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Excessive Sentencing Reviews: Eighth Amendment Substance and Procedure

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ABSTRACT. This Essay explores the doctrinal regime regulating noncapital sentences. In particular, this Essay argues that the lack of meaningful substantive protections from excessive punishment under the Federal Constitution creates a greater emphasis on state procedural rights at sentencing. Using the case study of state habitual-offender enhancements—which serve as key drivers of mass incarceration and racial disparities in sentencing—this Essay demonstrates how existing procedural rights cannot effectively protect against extreme prison sentences. Given the low probability of reinvigorated substantive review under the Eighth Amendment, this Essay argues for procedural reforms that permit postconviction review of lengthy sentences.

INTRODUCTION

A man is arrested for stealing a purse. What happens next may span days or decades.

Some version of this story unfolds every day in criminal courts across the country.[1] Virtually every iteration involves a period of incarceration,[2] but the

1. According to the Federal Bureau of Investigation's Uniform Crime Reporting Program, law enforcement made 508,181 larceny or theft arrests in 2020, the last year for which these data were available. *Crime Data Explorer: Arrests Offense Counts in the United States*, FED. BUREAU INVESTIGATION, https://crime-data-explorer.app.cloud.gov/pages/explorer/crime/arrest [https://perma.cc/T98U-VRF6]. In introducing this anecdote, I do not claim that this type of case necessarily represents the criminal legal system. As Alice Ristroph discusses in her excellent essay, the types of (interpersonal, violent) offenses that traditionally receive academic attention compose "only a tiny slice of the vast range of conduct defined as criminal by state and federal penal codes." Alice Ristroph, *The Curriculum of the Carceral State*, 120 COLUM. L. REV. 1631, 1664 (2020). Rather, I chose this example because it is based on a case I litigated.

2. *See, e.g.*, Cnty. of Riverside v. McLaughlin, 500 U.S. 44 (1991) (permitting detention for up to forty-eight hours before determining whether there is probable cause for a warrantless arrest).

length of confinement may vary wildly depending on how the police, prosecutors, and courts exercise their discretion. If charged with misdemeanor theft, the individual may be released on his own recognizance or a nominal bond in a matter of hours. Even if convicted of that crime, he may be sentenced to a period of probation or community service that results in no additional incarceration.

Elijah,[3] a client I represented in postconviction proceedings, falls far on the opposite end of the spectrum. He was accused of taking a purse from a passerby on the street and charged with the crime of purse snatching.[4] Because he could not afford his $25,000 bond, Elijah remained in jail for sixteen months until a jury found him guilty as charged. By the time of his sentencing hearing, Elijah was eligible for release on supervision.[5] However, the prosecution deployed Louisiana's Habitual Offender law[6] to seek an enhanced sentence against Elijah. Due to his criminal record, the trial court automatically sentenced him to life imprisonment without the possibility of parole.

Although Elijah's death-by-incarceration sentence is draconian, it is not uncommon. In Louisiana, the state with the highest rate of incarceration,[7] thousands of individuals have been sentenced to lengthy prison terms under the Habitual Offender law.[8] These recidivist-enhancement laws, which increase the maximum permissible prison term for individuals with prior convictions, are common nationwide.[9] Scholars have recognized that these strict habitual-offender laws are a key driver of mass incarceration.[10] Moreover, these laws have

3. This name is a pseudonym. To protect this individual's identity, I have removed all identifying facts and references.

4. *See* LA. STAT. ANN. § 14:65.1 (2022).

5. In Louisiana, the crime of purse snatching is punishable by two to twenty years of imprisonment. LA. STAT. ANN. § 14:65.1 (2022). A trial court at its discretion may suspend that sentence. LA. CODE CRIM. PROC. ANN. art. 893(A)(1) (2022).

6. LA. STAT. ANN. § 15:529.1 (2022).

7. *The Facts: State-by-State Data*, SENT'G PROJECT, https://www.sentencingproject.org/the-facts/#rankings [https://perma.cc/CKJ7-HAHZ] (citing 2019 U.S. Bureau of Justice statistics data).

8. John Bel Edwards & James M. Le Blanc, *Briefing Book*, LA. DEP'T OF PUB. SAFETY & CORR. 38 (Jan. 2020) (on file with author). According to these data, approximately one-eighth of Louisiana's prison population consists of individuals serving an enhanced sentence under the habitual-offender law. *Id.* Among these prisoners, the average sentence spans 38.6 years. *Id.* at 39. Most of these individuals were not sentenced under the habitual-offender law for a violent crime. *Id.* at 40.

9. Ewing v. California, 538 U.S. 11, 14 (2003) (describing "a shift in the State's sentencing policies toward incapacitating and deterring repeat offenders who threaten the public safety").

10. *See, e.g.*, JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM 135-36 (2017).

disproportionately been applied to people of color, thereby contributing to racial disparities within the criminal legal system.[11]

Recently, advocates and policymakers have grown more concerned about excessive criminal punishments and racial disparities in sentencing,[12] which has produced bipartisan legislative reforms.[13] Despite these efforts, however, the United States remains an outlier in the criminal penalties it imposes. While thousands of Americans languish on life-without-parole (LWOP) and other extreme sentences,[14] the Supreme Court of Canada, for example, held in May 2022 that LWOP sentences are impermissible under any circumstance.[15] That decision noted that "in international and comparative law," these sentences are "generally considered to be incompatible with human dignity."[16]

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11. *See id.* at 149; DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II 53-54 (2008); SARA MAYEUX, FREE JUSTICE: A HISTORY OF THE PUBLIC DEFENDER IN TWENTIETH-CENTURY AMERICA 69 (2020).

12. *See, e.g.*, Shon Hopwood, *The Effort to Reform the Federal Criminal Justice System*, 128 YALE L.J.F. 791, 796 (2019) ("More Americans are becoming aware that the U.S. criminal justice system currently incarcerates more than two million people, that it's fundamentally unfair and ineffective, and that its social costs are unsustainable."); Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 820-21 (2017).

13. *See, e.g.*, Natalie Andrews, *Senate Passes Landmark Criminal-Justice Overhaul Bill in Bipartisan Vote*, WALL ST. J. (Dec. 18, 2018), https://www.wsj.com/articles/senate-passes-landmark-criminal-justice-overhaul-bill-in-bipartisan-vote-11545185430 [https://perma.cc/9PCS-QMD9]; 2017 La. Act. No. 282 (amending Louisiana's Habitual Offender law to narrow the range of eligible predicate offenses).

14. Over the last thirty years in the federal system, 4,459 people have been sentenced to life imprisonment for drug crimes alone. Alex Fraga, Drug Enf't & Pol'y Ctr., *Dealing in Lives: Imposition of Federal Life Sentences for Drugs from 1990-2020*, OHIO ST. UNIV. MORITZ COLL. OF L. 6 (Feb. 2022), https://ssrn.com/abstract=4043137 [https://perma.cc/9AJZ-V46Q]. "All of those sentenced to life are serving life sentences without parole (LWOP), because parole has been abolished in the federal system," though they are eligible for "a small reduction in the sentencing terms based on good behavior in prison." *Id.* The Sentencing Project estimates that more than 200,000 people across the nation are serving life sentences. Ashley Nellis, *No End in Sight: America's Enduring Reliance on Life Imprisonment*, SENT'G PROJECT 4 (Feb. 17, 2021), https://www.sentencingproject.org/publications/no-end-in-sight-americas-enduring-reliance-on-life-imprisonment [https://perma.cc/8T4X-Z7XE].

15. R. v. Bissonnette, [2022] S.C.R. 23, para. 97 (Can.) ("[A] sentence of imprisonment for life without a realistic possibility of parole is degrading in nature and thus intrinsically incompatible with human dignity. It is an inherently cruel and unusual punishment . . . ."). Notably, in reaching this conclusion, the Canadian high court cited studies of the American prison system that demonstrate the devastating "psychological consequences flowing from a sentence of imprisonment for life without a realistic possibility of parole." *Id.*

16. *Id.* paras. 98-108.

By its own terms, the Cruel and Unusual Punishment Clause of the U.S. Constitution's Eighth Amendment limits these noncapital sentences.[17] Historically, though, both the U.S. Supreme Court and state apex courts have largely abstained from meaningful substantive regulation of criminal sentences, at least outside of the death penalty.[18] Indeed, recent Supreme Court opinions suggest that even the minimal constitutional limitations on noncapital sentences currently in place may be in jeopardy.[19]

This Essay explores how advocates may combat and redress extreme noncapital sentences absent meaningful substantive protections. Drawing from my fellowship experience and case studies from Louisiana (where I practice), I examine how state-law procedural innovations may fill this Eighth Amendment vacuum. In particular, this Essay highlights a novel feature of Louisiana law that permits postconviction plea agreements to modify convictions and sentences.[20] Through this statute, known as Article 930.10, individuals like Elijah have been able to obtain a reprieve from a lifetime behind bars.

To understand why a provision like Article 930.10 is necessary, this Essay begins by examining the lack of substantive limits on noncapital punishment under the federal and state constitutions. Part I surveys the U.S. Supreme Court's approach to Eighth Amendment challenges to noncapital sentences. As Part I demonstrates, the Court's hands-off approach produces "hydraulic pressure[s]"[21] along two axes. First, deregulation under federal law places significant pressure on the states to regulate noncapital sentences. However, states themselves have largely adopted the Supreme Court's approach to noncapital punishment. Consequently, this lack of substantive limitations at both the federal and state levels creates a second set of pressures that place a heightened importance on procedural rights.

Part II examines the consequences of this regime based in state-law procedural rights and the unregulated sentences it produces. To do so, this Part uses Louisiana's Habitual Offender law as a case study. By examining the operation of that law and the rights afforded to people sentenced under its provisions, Part

17. *See* Solem v. Helm, 463 U.S. 277, 288-89 (1983) ("The constitutional language [of the Eighth Amendment] itself suggests no exception for imprisonment.").

18. William W. Berry III, *Cruel and Unusual Non-Capital Punishments*, 58 AM. CRIM. L. REV. 1627, 1628, 1636-37 (2021).

19. *See infra* note 170 and accompanying text.

20. LA. CODE CRIM. PROC. ANN. art. 930.10 (2022).

21. Lee Kovarsky, *Structural Change in State Postconviction Review*, 93 NOTRE DAME L. REV. 443, 460 (2017).

II shows how most existing procedural protections fail to combat excessive sentences.

Building on Part II's analysis, Part III offers visions for reforms. I begin by considering the prospect for greater regulation of criminal sentences under the Eighth Amendment. While such a jurisprudential shift could directly reduce the prevalence of excessive sentences, it is also exceedingly unlikely given the state of the law and the current composition of the U.S. Supreme Court. Instead, as Part III discusses, postconviction plea agreements under Article 930.10 can regulate excessive sentencing in the absence of meaningful constitutional review—although this overreliance on procedure introduces pitfalls of its own. I conclude by offering further procedural fixes inspired by Article 930.10 that would permit ongoing review and potential modifications of lengthy, noncapital sentences through periodic sentencing-review hearings.

I. CONSTITUTIONAL DEREGULATION

A. The State of the Eighth Amendment

The U.S. Constitution's Eighth Amendment prohibits "cruel and unusual punishment."[22] Although the Eighth Amendment does not explicitly distinguish between the death penalty and other punishments,[23] the Supreme Court has increasingly limited the force of the Cruel and Unusual Punishment clause in noncapital cases.[24] Technically, a narrow majority of the Court has consistently interpreted the Eighth Amendment over the last several decades as "contain[ing] a 'narrow proportionality principle.'"[25] Under this interpretation, the Constitution prohibits a sentence that is "grossly disproportionate" to the underlying offense.[26] In practice, however, the Court has emphasized that successful

22. U.S. CONST. amend. VIII.

23. *Compare id.* (prohibiting "cruel and unusual punishment"), *with* U.S. CONST. amend. V (requiring presentment or grand-jury indictment only for "capital, or otherwise infamous crime[s]"). *See also* Solem v. Helm, 463 U.S. 277, 288-89 (1983) ("The constitutional language [of the Eighth Amendment] itself suggests no exception for imprisonment.").

24. The Supreme Court has held that its "decisions . . . [in] capital cases are of limited assistance in deciding the constitutionality of the punishment" in a noncapital case because of "the unique nature of the death penalty." Rummel v. Estelle, 445 U.S. 263, 272 (1980) (citing Furman v. Georgia, 408 U.S. 238, 287, 289 (1972) (Brennan, J., concurring)).

25. Ewing v. California, 538 U.S. 11, 20 (2003) (plurality opinion) (quoting Harmelin v. Michigan, 501 U.S. 957, 996 (1991) (Kennedy, J., concurring in part and concurring in the judgment)); *id.* at 32-33 (Stevens, J., dissenting) (reiterating that noncapital "proportionality review is . . . required by the Eighth Amendment").

26. *Solem*, 463 U.S. at 288.

proportionality challenges to noncapital sentences will be "exceedingly rare."[27] In fact, since the Supreme Court formalized its distinction between death and prison sentences, the Justices have repeatedly clashed over whether the Eighth Amendment imposes *any* substantive limitation on noncapital prison sentences.[28] As a result, commentators have declared the Eighth Amendment "a dead letter with respect to noncapital" sentences.[29]

Although the Court has expressed some reservations about LWOP sentences and habitual-offender laws in particular, it has largely declined to establish categorical, Eighth Amendment limitations on enhanced sentences.[30] In the wake of the brief death-penalty moratorium imposed by the Supreme Court's decision in *Furman v. Georgia*,[31] the Court began to consider Eighth Amendment challenges to lengthy prison terms imposed by state courts.[32] For instance, in

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27. *Rummel*, 445 U.S. at 272.

28. For instance, in *Harmelin*, Justice Scalia, joined by Chief Justice Rehnquist, wrote that "the Eighth Amendment contains no proportionality guarantee." *Harmelin*, 501 U.S. at 965. Three Justices concurred in the judgment of the Court, stating that the mandatory life-without-parole sentence for cocaine possession under review in that case was not unconstitutionally excessive. Those three Justices wrote separately to emphasize their interpretation that "the Cruel and Unusual Punishments Clause encompasses a narrow proportionality principle." *Id.* at 997 (Kennedy, J., concurring in part and concurring in the judgment). The remaining four Justices authored three separate dissents, taking issue both with the sentence at issue in the case, *id.* at 1028 (Stevens, J., dissenting), and with the notion that the Eighth Amendment contains no proportionality principle, *id.* at 1013 (White, J., dissenting); *id.* at 1027 (Marshall, J., dissenting). A decade later, in *Ewing v. California*, 538 U.S. 11 (2003), a newly constituted Court replicated this ideological divide.

29. Berry, *supra* note 18, at 1628.

30. In recent years, though, the Court has reviewed for proportionality noncapital cases in which juveniles were sentenced to life without parole. *See, e.g.*, Graham v. Florida, 560 U.S. 48 (2010) (holding that the Eighth Amendment prohibits life-without-parole sentences for juveniles convicted of nonhomicide offenses); Miller v. Alabama, 567 U.S. 460 (2012) (holding that mandatory life-without-parole sentences for juveniles convicted of homicide is cruel and unusual). Although these cases created a "limited opening" for more robust noncapital proportionality review, the Court has not expanded those rulings beyond the juvenile-life-without-parole (JLWOP) context. *See* Miriam S. Gohara, *Grace Notes: A Case for Making Mitigation the Heart of Noncapital Sentencing*, 41 AM. J. CRIM. L. 41, 56 (2013). Instead, just last year, the Court "may have halted this expansive trend" by eliminating a key procedural protection in JWLOP cases. Leading Case, Jones v. Mississippi, 135 HARV. L. REV. 381, 381 (2021) (discussing Jones v. Mississippi, 141 S. Ct. 1307 (2021)).

31. 408 U.S. 238 (1972), *overruled by* Gregg v. Georgia, 428 U.S. 153 (1976).

32. *See* Solem v. Helm, 463 U.S. 277, 313 (1983) (Burger, C.J., dissenting) ("The prevailing view up to now has been that the Eighth Amendment reaches only the *mode* of punishment and not the length of a sentence of imprisonment."). Notably, in 1912, the Court rejected a challenge to a mandatory life sentence for theft under a West Virginia recidivist statute. *See* Graham v. West Virginia, 224 U.S. 616, 631 (1912). However, as the Court later noted, the Eighth

Rummel v. Estelle, the petitioner was convicted of felony theft in the amount of $120.75.[33] Because Rummel had two prior theft convictions, he received a mandatory life sentence under Texas's habitual-offender law.[34] On appeal, he argued that a life sentence, "as opposed to a substantial term of years," was grossly disproportionate for the crime of theft given that other jurisdictions would punish his conduct less severely.[35] Ultimately, the Supreme Court rejected his challenge, finding that "a constitutionally imposed uniformity" in sentencing would be "inimical to traditional notions of federalism" and the prerogative of individual states to "treat[] particular offenders more severely than any other State."[36]

Just three years later, the Court ostensibly changed course and invalidated a sentence enhanced by a state habitual-offender law. In *Solem v. Helm*, the defendant raised an Eighth Amendment challenge to the life-without-parole sentence he received under South Dakota's habitual-offender law for passing a bad check valued at $100.[37] Although the Court endorsed a case-specific approach to noncapital proportionality review[38] and identified a number of relevant factors to be applied in that analysis,[39] its decision emphasized the nonviolent nature of Helm's crime.[40] Moreover, the *Solem* Court engaged in a comparative analysis of both "the sentences that could be imposed on other criminals in the same jurisdiction"[41] and "the sentences imposed for commission of the same crime in other jurisdictions."[42] Finally, the Court distinguished its holding in *Rummel* on the

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Amendment had not been formally incorporated against the states at time of its decision in *Graham*. *See Rummel*, 445 U.S. at 277 n.13.

33. *Rummel*, 445 U.S. at 266.

34. *Id.* at 264. Without the habitual-offender enhancement, Rummel's theft would be punishable by a term of two to ten years. *Id.* at 266.

35. *Id.* at 270-71, 277.

36. *Id.* at 282. The Court also denied an Eighth Amendment challenge to a forty-year sentence for distribution of marijuana and possession of marijuana with intent to distribute in *Hutto v. Davis*, 454 U.S. 370, 371 (1982). The defendant there was sentenced to twenty years on each count, and the trial court ordered that the sentences run consecutively. *Id.* He was not subjected to a habitual-offender statute.

37. *See* Solem v. Helm, 463 U.S. 277, 281-82 (1983). "Ordinarily the maximum punishment for uttering a 'no account' check would have been five years imprisonment in the state penitentiary and a $5,000 fine." *Id.* at 281.

38. *Id.* at 294-95; *see also id.* at 297 n.24 (declining to review the "general validity of sentences without possibility of parole" and considering only whether "the sentence imposed on this petitioner violates the Eighth Amendment").

39. *Id.* at 290-92.

40. *Id.* at 296 ("Helm's crime 'was one of the most passive felonies a person could commit.'" (quoting State v. Helm, 287 N.W.2d 497, 501 (S.D. 1980) (Henderson, J., dissenting))).

41. *Id.* at 298-99.

42. *Id.* at 299-300.

basis of parole eligibility. In *Rummel*, the Court had emphasized the fact that Texas's "relatively liberal policy of granting 'good time' credits to its prisoners" would render Rummel eligible for parole "in as little as 12 years."[43] But because Helm was ineligible for parole and therefore required to serve his entire sentence unless he received executive clemency, the Court determined that his punishment was "far more severe" than the sentence Rummel received and thus violated the Eighth Amendment.[44]

Over the next two decades, the Supreme Court significantly rolled back each of these key features of noncapital proportionality review: comparative analysis, parole eligibility, and the severity of the underlying offense. None of these opinions produced a single majority, but the analyses in the plurality and concurring opinions indicate a clear retreat from the framework announced in *Solem*. For instance, the plurality and concurring opinions in the 1991 case of *Harmelin v. Michigan* limited the first two features of *Solem*'s test.[45] In that case, a majority of the Court rejected Eighth Amendment challenges to both the "severe length"[46] and the mandatory imposition of a life-without-parole sentence for possession of 672 grams of cocaine.[47] To support this challenge, the petitioner argued that *Solem* required the Court to conduct "a comparative analysis between petitioner's sentence and sentences imposed for other crimes in Michigan and sentences imposed for the same crime in other jurisdictions."[48] Justice Scalia's plurality opinion asserted that "the Eighth Amendment contains no proportionality guarantee,"[49] but Justice Kennedy, writing for three members of the Court, declined to go so far.[50] However, Justice Kennedy's application of *Solem* in his concurring opinion narrowed the scope of the "intrajurisdictional and interjurisdictional analyses" factor by declaring that such comparisons are "not always relevant to proportionality review."[51] Rather, the concurrence stated, a court need only

43. Rummel v. Estelle, 445 U.S. 263, 280 (1980).

44. *Solem*, 463 U.S. at 297 ("Helm's sentence is the most severe punishment that the State could have imposed on any criminal for any crime. . . . Only capital punishment, a penalty not authorized in South Dakota when Helm was sentenced, exceeds it.").

45. 501 U.S. 957 (1991).

46. *Id.* at 1001 (Kennedy, J., concurring in part and concurring in the judgment).

47. *Id.*; *id.* at 961 (plurality opinion). Notably, the petitioner had no prior criminal convictions: his extreme sentence was not enhanced under a habitual-offender law. *See id.* at 1021 (White, J., dissenting).

48. *Id.* at 1004 (Kennedy, J., concurring in part and concurring in the judgment).

49. *Id.* at 965 (plurality opinion).

50. *Id.* at 997 (Kennedy, J., concurring in part and concurring in the judgment) ("Our decisions recognize that the Cruel and Unusual Punishments Clause encompasses a narrow proportionality principle.").

51. *Id.* at 1005.

perform this comparative analysis in the "rare case" where the court's "initial judgment" or "threshold comparison" of the crime and sentence suggests "gross disproportionality."[52] Notably, though, the *Harmelin* concurrence neglects to provide guidance on how a court should make this "threshold" proportionality determination: whereas *Solem* considered the comparative analysis to be part of its "objective" review,[53] the *Harmelin* concurrence replaces that analysis with a subjective, standardless inquiry.

In addition, the *Harmelin* opinions eviscerated the distinction between parole-eligible and LWOP sentences that was central to both *Solem* and *Rummel*. *Solem* recognized "[a]s a matter of law" the distinction between parole-eligible sentences and the mere possibility of executive clemency.[54] The decision thus made clear that the chance of executive clemency could not salvage an otherwise-excessive LWOP sentence.[55] Nevertheless, the plurality opinion unceremoniously collapsed that distinction: despite the categorical language of *Solem*, Justice Scalia's opinion asserts that "[i]n some cases . . . there will be negligible difference" between an LWOP sentence and a lengthy prison term with a long initial period of parole ineligibility.[56] Furthermore, his opinion suggests that LWOP sentences are not as severe as *Solem* had thought due to "the possibilities of retroactive legislative reduction and executive clemency."[57]

The Court subsequently considered *Ewing v. California*,[58] a challenge to a twenty-five-years-to-life sentence under California's "three strikes" law for the theft of three golf clubs valued at $399 each.[59] Both *Harmelin*'s and *Ewing*'s plurality opinions considered the seriousness of the underlying offense as a feature of noncapital proportionality review, but those opinions introduced a less protective version of that criterion. To be sure, they both emphasized that the predicate convictions used in enhancement by a habitual-offender law are relevant to sentencing decisions.[60] But where *Solem* held that the defendant had "paid the penalty for each of his prior offenses" and so directed courts to "focus on . . . the

52. *Id.*

53. Solem v. Helm, 463 U.S. 277, 290 (1983).

54. *Id.* at 300.

55. *Id.* at 303 ("Recognition of such a bare possibility [of executive clemency] would make judicial review under the Eighth Amendment meaningless.").

56. *Harmelin*, 501 U.S. at 996 (plurality opinion).

57. *Id.*

58. 538 U.S. 11 (2003).

59. *Id.* at 18.

60. *Solem*, 463 U.S. at 296-97 & n.21; *Ewing*, 538 U.S. at 29 (plurality opinion) ("In weighing the gravity of Ewing's offense, we must place on the scales not only his current felony, but also his long history of felony recidivism.").

felony that triggers" the enhanced sentence,[61] the *Ewing* plurality opinion again retreated from this stance, noting that the petitioner "incorrectly frames the issue" by focusing primarily on the triggering offense.[62] Instead, the plurality in *Ewing* determined that proportionality review of a sentence imposed under a recidivist enhancement must "accord proper deference" to a state's decision to punish repeat offenders more severely.[63]

Most notably, the recent noncapital proportionality jurisprudence changes how lower courts should analyze the severity of the offense giving rise to a contested sentence by imposing a hierarchy of offenses that usurps authority from the states.[64] Notably, the early noncapital Eighth Amendment decisions deferred to the states by emphasizing the ability of each jurisdiction to declare certain content criminal or felonious.[65] However, in *Harmelin*, the concurrence asserted that the drug-possession offense at issue could not be considered "relatively minor."[66] Although Justice White's dissent argued that Harmelin's conduct was "not exceptionally serious,"[67] the concurrence dismissed the claim that his offense was "nonviolent and victimless" as "false to the point of absurdity."[68] Thus, rather than affirming state-by-state variation on punishment under a constitutional ceiling, as *Rummel* and *Solem* did, *Harmelin* arguably requires that drug offenses be treated as sufficiently severe to impose a life sentence without parole, thereby creating a constitutional floor.

Each of these jurisprudential changes narrows the scope of proportionality generally and particularly in ways that limit challenges to extreme sentences under habitual-offender laws. Most explicitly, *Ewing*'s plurality expands the "fram[ing]" of noncapital proportionality review to encompass review of predicate offenses and requires deference to state legislative goals of punishing repeat

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61. *Solem*, 463 U.S. at 296 n.21.

62. *Ewing*, 538 U.S. at 28 (plurality opinion).

63. *Id.* at 29.

64. *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 66 n.225 (1997) ("[The] Justices [in *Harmelin*] also concluded that possession of a significant amount of drugs was serious. The upshot is that proportionality review is now unavailable for all major street crimes, for drug distribution, and for drug possession where the amount possessed was substantial.").

65. Rummel v. Estelle, 445 U.S. 263, 282 (1980) ("Until quite recently, Arizona punished as a felony the theft of any 'neat or horned animal,' regardless of its value; California considers the theft of 'avocados, olives, citrus or deciduous fruits, nuts and artichokes' particularly reprehensible. In one State theft of $100 will earn the offender a fine or a short term in jail; in another State it could earn him a sentence of 10 years' imprisonment." (footnotes omitted)).

66. 501 U.S. 957, 1002 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

67. *Id.* at 1024 (White, J., dissenting).

68. *Id.* at 1002 (Kennedy, J., concurring in part and concurring in the judgment).

offenders more severely.[69] Furthermore, and as discussed below, many habitual-offender laws "flatten" sentences by removing parole eligibility.[70] Thus, by deemphasizing the role of parole eligibility in noncapital proportionality review, *Harmelin* erased a key protection from particularly cruel applications of recidivist enhancements for minor offenses. Similarly, states vary widely in which offenses can serve as predicates for a recidivist enhancement.[71] As in *Solem*, robust comparative analysis could constrain extreme applications of habitual-offender laws in cases where the predicate and triggering offenses are all relatively minor. However, by abandoning that requirement, *Harmelin* permits these outlier applications so long as the sentence does not appear disproportionate under a judge's subjective analysis. Although the Supreme Court may still invalidate a life sentence for "overtime parking"[72] even under this weakened form of noncapital proportionality review, it has defanged the Eighth Amendment's relevance to the habitual-offender laws that permeate state code books.

B. State Analogues to the Eight Amendment

In theory, individual states are free to adopt more expansive protections against excessive sentences through their own constitutions and legislatures. Nearly every state constitution contains a provision analogous to the federal Eighth Amendment.[73] Slight semantic variations in these state constitutions "suggest[] that some state provisions . . . may place greater restrictions on state punishment practices than the U.S. Constitution."[74] As Professor William Berry III has documented, eleven state constitutions feature the same "cruel and unusual" phrasing as the Eighth Amendment.[75] "Another thirteen states have adopted the 'cruel and unusual' language and supplemented it with additional requirements."[76] Six states' constitutions ban "cruel, but not unusual,

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69. Ewing v. California, 538 U.S. 11, 28 (2003) (plurality opinion).

70. *See infra* notes 121-122 and accompanying text.

71. *Compare* LA. STAT. ANN. § 15:529.1(A) (2022) (applying the habitual-offender enhancement to an individual convicted of "a felony" who then commits "any subsequent felony"), *with* CAL. PENAL CODE § 667(a)(1) (West 2022) (applying the habitual-offender enhancement only to a person previously convicted of a statutorily enumerated "serious felony" offense").

72. *Ewing*, 538 U.S. at 21 (plurality opinion) (citing Rummel v. Estelle, 445 U.S. 263, 274 n.11 (1980)).

73. William W. Berry III, *Cruel State Punishments*, 98 N.C. L. REV. 1201, 1205-06 & n.23 (2020).

74. *Id.* at 1206.

75. Berry, *supra* note 18, at 1636 & n.63.

76. *Id.* at 1636 & n.64.

punishments."[77] The remainder of state constitutions prohibit cruel *or* unusual punishments using a disjunctive conjunction.[78]

In the capital context, some state courts have interpreted their constitutions more robustly than the U.S. Supreme Court has read the Eighth Amendment.[79] For example, although the U.S. Supreme Court famously rejected an Eighth Amendment challenge to the constitutionality of the death penalty based on racial disparities in its application,[80] the Supreme Court of Washington subsequently held that the state's capital punishment regime violated the state constitutional prohibition on "cruel punishment"[81] because it had been administered in an "arbitrary and racially biased manner."[82]

State courts could issue similar rulings in noncapital cases, but "the overwhelming majority of states" have declined to enforce greater protections against excessive prison sentences.[83] As Professor Berry has documented, forty states "simply apply the Supreme Court's gross disproportionality doctrine" in reviewing noncapital punishments.[84] Consider, for instance, the Supreme Court of Iowa's recent decision in *Dorsey v. State*.[85] The petitioner, James Dorsey, appealed a mandatory life-without-parole sentence for a first-degree murder he committed at the age of eighteen years and five days.[86] Dorsey raised two challenges to that sentence. First, attempting to expand the U.S. Supreme Court's *Miller* ruling[87] and citing "medical and social science literature," he argued that imposing a mandatory LWOP sentence on someone who was under twenty-five years old violated the state constitutional prohibition on "cruel and unusual punishment."[88] The Iowa high court denied relief on that claim, citing precedent that established a "bright-line constitutional distinction between juvenile offenders

77. *Id.* at 1636 & n.66.

78. *Id.* at 1636 & n.65.

79. *E.g.*, State v. Santiago, 122 A.3d 1, 73 (Conn. 2015).

80. McCleskey v. Kemp, 481 U.S. 279 (1987).

81. State v. Gregory, 427 P.3d 621, 631 (Wash. 2018) (citing WASH. CONST. art. I, § 14).

82. *Gregory*, 427 P.3d at 636.

83. Berry, *supra* note 18, at 1636-37.

84. Berry, *supra* note 18, at 1653.

85. 975 N.W.2d 356 (Iowa 2022).

86. *Id.* at 358.

87. Miller v. Alabama, 567 U.S. 460 (2012) (holding that the Eighth Amendment prohibits mandatory life-without-parole sentences for defendants under eighteen years of age at time of offense).

88. *Dorsey*, 975 N.W.2d at 361-62 (citing IOWA CONST. art I, § 17). Dorsey made the same challenge under the Eighth Amendment but abandoned this federal claim on appeal. *Id.*

and adult offenders for purposes of" the state's Eighth Amendment analog.[89] Second, Dorsey asserted that his LWOP sentence was "grossly disproportionate" to his offense.[90] Though Dorsey raised this challenge under the state constitution, the Iowa Supreme Court analyzed his claim through the "gross disproportionality" analysis outlined in Justice Kennedy's concurrence in *Harmelin*.[91] Under that stringent analysis, the state high court affirmed the sentence.

In *Dorsey*, the language of the state constitutional provision at issue happened to match the language of the Eighth Amendment's Cruel and Unusual Punishment Clause, which arguably supports the Iowa court's reasoning.[92] However, "irrespective of the language of the state constitution," most states do not provide greater protections from excessive noncapital sentences.[93] The Louisiana state constitution, for example, prohibits "cruel, *excessive*, or unusual punishment."[94] The Louisiana Supreme Court has offered two general definitions for what constitutes an excessive punishment. First, a sentence is unconstitutionally excessive when "it makes no measurable contribution to acceptable goals of punishment."[95] A sentence is also unconstitutionally excessive when it violates a gross proportionality principle, echoing the federal standard.[96] Further, sentencing courts have a "duty[] to reduce" disproportionate sentences "to one[s] that would not be constitutionally excessive" even when the sentences fall within the prescribed sentencing range.[97]

Despite these protections, the Louisiana state constitution still permits a range of extreme sentences in practice, including many imposed through the Habitual Offender law. Consider, for instance, the case of Fair Wayne Bryant. In 1997, Mr. Bryant was convicted of theft "for unsuccessfully attempting to make

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89. *Id.* at 363.

90. *Id.*

91. *Id.* at 364 (citing Harmelin v. Michigan, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring in part and concurring in the judgment)).

92. IOWA CONST. art. I, § 17.

93. Berry, *supra* note 18, at 1653.

94. LA. CONST. art. I, § 20 (emphasis added); *see also* State v. Sepulvado, 367 So. 2d 762 (La. 1979) (explaining that the Louisiana Constitution prohibits not just "cruel" or "unusual" but also "excessive" sentences).

95. State v. Dorthey, 623 So. 2d 1276, 1280 (La. 1993) (citing State v. Scott, 593 So. 2d 704, 710 (La. Ct. App. 1991)).

96. *Id.* (noting that a sentence is also excessive if "grossly out of proportion to the severity of the crime" such that the punishment "is nothing more than the purposeless imposition of pain and suffering").

97. *Id.* at 1280-81; *see also Sepulvado*, 367 So. 2d at 766-67 (stating that sentences could be excessive even if they fall within the prescribed sentencing range). *But see* State v. McCoy, 2003-1948, pp. 6, 8 (La. App. 4 Cir. 3/3/04), 869 So. 2d 918, 921-22 (holding that the trial court was without authority to amend a final sentence).

off with somebody else's hedge clippers."[98] Due to his four prior felony convictions, Mr. Bryant received a life sentence for the attempted theft under Louisiana's Habitual Offender law—even though only one of his prior convictions, a 1979 attempted armed robbery, was considered a "crime of violence."[99] On direct appeal, the court upheld that sentence.[100] After two decades of incarceration, Mr. Bryant filed a motion to correct an illegal sentence in the trial court, arguing that his sentence was excessive and therefore illegal under the state constitution. The trial court denied relief on procedural grounds: because the trial court had signed an order of appeal, it was divested of jurisdiction over the case.[101] An appellate court affirmed that ruling but noted that, under state procedural law, the trial court did still have jurisdiction to correct Bryant's sentence if that sentence were, in fact, excessive and therefore illegal.[102] Thus, the appellate court's denial of relief amounted to a decision that Bryant's sentence was not excessive. The state high court declined to disturb the appellate court's decision.[103]

Mr. Bryant's case generated considerable publicity, and he fortunately secured his release on parole shortly after his appeal was denied.[104] However, he served twenty-four years in prison before securing his freedom. As his case demonstrates, the addition of "excessive" in the Louisiana constitution does not confer much protection beyond the narrow protection of the Eighth Amendment.

C. Pressures on Procedure

Because the Eighth Amendment does not effectively protect against draconian prison sentences, litigants must rely on a regime of state procedural rights to combat excessive punishments.[105] As Professor Lee Kovarsky diagnosed when

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98. State v. Bryant, 2020-00077, p. 1 (La. 7/31/20), 300 So. 3d 392, 393 (Johnson, C.J., dissenting from denial of certiorari).

99. *See id.*; *infra* note 120 and accompanying text (explaining that the habitual-offender law provides harsher enhancements of a sentence when a predicate conviction is for a "crime of violence").

100. *Bryant*, 285 So. 3d at 517.

101. *Id.*

102. *Id.*

103. *Id.* at 393.

104. Lea Skene, *He Got Life for Stealing Hedge Clippers Under Louisiana's Habitual-Offender Law. Now He's Free After 24 Years*, ADVOCATE (Oct. 15, 2020, 5:22 PM), https://www.theadvocate.com/baton_rouge/news/article_4ef13e22-0efa-11eb-b5e0-27db0371d9f8.html [https://perma.cc/8MHW-G36Q].

105. Stuntz, *supra* note 64, at 54 ("Constitutionally speaking, substantive criminal law is almost entirely unregulated.").

discussing narrowed federal habeas review, the unavailability of a federal forum creates "hydraulic pressure redirecting the critical . . . activity to state courts."[106] This observation applies equally to the context of excessive sentences, where deregulation under the Eighth Amendment redirects substantive review of noncapital sentences to state courts. In this case, that flow is quite deliberate: the Supreme Court has repeatedly invoked "traditional notions of federalism"[107] and "defer[ence] to state legislatures"[108] in narrowing the scope of Eighth Amendment noncapital proportionality review. At its extreme, this "hydraulic pressure" renders the Eighth Amendment so much of a "dead letter" that litigants like James Dorsey abandon federal constitutional claims altogether in favor of arguments under state law.[109]

These lax limits on excessive punishment create a second set of hydraulic pressures beyond the shift toward state courts. Because state constitutions largely mirror the toothless federal standard, substantive regulation of noncapital sentences fails at the state level as well. In the resulting "vacuum" of regulation, procedural rights necessarily receive greater emphasis.[110] As with its substantive provisions, the Federal Constitution provides only a baseline measure of procedural rights at sentencing: defendants are entitled to representation by counsel at sentencing,[111] and individuals subjected to habitual-offender laws must receive "reasonable notice" of the enhancement and an opportunity to contest it at a (nonjury) hearing.[112] However, the Due Process Clause does not require an adversarial sentencing hearing, and the federal right to confront witnesses does not apply to noncapital sentencing proceedings.[113]

Thus, within the realm of federal procedural rights at sentencing, a "hydraulic pressure" identical to the one identified by Kovarsky shifts the focus to state

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106. Kovarsky, *supra* note 21, at 460 (2017) ("When one forum becomes less efficacious, pressure mounts on the other.").

107. Rummel v. Estelle, 445 U.S. 263, 282 (1980).

108. Ewing v. California, 538 U.S. 11, 24 (2003).

109. *See, e.g.*, Dorsey v. State, 975 N.W.2d 356, 358 (Iowa 2022); *supra* note 88.

110. William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 29-30 (1996) (describing the relationship between procedural rights and "the absence of substantive limits" in criminal law).

111. Townsend v. Burke, 334 U.S. 736, 740-41 (1948); Mempha v. Rhay, 389 U.S. 128 (1967).

112. Oyler v. Boles, 368 U.S. 448, 452 (1962).

113. Williams v. New York, 337 U.S. 241, 250-51 (1949) (holding that there is no due-process violation if a trial court considers hearsay statements not admitted into evidence at a noncapital sentencing hearing); Gardner v. Florida, 430 U.S. 349, 362 (1977) (finding that a capital defendant "was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain"). *But see* United States v. Tsarnaev, 142 S. Ct. 1024, 1037 n.2 (2022) (expressing doubts that the Eighth Amendment regulates "the process by which [death] is imposed").

procedural rights. These procedural protections vary among jurisdictions,[114] but they may include the right to present mitigation evidence at a sentencing hearing or a requirement that trial courts provide their reasoning for discretionary sentencing decisions so that appellate courts can review the sentences for excessiveness.[115] The following Part explores these baseline procedural rights through a case study of Louisiana law and demonstrates how existing procedure-based regimes fail to prevent excessive punishments.

II. A CASE STUDY IN PROCEDURAL REGULATION UNDER STATE LAW

Unbounded by the Eighth Amendment and their own constitutions, many states have enacted laws that impose severe prison terms. Nowhere is this more apparent than in habitual-offender laws, which lengthen sentences for second or subsequent felony convictions.[116] Using Louisiana's recidivist-enhancement law as a case study, this Part explores how the regime of procedural rights applicable at sentencing attempts to regulate such extreme sentences. I begin by outlining how the Louisiana law operates both in theory and in application. I then describe the relevant state procedural rules that attempt to constrain application of the habitual-offender law. As this discussion demonstrates, this regime of procedural protections fails to prevent unjust and extreme sentences.

A. Louisiana's Habitual Offender Law

Louisiana, like most states, prescribes a range of penalties for violations of a criminal law. For example, a conviction for purse snatching, the crime for which my client, Elijah, was convicted, normally carries a wide range of two to twenty years of incarceration at hard labor.[117] In order to guide the sentencing court's

114. Given the wide variety of state sentencing procedures, a survey of all relevant procedural rights would far exceed the scope of this Essay. As an illustrative example of this variability, consider that at least two states permit juries to impose sentences in felony cases. *See* Nancy J. King & Rosevelt L. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885, 892 (2004); Ark. Code Ann. § 5-4-103 (2022); Ky. Rev. Stat. Ann. § 532.055 (West 2022). A third state, Virginia, formerly required jury sentencing in felony cases but recently enacted legislation permitting sentencing before either a judge or jury. *See* S.B. 5007, 2020 1st Spec. Sess. (Va. 2020).

115. *E.g.*, State v. Toney, 2021-0131, p. 15 (La. App. 4 Cir. 11/3/21), 331 So. 3d 398, 405, 408 (holding that trial court must state its reasoning and the factual basis for "(1) imposing a maximum sentence for any count of the conviction, (2) imposing consecutive sentences, and (3) restricting benefits on sentences").

116. Ewing v. California, 538 U.S. 11, 14 (2003).

117. LA. STAT. ANN. § 14:65.1(B) (2022).

discretion, the Code of Criminal Procedure outlines a number of nonbinding factors for the judge to consider in fixing punishment within that range.[118]

Under Louisiana's Habitual Offender law, also known as the "multiple bill," individuals with prior felony convictions face significantly longer prison terms than the law would normally authorize.[119] The mechanics are complicated, but the law essentially enhances the range of permissible prison terms based on the defendant's number of prior convictions and whether the current or prior convictions constitute "crime[s] of violence" or "sex offense[s]" under Louisiana law.[120] Additionally, the law provides that individuals sentenced under it are ineligible for probation[121] or good-time parole, which otherwise can reduce a sentence because of good behavior.[122] Under the current iteration of the Code, the sentencing range for an individual with one prior felony conviction would expand to "a determinate term not less than one-third the longest term and not more than twice the longest term prescribed for a first conviction."[123] Therefore, for example, the sentencing range for purse snatching grows from a period of two to twenty years, up to a mandatory minimum term of six-and-two-thirds years and a maximum term of forty years. The harsher version of the Habitual Offender law in effect at the time of Elijah's offense, which permitted the State to enhance his sentence with older prior drug convictions, required Elijah to serve a mandatory life-without-parole sentence for his purse-snatching conviction because he had at least three prior felony convictions.[124]

Notably, any prior felony conviction can be used to enhance the current offense if that conviction is sufficiently recent.[125] Because Louisiana punishes as a

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118. LA. CODE CRIM. PROC. ANN. art. 894.1(B) (2022) ("The following grounds, while not controlling the discretion of the court, shall be accorded weight in its determination [of whether to impose a sentence of imprisonment or whether to suspend the sentence].").

119. LA. STAT. ANN. § 15:529.1 (2022).

120. *See id.* § 14:2(B) (defining "crime of violence"); *id.* § 15:541 (defining "sex offense"). These two criteria—the number of prior felonies, and the nature of the current and former convictions—roughly mirror the focus on "offense conduct" and "criminal history" in other sentencing regimes, including the federal sentencing guidelines. *See* U.S. SENT'G GUIDELINES MANUAL § 1B1.1(a)(1)-(2) (U.S. SENT'G COMM'N 2021).

121. LA. STAT. ANN. § 15:529.1(G) (2022).

122. *Id.* § 15:571.3(C)(1).

123. *Id.* § 15:529.1(A)(1). If both the current and prior felonies are "sex offenses," the sentencing range increases further, potentially as far as life without parole. *Id.* § 15:529.1(A)(2)-(3).

124. LA. STAT. ANN. § 15:529.1(A)(4)(b) (2010) (amended 2017).

125. LA. STAT. ANN. § 15:529.1(C) (2022). Originally, Louisiana's Habitual Offender law provided a ten-year "cleansing period" after which a prior conviction could no longer be used to enhance a new felony sentence. This cleansing period began at "the expiration of the correctional supervision, or term of imprisonment" and excluded time spent in custody or under supervision (i.e. for other, intervening convictions). *Id.* In 2017, the Louisiana legislature passed a historic

felony the simple possession of any drug other than marijuana,[126] the range of enhanceable felonies is vast. For individuals like Elijah, a prior drug conviction can make the difference between a lengthy but finite sentence and death by incarceration.

In practice, the Habitual Offender law also cedes considerable control to local prosecutors, raising separate concerns about fairness in its application. Perhaps the most striking feature of the Habitual Offender law is that it does not automatically apply in every eligible case. Instead, local prosecutors wield significant discretion in choosing when to seek enhanced sentences.[127] In general, Louisiana prosecutors apply the law relatively sparingly. Over ninety percent of Louisiana prosecutors brought three or fewer habitual-offender cases in 2015.[128] However, the previous two district attorneys of Orleans Parish routinely invoked the Habitual Offender law.[129] In 2015 alone, the Orleans Parish district attorney used the habitual-offender enhancement 154 times, the most of any judicial district[130] and far more frequently than prosecutors in other similarly sized urban jurisdictions.[131] With the ever-present threat of the multiple bill if an individual

criminal-justice reform package that, among other provisions, shortened this cleansing period to five years for felonies that are not crimes of violence or sex offenses. *See* 2017 La. Acts 282. The ten-year period remains for those more serious convictions. *Id.*

126. *See* LA. STAT. ANN. §§ 40:966-:970 (2022). Until 2016, a second subsequent conviction for the simple possession of marijuana also constituted a felony punishable by up to five years in prison. *Compare* LA. STAT. ANN. § 40:966(E) (2014), *with id.* § 40:966(E) (2016).

127. LA. STAT. ANN. § 15:529.1(D)(1)(a) (2022) (establishing that a "district attorney of the parish in which subsequent conviction was had *may* file" a multiple bill of information (emphasis added)). The district attorney (DA) also retains the discretion to choose which prior felonies will be used to seek an enhancement. In other words, if an individual has more than one prior felony conviction that qualifies to enhance a subsequent conviction under the statute, the DA can choose whether to include all or some of those prior convictions in a multiple bill. As with other discretionary charging decisions, the parties may negotiate whether a multiple bill will be filed and how many of the eligible priors will be included, but the DA's ultimate decision is essentially unreviewable. *See also* Oyler v. Boles, 368 U.S. 448, 456 (1962) (holding that prosecutors have discretion in enforcement as long that selective enforcement is not "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification").

128. John Simerman, *Louisiana's Habitual-Offender Law Used Sparingly Except in Orleans, Jefferson, St. Tammany*, NOLA.COM (Oct. 1, 2016, 6:00 PM), https://www.nola.com/article_5a580ecd-23a2-508e-b978-2b0bcbf543d3.html [https://perma.cc/TL66-MQMY] ("None of the 39 other judicial districts in the state . . . shipped more than three people to prison under the statute last year.").

129. *Id.*

130. Eve Abrams, *Habitual Offender Prosecutions Down in New Orleans*, LENS (Nov. 29, 2018), https://thelensnola.org/2018/11/29/habitual-offender-prosecutions-down-in-new-orleans [https://perma.cc/TZX6-Z962].

131. *Id.*

proceeded to trial, an untold number forewent their constitutional right to a jury trial and entered guilty pleas to avoid enhanced sentences.[132]

These concerns about inequitable applications are hardly abstract. As both the former Chief Justice of the Louisiana Supreme Court[133] and the academic community have recognized,[134] habitual-offender laws disproportionately target people of color and "undoubtedly contributed to the expansion of the Black prison population."[135] Among southern states, these laws "replaced the Black Codes that were prevalent after the Civil War ended" and "criminalized recently emancipated African American citizens by introducing extreme sentences for petty theft associated with poverty."[136] In the present day, the laws have had the discriminatory effect that was originally intended: Black Louisianans comprise less than a third of the state's total population,[137] but eighty percent of those incarcerated under the habitual-offender law are Black.[138]

B. Procedural Regulation in the Absence of Substance

The wide reach of the Habitual Offender law, the penalty it imposes on individuals who exercise their trial rights, and the disparities in its application all

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132. *See id.* ("[E]ven if convictions under the habitual offender statute have gone down [in Orleans Parish, a former prosecutor] said, using it to leverage plea deals is 'very much still in constant use.'"); PFAFF, *supra* note 10, at 136. The U.S. Supreme Court has approved of this coercive plea-bargaining tactic, finding no due-process violation where a prosecutor invoked Kentucky's recidivist-enhancement law after a defendant rejected a plea deal. *See* Bordenkircher v. Hayes, 434 U.S. 357 (1978). With facts that presage the Court's later rulings in *Solem* and *Hutto*, *see supra* notes 36-37, Paul Hayes was accused of issuing a bad check in the amount of $88.30. *Bordenkircher*, 434 U.S. at 358. Under the applicable habitual-offender law, Hayes received a mandatory sentence of life imprisonment. *Id.* at 358-59.

133. State v. Bryant, 2020-00077, p. 2 (La. 7/31/20), 300 So. 3d 392, 393 (Johnson, C.J., dissenting from denial of certiorari) (arguing that the habitual-offender and other Reconstruction-era "Pig Laws" that "introduce[ed] extreme sentences for petty [offenses] associated with poverty . . . were largely designed to re-enslave African Americans").

134. *See* PFAFF, *supra* note 10, at 149 ("These laws are generally viewed as having disparate racial impacts."); BLACKMON, *supra* note 11, at 53-54; MAYEUX, *supra* note 11, at 69.

135. *Bryant*, 300 So. 2d at 393 (Johnson, C.J., dissenting from denial of certiorari).

136. *Id.*; *accord* Ramos v. Louisiana, 140 S. Ct. 1390, 1394 (2020) (stating that the "avowed purpose" of the constitutional convention that culminated in Louisiana's now-defunct nonunanimous jury requirement "was to establish the supremacy of the white race" (internal quotation marks omitted)).

137. *See QuickFacts: Louisiana, Population Estimates*, U.S. CENSUS BUREAU (July 1, 2021), https://www.census.gov/quickfacts/LA [https://perma.cc/A7NC-V6X8] (reporting that 33% of Louisiana's population is Black).

138. Edwards & Le Blanc, *supra* note 8, at 38 (reporting that 79.1% of habitual offenders are Black compared to the 20.1% who are white).

warrant more stringent regulation of its use. To be sure, the law itself recognizes the unremarkable proposition that it cannot justify imposition of a "constitutionally excessive" sentence.[139] However, as Part I described, state and federal courts have routinely denied substantive constitutional challenges to applications of the Habitual Offender law: as the Louisiana judiciary recently clarified in Fair Wayne Bryant's case, life imprisonment for attempted theft is not unconstitutionally excessive.[140] Moreover, to the extent that sentencing courts actually find that an application of the habitual-offender law is excessive, the law still requires the court to "impose the most severe sentence that is not constitutionally excessive."[141]

In the absence of meaningful substantive protections, robust procedural rights can, in theory, mitigate the risk of erroneous punishments and may even help reduce their substantive harshness. However, as this Section will illustrate, existing procedural rights fail to protect defendants against unjust punishment. Technically, under the Habitual Offender law, a sentencing court must hold an adversarial proceeding before imposing an enhanced sentence.[142] But in essence, these so-called multiple-bill hearings amount to bench trials on strict-liability issues with low burdens of proof.[143] Thus, the procedural rights afforded to the accused do not meaningfully mitigate the harshness of the penalty.

To seek an enhanced sentence under the Habitual Offender law, the prosecution must file a bill of information "accusing the person of a previous conviction."[144] The sentencing court then schedules an adversarial hearing, where the prosecutor must prove that the defendant has prior convictions "beyond a reasonable doubt."[145] In practice, the prosecution can usually meet this burden quite easily. In fact, the law provides that the "presumption of regularity of judgment shall be sufficient to meet the original burden of proof," so the prosecution can simply supply certified records of the prior conviction as a means of identifying the defendant.[146]

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139. LA. STAT. ANN. § 15:529.1(I) (2022).

140. *See supra* Section I.B (discussing *Bryant*, 300 So. 3d 392).

141. LA. STAT. ANN. § 15:529.1(I) (2022).

142. *See infra* note 145 and accompanying text.

143. *See infra* note 146.

144. LA. STAT. ANN. § 15:529.1(D)(1)(a) (2022). This multiple-offender bill of information can be filed "at any time, either after conviction or sentence" and satisfies the due-process notice requirement of *Oyler v. Boles*, 368 U.S. 448, 452 (1962). *See supra* note 112 and accompanying text.

145. LA. STAT. ANN. § 15:529.1(D)(1)(b), (D)(2) (2022).

146. *Id.* § 15:529.1(D)(1)(b).

The limited scope of the multiple-bill hearing does not consider the propriety of the prosecutor's choice to invoke the sentencing enhancement. Further, defendants have no right to a jury trial in determining whether they qualify for enhanced sentences. In general, the Sixth Amendment requires that facts used to enhance a sentence be submitted a jury.[147] However, the Supreme Court decision establishing this rule, *Apprendi v. New Jersey*, created an exception for "the fact of a prior conviction."[148] Louisiana courts have followed *Apprendi*'s holding under the state-law analog of the Sixth Amendment, meaning that the multiple-bill hearing occurs before a judge.[149] But there are good reasons why a jury should decide whether the State has proved that an individual qualifies for an enhanced sentence under the Habitual Offender Law . Ordinarily, introducing a prior felony conviction during a jury trial may prejudice a defendant.[150] But the risk of prejudice at a multiple-bill hearing is minimal given that the hearing occurs after the individual has already been convicted of the triggering offense.[151] On the other hand, an individual may be subjected to an enhanced sentence under Louisiana's Habitual Offender law without a jury ever learning of the enhancement: Louisiana law normally permits the parties to discuss unenhanced mandatory sentences in closing arguments.[152] However, if an individual has been or may be subjected to the Habitual Offender law, Louisiana law prohibits the defense from informing the jury of the heightened mandatory penalty that would be imposed under the multiple bill.[153] Thus, the current procedural regime deprives the accused of a jury's "common-sense judgment," which may help protect against "corrupt or overzealous" applications of the Habitual Offender law.[154]

While the Habitual Offender law is particularly harsh, the regime of procedural rights that applies to unenhanced noncapital sentences also insufficiently

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147. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

148. *Id.* ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury . . . .").

149. *See* State v. Smith, 2005-0375, pp. 3-5 (La. App. 4 Cir. 7/20/05), 913 So. 2d 836, 839-40.

150. *See, e.g.*, Old Chief v. United States, 519 U.S. 172, 180-81 (1997).

151. LA. STAT. ANN. § 15:529.1(D)(1)(a) (stating that a multiple bill is to be filed "after conviction or sentence").

152. *See* State v. Jackson, 450 So. 2d 621, 633-34 (La. 1984).

153. *See* State v. Guidry, 2016-1412, p. 3 (La. 3/15/17). 221 So. 3d 815, 817.

154. Duncan v. Louisiana, 391 U.S. 145, 156 (1968); *see also Guidry*, 221 at 819 n.2 ("[T]he jury protects against tyranny of the law and the penalty alone may render a law oppressive." (citing State v. Harris, 247 So. 2d 847, 851 (La. 1971) (Dixon, J., dissenting))); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 700 (1995) ("I argue that it is both lawful and morally right that black jurors consider race in reaching verdicts in criminal cases.").

protects against excessive punishment. A recent appellate court opinion in *State v. Toney* illustrates these limitations.[155] In that case, the defendant's intoxicated driving killed two bikers and seriously injured several others.[156] The trial court sentenced the defendant to a ninety-one-year cumulative sentence by imposing the maximum sentence for each count, ordering the sentences for Toney's vehicular-homicide convictions to run consecutively as opposed to concurrently, and denying parole eligibility on the vehicular homicide counts.[157] The defendant appealed, arguing both that the sentences were unconstitutionally excessive and that the sentencing judge provided insufficient justification for her discretionary decisions.[158] The appellate court agreed with the latter claim and remanded the case for a "meaningful sentencing hearing."[159]

While the *Toney* opinion vindicates the basic procedural rights at sentencing, it also demonstrates how minimally protective those rights are. The court declined to reach the substantive excessive-sentence claim because the trial court's "lack of sufficiently articulated reasons" rendered the appellate record "insufficient to allow for a meaningful review of defendant's excessiveness claim."[160] Earlier in the decision, though, the appellate court acknowledges that the punishment at issue in the case is "the harshest sentence for vehicular homicide in Louisiana jurisprudence."[161] As the opinion notes, the second-closest sentence on record was nearly half as long as the punishment at issue in *Toney*.[162] Based on this, the appellate court certainly could have found the original sentence substantively excessive and mandated not only a meaningful hearing but also a cap on the eventual punishment. However, the court chose instead to remand the case for additional fact-finding. While compliance with the rules protecting these procedural rights may ultimately result in a less excessive sentence, nothing in the appellate court's opinion prohibits the sentencing court from imposing the exact same — or even a more severe — sentence if it spells out its justifications. Indeed, the appellate court's refusal to rule that the sentence was impermissibly excessive, despite the comparative evidence that the opinion cited, suggests that

155. 2021-0131 (La. App. 4 Cir. 11/3/21), 331 So. 3d 398.

156. *Id.* at 400.

157. *Id.* at 401-02.

158. *Id.* at 402.

159. *Id.* at 407; *see also id.* at 408 (explaining that the trial court must state its reasoning and the factual basis for "(1) imposing a maximum sentence for any count of the conviction, (2) imposing consecutive sentences, and (3) restricting benefits on sentences").

160. *Id.* at 407.

161. *Id.* at 405.

162. *Id.* at 405-06 (citing State v. Gordon, 17-846 (La. App. 3 Cir. 3/28/18), 240 So. 3d 301, which imposed three consecutive eighteen-year sentences for a total of fifty-four years for conviction of three counts of vehicular homicide).

the appellate court may be inclined to uphold the same sentence if imposed again on remand so long as the trial court follows the proper procedures.

III. VISIONS OF REFORM

The foregoing discussion demonstrates how criminal sentencing exists within a vacuum of substantive rights that places significant hydraulic pressure on procedural protections. Furthermore, as discussed in the previous Part, defendants are afforded only a minimal baseline of procedural rights. How, then, can a regime based in procedure protect against draconian sentences?

This final Part considers reform efforts that may mitigate some of the harsh sentencing laws in effect. To begin, I briefly consider the prospect of more robust substantive protections. Due to jurisprudential and political barriers, such reforms are not likely to occur. Instead, then, I identify procedural fixes that may undo some of the harms of excessive sentencing regimes. In particular, I describe a novel aspect of Louisiana law that authorizes postconviction plea agreements to "amend[] the petitioner's conviction, sentence, or habitual offender status."[163] Although this law has certain drawbacks, it permits individuals like Elijah to revisit his harsh sentence. Building on this provision, I consider an additional procedural reform.

A. Reinvigorating Substantive Review

Although the Supreme Court has largely divested from noncapital proportionality review, there are jurisprudential reasons to renew that call.[164] In recent Terms, the Court has reaffirmed that the Eighth Amendment "incorporates 'evolving standards of decency'" that may require reevaluation of past precedent.[165] To evaluate ever-changing standards of decency, the Supreme Court has looked to "objective indicia of society's standards, as expressed in legislative

163. LA. CODE CRIM. PROC. ANN. art. 930.10(B) (2021).

164. *See, e.g.*, Stuntz, *supra* note 64, at 66-67 (1997) ("Substantive constitutional regulation of this sort may be more workable than one might think. A proportionality requirement need not mean appellate review of every sentence. Courts might instead require that trial judges be given the power to revise sentences downward, that legislative guidelines be construed to set ceilings for sentences but not floors. Just as the finder of fact in a criminal case may acquit for any reason, notwithstanding the legislature's definition of the offense, perhaps the sentencer should have the constitutionally guaranteed option of leniency, again without regard to legislative instruction." (footnote omitted)).

165. United States v. Briggs, 141 S. Ct. 467, 472 (2020) (quoting Kennedy v. Louisiana, 554 U.S. 407, 419 (2008)).

enactments and state practice[s]."[166] For habitual-offender laws, the 2017 amendments to Louisiana's multiple-bill law — which made it harder for the government to use prior felonies to enhance sentences — should provide some measure of "objective" proof that society has moved beyond its most draconian recidivist rules. Similarly, prosecutors' declining use of the habitual-offender enhancement — including a campaign pledge from Orleans Parish's district attorney not to invoke the law[167] — should provide additional corroboration for applying greater Eighth Amendment scrutiny to enhanced sentences. But the Supreme Court has only struck down sentencing practices for violating "evolving standards of decency" when there is a societal trend toward completely abolishing the practice.[168] In this binary conception between permissible and outlawed practices, the legislative tweaks to the habitual-offender law likely do not provide sufficient evidence of a shift in society's standards because they do not completely outlaw habitual-offender laws.

More fundamentally, the success of these arguments is as much a question of politics as it is a question of law. A majority of the current Supreme Court favors an originalist understanding of the Eighth Amendment that limits the viability of the more expansive Eighth Amendment claims described above.[169] Just this Term, for instance, a majority of the Court intimated that, in its view, the Eighth Amendment might not confer *any* procedural rights, even in capital or JLWOP cases, because the provision, as originally understood, concerns only "the character of the punishment."[170] Read optimistically, this dictum could potentially create an opening for more substantive challenges to noncapital sentences because excessive sentences, one could argue, fall under "the character of the punishment." The stronger tea-leaf reading, though, cuts the other way: if the Court is willing to reconsider a long-standing right of a *capital* defendant to present all

166. Roper v. Simmons, 543 U.S. 551, 563 (2005).

167. John Simerman, *Jason Williams Says Office Won't Oppose Parole Bids as New DA Launches Reform Agenda*, NOLA.COM (Jan. 26, 2021, 8:36 PM), https://www.nola.com/news/courts/article_60463a88-6026-11eb-aafc-2f392551c025.html [https://perma.cc/7KR5-Q8X9].

168. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 312, 315-16 (2002) (stating that the execution of individuals with intellectual disabilities violates Eighth Amendment "evolving standards of decency" because "legislatures that have addressed the issue have voted overwhelmingly" to ban the practice).

169. Bucklew v. Precythe, 139 S. Ct. 1112, 1122 (2019) (examining "the original and historical understanding of the Eighth Amendment").

170. United States v. Tsarnaev, 142 S. Ct. 1024, 1037 n.2 (2002) ("Some have argued that [*Lockett v. Ohio*, 438 U.S. 586 (1978)] and [its] progeny do not reflect the original meaning of the Eighth Amendment, whose prohibition 'relates to the character of the punishment, and not the process by which it is imposed.'" (quoting Gardner v. Florida, 430 U.S. 349, 371 (1977) (Rehnquist, J., dissenting))).

relevant mitigating evidence to the sentencer,[171] it would be naive to think that it would be open to more expansive arguments, albeit substantive ones, on behalf of noncapital defendants.

B. A Procedural Solution: Article 930.10

If, after all, the law of noncapital sentencing is not amenable to substantive reforms, then procedural innovations may be the only realistic path to review and mitigation of excessive sentences. Article 930.10 of Louisiana's Code of Criminal Procedure, for example, may provide a novel answer for people like Elijah. This statute, which was added to the code books only in 2021, authorizes postconviction plea agreements that "amend[] the petitioner's conviction, sentence, or habitual offender status."[172]

In short, Article 930.10 is a sea change in postconviction procedure. Usually, collateral proceedings are governed by "a twisted labyrinth of deliberately crafted legal obstacles" that constrain a court's ability to revisit a final judgment.[173] Under Louisiana law, for instance, all postconviction claims must be brought within two years of a conviction becoming final.[174] Additionally, the Post-Conviction Relief Act imposes a procedural default rule that prohibits collateral review of arguments that could have been raised at previous stages but were not argued at that time.[175] Therefore, unless an individual challenged the harshness of their

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171. *See* Lockett v. Ohio, 438 U.S. 586, 608 (1978) ("To meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors."); Payne v. Tennessee, 501 U.S. 808, 822 (1991) ("We have held that a State cannot preclude the sentencer from considering 'any relevant mitigating evidence' that the defendant proffers in support of a sentence less than death. . . . [V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." (citing Eddings v. Oklahoma, 455 U.S. 104, 114 (1982))).

172. LA. CODE CRIM. PROC. ANN. art. 930.10(B) (2021).

173. Stephen R. Reinhardt, *The Demise of Habeas Corpus and the Rise of Qualified Immunity: The Court's Ever Increasing Limitations on the Development and Enforcement of Constitutional Rights and Some Particularly Unfortunate Consequences*, 113 MICH. L. REV. 1219, 1220 & n.4 (2015). To see the effect of these rules, it is worth noting a second challenge that the U.S. Supreme Court considered in tandem with its ruling in *Ewing v. California*, 538 U.S. 11 (2003). The petitioner in *Ewing* challenged his sentence under the three-strikes law on direct appeal, but another case raised a similar claim in federal habeas proceedings. *See* Lockyer v. Andrade, 538 U.S. 63, 69 (2003). In that posture, the federal courts must consider not only whether the sentence is excessive but also whether the California court's determination—that the sentence was not excessive—was "contrary to, or an unreasonable application of, clearly established Federal law." *Id.* at 70 (quoting 28 U.S.C. § 2254(d)(1) (2000)).

174. LA. CODE CRIM. PROC. ANN. art. 930.8(A). The law admits a narrow set of exceptions for newly discovered evidence and new, retroactive constitutional rules. *Id.*

175. *Id.* art. 930.4(B).

sentence in their initial appeal and then renewed that challenge within just two years of their conviction becoming final, they generally cannot raise a future claim arguing that their sentence is excessive. Consequently, these postconviction procedural rules block individuals serving long sentences from arguing that they have become rehabilitated behind bars and that their sentence thus no longer makes any "measurable contribution to acceptable goals of punishment."[176]

Article 930.10 cuts directly through these procedural barriers and permits substantive review of time-barred sentences and convictions. Specifically, if the defense and prosecution reach a postconviction agreement, Article 930.10 allows the parties to "deviate from any of the provisions" of the Post-Conviction Relief Act, regardless of "any provision of law to the contrary."[177] So long as the trial court approves the agreement,[178] the parties can effectively bypass the two-year statute of limitations and any other procedural default rule.

In an era where stories of wrongful convictions have become all too commonplace,[179] a number of states have amended their postconviction procedures to allow for greater review of problematic convictions and sentences.[180] None go as far as Article 930.10, which is unprecedented in its ability to waive any and all procedural barriers to review. In my own practice, this statute has permitted me to seek justice for folks like Elijah who otherwise have no meaningful avenue through which to revisit their sentences. Over their decades of incarceration, many of my postconviction clients have worked tirelessly toward rehabilitation. One individual who grew up in an underserved community could not read or write at the time of his arrest. After nearly fourteen years of incarceration on a

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176. State v. Dorthey, 623 So. 2d 1276, 1280 (La. 1993).

177. LA. CODE CRIM. PROC. ANN. art. 930.10(A), (B).

178. *Id.* art. 930.10(B).

179. *See*, *e.g.*, Glossip v. Gross, 576 U.S. 863, 910 (2015) (Breyer, J., dissenting) ("[D]espite the difficulty of investigating the circumstances surrounding an execution for a crime that took place long ago, researchers have found convincing evidence that, in the past three decades, innocent people have been executed."); WHEN THEY SEE US (Netflix 2019) (dramatizing the wrongful conviction of several young Black and Latinx boys in the so-called "Central Park Five" case). *See generally* NAT'L REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/about.aspx [https://perma.cc/7YL5-S2EH] (documenting over 3,200 exonerations across the United States since 1989).

180. *See, e.g.*, Valena E. Beety, *Changed Science Writs and State Habeas Relief*, 57 HOUS. L. REV. 483, 524-27 (2020) (documenting state legislation permitting review of convictions based on changes in forensic science); *Annual Report*, INNOCENCE PROJECT (2021), https://report2021.innocenceproject.org/transforming-systems [https://perma.cc/33LG-GDL3] (documenting new legislation in New Hampshire to expands access to postconviction DNA testing and a new law in Virginia "removing obstacles for those . . . who are trying to prove their innocence through non-DNA evidence").

habitual-offender sentence for a nonviolent drug offense, he painstakingly taught himself to read and recently earned his GED. With those new skills and credentials, he has become eligible for programming at his prison that seeks to address the root causes of his misconduct. The court and prosecutor who imposed an enhanced sentence four times longer than his original prison term likely could not have anticipated these developments. Without Article 930.10, they would have no legal means of evaluating his progress and reexamining his sentence.

C. Drawbacks of Procedural Reforms

As Elijah's case demonstrates, reforms like Article 930.10 are certainly beneficial given the status quo. However, a system that permits decades-long sentences for petty crimes while providing only a mere possibility for a postconviction plea agreement is still suboptimal. Such a case-by-case approach to resentencing will necessarily be slow and incomplete. Furthermore, the vague prospect of release can take a serious psychological toll on incarcerated people.[181]

More fundamentally, an overreliance on postconviction procedures like Article 930.10 may have "perverse" effects on constitutional rights other than the freedom from excessive punishments,[182] such as the right to a jury trial. As Professor William Stuntz explains, "Procedural rules make broader criminal liability more attractive, since the latter can be used as a device for evading the costs of the former."[183] Therefore, enacting procedural rules without substantive constraints may actually "give the government an incentive to generate bad substantive rules."[184]

In the case of habitual-offender laws, this risk of perverse results is not merely theoretical. As described above, prosecutorial threats of filing a multiple bill have already induced hundreds of guilty pleas from individuals who forwent their right to a jury trial to avoid an enhanced sentence upon conviction.[185] The availability of a postconviction remedy may amplify these pressures: for instance, prosecutors may threaten harsher sentences before trial, with the understanding that litigants have future opportunities to seek leniency. Additionally, the existence of a postconviction procedural mechanism to undo plea agreements

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181. Richard Rivera, *Traumatized to Death: The Cumulative Effects of Serial Parole Denials*, 23 CUNY L. REV. 25, 33 (2020) (describing serial parole-board denials as a form of complex trauma that "result[s] in emotional and psychological injury and shock to the individual's sense of self").

182. Stuntz, *supra* note 110, at 7.

183. *Id.* at 10.

184. *Id.* at 7 (emphasis omitted).

185. *See supra* note 132.

may make it more appealing for individuals to take a deal up front and then argue for relief later.[186] In both scenarios, then, procedural reforms like Article 930.10 may further deter the exercise of jury-trial rights.

D. Additional Procedure-Based Reforms: Periodic Sentencing-Review Hearings

Though imperfect, Article 930.10 represents a realistic avenue for combating unjust punishments. It contemplates case-specific adjudications and provides further opportunities for postsentencing review beyond the usual two-year window permitted under the Post-Conviction Relief Act. However, Article 930.10 relies on the parties to initiate sentencing review. A legislature could easily extend Article 930.10 to create automatic periodic postconviction sentencing-review hearings — that is, hearings that do not depend on the parties to initiate. Under such a regime, trial courts would hold status hearings every few years to evaluate the progress and utility of lengthy sentences. The courts could then reduce or suspend sentences that no longer serve their original purposes.[187] Given that Louisiana law prohibits sentences that "make[] no measurable contribution to acceptable goals of punishment,"[188] this periodic review is arguably necessary to ensure that a sentence does not become excessive.

Although these hearings may burden already crowded trial courts, trial courts are ideally positioned to conduct postconviction sentencing-review hearings: they regularly oversee the probation of individuals they sentence,[189] and sentencing-review hearings could occur far less frequently than probation status hearings.[190] In addition, Louisiana, like many other states, requires petitions for

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186. *See* Fiona Doherty, *Testing Periods and Outcome Determination in Criminal Cases*, 103 MINN. L. REV. 1699, 1786 (2019) (describing how proliferation of probation, specialty courts, and certain plea-bargaining practices amount to "modern Testing Periods" that create pre-adjudication pressures on the accused to forego jury trials in order "to avoid the thing they fear most: being sent to prison"). Notably, plea agreements usually contain waivers of future appeals, *see* Class v. United States, 138 S. Ct. 798, 802 (2018), so the availability of collateral review under Article 930.10 is a significant departure from previous practice that may impact plea decisions. Because Article 930.10 came into effect in 2021, it is too early to discern any effects.

187. *See, e.g.*, Right to Trial Act, H.R. 8092, 117th Cong. (2022) (introducing legislation to permit federal district-court judges to impose sentences below the mandatory minimum if an individual rejects a plea deal but is convicted at trial).

188. State v. Dorthey, 623 So. 2d 1276, 1280 (La. 1993). As described *supra* in Section I.B, other state constitutions contain similar provisions that purport to constrain excessive sentences.

189. *See* Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 292 (2016) ("Unlike parole, probation is an independent criminal sentence imposed and administered by a judge. The judge, assisted by the probation officer, retains jurisdiction during the period of the sentence." (footnote omitted)).

190. *See*, *e.g.*, LA. CODE CRIM. PROC. ANN. art. 893(A)(1)(a) (2022) (limiting period of felony probation to three years unless certain limited exceptions apply).

postconviction relief to be filed in "the district court for the parish in which the petitioner was convicted."[191] Given that trial courts already must field collateral appeals, scheduling periodic sentencing review hearings aligns with this longitudinal review function. In fact, sentencing-review hearings may actually streamline adjudication of postconviction petitions, which could be scheduled simultaneously. Though these sentencing reviews would, of course, increase the toll on judicial resources, "considerations of cost cannot carry the day when a constitutional interest as fundamental as bodily liberty is at stake."[192]

Finally, although these sentencing-review hearings may appear to undermine the finality of a criminal conviction,[193] this concern must be balanced against the underlying constitutional values of dignity and humanity, which the prohibitions on excessive sentencing seek to vindicate.[194] As Angela Davis observed, "[P]risons do not disappear problems, they disappear human beings."[195] Therefore, elevating finality erases the reality of individuals condemned to languish behind bars for interminable sentences but who should ultimately return to the outside world.

CONCLUSION

Through a novel postconviction procedure, my client Elijah—sentenced to die in prison for snatching a purse—was able to walk free after receiving a new, more humane sentence. Countless others like him remain incarcerated on extreme sentences.

By limiting the scope of the Eighth Amendment in noncapital cases, the U.S. Supreme Court has permitted states to enact habitual-offender laws like Louisiana's that facilitate draconian sentences. Without meaningful substantive restraints or a reinvigorated Eighth Amendment, individuals must resort to a weak

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191. LA. CODE CRIM. PROC. ANN. art. 926(A) (2021).

192. Salil Dudani, *Unconstitutional Incarceration: Applying Strict Scrutiny to Criminal Sentences*, 129 YALE L.J. 2112, 2175 (2020).

193. Edwards v. Vannoy, 141 S. Ct. 1547, 1554 (2021) (describing finality as a "principle . . . essential to the operation of our criminal justice system" (quoting Teague v. Lane, 489 U.S. 288, 304 (1989) (plurality opinion))).

194. *See* William W. Berry III & Meghan J. Ryan, *Introduction* to THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT 1, 3 (Meghan J. Ryan & William W. Berry III eds., 2020); John D. Bessler, *From the Founding to the Present: An Overview of Legal Thought and the Eighth Amendment's Evolution*, *in* THE EIGHTH AMENDMENT AND ITS FUTURE IN A NEW AGE OF PUNISHMENT, *supra*, at 11, 11-14.

195. Angela Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES (Sept. 10, 1998, 12:00 PM ET), https://www.colorlines.com/articles/masked-racism-reflections-prison-industrial-complex [https://perma.cc/C3KW-YNWS].

set of procedural protections to combat excessive noncapital punishment. Though this prognosis may seem bleak, creative procedural mechanisms like the Article 930.10 postconviction plea statute or a system of postconviction sentencing-review hearings may mitigate the harm of severe sentences.

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