinement without it.

C. Pretrial Detention: United States v. Salerno

The continuously developing law of pretrial detention[85] displays the same critical features as the case law on civil commitment. The foundational case, *United States v. Salerno*,[86] is premised on the inherent importance of physical liberty. *Salerno* suggests that confinement must be "carefully limited" and "narrowly focused"—in other words, necessary—and that individualized determinations, not legislative mandates, are required to comport with due process. The pretrial detention policy at issue passed constitutional muster because it conditioned confinement on an individualized determination that no less restrictive response would suffice.[87]

In *Salerno*, the Court upheld provisions of the federal Bail Reform Act of 1984 that authorize pretrial detention for dangerousness. The Act permits detention only when there is no less restrictive alternative that would reasonably assure appearance and public safety,[88] and detention on the basis of dangerousness is

82. *Id.* at 376 (quoting KAN. STAT. ANN. §§ 59-29a02 to -29a03 (1994)); *see also id.* at 346-48, 353-55 (emphasizing the same).

83. Kansas v. Crane, 534 U.S. 407, 407 (2002).

84. The Act was justified by legislative findings that these persons have a high "likelihood of engaging in repeat acts of predatory sexual violence," that "the prognosis for rehabilitating sexually violent predators in a prison setting is poor," and that "the treatment needs of this population are very long term." *Id.* at 351 (quoting KAN. STAT. ANN. § 59-29a01 (1994)).

85. *See* Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098 (2019).

86. 481 U.S. 739 (1987).

87. As discussed below, lower courts have applied *Salerno* to invalidate legislative attempts to require unnecessary pretrial detention. *See infra* Section II.C.1.b.i.

88. 18 U.S.C. § 3142(e)(1) (2018).

only authorized in certain "extremely serious" cases.[89] The *Salerno* Court explained that pretrial liberty is a "fundamental" right.[90] Writing for the majority, Chief Justice Rehnquist did not rely on historical practice to affirm the substantive-due-process right to be free from unwarranted pretrial confinement. Instead, he considered it obvious that some substantive right to physical liberty inheres in due process. After acknowledging the "compelling" government interest in "preventing crime,"[91] the Court simply stated, "On the other side of the scale, *of course*, is the individual's strong interest in liberty . . . . [T]his right may, in circumstances where the government's interest is sufficiently weighty, be subordinated to the greater needs of society."[92]

The Court then invoked civil commitment and other forms of confinement, reasoning that the Act's detention-for-dangerousness provisions "must be evaluated in precisely the same manner."[93] Next, the Court applied the "carefully limited"/"sharply focused" standard that it would later invoke in *Foucha*[94] and upheld the challenged provisions because of the robust individualized determinations prescribed by the Act.[95] The Act required the government to prove that no combination of pretrial release conditions could adequately contain the individual's dangerousness at a hearing with robust procedural protections, and the detention provisions applied only to "a specific category of extremely serious offenses."[96] The Court viewed the Act as "narrowly focuse[d] on a particularly acute problem in which the Government interests are overwhelming" because it was limited to the "narrow circumstances" "when the Government musters convincing proof that the [particular] arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community" that no response less restrictive than confinement can contain.[97]

The constitutional law of sentencing differs dramatically from that concerning civil commitment and pretrial detention. Prison sentences impose confinement as surely as civil commitment and pretrial detention and do so for uniquely long periods — yet the substantive-due-process jurisprudence is silent.

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89. *Salerno*, 481 U.S. at 750; *see also* 18 U.S.C. § 3142(f)(1) (demonstrating the same).

90. *Salerno*, 481 U.S. at 750.

91. *Id.* at 739.

92. *Id.* at 750-51 (emphasis added).

93. *Id.* at 748-49.

94. Foucha v. Louisiana, 504 U.S. 71, 81 (1992).

95. *Salerno*, 481 U.S. at 750-51; *Foucha*, 504 U.S. at 81.

96. *Salerno*, 481 U.S. at 750-52.

97. *Id.* at 750 (emphasis added).

II. DUE-PROCESS SCRUTINY OF CRIMINAL CONFINEMENT

Under the Constitution and by statute, pretrial detention and civil commitment may only be imposed when necessary.[98] Similarly, by statute, criminal sentences of confinement may only be imposed when necessary.[99] Against this legal background, one might expect the Constitution to require the same of criminal sentences of confinement. With minimal explanation, the Supreme Court has instead concluded that substantive due process imposes virtually no constraint on criminal confinement. Part II discusses this unexplained holding, reviews the two previous proposals for "strict scrutiny" of criminal confinement in the academic literature, and considers how courts must scrutinize criminal confinement under substantive-due-process principles.

In proposing the details of due-process scrutiny of criminal confinement, Part II assumes parity between civil and criminal confinement. The case for parity is straightforward: because sentences of confinement infringe on bodily liberty just as civil confinement does, under the constitutional principles reviewed in Part I, the right against unwarranted confinement applies. Part III will defend this premise at length. This Part will apply it.

A. Prison Sentences: Exempt Without Explanation

In 1984, Congress imposed a rule of necessity on federal sentences of confinement that is substantially identical to the limit on pretrial detention it instated that same year[100]: under 18 U.S.C. § 3553, federal sentencing courts must

98. *See* 8 U.S.C. § 3142 (2018); *supra* Section I.B. (discussing the constitutional case law on civil commitment); *supra* Section I.C (discussing the constitutional case law on pretrial detention); SAMSA, *Civil Commitment and the Mental Health Care Continuum: Historical Trends and Principles for Law and Practice* 12 (2019), https://www.samhsa.gov/sites/default/files/civil-commitment-continuum-of-care.pdf [https://perma.cc/YQ56-8F6V] (delineating that "most states require that commitment comport with the principle of the least restrictive means").

99. 8 U.S.C. § 3553(a) (2018); *see also* People v. Notey, 72 A.D.2d 279 (N.Y. App. Div. 1980) (forbidding unnecessary prison sentences as a matter of state statutory law).

100. Bail Reform Act of 1984, Pub. L. No. 98-473, § 203(a), 98 Stat. 1837, 1976-81. This provision has since been amended as 18 U.S.C. § 3142(e)(1) (2008).

impose prison sentences "no greater than necessary" to meet the aims of sentencing.[101] This statutory provision is sometimes called "the parsimony principle,"[102] and it reflects Congress's judgment that imprisonment should be a last resort.[103] One federal court recently explained the policy animating § 3553 as follows:

> The difference between ten and fifteen years may determine whether a parent sees his young child graduate from high school; the difference between ten and fifteen months may determine whether a son sees his sick parent before that parent passes away; the difference between probation and fifteen days may determine whether the defendant is able to maintain his employment and support his family. Thus, it is crucial that judges give careful consideration to every minute that is added to a defendant's sentence. Liberty is the norm; every moment of incarceration should be justified.[104]

This description of federal sentencing may be aspirational,[105] and because the statute provides for a deferential standard of review on appeal, perhaps federal sentencing courts are violating the rule of necessity without correction.[106] Even if so, the statutory principle remains unambiguous: just as the Constitution limits civil confinement to the minimum necessary, so does federal statute limit criminal sentences of confinement. But unlike the Constitution, the statute does not apply against the states, where the majority of criminal sentencing occurs.[107] Without explanation, the Supreme Court has asserted a constitutional rule permitting any minimally "rational" sentence of confinement, the virtual opposite of the rule of necessity.

Since recognizing a due-process right against confinement, the Supreme Court has ruled on the substantive-due-process limits on criminal confinement

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101. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212(a)(2), 98 Stat. 1837, 1989. This provision has since been amended as 18 U.S.C. § 3553(a) (2018).

102. *See, e.g.*, United States v. Chavez, 611 F.3d 1006, 1009, 1010 (9th Cir. 2010) (per curiam).

103. *See* STANDARDS FOR CRIMINAL JUSTICE SENTENCING, Standard 18–6.4(a) (AM. BAR ASS'N 3d ed. 1994) ("A sentencing court should prefer sanctions not involving total confinement in the absence of affirmative reasons to the contrary.").

104. United States v. Faison, No. GJH-19-27, 2020 WL 815699, at *1 (D. Md. Feb. 18, 2020).

105. *Id.* at 3 ("[I]f judges are not careful, a rote application of the [Sentencing] Guidelines can turn what is often a life-defining moment for the defendant into a check-the-box, formulaic calculation devoid of the individualized sentencing we strive for.").

106. *See infra* notes 245-247.

107. *See* Resnik, *supra* note 17, at 370.

only once.[108] In *Chapman v. United States*, the defendant challenged under due process a mandatory five-year drug sentence triggered by the weight of the drug's container, as opposed to the weight of the drug itself.[109] The first question in *Chapman* was whether the drug sentencing provision burdened a constitutionally protected right. Due process *always* requires that a government policy have some minimal "rational basis," and almost any prison sentence would survive traditional rational-basis review.[110] By contrast, policies that burden constitutionally protected rights, such as the right against unwarranted confinement, receive more searching review—as did each of the civil-commitment and pretrial-detention policies discussed above. Richard Chapman argued that the sentencing provision burdened his fundamental freedom from physical constraint—in other words, his right against unwarranted confinement.

The Court rejected Chapman's argument in conclusory fashion[111] and upheld the sentence as minimally "rational" under rational-basis review.[112] The Court had perceived no "fundamental right to liberty" implicated by Chapman's five-year prison sentence.[113] Once a person has been lawfully convicted, the Court held, the government may constitutionally impose "whatever punishment is authorized by statute" so long as it is not cruel and unusual or so irrational as to fail under rational-basis review. But the Court did not explain *why* confining

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108. What defines "criminal confinement"? Unlike civil confinement, criminal sentences of confinement are intended to punish, traditionally presuppose a finding of culpability, and further the aims of retribution and deterrence. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416-17 (2003); Kansas v. Hendricks, 521 U.S. 346, 361-62 (1997); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1988). Whereas incapacitation is also a conventionally accepted purpose of punishment, *see* Ewing v. CA, 538 U.S. 11, 25 (2003); Harmelin v. Michigan, 501 U.S. 957, 999 (1991), those two aims distinguish punishment from civil confinement.

109. 500 U.S. 453 (1991).

110. *Cf.* TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 456 (1993) (noting, in a case concerning punitive damages, that "[u]nder respondents' rational basis standard, apparently *any* award that would serve the legitimate state interest in deterring or punishing wrongful conduct, no matter how large, would be acceptable").

111. 500 U.S. 453, 464-65 (1991) ("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* 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." (citations omitted)).

112. *Id.* at 466 ("Blotter paper makes LSD easier to transport, store, conceal, and sell. It is a tool of the trade for those who traffic in the drug, and therefore it was rational for Congress to set penalties based on this chosen tool.").

113. *Id.* at 465.

Chapman for five years did not infringe upon the same constitutionally protected bodily liberty that any other form of confinement would.[114] Remarkably, one short paragraph in *Chapman* represents the Court's only attempt to grapple with the question of how much justification due process requires before a criminal court may sentence a person to incarceration for years on end.[115]

In fairness to the Court, no litigant has ever pressed a robust argument for analyzing criminal confinement under the right against unwarranted confinement. The penalty challenged in *Chapman* was so questionable that the parties focused on whether it should even survive rational-basis review: oral argument exclusively concerned this question, as did Justice Stevens's dissent.[116] The Court has therefore never had to consider seriously the argument advanced in this Note. Indeed, just two years after *Chapman*, Justices O'Connor and Souter—both among the *Chapman* majority—remarked in a concurrence that "punitive" criminal confinement *is* subject to "heightened, substantive due process scrutiny," apparently forgetting *Chapman*'s curt rejection of this view.[117]

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114. In a case preceding the modern law of confinement, the Court appears to have taken the more extreme position—even more curtly than in *Chapman*—that due process imposes *no* constraint on criminal punishment, permitting even punishments lacking a minimal rational basis. Williams v. Oklahoma, 358 U.S. 576, 586 (1959).

115. Although *Chapman* is the Court's only holding on the issue, the Court's dicta in other cases display the same instinct—an instinct that, without fail, the Court expresses without reasoning. In *Foucha*, the Court contrasted civil commitment against criminal incarceration with an offhand remark: "A State, pursuant to its police power, may *of course* imprison convicted criminals for the purposes of deterrence and retribution." Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (emphasis added). The Court made the same assumption in *Robinson v. California* when it invalidated the *criminalization* of drug addiction with the justification that "[e]ven one day *in prison* would be a cruel and unusual punishment for the 'crime' of having a common cold." 370 U.S. 660, 667 (1962) (emphasis added). But the impermissibility of the penalty only implies the impermissibility of the criminalization if one supposes that the constitutional authority to criminalize necessarily implies the constitutional authority to incarcerate. *Bowers v. Hardwick*, 478 U.S. 186 (1986), is another example of this assumption. *See* Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781, 806 (1994). The Court has never justified the assumption that no "liberty" is at stake and due process poses no bar whenever a state wishes to imprison a person whom it has criminally convicted.

116. United States v. Chapman, 500 U.S. 453, 468 (1991) (Stevens, J., dissenting); Transcript of Oral Argument, United States v. Chapman, 500 U.S. 453 (1991) (No. 90-5744), 1991 WL 636587.

117. Reno v. Flores, 507 U.S. 292, 315-16 (1993) (O'Connor, J., concurring) (accepting, as this Note advocates, that "[a] person's core liberty interest is . . . implicated when she is confined in a prison, a mental hospital, or some other form of custodial institution . . . . This is clear beyond cavil . . . . 'In the substantive due process analysis, it is the State's affirmative act of restraining the individual's freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the deprivation of liberty triggering the

Although the Court has never addressed its criminal-confinement exceptionalism, the dissenters in *Foucha* took it to task. Justice Thomas—joined by Justice Scalia and Chief Justice Rehnquist—questioned why prison sentences are not subject to searching substantive-due-process review under the majority's view of civil commitment. Recall that *Foucha* concerned whether the state could confine an allegedly dangerous insanity acquittee who was no longer mentally ill. The majority invalidated the confinement, brusquely contrasting criminal incarceration with the civil commitment of an insanity acquittee. For the majority and other dissenters, the substantive-due-process analysis turned on whether Terry Foucha's confinement was "criminal."[118] Justice Thomas objected that since the Court justified the right against unwarranted confinement by the value of physical liberty, it would just as well apply to *criminal* incarceration, and "[i]f convicted prisoners could claim such a right . . . we would subject all prison sentences to strict scrutiny."[119] In Justice Thomas's view, the Court's confidence in the importance of conviction under substantive due process was misplaced: "I am not sure that [conviction] deserves talismanic significance," because "[i]t is surely rather odd to have rules of federal constitutional law turn entirely upon the *label* chosen by a State."[120]

Concededly, Justice Thomas's objection was limited to insanity acquittees. He believed that a person's criminal *conduct*—irrespective of whether she was convicted or acquitted as insane—extinguished her right against unwarranted confinement.[121] The view that I will defend, however, is that criminal conduct—no matter the "label"—does *not* extinguish this right.[122] Nonetheless, Justice Thomas recognized that it is unjustifiable to scrutinize confinement in order to safeguard bodily liberty right up until the moment the state labels it "criminal."

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protections of the Due Process Clause' . . . . The institutionalization of an adult by the government triggers heightened, substantive due process scrutiny. There must be a 'sufficiently compelling' governmental interest to justify such action, usually *a punitive interest in imprisoning the convicted criminal* or a regulatory interest in forestalling danger to the community." (emphasis added) (citation omitted)).

118. *Foucha*, 504 U.S. at 80; *id.* at 101-02 (Kennedy, J., dissenting) ("[T]he majority conflates the standards for civil and criminal commitment, treating this criminal case as though it were civil.").

119. *Id.* at 118 (Thomas, J., dissenting). Justice Kennedy's dissent raised a similar objection. *Id.* at 99-100 (Kennedy, J., dissenting) (objecting that the majority's holding implies substantive-due-process rights for prisoners seeking parole).

120. *Id.* at 118 n.13 (Thomas, J., dissenting).

121. *Id.* at 121.

122. *See infra* Section III.B.1.

B. Previous Calls for Strict Scrutiny

In the academic literature, two commentators have called for "strict scrutiny" of prison sentences under substantive due process. Alec Karakatsanis has recently pointed out the anomalous omission of criminal confinement in fundamental-rights law in forceful terms but has not elaborated upon how courts should implement the required scrutiny.[123] Twenty-five years ago, as mass incarceration was gathering steam, Sherry Colb likewise argued that prison sentences should be subject to "strict scrutiny."[124] Yet she advocated a highly deferential scrutiny out of step with how contemporary courts scrutinize civil confinement.

Karakatsanis highlights the oddity of insisting that due process requires proof beyond a reasonable doubt for conviction,[125] but requires only a thin "rational basis" for incarceration. Since "courts define 'rational basis' to mean any potential reason, no matter how unpersuasive, and even if it was not the actual reason for the law,"[126] this standard "is almost the *exact opposite* of the 'beyond a reasonable doubt' approach that we are told the Constitution requires for taking away bodily liberty. In the latter, a person must not be caged so long as there could be a single reason to doubt her factual eligibility for incarceration."[127] This disparity creates "a central paradox of American criminal law": "to put a person in prison, we have to prove by overwhelming evidence that she merits punishment in a narrow factual sense; but . . . to put millions of people in prison, we do not need show that doing so would do any good."[128]

Karakatsanis also contrasts how courts treat criminal confinement with the way they protect fundamental liberties besides freedom from confinement. For example, courts would apply strict scrutiny to—and, in all likelihood, invalidate—a policy terminating the parental rights of people who give their children Coca-Cola.[129] They would rigorously probe whether "the law's termination of parental rights was the most narrowly tailored way" to promote the children's

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123. Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform,"* 128 YALE L.J.F. 848, 867-68 (2019) [hereinafter Karakatsanis, *Punishment Bureaucracy*]; Alec Karakatsanis, *Policing, Mass Imprisonment, and the Failure of American Lawyers*, 128 HARV. L. REV. F. 253, 256-62 (2015) [hereinafter Karakatsanis, *Mass Imprisonment*].

124. *See* Colb, *supra* note 115, at 784.

125. *In re* Winship, 397 U.S. 358, 362 (1970).

126. Karakatsanis, *Punishment Bureaucracy*, *supra* note 123, at 867 (citing FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313 (1993)).

127. *Id.*

128. *Id.*

129. *Id.* at 868 (citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925)).

health.[130] But if the same law also criminalized "the distribution of sugary sodas to minors" and imposed a mandatory sentence of ten years' imprisonment, courts applying *Chapman* would uphold it.[131] No matter that the convicted parent would "lose her bodily liberty and, incidentally, the ability to raise her daughter."[132] The problem is not just hypothetical: although "a law stripping felons of the right to parent would be struck down instantly," we "effect the same result when we put someone in prison for a drug offense."[133]

Like Karakatsanis, Colb does not see why "freedom from incarceration" should be "different from all other rights."[134] Colb develops several critical arguments echoed in this Note.[135] Yet the due-process scrutiny she prescribes would preserve courts' anomalous treatment of criminal confinement as largely unreviewable. Under her approach, "incarceration for such crimes as murder, rape, assault, battery, and robbery would be beyond constitutional reproach,"[136] no matter its duration or mandatory nature.[137] The gap between Colb's deferential theory and the searching scrutiny courts apply to civil confinement underlines an important question: how exactly should courts apply the right against unwarranted confinement to sentencing? The next Section proposes an answer.

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130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* n.67.

134. Colb, *supra* note 115.

135. Like this Note, Colb argues that freedom from unwarranted confinement is a fundamental right, *id.* at 787-90, not erased by criminal conduct, *id.* at 803-09, the Eighth Amendment's prohibition on cruel and unusual punishment, *id.* at 810-12, or criminal defendants' procedural protections, *id.* at 796-803 (concerning the procedural protection of notice); *id.* at 813-16 (concerning procedural protections generally).

136. *Id.* at 824.

137. *Id.* at 833. There are three related problems with Colb's approach. First, she declines to analogize criminal confinement to civil confinement. *Id.* at 844. Second, Colb would only scrutinize the decision of *whether* to incarcerate — not the length of a prison sentence — on the assumption that courts will not be able to find the line between warranted and unwarranted confinement. *Id.* at 833. This concern relates to judicial competence and is addressed *infra* Section III.A.1. Third, Colb proposes a nonempirical scrutiny that the Court has sometimes applied in First Amendment challenges: courts should presume that a sentencing policy will in fact have the effects posited by the government unless the defendant provides overwhelming proof to the contrary. *Id.* at 825-26, 831-32. This deference is out of sync with the law of confinement. *See infra* Section II.C.1.b.i. Due process is more straightforward than all this: because any instance of confinement infringes on liberty, the government must prove that any confinement is warranted in "precisely the same manner." Salerno v. United States, 481 U.S. 739, 748 (1987).

C. Applying the Right to Criminal Confinement

Due process prohibits unwarranted confinement and thus unnecessary prison sentences. Courts, therefore, must determine whether any given sentence of confinement is the least restrictive means of achieving the constitutional justifications of punishment. If the government relies on the claim that the sentence will deter others from committing crime, courts must require empirical proof. And, to the extent that courts accept retribution as a constitutional basis for confinement, they must apply "proportionality" doctrines developed in other contexts to gauge the extent to which it warrants confinement in any given case. However, they must inquire into confinement's retributive value with a more exacting eye than these doctrines usually demand. Under substantive due process, the question is whether confinement is *necessary*, not merely whether it is grossly disproportionate or unreasonable. This task is far from impossible: by statute, federal sentencing courts engage in exactly this inquiry every day.

After discussing how courts should conduct this scrutiny, I will elaborate on two of its doctrinal consequences. First, mandatory minimum sentences as they are currently fashioned would lose effect. Second, discretionary sentences imposed by judges would be subject to constitutional review on appeal. The usual deferential standards would no longer be appropriate: appellate judges would have reason to review sentences de novo.

1. Scrutinizing Prison Sentences

The traditional legal justification for criminal confinement is threefold: retribution, incapacitation, and deterrence.[138] Deterrence includes both deterrence of the wrongdoer from committing further wrongs ("specific deterrence") and deterrence of others ("general deterrence").[139] While retribution is premised on the idea that punishment is morally worthy irrespective of its consequences, the utilitarian goals of punishment—incapacitation, specific deterrence, and general deterrence—are "forward-looking" and concern the effects of punishment.[140]

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138. *See* Ewing v. California, 538 U.S. 11, 25 (2003) (plurality opinion) ("A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation."). Rehabilitation is usually not a basis for confinement. *See* Tapia v. United States, 564 U.S. 319 (2011) (forbidding sentences of imprisonment imposed for the purpose of rehabilitation under federal statutory law).

139. *See* Kelli D. Tomlinson, *An Examination of Deterrence Theory: Where Do We Stand?*, 80 FED. PROB. 33, 33 (2016).

140. *See* VICTOR TADROS, THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW (2011).

Whether a given punishment furthers utilitarian goals is, in principle, empirically provable, while a punishment's retributive value is not.

To determine whether a criminal sentence is necessary, courts applying substantive-due-process scrutiny will have to conduct different analyses based on the distinction between punishment's retributive and utilitarian goals. They must first determine whether retribution is a constitutionally appropriate basis for confinement. If so, they must apply a more searching form of the "proportionality" analysis that they already apply to various punishments besides incarceration. As for utilitarian goals, they should apply the kind of scrutiny that some courts have applied to pretrial detention[141]: if the government cannot empirically defend the claim that a sentence would further a utilitarian goal, it cannot rely on that goal to justify confinement.

a. Scrutiny as to Retribution

Under substantive due process, fundamental rights such as bodily liberty may only be deprived to further "compelling" state interests.[142] Whether retribution is even a legitimate state interest, let alone a compelling one, has provoked controversy. The question is whether the state may confine a person solely for the purpose of retribution—simply because the person is thought to deserve it, even when confinement would do nothing to prevent crime or accomplish any other goal.[143] Justice Marshall thought not.[144] Other Justices have taken the view that retribution is not punishment's "dominant objective," but is also not "forbidden."[145] At the outset, courts applying substantive due process to sentences of confinement will have to decide whether the state's alleged interest qualifies as "compelling."

If retribution is in principle compelling, the next question is whether, as a practical matter, it can be proven *necessary*. Substantive due process only permits confinement to the extent that no less restrictive alternative meets the aims of punishment. Retribution might fail to justify confinement simply because this showing is too difficult to make: that is, even if retribution is a worthy goal, and

141. *See infra* Section II.C.1.b.i.

142. *See supra* Section I.A.

143. Gregg v. Georgia, 428 U.S. 153, 237 (1976) (Marshall, J., dissenting) ("[O]ur recognition that retribution plays a crucial role in determining who *may* be punished by no means requires approval of retribution as a general justification for punishment." (emphasis added)).

144. *Gregg*, 428 U.S. at 233 (Marshall, J., dissenting); Furman v. Georgia, 408 U.S. 238, 343 (1972) (Marshall, J., concurring) ("Punishment as retribution has been condemned by scholars for centuries . . . .").

145. *Gregg*, 428 U.S. at 183 (plurality opinion) (quoting Williams v. New York, 337 U.S. 241, 248 (1949)).

even if the state may rely on it when justifying punishments such as fines, the necessity standard might be too exacting for the state to rely on retribution where fundamental constitutional rights are at stake.

Assuming arguendo that retribution may justify a sentence of confinement under substantive due process, courts must determine how to analyze it. The best starting points are the constitutional "proportionality" doctrines applied to noncarceral sentences and punitive damages. When constitutionally scrutinizing sentences (under the Eighth Amendment) or punitive damages (under due process), the Court examines three factors: the "degree of the defendant's reprehensibility or culpability"; the relationship between the penalty and the harm to the victim caused by the defendant's actions . . . ; and the sanctions imposed in other cases for comparable misconduct."[146] These criteria implement the "ancient and fundamental principle of justice" that "the punishment be proportionate to the offense,"[147] and thus primarily relate to retribution, connecting to deterrence and incapacitation only indirectly, if at all. For example, in the Excessive Fines Clause case *United States v. Bajakajian*, the Court weighed culpability, harm, and sanctions in comparable cases to determine that the forfeiture sought by the government was a "grossly disproportionate" punishment.[148] Courts implement these proportionality standards most rigorously when reducing punitive damages awarded against corporations;[149] in their substantive-due-process analysis, they have closely examined the mental state of the defendants[150] and the exact degree

146. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 435 (2001) (citations omitted).

147. TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 478 (1993) (O'Connor, J., dissenting) (arguing for a reduction in punitive damages under substantive due process in a corporate fraud case).

148. 524 U.S. 321 (1998). The Court reasoned that the crime was merely technical and not connected to any other illegal activity, that it caused minimal harm, and that the Sentencing Guidelines "only" prescribed a sentence of six months of incarceration and a $5,000 fine. *Id.* at 338-340; Frase, *supra* note 22, at 52. Given the Court's recent decision incorporating the Excessive Fines Clause against the states, "it is likely that state and lower federal courts around the nation will be called upon to further develop Excessive Fines Clause doctrine," thereby further modeling proportionality analysis. Beth A. Colgan & Nicholas M. McLean, *Financial Hardship and the Excessive Fines Clause: Assessing the Severity of Property Forfeitures After* Timbs, 129 YALE L.J.F. 430, 430 (2020). For deeper analysis surrounding the foundation for this claim, see *Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019).

149. *See* Steven Semeraro, *Responsibility in Capital Sentencing*, 39 SAN DIEGO L. REV. 79, 144 (2002); Adam M. Gershowitz, Note, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249, 1302 (2000).

150. *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580 (1996).

of harm caused[151] (as well as the contribution of punitive damages to general deterrence).[152] Courts could apply the same general method to determine whether the government's interest in retribution warrants a given carceral sentence in a substantive-due-process challenge.

Proportionality analysis, however, does not probe necessity: it is far more deferential, prohibiting only "grossly disproportionate" sentences[153] and "grossly excessive" punitive damages.[154] Its deference is virtually limitless as to criminal sentences of confinement.[155] Prison sentences are subject to a special constitutional rule: federal courts consider sanctions in comparable cases "only in the rare case in which a *threshold* comparison of the crime committed and the

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151. *Id.* at 575-56.

152. *Id.* at 584 ("The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether *less drastic remedies* could be expected to achieve that goal.") (emphasis added); Cont'l Trend Res. v. OXY USA, 101 F.3d 634 (10th Cir. 1996) (analyzing what sum would be sufficient to deter). It is fair to wonder to what extent a bias in favor of corporate defendants and against criminal defendants has driven proportionality law's relative solicitude towards the former, given the absence of relevant differences between punitive damages and criminal penalties. *See infra* Section III.A.2; Section III.B.2 (noting the absence of relevant differences when analyzing democratic legitimacy and procedure, respectively). At times, there is a noticeable gap between the Court's reasoning and rhetoric across the two contexts. Justice O'Connor argued that the inherent "difficulty" of proportionality review cut *against* the Court's scrutinizing criminal sentences but *in favor of* the Court's scrutinizing punitive damages. *Compare* Harmelin v. Michigan, 501 U.S. 957 (1991), *with* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003). Justice O'Connor advocated for interjurisdictional and intrajurisdictional comparisons of punitive damages but against these same comparisons of criminal sentences. *See* Gershowitz, *supra* note 149, at 1275-76 n.157. Consider the sensitivity to corporate pain that Justice O'Connor displays when lamenting, "Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm." Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting); *see also* TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 495 (1993) (O'Connor, J., dissenting) ("[T]he frequency and size of [punitive-damages] awards have been skyrocketing."). When rejecting the claim of a man sentenced to die in prison for stealing three golf clubs, however, she does not mention whether prison sentences have "a devastating potential for harm" or are "skyrocketing." Instead, she opens the opinion by describing the kidnapping that motivated California to adopt its "Three Strikes" recidivist sentencing statute and endorsing the legislature's theory that it promotes "public safety." *See* Ewing v. California, 538 U.S. 11, 11-12 (2003); *id.* at 28 ("Ewing's theft [of golf clubs] should not be taken lightly."). Chief Justice Rehnquist and Justice Kennedy likewise took divergent positions on punitive damages and sentences of confinement. *Compare Harmelin*, 501 U.S. 957 (1991), *with State Farm*, 538 U.S. 408 (2003).

153. *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring).

154. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 562 (1996).

155. *See supra* notes 16-17 and accompanying text.

sentence imposed leads to an inference of gross disproportionality,"[156] a "judicial gut reaction"[157] intended to screen out all but "exceedingly rare" claims.[158] Moreover, because criminal sentences are evaluated for proportionality under the Eighth Amendment's Cruel and Unusual Punishments Clause, their constitutional "usualness" matters. Even "[s]evere, mandatory" prison terms that "may be cruel" are permissible if "they are not unusual in the constitutional sense," such as if they were historically accepted[159] or are in wide contemporary use,[160] as the Supreme Court explained when upholding a sentence of life imprisonment without the possibility of parole for possessing cocaine.[161]

These features of proportionality analysis — extensive deference, preliminary "gut checks," and a central focus on national norms — do not square with the rule of necessity, under which the only question is whether the state could achieve its compelling goals without confinement. Still, courts can apply the "proportionality" factors to determine what retribution warrants under due process, in a more exacting manner when the rule of necessity so requires.[162] No doubt, retributive analysis is difficult. But this difficulty is inherent in criminal sentencing, as federal judges already tasked with gauging how much retribution is "necessary" will attest.[163] As Justice O'Connor has said in a related context, "Our inability to discern a mathematical formula does not liberate us altogether from our duty to provide guidance to courts that . . . must address [this problem] on a regular basis. On the contrary, the difficulty of the matter imposes upon us a correspondingly greater obligation to provide the most coherent explanation we can."[164]

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156. Ewing v. California, 538 U.S. 11, 30 (2003) (O'Connor, J., concurring); *Harmelin*, 501 U.S. at 1005 (emphasis added).

157. Rachel A. Van Cleave, *"Death Is Different," Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages — Shifting Constitutional Paradigms for Assessing Proportionality*, 12 S. CAL. INTERDISC. L.J. 217, 230, 246 (2003).

158. *Ewing*, 538 U.S. at 21 (plurality opinion).

159. *Harmelin*, 501 U.S. at 994-95.

160. Kennedy v. Louisiana, 554 U.S. 407, 419, 422-26 (2008).

161. *Harmelin*, 501 U.S. 957.

162. For examples of more searching proportionality scrutiny, courts might draw on Illinois cases based on the state constitution's unique "proportionate penalties clause." Frase, *supra* note 22, at 70-71.

163. *See* 18 U.S.C. § 3553(a) (2018).

164. TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 495 (1993) (O'Connor, J., dissenting) (referring to substantive due-process review of punitive damages).

Courts must develop retributive principles through case-by-case applications of close scrutiny.[165] Two foundational principles may be stated at the outset. First, the nature and extent of the harm caused by the criminal act matter. Crimes generally considered nonviolent warrant less retribution than those generally considered violent crimes,[166] but even sentences for violent crimes must be probed to assess how much, if any, confinement they warrant.[167] Second, to accurately assess what retribution requires, courts must properly weigh mitigation. The Supreme Court has defined mitigation broadly, to encompass any reason for a lower sentence, in its cases requiring sentencing courts to consider it before ordering execution.[168] Here, courts must not just consider mitigation, but develop case law on the extent to which it undercuts retributive justifications for confinement. Certain facts' mitigating effect is well established, such as poverty and trauma,[169] intellectual disability,[170] and youth,[171] to name but a few. The critical task is to weigh these and other mitigating factors against the state's arguments for retribution. If a court has not given the applicable mitigating factors their full effect, it has likely overestimated the necessity of confinement and thereby violated due process.

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165. *See infra* notes 253-256 and accompanying text (arguing, based on Supreme Court precedent, for de novo appellate review of whether a given sentence of confinement complies with due process in order to enable this development of the case law).

166. *See, e.g.*, Solem v. Helm, 463 U.S. 277, 292-93 (1983). These must be defined carefully. *Cf.* Eli Hager, *When "Violent Offenders" Commit Nonviolent Crimes*, MARSHALL PROJECT (Apr. 3, 2019), https://www.themarshallproject.org/2019/04/03/when-violent-offenders-commit-nonviolent-crimes [https://perma.cc/8QUG-HAF2] ("[Y]ou can get charged and convicted as a violent criminal in more than a dozen states if you enter a dwelling that's not yours. That might seem like a property crime, but it's often deemed a violent one: burglary. Similarly, purse snatching is considered a 'violent' offense in several states.").

167. *See, e.g.*, *In re* Rodriguez, 537 P.2d 384, 394 (Cal. 1975) (invalidating under the state constitution a life sentence for a child-molestation offense after the defendant had served twenty-two years in prison, for even the twenty-two years were unconstitutionally excessive).

168. *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 604 (1978).

169. *See, e.g.*, Miriam S. Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 AM. J. CRIM. L. 41, 66-67 (2013) (listing the many psychological effects of poverty and trauma on capital defendants, including "endemic despair, frustration, undersocialization of children, interference with nurturant parenting, . . . aggression leading to violence, . . . post-traumatic stress disorder (PTSD), depression, anxiety, psychosis, dissociation, significant impairment, and substance abuse").

170. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 320 (2002) (explaining why intellectual disability is mitigating).

171. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 569-70 (2005) (articulating the cognitive and behavioral characteristics of youth that make it a mitigating factor).

b. Scrutiny as to Utilitarian Goals

Scrutinizing criminal confinement's necessity for the utilitarian goals of punishment—incapacitation, specific deterrence, and general deterrence—raises a question not answered by the retribution-focused case law on proportionality: just what must the government prove to rely on these rationales?

The law of confinement suggests an answer. Courts assessing pretrial detention policies have probed such policies with empirical rigor, modeling the general approach that courts scrutinizing criminal sentences justified by utilitarian purposes should take. If the state seeks to rely on the social-scientific theory of general deterrence to overcome the individual's fundamental interest in bodily liberty, it must provide persuasive empirical proof that the sentence sought will promote it. This rule coheres with courts' demand for empirical proof when confronted with attempts to curtail the right to pretrial liberty based on broad empirical assertions (in that context, regarding the flight risk or dangerousness posed by certain defendants).

By contrast, the state need not always provide statistical evidence when arguing that the specific characteristics of the person require confinement for incapacitation or specific deterrence. But it must provide persuasive reasons why a given term of confinement would prevent the individual from committing harmful conduct, and why no less restrictive response would.

i. The Law of Confinement

Lower courts have applied the rule of necessity to pretrial-detention statutes with empirical rigor. Four times in recent years, state and federal courts have forbidden Arizona's attempts to impose mandatory detention on particular classes of criminal defendants—one targeting certain undocumented immigrants, and three others targeting certain classes of alleged sex offenders. These courts assumed that due process could permit a mandatory detention policy—an assumption that I will challenge later when discussing whether due process permits *any* confinement without an individualized determination that it is necessary.[172] Nevertheless, they invalidated the statutes before them because the state did not provide a convincing empirical basis for the judgment that detention is necessary. This empirical rigor illustrates how courts should scrutinize confinement whenever the state seeks to justify detention based on broad empirical assertions.

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172. *See infra* Section II.C.2 (explaining why any mandatory detention scheme would violate the Supreme Court precedents on confinement reviewed in Part I).

Start with the statute targeting undocumented immigrants. Arizona voters amended their state constitution to require the pretrial detention of immigrants arrested for any felony from among a wide range.[173] Sitting en banc in *Lopez-Valenzuela v. Arpaio*, the Ninth Circuit reasoned from the premise that "requiring pretrial detention in all cases without an individualized determination of flight risk or dangerousness . . . would have to be carefully limited. The state's chosen classification would have to serve as a *convincing proxy* for unmanageable flight risk or dangerousness."[174] But in the instant case, "[t]here [wa]s no evidence that undocumented status *correlates closely* with unmanageable flight risk."[175]

The Arizona Supreme Court has followed suit. In *Simpson v. Miller*, the court invalidated part of a state constitutional amendment requiring the detention of all defendants charged with "capital offenses, sexual assault, sexual conduct with a minor under fifteen years of age[,] or molestation of a child under fifteen years of age[,] when the proof is evident or the presumption great."[176] The court recognized that the challenged state constitutional provision implicated the defendant's "fundamental due process right to be free from bodily restraint"[177] and concluded that it violated substantive due process because sexual conduct with a minor under fifteen "is not in itself a proxy for dangerousness."[178]

In *State v. Wein*, the Arizona Supreme Court similarly invalidated a mandatory-detention provision that applied to cases "involv[ing] the sexual violation of a person through force, coercion, or deception."[179] The court clarified that *Simpson* rested on the principle that the charge did "not inherently demonstrate future dangerousness pending trial."[180] Thus, the "pertinent inquiry is whether a sexual-assault charge alone, when the proof is evident or the presumption great as to the charge, inherently demonstrates that the accused will pose an unmanageable risk of danger if released pending trial."[181] The court answered in the negative, rejecting the government's statistical evidence regarding recidivism rates because "they concern a wide variety of sex crimes besides sexual assault, arrive at disparate conclusions, and for the most part do not focus on the relatively short time period between arrest and trial"; in any event, the statistics at

173. Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 775 (9th Cir. 2014) (en banc).

174. *Id.* at 786 (emphasis added).

175. *Id.* (emphasis added).

176. 387 P.3d 1270, 1273 (Ariz. 2017).

177. *Id.* at 1274.

178. *Id.* at 1278.

179. State v. Wein, 417 P.3d 787, 797 (Ariz. 2018) (Bolick, J., dissenting).

180. *Id.* at 795 (majority opinion).

181. *Id.* at 793.

most only demonstrate that "5.6% [of convicted rapists] reoffend[] within five years of release from prison."[182] Particularly given the alternatives to mandatory detention, such as individualized detention determinations or release with GPS monitoring,[183] the court held that this evidence failed to establish that a sexual assault charge is a constitutionally adequate proxy for dangerousness warranting pretrial detention.[184]

The *Wein* court acknowledged that it would be difficult for the state to prove that people charged with sexual assault specifically are likely to abscond or reoffend while on bail.[185] If the empirical theory advanced by the state was difficult to prove in practice, even *inherently* difficult to prove, so much the worse for the government, the court concluded. In other words, the *Wein* court did not artificially relax the government's burden to prove a convincing proxy based on the difficulty of making an empirically sound "prediction of future criminal conduct."[186] Under the rubric of these cases, the government may secure confinement—but it must do so on a basis other than a broad, unproven empirical assertion.[187]

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182. *Id.* at 794.

183. *Id.* at 795.

184. A state appellate court applied *Simpson* to invalidate the mandatory detention provision that applied to the charge of molestation of a child under fifteen, Chantry v. Astrowsky, 395 P.3d 1114, 1115 (Ariz. Ct. App. 2017), meaning the voters' constitutional amendment has been abrogated completely insofar as it related to sex crimes.

185. *Wein*, 417 P.3d at 793 ("Indeed, this showing would be a difficult undertaking. . . . '[A] prediction of future criminal conduct is an experienced prediction based on a host of variables which cannot be readily codified.'" (quoting Schall v. Martin, 467 U.S. 253, 279 (1984))).

186. *Id.*

187. Without explanation, the Arizona Supreme Court abandoned its commendable empirical approach in *Moreno v. Brickner*, 416 P.3d 807 (Ariz. 2018), upholding the mandatory pretrial detention of those on bail in a felony case who are arrested for a new alleged felony. The case unpersuasively indulges the state's bare assertion that any alleged felony while on bail establishes flight risk or dangerousness requiring confinement. Over ninety-five percent of arrests in the United States are not for serious violent offenses. Rebecca Neusteter & Megan O'Toole, *Every Three Seconds: Unlocking Police Data on Arrests*, VERA INST. (Jan. 2019), https://www.vera.org/publications/arrest-trends-every-three-seconds-landing/arrest-trends-every-three-seconds/overview [https://perma.cc/4A2G-C9FC]. In fact, eighty-eight percent of people who have been arrested and jailed multiple times in the past twelve months have not been arrested for a serious violent offense in that period. Alexa Jones & Wendy Sawyer, *Arrest, Release, Repeat: How Police and Jails are Misused to Respond to Social Problems*, PRISON POL. INITIATIVE (Aug. 2019), https://www.prisonpolicy.org/reports/repeatarrests.html [https://perma.cc/9GXN-GZYG].

ii. Incapacitation and Specific Deterrence

Due process permits criminal confinement based on incapacitation or specific deterrence when a judge reaches a well-reasoned determination that a particular sentence is *necessary*, based on all the evidence, to prevent the individual from causing serious harm during or after the sentence. Adequate alternatives to confinement would undermine this necessity determination. Thus, a judge must conclude that no less-restrictive response or combination of responses would prevent the person from committing serious wrongdoing as effectively as incarceration[188]—not, for instance, probation, GPS monitoring,[189] home detention,[190] community supervision,[191] drug treatment,[192] restorative-justice programming,[193] or any combination of them. If the government cannot make this showing, confinement is unconstitutional. On the other hand, if the government can prove, based on a person's conduct and other characteristics, that she poses a specific danger and that confinement is needed to mitigate it, due process permits the court to impose a sentence of confinement.

Empirical evidence must inform this analysis in two situations. First, if the government asserts a need to confine a person to prevent future wrongdoing on the basis of broad generalizations, such as that the crime of conviction itself proves a need to incapacitate or deter the person through confinement, courts must demand empirical proof. Recall that courts invalidated Arizona's mandatory-detention statutes when the state asserted that certain categories of defendants generally require incapacitation.[194] In each case, the government failed to

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188. *Cf.* 8 U.S.C. § 3142 (2018) (prescribing the same standard for pretrial detention).

189. *See* State v. Wein, 417 P.3d 787, 795 (Ariz. 2018).

190. *Cf.* O'Connor v. Donaldson, 422 U.S. 563, 576 (1975) (noting Donaldson's capability of surviving safely in freedom with the help of willing family members).

191. Raj Jayadev, *The Future of Pretrial Justice Is Not Money Bail or System Supervision—It's Freedom and Community*, SILICON VALLEY DE-BUG (Apr. 4, 2019), https://siliconvalleydebug.org/stories/the-future-of-pretrial-justice-is-not-money-bail-or-system-supervision-it-s-freedom-and-community [https://perma.cc/5FKY-5ZP2].

192. *In re* Humphrey, 228 Cal. Rptr. 3d 513, 542 (Ct. App. 2018).

193. *See generally* DANIELLE SERED, UNTIL WE RECKON: VIOLENCE, MASS INCARCERATION, AND A ROAD TO REPAIR 129-41 (2019) (discussing the efficacy of restorative justice).

194. *See supra* notes 173-185 and accompanying text. Specifically, the Ninth Circuit held that undocumented immigration status was not shown to be a "convincing proxy for unmanageable flight risk or dangerousness," *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 786 (9th Cir. 2014) (en banc), and the Arizona Supreme Court determined that alleged sexual conduct with a minor under fifteen "is not inherently predictive of future dangerousness," *Simpson v. Miller*, 387 P.3d 1270, 1278 (Ariz. 2017), and that alleged sexual assault does "not inherently demonstrate future dangerousness pending trial," *State v. Wein*, 417 P.3d 787, 795 (Ariz. 2018).

present statistical evidence indicating a special risk of future wrongdoing correlated with the criminal charge or immigration status at issue. The bare assertion that such a correlation must exist did not suffice. Arizona voters concluded, for example, that people accused of certain sex crimes "where the proof is great" are too dangerous to be released pretrial, but the state supreme court recognized that due process did not require deference to this judgment. Instead, the court pressed the government for empirical proof. Courts must do the same whenever the government argues for incapacitation or specific deterrence on the basis of broad assertions about categories of defendants rather than analysis of the person's individual characteristics.[195]

For the same reasons, if the defendant rebuts the government's argument about incapacitation or specific deterrence with empirical evidence, the court must take that evidence into account. For example, defendants generally "age out" of crime: "very few individuals—even those with a history of involvement in serious crime . . . engag[e] in criminal activity after their midtwenties,"[196] suggesting that a few-year sentence is equally effective for a twenty-five-year-old as is a decades-long sentence. Additionally, confinement is "criminogenic," or crime-producing: incarceration *makes* an individual more likely to commit crime in the future.[197] To the extent that these phenomena apply to any given case, they

195. The Arizona pretrial detention cases did not turn on the unsubstantiated nature of the criminal charges; neither the Ninth Circuit nor the Arizona Supreme Court relied on the potential inaccuracy of the immigrant designation or the criminal charge. Instead, the courts required "convincing" empirical proof that the *conduct* described by the charge was "inherently predictive" of suitability for confinement. *See supra* notes 173-185. Courts should do the same whenever the government seeks to rely on such broad assertions relating to people facing sentencing.

196. Laurence Steinberg et al., *Psychosocial Maturity and Desistance from Crime in a Sample of Serious Juvenile Offenders*, U.S. DEP'T JUST. 6 (2015), https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/248391.pdf [https://perma.cc/9ZAF-6S8P].

197. *See, e.g.*, Daniel S. Nagin, *Deterrence*, *in* 4 REFORMING CRIMINAL JUSTICE 19, 20 (Erik Luna ed., 2017), https://law.asu.edu/sites/default/files/pdf/academy_for_justice/Reforming-Criminal-Justice_Vol_4.pdf [https://perma.cc/J3WH-HPKM] ("[T]here are many sound reasons for suspecting that the experience of punishment might not have the chastening effect that is implied by the label but instead might increase, not decrease, future offending."); Daniel S. Nagin, Francis T. Cullen & Cheryl Lero Johnson, *Imprisonment and Reoffending*, 38 CRIME & JUST. 115, 125-28 (2009) (outlining several mechanisms through which incarceration produces more crime); Valerie Wright, *Deterrence in Criminal Justice: Evaluating Certainty vs. Severity of Punishment*, SENT'G PROJECT 6 (Nov. 2010), https://www.sentencingproject.org/wp-content/uploads/2016/01/Deterrence-in-Criminal-Justice.pdf [https://perma.cc/5Z38-FC6X] ("[F]rom a deterrence perspective, the more severe the imposed sentence, the less likely offenders should be to re-offend. A 1999 study . . . found that longer prison sentences were associated with a three percent increase in recidivism."); *see also* Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 760-62 (2017) (finding that mere days of pretrial detention have a net criminogenic, not deterrent, effect).

tend to undercut the argument that incarceration will prevent crime: lengthy incapacitation may well be unnecessary, and incarceration's criminogenic effect dilutes its deterrent effect. Faced with persuasive and pertinent social-scientific evidence of these "aging out" and "criminogenic" phenomena, or any others, the court must account for the evidence in determining the defendant's sentence. The Constitution does not permit a court to deprive a defendant of his physical liberty based merely on an intuitive judgment that this evidence must be mistaken. Because due process requires that confinement be *proven* necessary, a defendant's sentence must reflect any persuasive evidence that incarceration of the duration sought is not genuinely warranted.

iii. General Deterrence

The same principle should govern how courts analyze general deterrence: the government must offer empirical proof supporting the otherwise-speculative claim that a given sentence will deter others. The theory of general deterrence is that certain punishments will prevent others from committing crimes akin to those of the sentenced individual. As a rationale for a prison sentence, the theory posits that the sentence sought will have a salutary effect *on society at large*. This utilitarian justification of punishment thus differs from the others: it issues a forward-looking prediction about the behavior of others in society, not of the person confined. And this characteristic of general deterrence makes it more difficult for the government to justify confinement on its basis: by their nature, predictions of general deterrence are more likely to be speculative and uncertain than empirical judgments about an individual before the court.

Given the central role the theory of general deterrence plays in justifying criminal confinement, the weakness of the empirical evidence supporting it is remarkable.[198] If confinement's marginal propensity to deter *at all* is in question,

198. *See, e.g.*, Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199, 201 (2013) ("[T]here is little evidence of a specific deterrent effect arising from the experience of imprisonment . . . . Instead, the evidence suggests that reoffending is either unaffected or increased."); Michael Tonry, *An Honest Politician's Guide to Deterrence: Certainty, Severity, Celerity, and Parsimony*, *in* 23 DETERRENCE, CHOICE, AND CRIME: CONTEMPORARY PERSPECTIVES (Daniel S. Nagin, Francis Cullen & Cheryl Lero Jonson eds., 2018), https://ssrn.com/abstract=2981749 (describing the broad consensus among economists and social scientists that the effects of deterrence are nonexistent, too small to justify, or too contingent on particular conditions to have policy relevance); Jed S. Rakoff, *Mass Incarceration: The Silence of the Judges*, N.Y. REV. BOOKS (May 21, 2015), https://www.nybooks.com/articles/2015/05/21/mass-incarceration-silence-judges [https://perma.cc/Z3AM-NB3] ("[T]he supposition on which our mass incarceration is premised—namely, that it materially reduces crime—is, at best, a hunch. Yet the price we pay for acting on this hunch is enormous."); *What Caused the Crime*

its *necessity* for deterrence is even more dubious. One scholar invokes the difficulty of proving that prison sentences actually further general deterrence as a reason why courts should simply accept the government's assertion of this theory.[199] Such acceptance would violate the law of confinement. Just as courts require proof that incapacitation via pretrial detention is necessary and do not relax this requirement when empirical evidence is hard to supply,[200] they must insist on the same requirements for the even more speculative justification of general deterrence.

Applying searching scrutiny in these ways would not mean the elimination of all prison sentences that lack the support of statistical studies. Nor would it necessarily imply the elimination of general deterrence as a justification for confinement. The principle is only that *if* the government wishes to rely on a broad empirical claim to justify the confinement of a human being, it has to support that claim. If the government cannot prove that its requested sentence of confinement would further general deterrence, it must proceed by showing that it would further retribution, incapacitation, or specific deterrence. The right against unwarranted confinement demands as much.

2. *What Mandatory Sentences Could Survive?*

Mandatory minimum sentences of confinement are those that legislatures require courts to impose regardless of the court's own view of what sentence is necessary or just. The trigger for a mandatory minimum sentence is typically the crime of conviction alone, or in combination with the defendant's criminal history.[201] Mandatory minimum sentences have dramatically increased in frequency

Decline?, BRENNAN CTR. FOR JUST. 23 (2015), https://www.brennancenter.org/sites/default/files/2019-08/Report_What_Caused_The_Crime_Decline.pdf [https://perma.cc/F8WR-NZRE] (concluding on the basis of rigorous regression analysis that increased incarceration had minimal effect on the reduction in property crime and no observable effect on the reduction of violent crime in the 1990s and 2000s); Wright, *supra* note 197, at 1 (observing that "the criminal justice system as a whole provides some deterrent effect" but "enhanced sanctions" likely do not). Even government sources at times concede that general deterrence is a poor justification for any particular sentence of lengthy confinement. *See, e.g.*, Tomlinson, *supra* note 139, at 33; NAT'L INST. OF JUSTICE, *Five Things About Deterrence,* U.S. DEP'T JUST. (May 2016), https://www.ncjrs.gov/pdffiles1/nij/247350.pdf [https://perma.cc/MB3T-6K5S].

199. Colb, *supra* note 115, at 831–32.

200. *See supra* Section II.C.1.b.i.

201. *See, e.g.*, Lockyer v. Andrade, 538 U.S. 63 (2003); Ewing v. California, 538 U.S. 11 (2003); *Paul Houser*, *supra* note 1.

in recent decades,[202] but the pendulum appears to be swinging back toward discretionary sentencing, if slowly.[203] Mandatory sentences have an important effect on criminal defendants even when they are not imposed, and even when they are not charged: a defendant with potential exposure to a charge carrying a lengthy mandatory minimum has a strong incentive to plead guilty to a lesser charge, whether or not he is in fact guilty.[204] Mandatory minimums constrained the judges who sentenced over forty percent of people currently serving federal sentences, and they are serving sentences about four times as long as other federal prisoners.[205] Their prevalence varies across state systems.[206]

Strangely enough, under the "individualized capital sentencing doctrine," the Eighth Amendment prohibits mandatory sentences of execution. However, sentences of confinement—including sentences of death in prison—are not considered severe and irrevocable enough to trigger this rule.[207] Why the Eighth Amendment line should be drawn at the capital/noncapital divide is less than clear,[208] for the Court's insight on capital sentencing is no less true of carceral

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202. *See Mandatory Minimum Penalties in the Federal Criminal Justice System*, U.S. SENT. COMM'N 5-10 (August 1991), https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/1991_Mand_Min_Report.pdf [https://perma.cc/TJ47-2AH2]. Indeed, for close to two decades, virtually all of federal sentencing was mandatory, in that federal sentencing courts had no choice but to follow the Sentencing Guidelines promulgated by the Sentencing Commission, an agency created by an act of Congress. This ended in 2005 with the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220, 261 (2005).

203. *See An Overview of Mandatory Minimum Penalties in the Federal Criminal Justice System*, U.S. SENT. COMM'N 6 (July 11, 2017), https://www.ussc.gov/research/research-reports/2017-overview-mandatory-minimum-penalties-federal-criminal-justice-system [https://perma.cc/ZW2F-BCEW] (indicating that the proportion of federal inmates serving mandatory sentences is *slowly* going down); Gohara, *supra* note 169, at 45 (arguing that the move toward more merciful, discretionary sentencing in capital cases provides a framework for doing the same in noncapital cases).

204. *See* Rachel E. Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 95-100 (2003); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2560 (2004). These difficult conversations are part of our daily practice as federal public defenders.

205. U.S. SENT. COMM'N, *supra* note 203, at 6.

206. For example, only 4.2% of sentences imposed in Massachusetts in fiscal year 2013 were mandatory. Exec. Office of the Trial Court, Dep't of Research & Planning, *Survey of Sentencing Practices FY 2013*, 18 (Dec. 2014), https://www.mass.gov/files/documents/2016/08/oo/fy2013-survey-sentencing-practices.pdf [https://perma.cc/6UAD-CKRQ].

207. *See* Harmelin v. Michigan, 501 U.S. 957, 994-96 (1991); Lockett v. Ohio, 438 U.S. 586, 603-04 (1978); Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

208. *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, 1147 (2009).

sentencing: "the diverse frailties of humankind" distinguish each defendant from the next.[209] Despite the Court's professed view that "it has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue,"[210] mandatory minimum sentences persist.

If courts abide by the rule of necessity when imposing criminal confinement, as this Note proposes, mandatory minimum sentences are constitutionally invalid: courts must set them aside and impose discretionary sentences that obey the rule of necessity. Even a more permissive view of the individualization requirement, in which a highly persuasive "proxy" for an individualized determination of necessity satisfies the rule of necessity, would not tolerate mandatory minimum sentences as we know them.

a. The Impermissibility of Mandatory Confinement

Under the Supreme Court's case law on confinement, legislatures may not direct courts to impose confinement without an individualized determination that it is necessary. In the Supreme Court's first foundational case on bail, *Stack v. Boyle*, the Court emphasized the constitutional importance of individualization when it held that the Eighth Amendment prohibits "[b]ail set at a figure higher than an amount reasonably calculated" to ensure the defendant's appearance in court.[211] In line with this focus on individualization, the *Salerno* Court repeatedly emphasized the individualized determinations of necessity prescribed by the Act as central to the policy's constitutionality.[212] *Salerno*, therefore, cannot justify a mandatory pretrial detention statute that does not require individualized determinations that confinement is necessary.[213] Although the Court emphasized that

209. *Woodson*, 428 U.S at 304 (1976).

210. Pepper v. United States, 562 U.S. 476, 487 (2011) (citing Koon v. United States, 518 U.S. 81, 113 (1996)); *see also id.* at 487-88 ("[T]he punishment should fit the offender and not merely the crime.") (citing Williams v. New York, 337 U.S. 241, 247 (1949)).

211. 342 U.S. 1, 5 (1951); *see also id.* ("[T]he fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. The traditional standards . . . are to be applied in each case to each defendant."); *id.* at 9 (Jackson, J., concurring) (arguing that in the context of bail, "[e]ach defendant stands before the bar of justice as an individual").

212. *See, e.g.*, *Salerno*, 481 U.S. at 755 ("The Act authorizes the detention prior to trial of arrestees charged with serious felonies who are found after an adversary hearing to pose a threat to the safety of individuals or to the community which no condition of release can dispel.").

213. *See* Colb, *supra* note 115, at 843-44 (reading *Salerno* as requiring "an individualized determination of narrow tailoring").

"*Congress* specifically found that [the] individuals [targeted by the Act] are far more likely to be responsible for dangerous acts in the community after arrest,"[214] the Court only interpreted this finding to underscore Congress's "careful delineation of the circumstances under which detention will be *permitted*" on an individualized basis.[215] In fact, the Court specifically contrasted the Act with a hypothetical alternative that imposed detention on all defendants charged with "these serious crimes," pejoratively referring to such a policy as a "scattershot attempt" to achieve incapacitation.[216]

This disapproval of mandatory detention is consistent with the Court's civil-commitment cases. In *Jones*, the Court held that a jury's determination of insanity warranted civil commitment but only for a limited duration, after which point a proper determination of necessity is constitutionally required.[217] This holding would make little sense if legislatures were free to legislate away the need for *any* individualized determination of necessity *at any time*. In *Crane*, a jury's determination of a mental abnormality likely to cause sexual violence did not warrant civil commitment, because this was not an adequate justification for confinement unless the individual suffered from a lack of control.[218] This holding, too, is difficult to understand if legislatures can order confinement based on their generalized determination that it is appropriate.

Ultimately, mandatory detention conflicts with the rule of necessity, which requires confinement to be necessary—and to last no longer than necessary—to meet its purposes. There is only one way to effectively enforce the principle that confinement may only be imposed when necessary: requiring the government to prove that each individual it wishes to confine warrants it. Otherwise, an individual facing mandatory detention might suffer unnecessary confinement and

214. *Salerno*, 481 U.S. at 750 (emphasis added).

215. *Id.* at 751 (emphasis added).

216. *Id.* at 750. The federal courts have been so protective of the need for individualization in pretrial detention that they have neither permitted "*rebuttable* presumptions" that shift the burden of persuasion to the defendant based on the crime charged, *see, e.g.*, United States v. Cherry, 221 F. Supp. 3d 26, 32 (D.D.C. 2016) (emphasis added); and United States v. English, 629 F.3d 311, 319 (2d Cir. 2011), nor mandatory *home detention* for sex offenses, *see, e.g.*, United States v. Karper, 847 F. Supp. 2d 350, 363 (N.D.N.Y. 2011).

217. *See supra* notes 76-80 and accompanying text.

218. *See supra* note 83 and accompanying text.

there would be no way to know. As the Supreme Court has explained, the principles of individualization and necessity are therefore linked.[219] When physical liberty is at stake, narrow tailoring requires individualization.[220]

Given confinement's brutality, requiring that the government justify its necessity on an individual basis makes constitutional sense. Boiled down to its essence, substantive due process is about weighing the government's interest in infringing certain liberties against an individual's interest in retaining those liberties.[221] Among liberty deprivations, confinement is distinctly oppressive and violent. It is a near-complete restriction of the individual's freedom to move her own body, and it inflicts profound psychological effects on those who endure it. As Justice Kennedy has put it, incarceration is among "the most feared instruments of state oppression and state indifference."[222] On the other side of the scale, all the government must do to vindicate its compelling interests in securing detention is to prove that it is warranted.[223] The Supreme Court has thus been wise to demand that confinement be individualized.

b. Lower Courts' Misreading of Salerno

In *Lopez-Valenzuela v. Arpaio*, the first of the pretrial detention cases out of Arizona discussed above,[224] the en banc Ninth Circuit remarked that "[w]hether

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219. In *Reno v. Flores*, 507 U.S. 292, 305 (1993), the Court equated narrow tailoring with individualization, observing that respondents' argument for an individualized determination "is, in essence, a demand that the . . . program be narrowly tailored" and remarking that "narrow tailoring is required . . . when fundamental rights are involved."

220. *See* Colb, *supra* note 115, at 843 (noting, in connection to *Salerno*, that physical liberty is unique in that "an individualized determination of narrow tailoring is not required in the case of any other fundamental right").

221. Note that the Supreme Court reasons from substantive due process, not procedural due process, to gauge the need for individualized determinations that a constitutionally protected liberty interest may be infringed. Reno v. Flores, 507 U.S. 292, 301-05 (1993) (analyzing the need for an "individualized hearing" in a nonconfinement case under "substantive due process"); *id.* at 308 (rejecting a "procedural due process" framing of the argument for individualized determinations).

222. Foucha v. Louisiana, 504 U.S. 71, 90 (1992) (Kennedy, J., dissenting).

223. Simpson v. Miller, 387 P.3d 1270, 1278 (Ariz. 2017) (concluding that "[t]he challenged [pretrial detention] provisions also are not narrowly focused given alternatives that would serve the state's objective equally well at less cost to individual liberty"—in particular, the alternative of seeking detention through the state's individualized provisions that resemble the federal act upheld in *Salerno*).

224. *See supra* notes 173-175 and accompanying text.

a categorical denial of bail for noncapital offenses could ever withstand heightened scrutiny is an open question"[225] in that "neither the Supreme Court nor any federal court of appeals has" ruled on the issue.[226] The court ultimately held that, unlike the acceptable, "narrowly focuse[d]" policy in *Salerno*,[227] Arizona's policy targeting undocumented immigrants for pretrial detention "employ[ed] an overbroad, irrebuttable presumption rather than an individualized hearing to determine whether a particular arrestee poses an unmanageable flight risk."[228] However, the court left open the possibility that mandatory detention might be permissible if some feature of the putative detainee "correlates closely" with and is a "convincing proxy" for necessity of confinement.[229]

The Ninth Circuit arrived at this conclusion by misreading *Salerno* as generating a three-factor test in which individualization is but one element. Quoting *Salerno*, the court applied due-process scrutiny to Arizona's policy under three metrics: the extent to which it addressed a "particularly acute" problem (here, there was no proof that undocumented immigrants posed a particularly high risk of flight), whether it was limited to "extremely serious" offenses (it was not), and whether it imposed confinement on an individualized basis (it did not). [230] But *Salerno* nowhere suggests that these considerations could ever justify a mandatory detention policy. The existence of the Bail Reform Act's individualization requirement was a necessary predicate for the *Salerno* Court's conclusion that the Act addressed "a particularly acute problem" in the first place:[231] the policy was tailored to individuals proven dangerous. Likewise, the *Salerno* Court approved an *individualized* detention policy limited to extremely serious offenses, not a *mandatory* detention policy.

Nonetheless, in the cases evaluating Arizona's mandatory-detention policies pertaining to people accused of sex offenses, Arizona state courts have embraced the dictum in *Lopez-Valenzuela* that a "convincing proxy" for flight risk or dangerousness *might* satisfy the requirement of individualized determinations of necessity.[232] These cases therefore reasoned based on an unduly relaxed view of the individualization requirement. Yet, as we have seen, they applied searching due-

225. 770 F.3d 772, 785 (9th Cir. 2014) (en banc).

226. *Id.* at 786 n.8.

227. *Id.* at 791 (quoting United States v. Salerno, 481 U.S. 739, 750 (1987)).

228. *Id.* at 784.

229. *Id.* at 783.

230. *Id.* at 784 (quoting *Salerno*, 481 U.S. at 750-51).

231. *Salerno*, 481 U.S. at 750.

232. Simpson v. Miller, 387 P.3d 1270, 1277-78 (Ariz. 2017) (citing *Lopez-Valenzuela*, 770 F.3d at 786).

process scrutiny, illustrating valuable lessons about how courts should scrutinize any instance of confinement. Just as the Ninth Circuit invalidated the provision imposing pretrial detention on certain immigrants because the evidence of unmanageable flight risk was lacking, the Arizona Supreme Court invalidated policies imposing pretrial detention on certain people accused of sex offenses because the evidence of unmanageable dangerousness was lacking. The only individualized determinations that these policies required were whether the person was a qualifying immigrant or a qualifying sex-offense defendant, and these were held to be inadequate proxies for necessity of confinement.[233]

For the sake of argument, suppose that mandatory detention is permissible and the permissive "proxy" theory is correct. Remarkably, mandatory minimum sentences as we know them would nonetheless be unjustifiable under the law of confinement. The mandatory sentences that could survive would be more narrowly tailored impositions on the right against unwarranted confinement.

c. Applying Substantive Due Process to Mandatory Minimum Sentences

As I have argued above, due process only permits confinement justified by an individualized determination of necessity. If this is so, then applying the constitutional law of confinement to mandatory minimum sentences is straightforward: they are forbidden. Courts would disregard mandatory minimum statutes and only impose the sentence that is necessary in the case at bar.

Assume, however, that a court need only find a "convincing proxy" for the necessity of confinement. As the cases out of Arizona observe, under this principle, criminal conduct alone is not enough to warrant confinement.[234] In *Wein*, even a well-founded charge of sexual assault, involving "force, coercion, or deception," on its own did not "inherently demonstrate future dangerousness" adequate to warrant automatic confinement.[235] Analogously, the commission of a specified crime or a given criminal history cannot be persuasive proxies for an individualized determination of necessity (unless there exists persuasive empirical evidence of a sentence's general deterrent effect). A criminal incident alone is not highly probative of the forward-looking need to incapacitate, let alone of the retributive value of punishment; these matters centrally depend upon the details of the individual's psychology that caused the conduct.[236] To provide just

233. *See supra* notes 179-187 and accompanying text.

234. *See supra* notes 225-232.

235. *See supra* notes 179-180; State v. Wein, 417 P.3d 787, 797 (Ariz. 2018) (Bolick, J., dissenting).

236. *See, e.g.*, Pennsylvania *ex rel.* Sullivan v. Ashe, 302 U.S. 51, 55 (1937) ("For the determination of sentences, justice generally requires consideration of more than the particular acts by which

a few examples: a serious crime that may often warrant significant confinement on the basis of retribution may not do so to the same extent if the act was out of character[237] or the defendant has taken significant steps to make amends;[238] a period of confinement may be justified as a matter of specific deterrence for defendants likely to weigh the consequences of their actions in the future, but not for those who are unlikely to do so when placed in the circumstances that propelled them to crime;[239] or a sentence of confinement may be necessary as a means of incapacitation for only those defendants who committed a given crime under circumstances that are likely to be repeated.[240] The variability of these potential mitigating factors is practically limitless, for weighting mitigation is an exercise in human psychology and therefore as complex and varied as human nature itself.[241] This is why substantive due process, even under the diluted "persuasive proxy" view, could not permit any general rule that a particular crime "will always warrant" a particular prison term[242] and certainly not a sentence of any considerable length.

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the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.").

237. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 5K2.20 (U.S. SENTENCING COMM'N 2003), https://guidelines.ussc.gov/gl/%C2%A75K2.20 [https://perma.cc/Z8A4-UMM6] (allowing for a downward departure for aberrant behavior).

238. SERED, *supra* note 193, at 129-41 (restorative justice).

239. Wright, *supra* note 197, at 2 ("[H]alf of all state prisoners were under the influence of drugs or alcohol at the time of their offense."); *What Caused the Crime Decline?*, *supra* note 198, at 79 ("This report demonstrates that when other variables are controlled for, increasing incarceration had a minimal effect on reducing property crime in the 1990s and no effect on violent crime. In the 2000s, increased incarceration had no effect on violent crime and accounted for less than one-hundredth of the decade's property crime drop.").

240. As for general deterrence, the analysis should remain essentially the same if the sentence under scrutiny happens to be prescribed by statute: the legislature should not receive any more deference as to its judgment on deterrence than the government would otherwise. It is true that the key advantage courts enjoy over legislatures is their ability to weigh individual-specific factors, and the extent to which a particular punishment furthers general deterrence usually does not turn on such factors. Indeed, it is through its generalized fact-gathering process that a legislature in principle *could* provide satisfactory proof that a given punishment would deter. But the generalized nature of the evidence at issue provides no reason to exempt legislatures from the requirement to provide such evidence.

241. *See* Gohara, *supra* note 169, at 65-70; *see also* Woodson v. North Carolina, 428 U.S. 280, 304 (1976). This is why developing and weighing sentencing mitigation both require a distinctive experience. *See infra* notes 265-270 and accompanying text.

242. *Cf.* Harmelin v. Michigan, 501 U.S. 957, 1022 (1991) (White, J., dissenting) (applying this "will always warrant" standard in scrutinizing a mandatory minimum for drug possession under the Eighth Amendment); United States v. Johnson, 379 F. Supp. 3d 1213, 1221 (M.D. Ala. 2019) ("One hypothetical defense of the quantity-based [Sentencing Guidelines] regime

Under the "persuasive proxy" view, however, some appropriately tailored proxies might suffice. Consider, for example, a statute requiring a felony sentencing court to impose incarceration if it is persuaded by an appropriate standard of proof—based on the defendant's track record with probation and all other relevant circumstances—that the defendant would violate probation by committing a new crime that endangers another. In a close case, such a provision may push a judge who would otherwise not have done so to impose a prison sentence. Although confinement would not be based on an individualized determination that it is the least restrictive means of achieving a compelling purpose, the inquiry is a close proxy for necessity for incapacitation. Such closely tailored proxies could permit lawmakers to continue to play a role in directing sentencing outcomes without burdening defendants' freedom from unwarranted confinement to an impermissible degree.

3. Reviewing Discretionary Sentences on Appeal

Given the constitutional right against unwarranted confinement, sentencing courts not bound by a mandatory minimum statute would likewise have to observe due process and order only such confinement as is necessary. Besides the sentencing court itself, the implementation of this right is up to the appellate courts. At present, sentencing appeals are common: in the federal system, they are the most common kind of criminal appeal.[243] A sizable share of these sentencing appeals challenge the sentence imposed on the ground of statutory excessiveness,[244] which appellate courts review for mere "reasonableness."[245] State

would be that the quantity of drugs involved in an offense is a proxy for the offender's role in the drug trade hierarchy. Granted, this may be true in many cases. But in many others, it is not." (footnote omitted)).

243. In fiscal year 2012, fifty-nine percent of federal criminal appeals challenged the sentence alone, compared to twenty-five percent of appeals that challenged only the conviction and sixteen percent of appeals challenging both. *2012 Sourcebook of Federal Sentencing Statistics*, U.S. SENT. COMM'N fig.M (2012), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2012/FigureM_0.pdf [https://perma.cc/J769-TYLG]. I have omitted "*Anders* briefs" from the data; in an *Anders* brief, an appointed defense attorney simply represents that there is no colorable issue for appeal. *See* Anders v. California, 386 U.S. 738 (1967).

244. In fiscal year 2012, twenty-five percent of sentencing appeals related to "reasonableness," which could be substantive reasonableness (i.e., excessiveness) or procedural reasonableness. Another twelve percent related to the § 3553(a) factors in some other manner. *Guideline Involved in Issues Appealed by the Defendant*, U.S. SENT. COMM'N tbl.57 (2012), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2012/Table57_0.pdf [https://perma.cc/Y2RN-KTRR].

245. United States v. Booker, 543 U.S. 220, 261 (2005).

criminal systems likewise apply deferential standards of review in such appeals.[246]

The theory advanced here would subject criminal sentences of confinement to the rule of necessity as a *constitutional* matter. Accordingly, the deference that appellate courts accord to sentencing judges by only reversing "unreasonable" sentences would no longer be appropriate.[247] The Supreme Court has held that constitutional proportionality determinations — whether about fines, capital sentences, prison sentences, or punitive damages — should be reviewed de novo on appeal.[248] Whereas the lower court's factual findings must be reviewed for "clear error" only, its constitutional conclusion as to the punishment's excessiveness receives no deference.[249] This rule comports with the case law on confinement: in cases like *Salerno*[250] and *Foucha*,[251] the Court engages in a de novo constitutional analysis of the permissibility of the confinement at issue. More generally, this less deferential review comports with how courts apply heightened constitutional scrutiny to any kind of state action burdening the rights of individuals.[252]

The Court's rationale for subjecting proportionality determinations to de novo review also applies to necessity determinations under substantive due process. Like proportionality, necessity in sentencing is a "fluid concept[]" that will

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246. *See, e.g.*, Rozkydal v. Alaska, 938 P.2d 1091, 1094-95 (Alaska Ct. App. 1997) (assessing whether the district court abused its discretion); People v. Giminez, 534 P.2d 65, 67 (Cal. 1975) (defining abuse of discretion as "arbitrary or irrational"); Commonwealth v. Glass, 50 A.3d 720, 726-27 (Pa. 2012) (stating that the defendant must prove "a substantial question" before an appellate court will review a discretionary sentence for "manifest abuse of discretion"). A notable exception is New York, where appellate courts have the power to reduce sentences "in the interest of justice" upon a de novo review. *See* N.Y. C.P.L.R. 470.15(3)(C) (McKinney 2019); People v. Mitchell, 168 N.Y.S.3d 421, 422-24 (App. Div. 2019).

247. Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 433 (2001) (reasoning that "[i]f no constitutional issue is raised [regarding a penalty], the role of the appellate court . . . is merely to review the trial court's determination under an abuse-of-discretion standard," in contrast to when a constitutional infirmity is alleged).

248. *Id.* at 434-36.

249. *See id.* at 435.

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

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

252. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992) (applying substantive-due-process scrutiny to Pennsylvania's abortion statute without any deference); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (applying strict scrutiny to the state's admissions policy under equal protection without any deference to the lower court); Cohen v. California, 403 U.S. 15 (1971) (invaliding Cohen's conviction under the First Amendment without any deference to the lower court).

"acquire content only through application."[253] More specifically, the rule of necessity will "acquire meaningful content through case-by-case application at the appellate level."[254] Sentencing courts will be meaningfully constrained by the rule of necessity only if appellate courts issue precedential decisions binding them. To give these appellate opinions enough content to "unify precedent" and "stabilize the law," appellate courts must engage in de novo analysis, not merely affirm all but the most extreme sentences.[255] Through this process, the case law on sentencing will develop, and genuine legal reasoning will guide constitutional review of sentences. This development would not only bring the legal culture of American sentencing in line with that of other countries, where appeals of excessive sentences have generated relatively principled bodies of law;[256] it would also bring sentencing in line with the constitutional law of confinement.

The premise of Part II has been a constitutional analogy between civil and criminal confinement. The right against unwarranted confinement has been expounded in the civil context. If the analogy to criminal confinement is sound, mandatory minimum sentences as currently fashioned are constitutionally unjustifiable, and discretionary sentences must observe the requirements of substantive due process by imposing only such confinement as is necessary to further the goals of punishment. If the analogy fails, however, the case law on confinement is inapplicable. Part III will thus defend the analogy against the most likely objections.

III. DEFENDING THE ANALOGY BETWEEN CIVIL AND CRIMINAL CONFINEMENT

In this Part, I defend the analogy between civil and criminal confinement against seven possible objections. The first three objections urge that punishments are uniquely legislative; thus, the objections contend, judicial scrutiny akin to that applied to civil confinement is inappropriate. The next three objections raise other arguments. First, perhaps people convicted of crimes forfeit their right against unwarranted confinement. Second, perhaps criminal defendants' unique procedural protections mitigate the need for substantive-due-process scrutiny, as the Supreme Court's cases applying such review to punitive damages awards imply. And third, perhaps the Eighth Amendment's prohibition

253. *Cooper Indus.*, 532 U.S. at 436.

254. *Id.*

255. *Id.*

256. *See, e.g.*, R v D (1997), 69 SASR 413 (Austl.), 1997 WL 1881492 (reducing a sentence for "persistent sexual abuse of a child" after analyzing the facts of six appellate opinions on excessive sentences).

on "Cruel and Unusual Punishments" bars substantive-due-process review of sentences of confinement. Finally, perhaps a constitutional rule of necessity in sentencing would provoke so much sentencing litigation that it would unduly overwhelm judicial resources. Upon inspection, none of these objections is persuasive.

A. Punishments as Legislative

In its case law on Eighth Amendment proportionality, the Supreme Court has embraced the view that legislative determinations of punishment merit special deference. In the Court's view, "the 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.'"[257] The Court has justified this position on the basis that "[t]he efficacy of any sentencing system cannot be assessed absent agreement on the purposes and objectives of the penal system"[258] and that such purposes and objectives "are peculiarly questions of legislative policy."[259]

As an objection to due-process scrutiny, the justification fails to persuade. Due process requires a court ordering regulatory confinement to ensure that confinement is warranted in view of any of its traditional aims—for example, flight risk or danger in the context of pretrial detention. Analogously, in the context of criminal confinement, the Constitution would only require a court to find confinement warranted by any of the conventional aims of punishment. In other words, the state would remain free to pursue any of the well-accepted purposes of punishment. Disagreement about the "purposes and objectives" of punishment, then, is neither here nor there. The question is whether any purpose or objective warrants confinement in the case at hand.

The Court's more general concern, however, merits a longer reply. Due-process scrutiny means courts would have to inquire into whether legislatively mandated sentences are genuinely necessary. As we have seen, courts are accepted as the appropriate decision-makers in analogous inquiries about civil confinement. In the context of incarceration, however, concerns about competence and dem-

257. Harmelin v. Michigan, 501 U.S. 957, 998 (Kennedy, J., concurring in part and concurring in judgment) (quoting Rummel v. Estelle, 445 U.S. 263, 275-76 (1980)).

258. *Id.*

259. *Id.* at 999 (quoting Gore v. United States, 357 U.S. 386, 393 (1958)).

ocratic legitimacy may seem to require that legislatures, rather than courts, decide what punishment fits specific crimes.[260] And, arguably, judges have historically respected mandatory sentencing statutes as authoritative. The following three Sections respond to these concerns.

1. Competence

At first blush, the objection that legislators, not judges, have the moral capacity to prescribe punishment may appear reasonable: if judges have no special ability to discern the punishment deserved by a given person,[261] then there is no justification for them to judge a legislative prescription of punishment. Yet judges constitutionally review legislation infringing fundamental rights across a variety of contexts, from abortion[262] to guns,[263] and sentences of confinement deprive a person of bodily liberty. If substantive due process requires courts to review legislative enactments on matters such as contraception[264] and civil confinement, but not on criminal confinement, it must be because judges suffer some *special* incompetence relative to legislatures in the area of criminal punishment that does not plague other areas of judicial review. With the burden of proof thus clarified, the objection is unpersuasive.

Judges — and judges alone — are expert sentencers. Only judges know what it is to condemn a person to years of incarceration, usually under brutal conditions, over his pleas for mercy.[265] Judges may also have expertise in making predictive judgments of flight risk or danger, but this expertise is diminished when a psychiatric disorder is the cause of danger. The dearth of information available to the court at the early point at which pretrial detention is decided likewise dimin-

260. I borrow the distinction between competence and legitimacy from Nancy Gertner. *See* Nancy Gertner, *On Competence, Legitimacy, and Proportionality*, 160 U. PA. L. REV. 1585 (2012).

261. The Reagan Administration took this position when advocating for mandatory sentencing policies. Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 530 n.28 (2007) ("The judge, while trained in the law, has no special competence in imposing a sentence that will reflect society's values.").

262. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973).

263. *See, e.g.*, McDonald v. City of Chicago, 561 U.S. 742, 778 (2010).

264. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965).

265. *See* Karakatsanis, *Mass Imprisonment*, *supra* note 123, at 255 ("[Imagine] the prosecutor stands to address the court and produces a wheel. . . . The prosecutor declares that, based on the way that her office has constructed the wheel, there is a one-in-ten chance that the defendant's punishment is that he will be taken into the next room and raped. . . . [T]his is essentially what we do when, in doctrinal silence, we allow people to be sentenced to American jails and prisons.").

ishes judicial expertise. Undoubtedly, however, at full-blown sentencing hearings—when a judge weighs the circumstances of the crime, the life story of the defendant, and the mitigation presented by defense counsel in order to fashion a criminal sentence that meets the prescribed aims of punishment—that judge is exercising a unique expertise.

The Supreme Court recognized this expertise in *Mistretta v. United States* when it rejected a separation-of-powers challenge to the newly created Sentencing Commission.[266] The Court relied on judges' unique expertise in sentencing to uphold the inclusion of judges on the Commission. The Court explained:

> Prior to the passage of the Act, the Judicial Branch, as an aggregate, decided precisely the questions assigned to the Commission: what sentence is appropriate to what criminal conduct under what circumstances. It was the everyday business of judges, taken collectively, to evaluate and weigh the various aims of sentencing and to apply those aims to the individual cases that came before them.[267]

For this reason, "although Congress has authorized the Commission to exercise a greater degree of political judgment than has been exercised in the past by any one entity within the Judicial Branch, in the unique context of sentencing, this authorization does nothing to upset the balance of power among the Branches."[268]

Legislators do not have comparable expertise: they are not sentencers. They issue prescriptions in the abstract, without the benefit of information about the individuals whose liberty they control or the input of the individuals harmed or affected by the criminal act in question. A generalized legislative debate is far-removed from a comprehensive hearing about an individual's deservingness of punishment. Nor do legislators suffer the burden of seeing the human impacts of the punishments they prescribe.[269] Although separation-of-powers principles do not *require* judges rather than legislators to determine the length of prison

266. 488 U.S. 361, 385 (1989). The role of the Commission was to author guidelines prescribing mandatory punishments based on the crime of conviction, prior offenses, and certain additional factors. The Guidelines have since been made advisory on Sixth Amendment grounds. *See* United States v. Booker, 543 U.S. 220, 245 (2005).

267. *Mistretta*, 488 U.S. at 394.

268. *Id.*

269. *See* Simon & Sidner, *supra* note 2.

sentences, they also fail to justify the exclusion of judges from an area in which they possess genuine expertise.[270]

2. *Legitimacy*

Concerns about democratic legitimacy might appear to support a separate objection to judicial evaluation of carceral sentences. One might argue that a judge in a democratic society should give effect to the community's moral, retributive judgment as expressed through a statute enacted by democratically elected legislators instead of setting aside this judgment in favor of the judge's own conclusion on whether confinement is warranted. However, this argument ignores the central role of courts in protecting fundamental rights, the purpose of which is to protect individuals from majoritarian legislative judgments.[271] Excepting the right against unwarranted confinement from courts' special expertise in this area could only be justified if legislatures were especially reliable at calibrating punishment, or if the community's retributive judgments were so trustworthy that courts did not need to second-guess them to safeguard physical liberty, the core freedom that due process protects.

Three decades into the era of mass incarceration,[272] this uncritical understanding of American criminal policy-making would be naïve. The United States imprisons more of its residents than any other society in the recorded history of the world.[273] There is a well-documented "one-way ratchet" in legislatures' sentencing policies: due to the "pathological politics" of criminal law, politicians find it far easier to increase penalties than to decrease them, and thus sentencing

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270. *Cf.* AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION 445 (2012) ("Judges may not be better than the rest of us in deciding the excruciatingly hard moral questions raised by, say, abortion or assisted suicide, but they do have special expertise concerning a criminal-justice system that operates in their own courtrooms and that pivots on their own personal signatures on death warrants and harsh prison sentences."); *id.* (arguing, as a constitutional matter, that "[h]aving wrongly prevented jurors from giving full vent to conscience and mercy, judges should in various situations use their own consciences to fill the conscience gap that they themselves have helped to create," such as by refusing to order incarceration in appropriate cases).

271. *See* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 407 (1971) (Harlan, J., concurring) ("[T]he Bill of Rights is particularly intended to vindicate the interests of the individual in the face of the popular will as expressed in legislative majorities . . . .").

272. *See* German Lopez, *Mass Incarceration in America, Explained in 22 Maps and Charts*, VOX (Oct. 11, 2016), https://www.vox.com/2015/7/13/8913297/mass-incarceration-maps-charts [https://perma.cc/6EBB-HKZ9].

273. World Prison Brief, *Highest to Lowest — Prison Population Rate*, INT'L CTR. FOR PRISON STUD., http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All [http://perma.cc/L79X-MRQB].

inflation is pervasive and difficult to remedy.[274] It is impossible to understand the prevalence of American incarceration without understanding the ways in which criminal punishment in the United States falls disproportionately on people who lack political power. Criminal punishment in the United States is imposed on people of color at infamously disproportionate rates,[275] and a staggering majority of the people processed in American criminal courts are experiencing poverty.[276]

Our constitutional tradition is sensitive to such risks. The Framers of the Constitution, Bill of Rights, and Fourteenth Amendment recognized the imperative to constrain the extent of the control of the politically powerful over the criminal system.[277] Through numerous countermajoritarian constitutional protections for criminal defendants, their provisions display a robust concern that

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274. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509-10 (2001) (arguing that this "one-way ratchet" is caused both by the "political bogey" status of the criminal and by various institutional characteristics of American criminal-justice systems); *see also* Atkins v. Virginia, 536 U.S. 304, 315 (2002) (noting "the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime").

275. *See generally* Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance: Regarding Racial Disparities in the United States Criminal Justice System, SENT'G PROJECT (Mar. 2018), https://www.sentencingproject.org/publications/un-report-on-racial-disparities [https://perma.cc/XT55-JY7S] (arguing that the racial disparity of incarceration in the United States violates the country's obligations under the International Covenant on Civil and Political Rights); *see also* John Gramlich, *From Police to Parole, Black and White Americans Differ Widely in Their Views of Criminal Justice System*, PEW RES. CTR. (May 21, 2019), https://www.pewresearch.org/fact-tank/2019/05/21/from-police-to-parole-black-and-white-americans-differ-widely-in-their-views-of-criminal-justice-system [https://perma.cc/9T5J-3WXJ] (finding that in the United States today, whites systematically favor harsher responses to crime than blacks do, even though blacks perceive crime to be a greater problem).

276. JUDICIAL CONFERENCE OF THE UNITED STATES, 2017 REPORT OF THE AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT xiv (Apr. 2018), https://cjastudy.fd.org/sites/default/files/public-resources/Ad%20Hoc%20Report%20June%202018.pdf [https://perma.cc/98NB-NQRT] ("Fully 90 percent of defendants in federal court cannot afford to hire their own attorney."); John Pfaff, Opinion, *A Mockery of Justice for the Poor*, N.Y. TIMES (Apr. 29, 2016), https://www.nytimes.com/2016/04/30/opinion/a-mockery-of-justice-for-the-poor.html [https://perma.cc/Y5CR-9AHP] ("Approximately 80 percent of all state criminal defendants in the United States qualify for a government-provided lawyer."); *see also* Karakatsanis, *Mass Imprisonment*, *supra* note 123, at 256 ("If nonviolent criminal laws were enforced on college campuses or investment banks for just a single day in the same rates as in poor communities, there would be twenty-four-hour news vans outside of every local jail and immediate public hearings about the harshness and efficacy of our legal system.").

277. *See* Aliza Plener Cover, *Cruel and Invisible Punishment: Redeeming the Counter-Majoritarian Eighth Amendment*, 79 BROOK. L. REV. 1141, 1147 (2014); Aliza Plener Cover, *Supermajoritarian*

criminal-justice policies could easily become the tools of an oppressive majority.[278] Substantive due process is similarly motivated by the need to protect the rights of politically powerless minorities.[279] People subject to criminal punishment need not be a "suspect class" under equal-protection doctrine to be protected by the right against unwarranted confinement. Instead, the substantive due-process principles that protect against unwarranted confinement in other contexts must also apply to criminal confinement. Democratic legitimacy cannot justify eliminating the right against unwarranted confinement in criminal court when the realities of American punishment policy, as well as the principles underlying our Constitution, suggest that prison sentences should be subject to the most stringent countermajoritarian judicial protections. At the very least, there is no reason to exercise special restraint.[280]

Criminal Justice, 87 GEO. WASH. L. REV. 875, 899 (2019) [hereinafter Cover, *Supermajoritarian Criminal Justice*].

278. These include the right to a unanimous, rather than majoritarian, jury—charged with deciding both fact and law at the Founding—guaranteed in Article III and again in the Bill of Rights; the prohibition of cruel and unusual punishment, motivated by the use of criminal sentences to punish political dissidents in England; and the special concern of the Framers of the Fourteenth Amendment with racially motivated punishment in the South. Cover, *Supermajoritarian Criminal Justice*, *supra* note 277, at 882-91. More generally, the heavy emphasis on criminal justice in the Bill of Rights—a decidedly minoritarian document—is revealing. *See* U.S. CONST. amends. IV, V, VI, VIII.

279. *See*, *e.g.*, United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 75-77 (1980) (suggesting that the famous *Carolene Products* footnote captures the Court's dual responsibilities to protect the democratic political process and to protect minorities from majorities). Tellingly, 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. *See* Skinner v. Oklahoma, 316 U.S. 535 (1942).

280. Curiously, the Court's cases applying substantive-due-process scrutiny to punitive damages suggest that the Court harbors a special fear that juries will be unfairly prejudiced against large corporations. *See, e.g.*, Philip Morris USA v. Williams, 549 U.S. 346, 352-53 (2007); TXO Prod. Corp. v. All. Res. Corp., 509 U.S. 443, 474-75 (1993) (O'Connor, J., dissenting). Yet this intuitive fear from the Court pales against the wealth of statistical proof that racial prejudice affects how prosecutors charge, how juries convict, and how judges sentence. *See* Radley Balko, Opinion, *There's Overwhelming Evidence that the Criminal-Justice System Is Racist. Here's the Proof.*, WASH. POST (Sept. 18, 2018 9:00 AM EDT), https://www.washingtonpost.com/news/opinions/wp/2018/09/18/theres-overwhelming-evidence-that-the-criminal-justice-system-is-racist-heres-the-proof [https://perma.cc/47N3-5234] (compiling a list of 120 studies). Pamela Karlan defends the Court's disparate treatment of corporate and criminal defendants by arguing that legislatures and prosecutors determine the range of permissible penalties and the criminal charges filed, and unlike civil juries, they are politically accountable, which diminishes the need for constitutional review of sentences. Pamela S. Karlan, *"Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 920 (2004). Yet legislatures also set damages caps in civil trials—and where they

3. Historical Practice

The merits of majoritarian sentencing policy aside, mandatory prison sentences have existed throughout our nation's history.[281] Since due-process case law sometimes emphasizes the role of historical practice in identifying unenumerated substantive rights, one might argue that this fact forecloses a right to be protected from unwarranted mandatory sentences. The counterarguments undermine this reasoning.

First, federal courts have never justified the right against unwarranted confinement on the basis of historical practice. Instead, the inherent value of freedom from physical restraint undergirds this particular substantive-due-process right. In recognizing substantive rights implicit in the Due Process Clause, the Court sometimes anchors its inquiry in history. At times, it has reasoned from the premise that "the [Due Process] Clause specially protects those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition."[282] At other times, it has acknowledged that "[h]istory and tradition guide and discipline this inquiry but do not set its outer boundaries."[283] The Court's cases on confinement fall in the latter category: the Court eschews any reliance on history when articulating the substantive right against unwarranted confinement. Instead, the Court reasons from the inherent importance of physical liberty. The analogous approach here would be to recognize the same right without regard to historical practice. Under this ahistorical mode of substantive-due-process reasoning, the fact that courts have not until now recognized the applicability of the right against unwarranted confinement in the criminal context is irrelevant.

As in *Salerno*,[284] the Court's line of civil-commitment cases likewise emphasizes the inherent importance of physical liberty without arguing that freedom

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choose to permit juries' discretion in fixing punitive damages rather than imposing a cap, that too is a politically accountable decision. *Cf.* Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 609 (2005) (arguing that the differences between the punitive damages and sentencing contexts "cut in both directions"). The suggestion in the Court's jurisprudence and Karlan's response that large corporations are more politically vulnerable than criminal defendants, and therefore require more extensive substantive-due-process protection from courts, is dubious indeed.

281. Harmelin v. Michigan, 501 U.S. 957, 994-95 (1991).

282. Washington v. Glucksberg, 521 U.S. 702, 703 (1997).

283. Obergefell v. Hodges, 135 S. Ct. 2584, 2598 (2015).

284. *See supra* notes 90-92 and accompanying text.

from civil commitment has been guarded as a matter of historical practice. *Donaldson*, *Jones*, *Foucha*, and the Kansas cases do not turn on any "history" or "tradition" of protecting the mentally ill from unwarranted confinement.[285] Indeed, this was the basis of Justice Thomas's dissent in *Foucha*.[286] The bare fact that physical liberty was at stake in civil-commitment proceedings drove the Court's substantive due-process interventions, irrespective of historical practice. On this, all nine Justices of the *Foucha* Court agreed.[287] The Court's other civil-commitment cases are reasoned the same way.[288] Under the Court's precedents, it is the sheer deprivation of physical liberty imposed by detention "for any purpose"[289] that triggers the substantive-due-process right against unwarranted confinement.

Second, it would misread history to assume that facially mandatory sentencing statutes were truly "mandatory" due to the permissibility of jury nullification in the early years of the United States. Whereas jury nullification today is a power, not a right, and juries must disobey express instructions to exercise it, nineteenth-century jurors enjoyed a robust and explicit right to nullify a substantive criminal law carrying a mandatory sentence that they believed unjust in the circumstances of the individual case at hand.[290] Indeed, they were often *told* of the penal consequences of conviction.[291]

Third, in many respects, contemporary prison sentences are an unprecedented kind of liberty infringement in the history of the United States. Prison

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285. *See supra* Sections I.A-B.

286. Foucha v. Louisiana, 504 U.S. 71, 102 (1992) (Thomas, J., dissenting).

287. The majority was moved not by history, but by the fact that "commitment for any purpose constitutes a significant deprivation of liberty." *Id.* at 80 (quoting Jones v. United States, 463 U.S. 354, 361 (1983)); *see also id.* ("We have always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty." (quoting United States v. Salerno, 481 U.S. 739, 750 (1987))). Likewise, one of the two dissents took the constitutional importance of freedom from bodily restraint to follow from the simple fact that "incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference." *Id.* at 90 (Kennedy, J., dissenting). And Justice Thomas's dissent criticized the Court's reasoning precisely because of this ahistorical method. *Id.* at 102 (Thomas, J., dissenting).

288. *See* Jones v. United States, 463 U.S. 354 (1983); O'Connor v. Donaldson, 422 U.S. 563 (1975). *Kansas v. Hendricks* contains a passing mention to a Founding-era commitment statute but only in support of the proposition that the Court has long upheld such statutes — not to derive the substantive-due-process right at issue. 521 U.S. 346, 357 (1997).

289. *Foucha*, 504 U.S. at 80.

290. United States v. Polizzi, 549 F. Supp. 2d 308, 405 (E.D.N.Y. 2008) (extensively canvassing the scholarship on eighteenth-century juries to show the positive characterization of jury nullification).

291. AMAR, *supra* note 270, at 432-33; *see also id.* at 445-48.

sentences of contemporary length are historically unprecedented,[292] as is the prevalence of mandatory sentences.[293] Moreover, much of today's substantive criminal law is a twentieth-century innovation.[294] For these reasons, the more specifically any given sentencing statute or sentence is described, the less historical deference the statute or sentence is owed in the substantive-due-process analysis — and the more appropriate heightened scrutiny appears. This relationship between the specificity of description and the historical pedigree is important, because the same judges who emphasize the importance of history insist that substantive-due-process rights be defined with a high degree of specificity.[295] Thus, those most concerned with the history of our carceral policies should be most attentive to the specific ways in which the carceral state has ballooned in recent decades.

In sum, historical practice presents no insurmountable obstacle. The justification for the right against unwarranted confinement is ahistorical. Regardless, historical analysis supports its extension to rein in our historically unprecedented — and unprecedentedly rigid — carceral state.

B. Other Principled Objections

Three further distinctions between regulatory and criminal confinement can be pressed. First, those who commit crimes might be viewed as forfeiting their right against unwarranted confinement. Second, criminal defendants enjoy unique procedural protections before conviction that those subject to regulatory confinement do not enjoy. And third, the Eighth Amendment's Cruel and Unusual Punishments Clause may be viewed as the exclusive substantive constitutional constraint on sentences of confinement. Yet, none of these arguments justifies the unique silence of substantive-due-process jurisprudence in regard to criminal confinement.

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292. Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 701 (2010).

293. U.S. SENT. COMM'N, *supra* note 203, at 6.

294. *See* DOUGLASK HUSAK, OVERCRIMINALIZATION 20-21 (2008) ("The incidence of punishment is at unprecedented levels partly because defendants are convicted of crimes that did not exist a few generations ago."); *id.* at 19 (noting, in 2008, that "[t]he past 20 years have seen novel changes in sentencing practices not replicated elsewhere in the world" and highlighting the rise of mandatory sentences as an example); *id.* at 125 ("As the right not to be punished is valuable, no law that implicates it is justified simply because it has a rational basis. A higher standard of justification should be applied throughout the criminal arena.").

295. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).

1. *Crime as Forfeiture of Liberty*

The Court has never considered whether criminal wrongdoing should negate the wrongdoer's substantive-due-process right against unwarranted confinement.[296] However, a plurality of Justices has endorsed the general principle that "the act which is assertedly the subject of a liberty interest [should not be viewed] in isolation from its effect upon other people—rather like inquiring whether there is a liberty interest in firing a gun where the case at hand happens to involve its discharge into another person's body."[297] Just as the constitutionally protected freedom of movement does not automatically entail a freedom to trespass, the constitutionally protected right to use a gun does not automatically entail a freedom to "discharge [it] into another person's body." At least one commentator, considering whether a substantive-due-process right against execution exists, has viewed this dictum as interfering with due-process scrutiny of criminal sentences.[298]

This objection confuses rights against inappropriate punishment with rights to commit crime, and rights against unwarranted confinement with rights to commit the acts warranting confinement. The right not to be drawn and quartered for committing murder does not imply the right to commit murder,[299] and the right not to be unnecessarily civilly committed for assaulting someone during a schizophrenic delusion does not imply the right to assault someone.[300] Analogously, the right not to be incarcerated for a crime without an individualized determination that imprisonment furthers a compelling government interest does not imply the right to commit crime. The state action prohibited by substantive due process is unwarranted confinement, not criminalization or punishment.

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296. Naturally, persons convicted of crimes forfeit their right against punishment: due process prohibits pretrial punishment. Bell v. Wolfish, 441 U.S. 520, 536-37 (1979). All that this principle shows is that *some* punishment does not necessarily violate due process after conviction. It sheds no light on which particular punishments due process permits.

297. Michael H. v. Gerald D., 491 U.S. 110, 124 n.4 (1989) (plurality opinion).

298. Daniel G. Bird, Note, *Life on the Line: Pondering the Fate of a Substantive Due Process Challenge to the Death Penalty*, 40 AM. CRIM. L. REV. 1329, 1361 (2003). Bird's interpretation of the dictum in *Michael H.* proves too much, for it cannot explain why the state is not automatically empowered to confine a person who has harmed others via *civil* commitment.

299. *See* Colb, *supra* note 115, at 810 ("The eighth amendment requires that punishments be scrutinized even when they penalize conduct that is itself unprotected.").

300. One might argue that, unlike persons subjected to civil commitment, criminal defendants have a unique constitutional entitlement to notice of their potential sentences of confinement, such that they uniquely forfeit their right to liberty. Colb explains that this procedural protection, like others, does not make up for an absence of substantive review. Colb, *supra* note 115, at 796-803.

Ultimately, the objection's intuitive appeal relies on confusing the right against *unwarranted* confinement for an absolute right against any confinement. I do not dispute that the state has the power to punish people with incarceration. Once the constitutional preconditions for punishment are met, the state's interest in punishment can overcome an individual's liberty interest on account of his commission of a crime. The question is what those constitutional preconditions amount to. And it is no answer to insist that *some* cases do warrant *some* amount of confinement.

This confusion is possible only because of how deeply normalized incarceration has become in our society, a society in which children are told that "if you can't do the time, don't do the crime," so that even Supreme Court Justices assume that crime and incarceration are constitutionally indistinguishable.[301] The same objection would seem implausible on its face with a different punishment at issue. Imagine a statute, rationalized by general deterrence and retribution, stripping the right to marry from any person convicted of a felony punishable by five years of confinement or longer.[302] As to this hypothetical statute's validity, no one would take the analysis to start and end with the fact that the person punished committed a crime, even a serious one. It would be obvious that the constitutional inquiry is whether *this particular response* to the crime is constitutionally justifiable. The same is true here—and if confining people convicted of crimes to jail cells had not become so normalized, the propriety of this inquiry would be equally obvious.

2. *Criminal Defendants' Unique Procedural Protections*

One might think criminal defendants' unique *procedural* due-process protections cut against substantive review. The Supreme Court has intimated as much. Under the Court's substantive-due-process case law, corporations receive searching scrutiny of punitive damages awarded against them to ensure they are not unconstitutionally disproportionate to the wrong done. To explain why punitive damages receive this treatment but criminal punishments do not, even though both kinds of penalties serve the very same functions,[303] the Court has implied that the unique procedural protections enjoyed by criminal defendants make the

301. *See supra* note 115.

302. Indeed, the Supreme Court invalidated a less drastic version of this policy in light of the substantive-due-process right to marriage. Turner v. Safley, 482 U.S. 78 (1987).

303. *See, e.g.*, State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003).

difference.[304] Justice Kennedy's *Foucha* dissent likewise asserted that one procedural protection in particular distinguishes criminal confinement from civil confinement: the requirement of proof beyond a reasonable doubt for conviction.[305] The argument is that, although criminal confinement infringes on bodily liberty, it does so after a uniquely "[]precise"[306] determination of *eligibility* for confinement. Under the logic of this argument, there is less need to inquire into the necessity of criminal confinement, because at least we are sure that the person is eligible.

This argument is badly confused. First, it suggests that substance and procedure are interchangeable, as if a certain amount of procedural protection compensates for an absence of substantive protection. This is not so. As the Supreme Court has explained, substantive and procedural protections vindicate entirely different values. In due-process analysis, the "substantive issue involves a definition of th[e] protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it. The procedural issue concerns the minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance."[307] Whatever the "minimum procedures required by the Constitution" are to deprive a person of liberty in a given context, they do nothing to explain "which competing state interests" warrant that deprivation.

Second, the argument conflicts with the Supreme Court's civil-commitment cases. These cases apply heightened scrutiny even when the "beyond a reasonable doubt" standard is applied. A jury found that Terry Foucha committed crimes

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304. *See, e.g.*, *id.* ("[D]efendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding. This increases our concerns over the imprecise manner in which punitive damages systems are administered."). The Supreme Court has additionally suggested that proportionality review in punitive damages cases are motivated only by a concern for fair notice, but Justice Scalia has argued that this procedural veneer for substantive review is unpersuasive. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 598-99 (1996) (Scalia, J., dissenting).

305. Foucha v. Louisiana, 504 U.S. 71, 93 (1992) (Kennedy, J., dissenting) ("Compliance with the standard of proof beyond a reasonable doubt is the defining, central feature in criminal adjudication, unique to the criminal law. . . . We have often subjected to heightened due process scrutiny, with regard to both purpose and duration, deprivations of physical liberty imposed before a judgment is rendered under this standard. . . . The same heightened due process scrutiny does not obtain, though, once the State has met its burden of proof and obtained an adjudication." (citations omitted)).

306. *State Farm*, 538 U.S. at 417.

307. Washington v. Harper, 494 U.S. 210, 220 (1990) (quoting Mills v. Rogers, 457 U.S. 291, 299 (1982)).

while insane beyond a reasonable doubt in *Foucha*, and a jury adjudicated Michael Crane a sexually violent predator beyond a reasonable doubt in *Crane*.[308] In substantively assessing the confinement, the Court applied heightened scrutiny, without putting any weight on the particular procedures applied to the detainee, because the substantive question was whether confinement was warranted, even if the procedures were reliable and the determinations accurate.[309]

Third, the complaint that criminal defendants already enjoy unique procedural protections confuses trial with sentencing. Suppose that procedure and substance are interchangeable. Even so, trial only determines whether a person is eligible for punishment. It is sentencing that determines whether confinement will be imposed, and sentencing hearings utterly lack the precision-enhancing procedures of trials. In fact, people facing criminal confinement receive less procedural protection against erroneous determinations than in civil-confinement proceedings, as the Supreme Court has expressly acknowledged.[310] In civil-commitment proceedings, due process requires courts to find that confinement is warranted by clear and convincing evidence.[311] At bail hearings, due process requires courts to find that confinement is warranted either by clear and convincing evidence or a preponderance of the evidence.[312] At sentencing hearings, due process generally requires no standard of proof at all to govern the determination that confinement is warranted.[313] Procedural due process even permits a court to impose its sentence based on conduct for which the trial jury acquitted the de-

308. Kansas v. Crane, 534 U.S. 407, 416 (2002) (Scalia, J., dissenting); *Foucha*, 504 U.S. at 92-93 (Kennedy, J., dissenting).

309. Similarly, in an Eighth Amendment proportionality case involving a jury-imposed prison sentence, the Supreme Court did not consider the imposing body when determining whether the sentence was unconstitutionally excessive. *See* Hutto v. Davis, 454 U.S. 370 (1982).

310. McMillan v. Pennsylvania, 477 U.S. 79, 92 n.8 (1986).

311. Addington v. Texas, 441 U.S. 418, 431 (1979).

312. *See* United States v. Motamedi, 767 F.2d 1403, 1413-16 (9th Cir. 1985) (Boochever, J., concurring in part and dissenting in part); *In re* Humphrey, 228 Cal. Rptr. 3d 513, 535-36 (Ct. App. 2018).

313. *McMillan*, 477 U.S. at 91 ("Sentencing courts have traditionally heard evidence and found facts without any prescribed burden of proof at all." (citing Williams v. New York, 337 U.S. 241 (1949))). It might be objected that the evidence adduced at trial informs the sentence, but trials occur in only six percent of state-court criminal cases and three percent of federal-court criminal cases. Emily Yoffe, *Innocence Is Irrelevant*, ATLANTIC (Sept. 2017), https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171 [https://perma.cc/875Z-426F].

fendant, if the sentencing judge determines that the preponderance of the evidence establishes that such conduct occurred.[314] Various other trial protections likewise do not apply at sentencing.[315] Thus, the premise that procedural due process extensively protects criminal defendants from erroneous confinement is not just insignificant, but false.

Substantively, it would have been of no help if Paul House had received a procedurally impeccable trial and a completely correct verdict. He will still have to die in prison for his drug-addicted behavior.[316] A substantive-due-process right against unwarranted confinement would have prevented this injustice: Houser's sentencing judge could not have imposed such a drastic sentence under the rule of necessity.

3. The Eighth Amendment's Potential Exclusivity

One might wonder whether the Eighth Amendment preempts substantive due process in the area of criminal punishment. The Eighth Amendment prohibits "cruel and unusual punishments," while the Due Process Clause protects "life, liberty, [and] property."[317] In *Graham v. Connor*, the Court reasoned that where one Bill of Rights "Amendment provides an explicit textual source of constitutional protection against [one] sort of physically intrusive governmental conduct, that Amendment, not the more generalized notion of 'substantive due process,'" controls.[318] Since *Graham*, however, the Court has twice "rejected the view that the applicability of one constitutional amendment preempts the guarantees of another,"[319] reasoning that "[c]ertain wrongs affect more than a single

314. United States v. Watts, 519 U.S. 148 (1997) (upholding Watts's sentence for possessing a gun after the jury acquitted him of this conduct). The Constitution requires proof beyond a reasonable doubt of only a small subset of facts at sentencing, and these facts relate to the defendant's conduct, not to the determination that confinement is appropriate. *See* Alleyne v. United States, 570 U.S. 99 (2013); Apprendi v. New Jersey, 530 U.S. 466 (2000).

315. *See, e.g.*, FED. R. EVID. 1101 (exempting sentencing); Betterman v. Montana, 136 S. Ct. 1609 (2016) (holding that the right to a speedy trial does not imply the right to a speedy sentencing); United States v. Booker, 543 U.S. 220 (2005) (holding that there is no Sixth Amendment right to jury fact-finding at sentencing, except that facts constituting elements of crimes must be found by the jury).

316. *See* Colb, *supra* note 115, at 815 ("[P]rocedural rights do nothing for the person who is fairly adjudged guilty of violating the criminal law.").

317. U.S. CONST. amends. VIII, V, XIV.

318. 490 U.S. 386, 395 (1989).

319. United States v. James Daniel Good Real Prop., 510 U.S. 43, 49 (1993) (rejecting the argument, based on *Graham*, that due process alone applies).

right and, accordingly, can implicate more than one of the Constitution's commands."[320] According to the Court, "Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn."[321]

Although the Court has been less than clear on when the *Graham* rule controls,[322] it is a poor fit in the context of the right against unwarranted confinement. The substantive-due-process claim in *Graham* was unpersuasive: no constitutional theory supported a due-process right against excessive force. By contrast, the Court's doctrine on civil confinement supports a well-established right against unwarranted confinement. Moreover, federal courts' treatment of pretrial liberty suggests the Eighth Amendment does not preempt substantive-due-process protection of the right against unwarranted confinement, as such preemption should apply equally to pretrial bail but does not.[323]

Most fundamentally, one wrong need not implicate only one right.[324] This is especially clear when the two rights vindicate very different constitutional values

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320. Soldal v. Cook Cty., 506 U.S. 56, 70 (1992) (rejecting the argument, based on *Graham*, that the Fourth Amendment alone applies).

321. *Id.* (first citing Hudson v. Palmer, 468 U.S. 517 (1984); and then citing Ingraham v. Wright, 430 U.S. 651 (1977)).

322. The Court's only guidance is to consider whether "both provisions target[] the same sort of governmental conduct." *Id.* at 70. If so, apply "the more 'explicit'" and more specific "textual source of constitutional protection" instead of substantive due process. *Id.* (quoting *Graham*, 490 U.S. at 394-95). The critical point is left unexplained: how to discern whether both provisions "target[] the same sort of governmental conduct." *Graham* held that the Fourth Amendment precluded a substantive-due-process right against excessive force by police. 490 U.S. at 395. Thus, the Fourth Amendment's bar on unreasonable seizures and the proposed due-process right against excessive force target "the same sort of governmental conduct." However, the cases after *Graham* held that the Fourth Amendment and due process both applied to civil asset forfeitures. *Daniel*, 510 U.S. at 49; *Soldal*, 506 U.S. at 70. Thus, the Fourth Amendment's bar on unreasonable seizures and due process's protection of "property" do *not* target the same sort of governmental conduct. The distinction is left mysterious.

323. The Eighth Amendment forbids "[e]xcessive bail," just as it does "cruel and unusual punishments." U.S. CONST. amend. VIII. Nonetheless, as we have seen, substantive due process also limits deprivations of pretrial liberty. *See, e.g.*, United States v. Salerno, 481 U.S. 739, 752-55 (1989) (considering, immediately after its substantive-due-process analysis, how the challenged statute fares under the Eighth Amendment without mentioning any *Graham*-type concern). Courts have consistently rejected arguments to the contrary. *See, e.g.*, ODonnell v. Harris County, 882 F.3d 528, 539 (5th Cir. 2018) (brusquely rejecting the argument that *Graham* precludes due-process review of a pretrial bail policy).

324. *See* LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION 21 (1991) (arguing that reading the Constitution correctly requires considering all parts of the document, not just one).

and generate very different inquiries, as is the case here.[325] The Eighth Amendment protects dignity;[326] due process protects liberty. The Eighth Amendment prohibits punishment that degrades the dignity of the wrongdoer, whether or not physical liberty is at issue. Meanwhile, due process prohibits unnecessary deprivations of physical liberty, whether or not the deprivation is punitive. Moreover, the Eighth Amendment question is whether the punishment is cruel and unusual, and thus it is critical whether a "national consensus" opposes the punishment.[327] Due process prohibits all unnecessary confinement, usual and unusual alike. Prison sentences that are historically prevalent, nationally accepted, and "usual" so as to comply with the Eighth Amendment's emphasis on dignity may nonetheless violate the Due Process Clause's concern for the "liberty" of "person[s]." In short, each constitutional guarantee exerts its own independent constraint on the government's power to impose a punishment of confinement.[328]

C. Overwhelming Judicial Resources

A final practical objection to applying substantive-due-process principles to carceral sentences is that allowing such challenges would overwhelm the court system. At present, however, courts routinely hear statutory sentencing appeals.[329] Moreover, constitutional review of all punishments, and of all confinement besides prison sentences, is authorized. It is difficult to see why courts

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325. In this regard, criminal confinement compares favorably against pretrial detention. The Excessive Bail Clause and substantive due process are motivated by similar concerns with inappropriate pretrial detention, and they generate very similar inquiries, yet courts *accept* their dual applicability. *See Salerno*, 481 U.S. at 754 ("The only arguable substantive limitation of the Bail Clause is that the Government's proposed conditions of release or detention not be 'excessive' in light of the perceived evil."); Funk, *supra* note 85, at 1111 n.72 (citing authority from the First, Sixth, and Eighth Circuits showing that Eighth Amendment scrutiny of bail "tend[s] to mimic a tailoring standard similar to heightened scrutiny" under due process). It should be even easier to accept that the Eighth Amendment and due process both constrain sentences of confinement.

326. *See, e.g.*, Hall v. Florida, 572 U.S. 701, 708 (2014); Brown v. Plata, 563 U.S. 493, 510 (2011); Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion).

327. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 316 (2002).

328. If there is interdependence, it too may speak in favor of due-process scrutiny of sentences of confinement. *See* Adamson v. California, 332 U.S. 46, 92 (Black, J. dissenting) (suggesting "tying our conception of due process to the values that are inherent in the text of the Constitution").

329. *See supra* notes 243-244 and accompanying text.

would not be able to handle constitutional challenges to carceral sentences, which are substantively similar to these other challenges.

While it is true that requiring courts to weigh sentences more rigorously would cause sentencing litigation to be more resource-intensive, it would likely decrease government expenditures on administering prison sentences. The more resource-intensive it is for the government to secure a given sentence, the less often it is likely to seek it—and it is the sentences that appear hardest to justify that would no longer be sought. Moreover, the government's behavior aside, the point of due-process scrutiny would be to limit incarceration to that which is necessary; such scrutiny would likely reduce the incarceration rate. Given the extremity of the carceral state's present bloating, this natural filtering and overall reduction in incarceration would be salutary effects, even from the perspective of saving resources.

Most fundamentally, however, considerations of cost cannot carry the day when a constitutional interest as fundamental as bodily liberty is at stake. In other contexts, administrative convenience is not viewed as appropriate to decide questions of constitutional law that are recognized as fundamentally important.[330] To treat incarceration otherwise disrespects the due-process rights of those potentially suffering years of constitutionally unwarranted physical confinement. Given the extent of constitutional litigation authorized in the criminal system, this position is particularly difficult to justify.[331] If our courts will not hear any meaningful constitutional challenges to carceral sentences simply because they are too busy, something has gone badly wrong in the administration of the criminal legal system.

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330. *See, e.g.*, Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 785 (9th Cir. 2014) (en banc) (reasoning that "administrative convenience" is not sufficient justification to deprive pretrial liberty without individualized inquiry (citing Stanley v. Illinois, 405 U.S. 645, 656-58 (1972))); *see also* Califano v. Goldfarb, 430 U.S. 199, 205, 217 (1977) (holding that "administrative convenience" does not justify gender discrimination under the Equal Protection Clause).

331. We typically permit criminal defendants to litigate a multitude of procedural questions—to take the example of suppression in state court, whether the police seized or searched him or his property in violation of the Fourth Amendment, or whether his confession violated the Fifth, Sixth, or Fourteenth Amendments—before the trial court, then before an intermediate appellate court, then before the state's highest court, then before a federal habeas court in habeas, and then before a federal appellate court, with two opportunities for U.S. Supreme Court review throughout this process. *See Death Penalty 101*, ACLU, https://www.aclu.org/other/death-penalty-101 [https://perma.cc/Q5X9-UYXD] (illustrating this process graphically).

CONCLUSION

This Note has drawn on federal constitutional principles to argue that the right against unwarranted confinement applies to criminal sentences as surely as it does to civil confinement. Yet, despite its inconsistency with the Supreme Court's due-process cases on confinement, *Chapman* purports to preclude federal courts from applying the theory in this Note. Nonetheless, state courts can—and should—lead the way in harmonizing the requirements of substantive due process across civil and criminal confinement.[332]

Some state courts have held that their state constitutions' due-process guarantees prohibit unnecessary infringements of fundamental rights generally and unwarranted confinement specifically.[333] In these states, such precedents imply that unnecessary criminal confinement violates due process as a matter of state law. Take Massachusetts as an example. Under the Massachusetts constitution's due-process guarantee, strict scrutiny governs confinement.[334] When Massachusetts state courts have disagreed with the Supreme Court on the scope of a substantive-due-process right, as in the case of abortion rights, they have not restricted their own state constitution's guarantee to the extent afforded in federal courts; instead, they have acknowledged that their due-process guarantee is in some respects more protective.[335] Each year, about 1,500 people in Massachusetts are sentenced under mandatory statutes, most commonly for crimes relating to guns, drugs, or driving under the influence.[336] The most common gun-related

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332. In fact, perhaps the only American court to have already embraced this Note's argument was a California appellate court in *People v. Olivas*, 551 P.2d 375, 384-85 (Cal. 1976), when it subjected a juvenile's criminal confinement to strict scrutiny under state and federal constitutional law because it infringed upon the fundamental right to bodily liberty. *Olivas* has since been cabined to juveniles, but it remains good law in California in the juvenile context. *See* People v. Wilkinson, 94 P.3d 551, 560 (Cal. 2004). *Olivas* reasoned from equal protection, not due process, but equal protection "essentially duplicates" due process in the area of fundamental rights such as freedom from physical restraint. Chapman v. United States, 500 U.S. 453, 465 (1991) (citing Jones v. United States, 463 U.S. 354, 362 n.10 (1983); *see also* Foucha v. Louisiana, 504 U.S. 71, 84-85 (1992) (opinion of White, J.) ("It should be apparent from what has been said earlier in this opinion that the Louisiana statute also discriminates against Foucha in violation of the Equal Protection Clause of the Fourteenth Amendment.").

333. *See supra* note 62.

334. *See* Kenniston v. Youth Servs., 900 N.E.2d 852, 857-58 (Mass. 2009) (youth confinement); Querubin v. Commonwealth, 795 N.E.2d 534, 539-40 (Mass. 2003) (pretrial detention).

335. *See* Planned Parenthood League of Mass., Inc. v. Attorney Gen., 677 N.E.2d 101, 103-04 (Mass. 1997).

336. MASS. GEN. LAWS ch. 269, § 10A (2020); *Survey of Sentencing Practices FY 2013*, *supra* note 206. As noted above, these mandatory minimum statutes affect other defendants as well: prosecu-

mandatory minimum is possession without a license — an eighteen-month mandatory sentence.[337] Massachusetts state courts should apply their precedents on civil confinement to disregard this mandatory minimum and sentence people thus convicted to confinement only to the extent necessary to secure the purposes of punishment. In many cases, no doubt, confinement shy of eighteen months would suffice.

To date, state and federal courts have generally assumed that constitutional principles do not limit the government's power to punish people convicted of crimes with confinement. On this reading, the Constitution is largely indifferent to the plight of those sentenced to unjustifiably harsh terms of imprisonment. Yet, properly interpreted, the Constitution is not silent on the problem of mass incarceration. Outside the context of sentencing, courts have recognized that unnecessary incarceration is unconstitutional incarceration. This discrepancy cannot be justified. Because bodily liberty is a fundamental right at the very "core" of the liberty that due process protects,[338] the government must prove that confinement is necessary to achieve a compelling purpose in each case. Courts must no longer exempt criminal sentences from this scrutiny.

tors have a powerful bargaining chip whenever a defendant may face liability for a crime carrying a mandatory minimum, thereby influencing case outcomes for such defendants who plead guilty and are sentenced under different statutes. *See supra* note 204 and accompanying text.

337. *Id.* at 46.

338. *See supra* note 54 and accompanying text.