Fordham Urban Law Journal

Volume 36, *Number* 1 2008 *Article* 3

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Alexander A. Reinert*

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Abstract

This Article focuses on two separate issues deriving from the Eighth Amendment's "cruel and unusual punishment" clause. Specifically, it discusses classic conditions of confinement litigation and sentencing proportionality litigation. Confinement litigation includes cases challenging the lived experiences of prisoners such as overcrowding, excessive force, failure to provide adequate medical care, and deprivation of material needs. Sentencing proportionality litigation involves challenges to the length of a prison sentence or mode of punishment. The Article, unlike modern contemporary scholarship, attempts to draw connections between each doctrinal area, ultimately suggesting ways in which proportionality litigation can invigorate conditions litigation. Part I consists of a discussion of the history of the Eighth Amendment. Part II is an examination of the current divergence between the two areas. Finally, Part III consists of a suggestion of how to unite the two and weighing the pros and cons of such a change.

EIGHTH AMENDMENT GAPS: CAN CONDITIONS OF CONFINEMENT LITIGATION BENEFIT FROM PROPORTIONALITY THEORY?

*Alexander A. Reinert**

* Assistant Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. E-mail: areinert@yu.edu. This paper is part of the *Fordham Urban Law Journal's* Colloquium on Conditions of Confinement. I owe thanks to Margaret Lemos and Max Minzner for feedback on an earlier draft of this paper, and to the staff of the *Fordham Urban Law Journal* for outstanding editorial contributions.

INTRODUCTION

The Eighth Amendment, by its plain terms, prohibits "excessive" fines and "cruel and unusual punishments."[1] This Article addresses two aspects of Eighth Amendment jurisprudence: classic conditions of confinement litigation[2] and sentencing proportionality litigation,[3] both of which spring from judicial interpretation of the "cruel and unusual punishment" clause. Although these aspects of Eighth Amendment jurisprudence emerged together at the beginning of the twentieth century, they have increasingly diverged in the past forty years. This Article explores whether proportionality litigation has anything to offer prison conditions jurisprudence. In many ways, this is a strange choice of topics. Proportionality litigation in the federal courts has not been particularly successful, especially in challenging non-capital sentences.[4] Further, the critical scholarly commentary regarding conditions of confinement and proportionality jurisprudence has focused on tweaking each particular doctrinal area rather than trying to bridge the differences between these strands of Eighth Amendment jurisprudence.[5] For

1. U.S. CONST. amend. VIII.

2. By this, I refer to a range of cases challenging the lived experiences of prisoners, including overcrowding, *see, e.g.*, Rhodes v. Chapman, 452 U.S. 337 *passim* (1981) (holding that confining two inmates in a single cell does not violate the Eighth Amendment), excessive force, *see, e.g.*, Hudson v. McMillian, 503 U.S. 1, 5-6 (1992), failure to provide adequate medical care, *see, e.g.*, Estelle v. Gamble, 429 U.S. 97, 104-05 (1976), failure to protect from harm, *see, e.g.*, Farmer v. Brennan, 511 U.S. 825 *passim* (1994), and deprivation of material needs like food and clean water or air, *see, e.g.*, Helling v. McKinney, 509 U.S. 25, 32, 33, 35 (1993) (holding that prisoner could state cause of action under Eighth Amendment for possible future harm to health caused by environmental tobacco smoke); Hutto v. Finney, 437 U.S. 678, 687 (1978) (upholding order to remedy extreme overcrowding, pervasive violence, insufficient food, and unsanitary conditions).

3. Proportionality litigation does not range as far and wide as conditions of confinement litigation. Under the Supreme Court's proportionality jurisprudence, criminal defendants facing a sentence can challenge the term of years of their sentence, *see, e.g.*, Hutto v. Davis, 454 U.S. 370 (1982) (rejecting a claim that a forty-year sentence for possession of nine ounces of marijuana is disproportionate), or the mode of punishment, *see, e.g.*, Trop v. Dulles, 356 U.S. 86 (1958) (finding that denationalization was a disproportionate punishment for military desertion). In recent years, most proportionality litigation has focused on the permissibility of the death penalty for certain types of crimes, *see, e.g.*, Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (holding that the death penalty may not be imposed on a defendant convicted for the rape of a child under the age of twelve), or for certain categories of defendants, *see, e.g.*, Roper v. Simmons, 543 U.S. 551 (2005) (holding that the death penalty may not be imposed on a defendant who committed a capital crime when under the age of 18).

4. See *infra* notes 56-57.

5. *See* Lisa Krim, *A Reasonable Woman's Version of Cruel and Unusual Punishment: Cross-Gender, Clothed-Body Searches of Women Prisoners*, 6 UCLA WOMEN'S L.J. 85, 105-06 (1995) (arguing that the objective test of Eighth Amendment deliber-

example, in the area of conditions of confinement litigation, commentators have suggested modifying the "deliberate indifference" test used to review conditions of confinement challenges,[6] or expanding the Eighth Amendment conditions of confinement rubric to embrace new kinds of constitutional claims.[7] In proportionality jurisprudence, scholars have argued that certain punishments should be considered unconstitutionally disproportionate,[8] or that the Supreme Court's proportionality analysis itself is flawed.[9] Some commentators have also argued for particular ways in which sentencing decisions could be informed by nontraditional considerations, without changing the contours of proportionality review.[10] This Article takes a different tack, albeit with caution. Comparing the two doctrines, I draw connections that suggest ways that pro-

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ate indifference standard should be gender-specific); Pamela M. Rosenblatt, *The Dilemma of Overcrowding in the Nation's Prisons: What Are Constitutional Conditions and What Can Be Done?* 8 N.Y.L. SCH. J. HUM. RTS. 489 (1991) (reviewing possible traditional challenges to overcrowding); Jeffrey Welty, *Restrictions on Prisoners' Religious Freedom as Unconstitutional Conditions of Confinement: An Eighth Amendment Argument*, 48 DUKE L.J. 601 (1998) (arguing that restrictions on exercise of religious practices should be analyzed under Eighth Amendment); Russell W. Gray, Note, Wilson v. Seiter*: Defining the Components of and Proposing a Direction for Eighth Amendment Prison Condition Law*, 41 AM. U. L. REV. 1339 (1992) (proposing that ambiguities in deliberate indifference standard be construed to favor prisoners); Ryan J. Huschka, Comment, *Sorry for the Jackass Sentence: A Critical Analysis of the Constitutionality of Contemporary Shaming Punishments*, 54 U. KAN. L. REV. 803 (2006) (arguing that "shaming" punishments are unconstitutional under traditional Eighth Amendment analysis); Gregory L. Ryan, Comment, *Distinguishing* Fong Yue Ting*: Why the Inclusion of Perjury as an Aggravated Felony Subjecting Legal Aliens to Deportation Under the Antiterrorism and Effective Death Penalty Act Violates the Eighth Amendment*, 28 ST. MARY'S L.J. 989 (1997) (arguing that deportation is a disproportionate penalty for perjury). *But see generally* Sherry F. Colb, *Freedom from Incarceration: Why is this Right Different from All Other Rights?*, 69 N.Y.U. L. REV. 781 (1994) (arguing that strict scrutiny should apply to criminal statutes that authorize incarceration for offenses); James E. Robertson, *The Majority Opinion as the Social Construction of Reality: The Supreme Court and Prison Rules*, 53 OKLA. L. REV. 161, 193-95 (2000) (arguing for the principle of restorative justice to inform sentencing decisions); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 840-43 (2006) (proposing greater scrutiny of prosecutors' role in sentencing); Pamela A. Wilkins, *The Mark of Cain: Disenfranchised Felons and the Constitutional No Man's Land*, 56 SYRACUSE L. REV. 85, 141-42 (2005) (considering felon disenfranchisement through proportionality lens).

6. *See* Krim, *supra* note 5, at 105-06. *See generally* Rosenblatt, *supra* note 5; Gray, *supra* note 5.

7. *See generally* Welty, *supra* note 5.

8. *See generally* Huschka, *supra* note 5; Ryan, *supra* note 5.

9. *See, e.g.*, Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63 (2007) (criticizing Court's reliance on international consensus as normative authority in proportionality analysis).

10. *See, e.g.*, Robertson, *supra* note 5; Stuntz, *supra* note 5, at 840-43. *See generally* Colb, *supra* note 5.

portionality analysis could invigorate conditions litigation. In particular, I argue that, with respect to twin confounding aspects of conditions litigation—deference to prison administrators and the need to establish culpable intent of prison officials—there is some value added by recognizing and effectuating some of the principles at stake in proportionality litigation.[11]

Part I of this Article begins with a discussion of the history of Eighth Amendment litigation, focusing on state and federal courts that have addressed both proportionality and conditions challenges. Part II examines the current divergence between conditions of confinement and proportionality jurisprudence. Finally, in Part III, I suggest how proportionality jurisprudence and conditions of confinement litigation might be reunited, why such a change might be positive, and what the potential drawbacks may be.

I. A Brief History of Eighth Amendment Interpretation

A. Early Interpretations of "Cruel and Unusual" Punishments

The purposes of the Framers of the Eighth Amendment, and the meaning of the "cruel and unusual" punishment clause, have never been clear. The Amendment was based on article I, section 9 of the Virginia Declaration of Rights, which had adopted the language directly from the English Bill of Rights.[12] There has been some disagreement as to whether the Framers intended for the clause to have the same meaning as the language in the English Bill of Rights,[13] but there was little contemporaneous debate of the

11. Pamela Wilkins has argued that some collateral consequences of conviction, such as felon disenfranchisement, should be analyzed under the proportionality framework. *See* Wilkins, *supra* note 5, at 141-42. Collateral consequences of conviction, like terms of confinement, fit well within the proportionality rubric because they are defined by statute and often tailored to particular offenses. *See generally* Office of the Pardon Att'y, U.S. Dep't of Justice, Federal Statutes Imposing Collateral Consequences upon Conviction (2000), http://www.usdoj.gov/pardon/collateral_consequences.pdf (describing collateral consequences imposed by federal statutes); Deborah N. Archer & Kele S. Williams, *Making America "the Land of Second Chances": Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. Rev. L. & Soc. Change 527 (2006) (discussing statutes imposing collateral consequences on state offenders).

12. *See* Solem v. Helm, 463 U.S. 277, 286 n.10 (1983). *See generally* Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 Cal. L. Rev. 839 (1969) (discussing the origin of Eighth Amendment and Framers' misinterpretation of the meaning of the English Bill of Rights).

13. *Compare Solem*, 463 U.S. at 284-85 (arguing that a proportionality principle was implicit in the Magna Carta and English Bill of Rights), *with id.* at 313 (Burger,

clause's meaning during the Constitutional Convention or during the debates over ratification of the Bill of Rights.[14]

For all of the nineteenth century, Eighth Amendment jurisprudence was underdeveloped in the federal courts. In large part, this was because the Supreme Court held that the Amendment applied only to national, not state, legislation,[15] and that various challenges brought against particular punishments were insubstantial.[16] At most, the early federal cases suggested that the Eighth Amendment prohibited "torture . . . and all others in the same line of unnecessary cruelty,"[17] but that judicial deference to legislative judgments about the appropriateness of particular punishment was nearly insurmountable.[18]

The federal government was not alone in prohibiting cruel and unusual punishments, however. Many states had adopted the same language from Virginia's Declaration of Rights, sometimes prohibiting cruel *or* unusual punishment instead of cruel *and* unusual punishment.[19] State courts interpreting their state constitution's

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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."). *See also* Granucci, *supra* note 12, at 844-60 (arguing that the drafters of the English Bill of Rights intended to prohibit both excessive and barbarous punishments).

14. As recounted in *Weems v. United States*, 217 U.S. 349, 368-69 (1910), some legislators objected to the vagueness of the "cruel and unusual punishments" language, asking whether it would mean that in the future, whipping or dismemberment would be prohibited for their cruelty. Little debate ensued in response, and the clause was "agreed to by a considerable majority." *Id.* at 369; *see also* Granucci, *supra* note 12, at 841-42 (discussing debates regarding the Eighth Amendment).

15. *See* Pervear v. Massachusetts, 72 U.S. (5 Wall.) 475, 479-80 (1866); *see also* O'Neil v. Vermont, 144 U.S. 323, 332 (1892); *In re* Kemmler, 136 U.S. 436, 448-49 (1890).

16. *See* Wilkerson v. Utah, 99 U.S. 130, 135 (1878) (finding that the Eighth Amendment does not prohibit execution by shooting for first degree murder); *Pervear*, 72 U.S. at 480 ("[I]t appears from the record that the fine and punishment in the case before us was fifty dollars and imprisonment at hard labor in the house of correction for three months. We perceive nothing excessive, or cruel, or unusual in this.").

17. *Wilkerson*, 99 U.S. at 136; *see also* In re *Kemmler*, 136 U.S. at 447 ("Punishments are cruel when they involve torture or a lingering death . . . ."). Cases in state courts from the nineteenth century similarly limited state constitutional prohibitions of cruel and unusual punishment to "barbarous" or "torturous" treatment. *See Weems*, 217 U.S. at 375-79 (reviewing state court judgments).

18. *See Pervear*, 72 U.S. at 480 ("The mode adopted, of prohibiting under penalties the sale and keeping for sale of intoxicating liquors, without license, . . . is wholly within the discretion of State legislatures.").

19. *See, e.g.*, WYOMING CONST. art. I, § 14. Very few state courts placed much reliance on the use of the disjunctive, at least in the nineteenth century. *But see* People v. Bullock, 485 N.W.2d 866, 871 (Mich. 1992) (relying on disjunctive "or" in Mich-

analog (and, in some cases, precursor) to the Eighth Amendment were generally in agreement with their federal cousins. Thus, many state courts exhibited nearly absolute deference to legislative judgments regarding the length of sentences, and only hinted at the possibility that courts might intervene to find a particular *mode* of punishment unconstitutional.[20] In so doing, most states agreed that

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igan constitution to justify departure from Supreme Court's interpretation of cruel and unusual punishment).

20. *See* State v. McCauley, 15 Cal. 429, 455-456 (1860) (holding convict leasing not unconstitutional, because it was not "of a barbarous character, and unknown to the common law"); Whitten v. State, 47 Ga. 297, 301 (1872) (holding that courts may not interfere with the judgment of legislature as long as "they do not provide cruel and unusual punishments, such as disgraced the civilization of former ages, and make one shudder with horror to read of them, as drawing, quartering, burning, etc."); People *ex rel.* Bradley v. Superintendent, 36 N.E. 76, 79 (Ill. 1894) ("When the legislature has authorized a designated punishment for a specified crime, it must be regarded that its action represents the general moral ideas of the people, and the courts will not hold the punishment so authorized as either cruel and unusual or not proportioned to the nature of the offense, unless it is a cruel or degrading punishment, not known to the common law, or is a degrading punishment which had become obsolete in the state prior to the adoption of its constitution, or is so wholly disproportioned to the offense committed as to shock the moral sense of the community."); Hobbs v. State, 32 N.E. 1019, 1021 (Ind. 1893) (suggesting that, when punishment was fixed by statute, the cruel and unusual punishment clause was all but "obsolete"); State v. White, 25 P. 33, 35 (Kan. 1890) (stating that prohibition "probably . . . relates to the kind of punishment to be inflicted, and not to its duration"); Foote v. State, 59 Md. 264, 267-68 (1883) (upholding whipping as punishment for assault because whipping was a permitted punishment at the Founding); People v. Morris, 45 N.W. 591, 592 (Mich. 1890) (holding that the state's "cruel or unusual" punishment clause applies to mode of punishment, not term of years); State v. Rodman, 59 N.W. 1098, 1100 (Minn. 1894) (finding that the clause is directed "not so much against the amount or duration of the punishment, as against the character of it"); State v. Williams, 77 Mo. 310, 312 (1883) (holding that the prohibition against cruel and unusual punishments "would apply to such punishments as amount to torture, or such as would shock the mind of every man possessed of common feeling," and giving as examples drawing and quartering, burning at the stake, and dismemberment); Territory v. Ketchum, 65 P. 169, 171 (N.M. 1901) (upholding death sentence for armed robbery and noting that "the discretion of the legislature in determining the adequacy of the punishment for crime is almost, if not quite, unlimited"); Garcia v. Territory, 1 N.M. (1 Gild.) 415, 418 (1869) (holding that penalty of thirty to sixty lashes for stealing cattle is not cruel and unusual because "cruel . . . was no doubt intended to prohibit a resort to the process of torture"); *In re* Bayard, 63 How. Pr. 73, 76 (N.Y. Gen. Term 1881) (interpreting state constitution to "prohibit[ ] any cruel or degrading punishment not known to the common law, and probably also, those degrading punishments which in any state had become obsolete when its existing constitution was adopted, and punishments so disproportioned to the offense as to shock the sense of the community"); Martin v. Johnston, 33 S.W. 306, 309 (Tex. Civ. App. 1895) (suggesting that cruel and unusual punishment clause applies to "degrading punishment which in any state had become obsolete before its existing constitution was adopted") (*quoting* THOMAS M. COLLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 402 (De Capo Press 1972) (1868)); Aldridge v. Commonwealth, 4 Va. (2 Va. Cas.) 447, 450 (1824) (finding that banishment and being

whether a punishment was "cruel" was judged by comparison to the punishments that were tolerated at common law, while the word "unusual" referred to how the penalty compared to the practices in other states or other "civilized" countries.[21] Thus, many state courts upheld punishments that fell within a common understanding of "cruel" or "unusual," but which did not meet the more specific requirement of having been rejected at common law. The New York State Court of Appeals's resolution of a challenge to death by electrocution exemplified this approach:

> Punishment by death, in a general sense, is cruel; but, as it is authorized and justified by a law adopted by the people as a means to the end of the better security of society, it is not cruel, within the sense and meaning of the Constitution. The infliction of the death penalty through a new agency is, of course, unusual; but, as death is intended as the immediate sequence of the mechanical application prescribed, it is not unusual in the sense that some certainly prolonged or torturous procedure would be understood to be.[22]

Contrary to the uniform position of the federal courts, however, states were not unanimous. A handful of states appeared to con-

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sold as a slave was not disproportionate punishment for larceny by a free black, because cruel and unusual punishment clause of Virginia "is merely applicable to the modes of punishment"); *In re* McDonald, 33 P. 18, 21 (Wyo. 1893) ("The constitutional provisions aimed at cruel and unusual punishments were probably intended to prevent the imposition of obsolete, painful, and degrading punishments, such as the whipping post, the pillory, and such as making capital a grade of offenses like larceny, forgery, and the like."). Some state courts simply could not decide whether the prohibition offered any role for judicial intervention. *See* State v. Lasater, 68 Tenn. 584, 587 (1877) ("Whether the courts have the power to annul the acts of the Legislature on this ground, or whether the provision is simply directed to the Legislature to govern them in the passage of laws, and to the courts in inflicting punishment in cases where the punishment is within the discretion of the courts, we need not now determine.").

21. *See Hobbs*, 32 N.E. at 1021 (interpreting "cruel" to prohibit punishment "such as that inflicted at the whipping post, in the pillory, burning at the stake, breaking on the wheel, etc." and "unusual" to refer to "that class of punishments which never existed in the state" or which public opinion had rejected); *In re* Tutt, 41 P. 957, 958 (Kan. 1895) (finding a penalty may be "severe," but still consititutional if it is "of the kind usually inflicted on offenders"); *White*, 25 P. at 35 (imprisonment at hard labor is not unconstitutional because it "is a kind of punishment which has been resorted to ever since Kansas has had any existence, and is a kind of punishment common in all civilized countries"); People v. Wilkinson, 2 Utah 158, 164 (1877) (finding that execution by firing squad is constitutional because it is the method used in the army, "other civilized countries," and the criminals' preferred mode of death, as compared to hanging or beheading); Commonwealth v. Wyatt, 27 Va. (6 Rand.) 694, 701 (1828) (upholding a statute that permitted courts to punish gambling with whipping to the point of death because, while perhaps "odious," it "cannot be said to be *unusual*").

22. People v. Kemmler, 24 N.E. 9, 11 (N.Y. 1890).

cede that excessive punishments, even if expressed in terms of years, could violate the constitutional prohibition.[23] Further, a surprising number of state courts struck down sentences, expressed both as modes of punishment and terms of years in prison, for being excessive. In some of these cases, the punishment at issue was akin to life imprisonment without the possibility of parole.[24] But in other cases the term of imprisonment was much less,[25] and the modes of punishment found unconstitutional ranged from lashes, the ducking stool, and seizure of property.[26]

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23. *See, e.g.*, Cardillo v. People, 58 P. 678, 680-81 (Colo. 1899) (holding that a penalty must be "clearly excessive" to violate constitution); Harper v. Commonwealth, 19 S.W. 737, 738 (Ky. 1892) (court can only find a punishment cruel and unusual where "it clearly manifestly so appears," and punishing gambling with imprisonment does not offend this principle); McDonald v. Commonwealth, 53 N.E. 874, 875 (Mass. 1899) (conceding the "possib[ility] that imprisonment in the state prison for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment"); State v. Becker, 51 N.W. 1018, 1022 (S.D. 1892) ("great latitude" must be given to the legislature, and the court should intervene "only when the punishment is so excessive or so cruel as to meet the disapproval and condemnation of the conscience and reason of men generally").

24. *See* Jones v. Territory, 43 P. 1072, 1074 (Okla. 1896) (suggesting in dicta that sentence of fifty years for manslaughter might be "cruel and inhuman" if it exceeded "the probable lifetime of the person convicted"); State v. Ross, 104 P. 596, 604-05 (Or. 1909) (holding that life imprisonment for nonpayment of fine arising from larceny conviction is cruel and unusual punishment and that court may declare sentence excessive "even though within the maximum of the statute").

25. *See* State *ex rel.* Garvey v. Whitaker, 19 So. 457, 459 (La. 1896) (finding that imprisonment for 2,160 days for being in default of paying fines of $270 violated the constitution where the court imposed a sentence for seventy-two distinct offenses of one city ordinance); State v. Driver, 78 N.C. 423, 429 (1878) (finding sentence of five years imprisonment for assault and battery of defendant's wife to be unconstitutional under state law, and noting that the power to find a sentence unconstitutional "is there, not so much to draw a fine line close up to which Judges may come, but as a 'warning' to keep them clear away from it."); *see also* Byrnes v. People, 37 Mich. 515, 517 (1877) (suggesting that a five year sentence for petit larceny is excessive); Johnson v. Waukesha County, 25 N.W. 7, 9 (Wis. 1885) (suggesting in dicta that an anti-tramp law could be unconstitutional because it makes tramping a felony simply by virtue of the location of the crime, and because the punishment amounts to fifteen days in jail with a diet of bread and water alone).

26. *See* Norris v. Doniphan, 61 Ky. (4 Met.) 385 (1863) (finding a statute providing for seizure of property and slaves of persons engaging in rebellion during Civil War was unconstitutional); Ely v. Thompson, 10 Ky. (3 A.K. Marsh) 70, 74 (1820) (finding a sentence of thirty lashes unconstitutional when applied as a punishment to a "free person of color" who attempts to defend himself against assault by a white person); James v. Commonwealth, 12 Serg. & Rawle 220, 230-34 (Pa. 1825) (finding the ducking stool was unconstitutional for punishment of a "common scold"); *cf.* Thomas v. Kinkead, 18 S.W. 854, 856 (Ark. 1892) (holding that a police officer may not use deadly force to effectuate arrest of misdemeanant because it would be unconstitutional to punish misdemeanor with death penalty).

Thus, at the end of the nineteenth century, challenges to punishments based on the Eighth Amendment, or a state constitutional analog, were rarely successful, in large part because of the deference afforded legislatures to make judgments regarding the appropriateness of particular punishments. To the extent that any doctrine had developed to evaluate the constitutionality of particular punishments, several sources of authority, none dispositive, had emerged, including the practices of the Framers, their contemporaries, other states, and other "civilized" nations, as well as the extent to which a particular punishment was repugnant to popular conceptions of justice.

At the time that a doctrine of excessiveness or proportionality was developing in the area of just punishment, little to no constitutional challenges had been brought to the conditions under which convicted individuals were imprisoned. This should not be surprising; during the nineteenth century, even as courts considered constitutional challenges to the length of imprisonment, the conditions experienced therein were considered out of bounds. Prisoners were considered to be "slaves of the State,"[27] and any rights they retained to decent treatment while incarcerated came from state and local laws, not the Constitution.[28]

B. Modern Interpretations of "Cruel and Unusual" Punishments

Joining the minority of state supreme courts which had struck down sentences for excessiveness, the United States Supreme Court advanced a more rigorous interpretation of the Constitu-

27. Most commentators cite *Ruffin v. Commonwealth*, 62 Va. (21 Gratt.) 790, 795-96 (1871), for this language, even though *Ruffin* concerns a right to a jury trial for a prisoner who was accused of killing a guard during an escape attempt:

> A convicted felon, whom the law in its humanity punishes by confinement in the penitentiary instead of with death, is subject while undergoing that punishment, to all the laws which the Legislature in its wisdom may enact for the government of that institution and the control of its inmates. For the time being, during his term of service in the penitentiary, he is in a state of penal servitude to the State. He has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State. He is *civiliter mortuus*; and his estate, if he has any, is administered like that of a dead man.

Id.

28. *See, e.g.*, Doster v. City of Atlanta, 72 Ga. 233, 234 (1884) (finding a municipality was not liable for a tort committed by inmate or guard upon a prisoner); *Ex parte* Jenkins, 58 N.E. 560, 561-62 (Ind. Ct. App. 1900) (finding a sheriff owes a duty of care to preserve the life and health of prisoners).

tion's cruel and unusual punishment clause in its 1910 decision in *Weems v. United States*.[29] In *Weems*, the Court for the first time struck down as excessive a sentence imposed by a court in the Philippines for falsifying a public and official document.[30] The trial court had sentenced the defendant, a Coast Guard official, to fifteen years imprisonment, as well as to an additional punishment known as *cadena temporal*.[31] Those individuals sentenced to *cadena temporal* were required, pursuant to statute, to engage in "hard labor,"[32] were chained at the ankle and wrist at all times, and were deprived of certain rights and privileges even after release from prison.[33] Because the Court viewed the sentence as excessive, especially compared to sentences for more serious crimes, it found that the statute fixing the sentence reflected "more than different exercises of legislative judgment" and that it instead imposed cruel and unusual punishment under the meaning of the Eighth Amendment.[34] The Court notably declined to consider the fixed imprisonment term of the sentence separately from the conditions of confinement imposed by the *cadena temporal* sentence, because they had been imposed pursuant to statute, and therefore had to be considered jointly as punishment.[35]

Although *Weems* embraced a substantively novel approach to Eighth Amendment questions by breaking with the traditional view that it only prohibited punishments deemed "barbarous" by

29. 217 U.S. 349 (1910).

30. *Id.* at 381-82. Because the case arose out of the Philippines, which contained a cruel and unusual punishment clause identical to the Eighth Amendment, the issue of incorporation of the Eighth Amendment against the States did not arise.

31. *Id.* at 362-64. The punishment originated in Spain, and literally means "temporary chain." *See id.* at 363.

32. The requirement that prisoners engage in "hard labor" originated in England in the mid-1500s and came into vogue in the United States at the beginning of the eighteenth century on the theory that work was intimately connected to successful rehabilitation. *See* David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 83-85 (1998). There also were overlapping economic interests in putting convicts to work, particularly as a substitute for slave labor after the Civil War. *See* Alexis M. Durham III, *Lease System*, *in* ENCYCLOPEDIA OF AMERICAN PRISONS 277, 281 (Marilyn D. McShane & Frank P. Williams eds., 1996).

33. *Weems*, 217 U.S. at 364-66. The additional punishment associated with *cadena temporal* included the deprivation of parental rights, the right to dispose of property through a will, the obligation to give authorities notice of any change in domicile, and the disqualification to hold public office or to vote. *Id.* at 364-65. As the Supreme Court noted, the only punishments more severe than *cadena temporal* were death or *cadena perpetua*. *Id.* at 363-64.

34. *Id.* at 380-81 (comparing punishment to punishment for crimes such as homicide, conspiracy, and forgery).

35. *Id.* at 381.

the Framers,[36] after *Weems*, the Supreme Court added little to Eighth Amendment jurisprudence for some years. This is not to say that, during this time, no cases offered interpretations of the federal and state prohibitions of cruel and unusual punishments. State and lower federal courts applied *Weems* in numerous novel ways, from ordering that a prisoner be set free rather than be returned to experience cruel and unusual punishment in Georgia's prison system;[37] finding vasectomy to be an excessive punishment

36. There are many notable aspects to the *Weems* decision that are beyond the scope of this Article, but the Court's embrace of a "living constitution" theory of the Eighth Amendment stands out. Indeed, in language that is evocative of much later Warren Court precedents, the *Weems* Court stated:

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions.

Id. at 373.

37. Johnson v. Dye, 175 F.2d 250, 253, 256 (3d Cir. 1949) (ordering that a prisoner be released because evidence indicated that Georgia prison officials "treat chain gang prisoners with persistent and deliberate brutality" and that "the State of Georgia has failed signally in its duty as one of the sovereign States of the United States to treat a convict with decency and humanity."); Harper v. Wall, 85 F. Supp. 783, 787 (D.N.J. 1949) (following *Johnson* in a case involving a fifteen-year-old escapee from Georgia who had been sentenced to ten years imprisonment). The Supreme Court reversed and remanded *Johnson* because the lower court had not required that the petitioner first exhaust his state law remedies prior to filing his federal habeas petition. Dye v. Johnson, 338 U.S. 864, 864 (1949) (reversing in light of *Ex parte* Hawk, 321 U.S. 114 (1944)). Nonetheless, *Johnson*'s substantive holding was followed by a district court in California facing substantially the same question. *In re* Middlebrooks, 88 F. Supp. 943, 951-54 (S.D. Cal. 1950) (relying on *Johnson* and holding that exhaustion of state law remedies in California was sufficient), *rev'd sub nom.* Ross v. Middlebrooks, 188 F.2d 308, 311 (9th Cir. 1951) (holding that petitioner need have exhausted state law remedies in Georgia *and* California). Other courts hesitated to find otherwise "inexcusable and shocking" conditions of confinement to violate the Eighth Amendment, precisely because of the concern that the ramification of doing so would result in the release of all prisoners held within the confines of the particular institution. *See Ex parte* Pickens, 101 F. Supp. 285, 289-90 (D. Alaska 1951); *see also Ex parte* Ellis, 91 P. 81, 83 (Kan. 1907) ("It must be obvious, however, that we cannot order the petitioner released on account of the condition of the jail. To do so would require us on similar applications to order the release of all prisoners confined there."); *cf. Ex parte* Terrill, 287 P. 753, 755 (Okla. Crim. App. 1930) (declining to entertain habeas petition alleging conditions amounting to cruel and unusual punishment where prison had not first attempted to pursue state law remedies). The Supreme Court, while not passing on the question of whether release on a habeas petition was a proper remedy for experiencing cruel and unusual punishment, eventually made clear that state law remedies must be pursued in the state in which the sentence was carried out, and not in the asylum state. *See* Sweeney v. Woodall, 344 U.S. 86, 89-90 (1952).

for rapists[38] or recidivist felons;[39] holding life imprisonment to be a disproportionate punishment for "committing lewd and lascivious acts upon and with the body of a female child under the age of sixteen years"[40] or for assault with intent to commit rape;[41] and finding a sentence of four years for assault with a deadly weapon to be excessive.[42]

The Supreme Court, however, did not address a substantive Eighth Amendment claim until 1958, in *Trop v. Dulles*,[43] almost fifty years after *Weems*. In *Trop*, the Supreme Court again struck down a punishment as "cruel and unusual." The statute that was invalidated authorized federal courts to impose denationalization as a punishment for military desertion, a penalty that the Court found to be repugnant to Eighth Amendment principles and international law—and what a plurality of the Court referred to as "evolving standards of decency."[44] This rubric, which self-consciously allowed for interpretive change over time, would come to be the centerpiece of proportionality analysis.

In some respects, the dearth of Eighth Amendment interpretation from *Weems* to *Trop* can be attributed to the Court's selective incorporation doctrine, under which the Eighth Amendment was not applied to the states until 1962.[45] Soon after the Eighth Amendment's incorporation, challenges were brought against capital punishment in particular, with brief initial success.[46] In these

38. *See* Mickle v. Henrichs, 262 F. 687, 691 (D. Nev. 1918).

39. *See* Davis v. Berry, 216 F. 413, 417-19 (S.D. Iowa 1914) (three-judge panel), *vacated as moot*, 242 U.S. 468 (1917).

40. *See* State v. Evans, 245 P.2d 788, 793-94 (Idaho 1952) (construing a maximum sentence to mean less than life in order to save constitutionality of statute).

41. *See* Cannon v. Gladden, 281 P.2d 233 (Or. 1955) (en banc).

42. *See* State v. Smith, 93 S.E. 910 (N.C. 1917). The prospect of lengthy detention for crimes of poverty, such as non-willful failure to comply with an order to pay alimony, also raised the ire of local judges. *E.g.*, Politano v. Politano, 262 N.Y.S. 802 (N.Y. Sup. Ct. 1933).

43. 356 U.S. 86 (1958).

44. *Id.* at 101 (plurality opinion).

45. *See* Robinson v. California, 370 U.S. 660, 666 (1962) (holding the Eighth Amendment was violated by a statute that made it a criminal offense for a person to be addicted to narcotics). *Robinson*'s substantive holding was limited in *Powell v. Texas*, which held that punishing a chronic alcoholic for public drunkenness did not violate the Eighth Amendment. *See* 392 U.S. 514, 532-33 (1968).

46. *See generally* Furman v. Georgia, 408 U.S. 238 (1972) (holding that capital punishment decisions could not be left to unconfined discretion of the judge or jury). After *Furman*, most states that contemplated imposing capital punishment on criminal defendants responded by passing statutes purporting to cabin that discretion. These statutes were, with some exceptions, upheld shortly after *Furman*. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976).

early challenges, *Weems* and its more recent progeny, *Trop*, were treated as the definitive precedent for understanding the meaning of the Eighth Amendment.[47]

This treatment continued in *Estelle v. Gamble*,[48] the first modern case to challenge prison conditions alone, separate and apart from a criminal sentence. Like the cases resolving challenges to capital punishment, *Estelle* looked to both *Weems* and *Trop* to establish that the Eighth Amendment applied to more than "physically barbarous punishments," but also to punishments incompatible with "evolving standards of decency" or involving the "unnecessary and wanton infliction of pain."[49] With these standards in mind, the *Estelle* Court held that the government had some obligation to provide medical care to prisoners, because the absence of such care could "result in pain and suffering which no one suggests would serve any penological purpose."[50] Such deprivations of medical care that amounted to "deliberate indifference to serious medical needs" were equivalent, in the Court's view, to unnecessary infliction of pain.[51]

Estelle is significant in one way that is familiar to the participants in this conference—it explicitly held that conditions of confinement imposed by prison officials rather than by statute can constitute "punishment" under the Eighth Amendment.[52] At the same time, however, *Estelle* distinguished conditions of confinement claims from claims that a punishment was disproportionate under the Eighth Amendment.[53] Thus, *Estelle* expanded the ability of prison advocates to use Eighth Amendment standards to challenge partic-

47. *E.g.*, *Furman*, 408 U.S. at 241-42, 264-69, 271-72 (Douglas, J., concurring) (relying on *Weems* and *Trop*).

48. 429 U.S. 97 (1976).

49. *Id.* at 102-03 (internal quotation marks and citations omitted).

50. *Id.* at 103.

51. *Id.* at 104.

52. It did so with little substantive analysis, an aspect of *Estelle* which has been criticized by Justices Scalia and Thomas, who argue that conditions of confinement imposed by prison officials should never be considered "punishment" for Eighth Amendment purposes. *E.g.*, Helling v. McKinney, 509 U.S. 25, 41-42 (1993) (Thomas, J., dissenting). In so doing, however, these dissenters have described *Weems* as a case about a "sentence imposed for the crime of falsifying a document," without adverting to that aspect of *Weems* which addressed the conditions of confinement imposed under *cadena temporal*. *Id.* at 41 n.1. Notably, pre-*Estelle* state and federal court cases that had addressed challenges to conditions of confinement had assumed that barbaric conditions could constitute "punishment" without much analysis, perhaps because they were brought as habeas actions rather than section 1983 claims. *See supra* notes 24-26, 37-42 and accompanying text.

53. *Estelle*, 429 U.S. at 103 n.7.

ular conditions of confinement in absolute terms—that is, to condemn particular conditions for all time and for any class of prisoner. Yet it also drew a line that severed sentences—whether terms of years or capital punishment—from conditions of confinement for the purpose of Eighth Amendment analysis, a line that had been obscured in *Weems* and post-*Weems* lower court cases.

This line was maintained and expanded by the post-*Estelle* decisions, both in the area of proportionality challenges and in conditions of confinement litigation. Thus, proportionality jurisprudence has been limited to cases involving challenges to death sentences[54] or fixed periods of imprisonment,[55] while *Estelle*'s formulation has been applied to conditions of confinement claims alleging, for example, overcrowding[56] or excessive force.[57]

54. For instance, sentencing regimes that mandate the death penalty upon conviction, without qualification, have been declared unconstitutional. *See* Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); *cf.* Lockett v. Ohio, 438 U.S. 586 (1978) (mitigating factors must be given individualized consideration prior to imposition of death penalty). Similarly, the Court has declared unconstitutional the imposition of the death penalty for crimes that do not involve the death of another. *E.g.*, Kennedy v. Louisiana, 128 S. Ct. 2641 (2008) (child rape); Coker v. Georgia, 433 U.S. 584 (1977) (rape of an adult woman). The Court has also declared that the states may be prohibited from executing particular categories of defendants. *E.g.*, Roper v. Simmons, 543 U.S. 551 (2005) (prohibiting the death sentence for those who commit crimes under the age of eighteen); Atkins v. Virginia, 536 U.S. 304 (2002) (death sentence for the mentally retarded is unconstitutional); Thompson v. Oklahoma, 487 U.S. 815 (1988) (prohibiting the death sentence for those who commit crimes under the age of sixteen). The Court has also reviewed challenges to executions carried out by particular means. *E.g.*, Baze v. Rees, 128 S. Ct. 1520 (2008) (finding a death sentence carried out pursuant to a three-drug lethal injection was not per se unconstitutional); Louisana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463-64 (1947) (plurality opinion) (rejecting claim that an attempt to execute someone by electrocution after the first attempt failed was a violation of the Eighth Amendment).

55. *See* Ewing v. California, 538 U.S. 11 (2003) (upholding California's "three-strikes" law); Harmelin v. Michigan, 501 U.S. 957 (1991) (upholding a sentence of life without parole for a first-time offender who was found guilty of possession of 650 grams of cocaine); Solem v. Helm, 463 U.S. 277 (1983) (finding the Eighth Amendment prohibited imposition of life imprisonment without possibility of parole for a non-violent recidivist whose crimes were minor); Hutto v. Davis, 454 U.S. 370 (1982) (per curiam) (upholding a sentence of forty years for possession with intent to distribute nine ounces of marijuana); Rummell v. Estelle, 445 U.S. 263 (1980) (upholding a sentence of mandatory life imprisonment under a Texas recidivist statute).

56. *See* Rhodes v. Chapman, 452 U.S. 337, 345-46 (1981). Interestingly, *Rhodes* hinted at a proportionality standard for prison conditions, stating that "[c]onditions must not involve the wanton and unnecessary infliction of pain, nor may they be grossly disproportionate to the severity of the crime warranting imprisonment." *Id.* at 347. But *Rhodes* then quickly suggested that, unless conditions of confinement meet the standard under the "wanton and unnecessary" prong, they will not be considered in violation of the Eighth Amendment, because "they are part of the penalty that criminal offenders pay for their offenses against society." *Id.*

The standard for conditions of confinement is *Estelle*'s "deliberate indifference" standard, which requires that a prisoner show that the prison official had a sufficiently culpable state of mind where the "pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge . . . ."[58] The standard for proportionality analysis has focused on the gross proportionality of sentences, in which the severity of a sentence is compared to the seriousness of the offender's crime.[59] Many factors contribute to the proportionality analysis, including how the punishment fits with different penological theories, the types of punishment meted out by sovereign states and even internationally, and the court's own subjective evaluation of proportionality.[60] In all of these and other cases, *Estelle*'s conditions of confinement standard is treated distinctly from *Weems*' proportionality analysis.[61]

Thus, modern Eighth Amendment jurisprudence is composed of several distinct strands, two of which are relevant to this paper. First, proportionality challenges to sentences of death or a term of years of imprisonment are brought by criminal defendants who allege that a sentence is excessive in relation to the seriousness of a

57. For use of force cases, a plaintiff must show that an official acted "maliciously and sadistically for the very purpose of causing harm." Whitley v. Albers, 475 U.S. 312, 320-21 (1986) (internal quotation marks omitted) (describing the standard for use of force during prison riots); *see also* Hudson v. McMillian, 503 U.S. 1, 5-6 (1992) (extending the *Whitley* standard to all allegations of excessive force).

58. Wilson v. Seiter, 501 U.S. 294, 300 (1991); *see also* Helling v. McKinney, 509 U.S. 25, 36 (1993) (applying subjective state of mind requirement to review of smoking policy in prison).

59. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in judgment); *Solem*, 463 U.S. at 290-91.

60. A good example of the intersection of each of these factors is presented by *Roper v. Simmons*, 543 U.S. 551 (2005), which held that the death penalty was disproportionate punishment for those who committed a death-eligible crime while under the age of eighteen years old.

61. *E.g.*, Kennedy v. Louisiana, 128 S. Ct. 2641, 2649 (2008) (citing *Weems* as an example of a basic proportionality principle); *Roper*, 543 U.S. at 560 (relying on *Weems* as an example of a case protecting against "excessive sanctions"); Ewing v. California, 538 U.S. 11, 24-25 (2003) (citing *Weems* as an example of a case applying the proportionality principle); Atkins v. Virginia, 536 U.S. 302, 311 (2002) (relying on *Weems* for the proportionality principle in a death sentence case); *Wilson*, 501 U.S. at 307 (White, J., concurring); Enmund v. Florida, 458 U.S. 782, 788 (1982) (relying on *Weems* for the proportionality principle in a death penalty case); Hutto v. Finney, 437 U.S. 678, 685 (1978) (describing *Weems* as proportionality decision and *Estelle* as a decision implicating the concepts of "dignity, civilized standards, humanity, and decency"). Only one case, which involved a challenge to corporal punishment in public schools, treated *Estelle*, *Trop*, and *Weems* as cases all involving punishment in general. *See* Ingraham v. Wright, 430 U.S. 651, 666-67 (1977).

criminal offense.[62] Second, challenges to particular conditions of confinement are judged by whether the conditions are reasonably connected to legitimate penological interests or, instead, inflict unnecessary pain and suffering.[63] Proportionality analysis asks whether the sentence imposed on a defendant is a proper "fit" for the offense of conviction—by definition, some sentences will be constitutional as applied to one set of defendants, but prohibited as applied to a different set of defendants. Conditions of confinement analysis, in contrast, asks whether the conditions violate minimum standards of decency, without reference to the crime of conviction—as such, particular conditions of confinement will be permitted or prohibited on an absolute, all-or-nothing basis.

II. The Principles and Practices of Proportionality and Conditions Litigation

In Part I, I sought to describe the historical trend in Eighth Amendment litigation. I first traced the evolution of the doctrine to *Weems*, which did not distinguish between the conditions of confinement experienced by prisoners and the length of their sentence. I then described the modern understanding that uses a proportionality analysis to review sentences of death or of a fixed term of years, and conditions of confinement analysis to consider the lived experience of prisoners. Part II demonstrates the ways in which this division has influenced the principles and practices of conditions and proportionality litigation.

62. *E.g.*, *Kennedy*, 128 S. Ct. at 2661 (finding the death penalty may not be imposed on a defendant convicted of the rape of a child under the age of twelve); *Harmelin*, 501 U.S. at 997 (Kennedy, J., concurring in part and concurring in judgment) (noting that the Eighth Amendment's proportionality principle applies to both capital and noncapital sentences). In recent years, most proportionality litigation has focused on the permissibility of the death penalty for certain types of crimes, or for certain categories of defendants. *E.g.*, *Roper*, 543 U.S. at 574 (holding that the death penalty may not be imposed on a defendant who committed a capital crime when under the age of eighteen). Challenges to the death penalty may also be brought based on the arbitrariness of a capital punishment regime, *see* Gregg v. Georgia, 428 U.S. 153 (1976), or because the goals of capital punishment are inconsistent with executing offenders who share particular characteristics, such as the mentally retarded. *See Atkins*, 536 U.S. at 321. These kinds of challenges rely, in many ways, on the factors that inform proportionality analysis, but they are not conceived of as challenges to the excessiveness of a particular sentence.

63. *See supra* notes 56-57 and accompanying text.

A. The Dissonant Elements of Modern Proportionality and Conditions of Confinement Jurisprudence

Both conditions of confinement and proportionality litigation challenge "punishments" as being inconsistent with Eighth Amendment standards. And the general principles of certain cases—*Weems* and *Trop* among them—inform both areas of jurisprudence. Nonetheless, depending on what kind of challenge is before them, courts use vastly different tools to obtain an answer to the same question: is a particular punishment "cruel and unusual"? In proportionality litigation, the fundamental question is the fit between a particular sentence, expressed as a prison term or as a mode of punishment, and the particular crime committed by a prisoner. Evaluating that fit involves both subjective and objective elements. Subjectively, courts ask whether the punishment appears "grossly disproportionate" to the crime, based on the seriousness of the crime and the extent to which the punishment meets rehabilitative, deterrent, and retributive goals.[64] Objectively, courts review several indicia of consensus as to the justness of a particular punishment in relation to a particular crime. Although the precise indicators of consensus are contested, courts have traditionally looked to the following factors: the punishment for more and less serious crimes within the sentencing jurisdiction (intrajurisdictional comparison); the punishment for comparable crimes in other states (interjurisdictional comparison); the punishment dispensed for comparable crimes in other countries; and public opinion as measured by polling data, jury verdicts, and specialized expertise.[65]

Conditions of confinement litigation also requires consideration of subjective and objective elements, but of an entirely different sort than proportionality cases. Subjectively, a plaintiff seeking to challenge particular prison conditions must show that the proper defendant had a particular state of mind with respect to those conditions.[66] The subjective state of mind that must be proved ranges from deliberate indifference, which is something akin to criminal recklessness, to intentionality.[67] Objectively, the prisoner must

64. *See supra* note 62 and accompanying text.

65. *See Roper*, 543 U.S. at 575-77 (discussing international law); Solem v. Helm, 463 U.S. 277, 291-92 (1983) (discussing intrajurisdictional and interjurisdictional comparisons); *Enmund*, 458 U.S. at 788 (discussing importance of jury verdicts to proportionality inquiry).

66. *Wilson*, 501 U.S. at 299.

67. *E.g.*, Farmer v. Brennan, 511 U.S. 825 (1994) (requiring that a plaintiff show deliberate indifference when the allegation is that prison officials failed to protect a

also show that the conditions of confinement she has experienced constitute an "extreme" deprivation of life's basic necessities, including adequate medical care, food, shelter, or safety.[68] Even intentional uses of force, if they inflict "de minimis" injury, do not amount to violations of the Eighth Amendment.[69]

One of the most glaring differences between proportionality and conditions of confinement analysis is the relevance of state of mind. In proportionality litigation, there is no explicit requirement that a prisoner show that any particular official intended to subject the prisoner to cruel and unusual punishment. The only question is whether the punishment offends evolving standards of decency, as measured by objective and subjective measures of proportionality. It may be that this is because proportionality challenges are typically brought against punishment that is imposed by legislation, and there can be no question that the legislature intended to pass whatever measures the statute provides for the punishment.[70] It might make sense to treat conditions of confinement as non-punitive where the condition is inflicted through unintentional or even negligent conduct, whereas the intentionality of legislatures passing criminal statutes is obvious. This explanation, however, would also apply to explicit policies or regulations adopted by prison administrators, in which the need to prove intent could also be said to be superfluous. An alternative explanation may lie in the different forms these challenges take. Proportionality challenges are typically brought as part of a direct appeal of a conviction and sentence, or through habeas challenges. In those circumstances, typically the state is defending the punishment, and it makes little sense to argue about the state of mind of a sovereign entity. Conditions of confinement challenges, on the other hand, are now brought almost exclusively pursuant to 42 U.S.C. § 1983, which has been interpreted to only permit actions against individuals and mu-

prisoner from assault by other detainees); Hudson v. McMillian, 503 U.S. 1, 9 (1992) (finding that excessive force is only actionable under the Eighth Amendment if an official had used force "maliciously and sadistically" to cause harm and not for a legitimate penological reason).

68. *Hudson*, 503 U.S. at 8-9.

69. *Id.* at 9-10.

70. This explanation may pose an interpretive difficulty for those judges who do not believe that legislative intent is ascertainable.

nicipalities, and not a state *qua* state.[71] A particular state of mind can be attributed to individuals, at the very least.[72]

The thread of deference that runs through both conditions of confinement and proportionality jurisprudence also rests on different assumptions in each category of cases. In proportionality litigation, deference is considered essential to ceding to the legislature, as a majoritarian institution, the primary responsibility of judging the seriousness of particular crimes. After all, if courts are generally disempowered from creating common law crimes because of separation of powers concerns,[73] it follows that legislatures should be given as much leeway to punish particular crimes as they are given to define them. The deference that pervades conditions of confinement litigation, in contrast, is grounded not in majoritarian principles, but in a discourse that relies heavily on agency "expertise." On this account, the daily decisions necessary to running a prison are better left to prison administrators than to state or federal judges.

The differences outlined here are not exhaustive. But they show that the answer to the question "what is a 'cruel and unusual' punishment?" depends largely on where, why, and by whom the question is being asked. Part II.B next addresses whether facially similar questions may be answered differently under either analysis.

B. The Practical Ramifications of the Dissonant Elements of Conditions and Proportionality Litigation

It may, at first glance, appear strange to suggest that conditions of confinement litigation could benefit from an incorporation of proportionality analysis. After all, it would seem that conditions of

71. Will v. Michigan, 491 U.S. 58, 64, 71 (1989). Of course, the fiction in *Ex parte Young*, 209 U.S. 123 (1908), allows prisoners to seek injunctive relief against the state by permitting suit against a state actor in his official capacity, *Will*, 491 U.S. at 7 n.10, but that fiction still assumes that an individual person is being sued, and not an entity that lacks the ability to have a state of mind.

72. As the Court has implicitly recognized, it may be harder to coherently speak of the state of mind of a municipality. *See* Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981) ("A municipality, however, can have no malice independent of the malice of its officials.").

73. *See* United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812). State courts appear to exercise more discretion in interpreting criminal statutes in light of the common law. *See* Keith Hampton, Case Note, *Criminal Law-Mail Fraud-Mail Fraud Statute Restricted to the Protection of Property Rights and Does not Extend to the Protection of the Intangible Right to Honest and Impartial State Government*, 19 ST. MARY'S L.J. 1115, 1121 n.21 (1988).

confinement litigation has been more friendly to advocates of prisoners, especially compared to proportionality litigation that has challenged non-capital sentences. While not uniformly successful, conditions of confinement litigation has alleviated some of the most extreme overcrowding and medical inadequacies,[74] assisted in the development of correctional norms and standards,[75] and contributed to the internalization of these norms through a professional corrections staff.[76] Conditions of confinement litigation has been successful for numerous reasons, including its potential to expose officials to negative publicity, the increased funding that normally accompanies court orders in institutional reform litigation, and the availability of highly competent counsel.[77]

There are limits to conditions of confinement litigation, however, in large part because of the hesitance of courts to interpret the Eighth Amendment to provide more than prisoners' basic needs.[78] Even after the explosion of prisoners' rights litigation in the 1970s and 1980s, when federal courts were accused of taking too interventionist a stance with respect to state prisons, prison conditions were far from optimal.[79] For example, in 1993, forty states,

74. *See* Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 670-73 & nn.135-46 (1993) [hereinafter Sturm, *Legacy*] (collecting cases); *see also* Morales Feliciano v. Roselló González, 13 F. Supp. 2d 151, 153 (D.P.R. 1998) (addressing inadequate medical care).

75. Sturm, *Legacy*, *supra* note 74, at 662-63.

76. *Id.* at 663-66.

77. *Id.* at 681-83. As an example of the threat with which prison administrators viewed public visibility, Human Rights Watch has always experienced significantly more difficulty obtaining access to prisons in the United States as compared with other countries. *Id.* at 692.

78. *Id.* at 675 ("Courts have not interpreted the Eighth Amendment to invalidate outdated institutions that warehouse inmates, even if levels of violence are predictably higher in those institutions, as long as inmates receive the basic necessities of life.")

79. *See, e.g.*, *id.* at 687-88 nn.216-19 (citing cases throughout the country from the 1980s and 1990s in which prison officials failed to respond to a tuberculosis outbreak, were in contempt for noncompliance with consent decrees, correctional institutions were condemned as unsanitary and dangerous, food services were determined to present a health risk, medical services were found inadequate, psychiatric services were deemed nonexistent, heating and cooling equipment were found insufficient, and the safety of inmates was considered threatened by recurrent violence). Recently, prisons have faced potentially deadly outbreaks of methicillin-resistant *Staphylococcus aureus* ("MRSA"), due in part to unsanitary conditions. *See, e.g.*, Ctrs. for Disease Control and Prevention, *Methicillin-Resistant* Staphylococcus aureus *Infections in Correctional Facilities—Georgia, California, and Texas, 2001-2003*, MORBIDITY & MORTALITY WKLY. REP., Oct. 17 2003, http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5241a4.htm (reporting investigations of transmission among Georgia, California, and Texas prisoners); Kelly Virella, *Releasing the Disease*, CHI. READER, Oct. 11, 2007, http://www.chicagoreader.com/features/stories/releasingthedisease/ (reporting on MRSA

the District of Columbia, Puerto Rico, and the Virgin Islands were under court supervision for overcrowding or other conditions of confinement; one quarter of all jails in the United States were supervised for crowding issues in 1990; and thirty percent of jails were under court order related to conditions of confinement.[80] By 1995, there were thirty-three prison systems under court supervision regarding overcrowding or general prison conditions, and even prison systems that were not under court order were "significantly overcrowded."[81]

In addition, many barriers to litigating prison conditions cases have sprung up in the last decade. So, while arguments have been made in favor of judicial involvement in reforming prisons,[82] those arguments appear to have less force in the face of the Prison Litigation Reform Act,[83] which limits the power of federal courts to enter remedial orders. The result has been a turn to individual damages actions and a decline in broad institutional reform litigation in favor of more precise and tailored conditions litigation.[84]

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outbreak in Cook County Jail); MRSA Outbreak Reported in State Prisons, http://www.nbc30.com/health/17432044/detail.html (last visited Oct. 20, 2008) (reporting dozens of prisoners infected with MRSA in Connecticut State prisons); Corrections.com, Super-Scary Superbugs, http://www.corrections.com/news/article/17883 (last visited Oct. 20, 2008) (reporting an outbreak of MRSA in a Tulsa, Oklahoma jail).

80. Sturm, *Legacy*, *supra* note 74, at 641-42. As of 1993, the problems in jails had not received as much attention as the problems in prisons, even though jails probably had more serious problems. *Id.* at 697-98.

81. Craig Haney, *The Wages of Prison Overcrowding: Harmful Psychological Consequences and Dysfunctional Correctional Reactions*, 22 WASH. U. J.L. & POL'Y 265, 268 (2006) (quoting figures from ACLU's National Prison Project).

82. *E.g.*, Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons*, 138 U. PA. L. REV. 805, 846-47 (1990) (arguing that courts are well-positioned to be involved in significant intervention because they are independent from political influences—an "external source of normative authority"—with power to distribute rewards and penalties to prison officials, with the potential to expose prison systems to "public scrutiny," and the possibility of giving well-intentioned, reform-minded participants cover to make change).

83. 18 U.S.C. § 3626 (2000). State analogs to the federal Prison Litigation Reform Act have been passed as well. *See, e.g.*, ARK. CODE ANN. §§ 16-106-201 to -204 (2006); LA. REV. STAT. ANN. §§ 15:1181-1191 (2005); MICH. COMP. LAWS §§ 600.5501-.5531 (2000); OKL. ST. ANN. tit. 57, § 566.4 (West 2004).

84. *See generally* Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550 (2006). Some of the decline may be attributable to greater judicial deference to prison administrators, the inculcation of the norms established in the first wave of litigation, and the need to devote resources to monitoring the litigation that has been successful to date. This is not to say that institutional reform litigation is no longer effective—litigators have had more success, for instance, challenging inadequate medical and psychiatric care in recent years, from wholesale challenges in California, *see, e.g.*, Plata v. Schwarzeneg-

With the relatively limited recent success of prison conditions litigation, it is worth asking whether there are alternative ways to obtain relief for prisoners who continue to experience debilitating conditions of confinement.

For instance, imagine two prisoners who are subjected to physical abuse by prison officials. One of these prisoners resides in a state where the battery[85] is mandated by statute as part of the criminal sentence.[86] The second prisoner resides in a different state, where the mistreatment is at the hands of a correction officer who has no legitimate reason for striking the prisoner. The first prisoner would likely succeed in claiming that the statute mandating the battery is unconstitutional under a traditional proportionality analysis.[87] A court would first ask whether the use of physical force is "grossly disproportionate" to the prisoner's crime, and then conduct an inter- and intrajurisdictional analysis to determine whether evolving standards of decency reflect a consensus that corporal punishment for criminal conduct is disproportionate punishment. In addition, the court would likely ask whether there is any penological purpose that is served by using physical assault to punish crime. At least as things currently stand, with no state authorizing the use of corporal punishment, it would be difficult to avoid the conclusion that a statute such as this is unconstitutional.

The prisoner challenging the abuse meted out by the corrections officer, on the other hand, has a more difficult task. Putting aside the need to establish that the corrections officer used the force "sadistically and maliciously," which we may presume from the fact that there was no legitimate security or disciplinary reason for using the force, the prisoner would still have to establish more than a "de minimis" harm.[88] This is not a trivial requirement, and has led

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ger, 556 F. Supp. 2d 1087 (N.D. Cal. 2008), to specific challenges to the provision of Hepatitis C vaccine in Oregon, *see, e.g.*, Anstett v. Oregon, No. 3:01-CV-01619 (D. Or. dismissed June 28, 2007), and New York, *see, e.g.*, Hilton v. Wright, 235 F.R.D. 40 (N.D.N.Y. 2006).

85. By "battery," I refer to the classic definition from tort law: nonconsented touching.

86. While it may be difficult today to imagine such a statute, it was not unusual for certain crimes to be punished by whipping or other physical force in the nineteenth century. *See supra* note 26.

87. *E.g.*, Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968) (finding use of "the strap" unconstitutional in Arkansas prisons).

88. *See* Hudson v. McMillian, 503 U.S. 1, 9-10 (1992). Although an injury can be either psychological or physical, to be actionable under the Eighth Amendment, the Prison Litigation Reform Act imposes an additional requirement that any claim of emotional injury is insufficient absent evidence of physical injury. *See* 42 U.S.C. § 1997e(e) (2000).

to dismissal of numerous claims under the Eighth Amendment.[89] If, for instance, the force used was in the form of pepper spray, there is little doubt that a penal statute which authorized pepper spray as a punishment for particular crimes would be declared unconstitutional, whereas numerous courts have found that the use of pepper spray on prisoners is a de minimis harm.[90] Thus, although the two prisoners have experienced exactly the same treatment, under proportionality analysis a prisoner would have an arguably better chance of having the punishment declared unconstitutional.

In part, this difference in the practical application of proportionality and conditions analysis reflects deeper tensions in the concept of deference at work in both contexts. While the deference present in proportionality litigation is profound when applied to sentences of terms of years in prison, courts have shown less deference to legislative judgments about the mode of punishment.[91] By contrast, in conditions cases, which all concern different modes of punishment, judicial deference to agency expertise in managing prisons is paramount, even as the actions deferred to begin to resemble punishment rather than prison management. In this sense, courts may be too deferential because of the difficulty in policing the line

89. *See* Bailey v. Schmidt, 239 Fed. App'x 306, 308 (8th Cir. 2007) (finding a rib contusion and facial bleeding were de minimis); Wertish v. Krueger, 433 F.3d 1062, 1067 (8th Cir. 2006) (finding relatively minor scrapes and bruises and temporary aggravation of shoulder problem were de minimis injuries); Fillmore v. Page, 358 F.3d 496, 504 (7th Cir. 2004) (finding a bruise that did not require medical treatment was a de minimis injury); Outlaw v. Newkirk, 259 F.3d 833, 839 (7th Cir. 2001) (finding pain, swelling, and bruising to prisoner's hand were de minimis injuries); Calabria v. Dubois, No. 93-1742, 1994 WL 209938, *2 (1st Cir. May 24, 1994) (holding that a radio belt that was thrown at face of prisoner, drawing blood, was de minimis force); White v. Holmes, 21 F.3d 277, 280-81 (8th Cir. 1994) (finding that keys swung at prisoner which slashed his ear was de minimis force); Jackson v. Pitcher, No. 92-1056, 1992 WL 133041, at *1 (6th Cir. June 16, 1992) (fing the stomping hand of prisoner was de minimis force); Fuller v. Cocran, No. 1:05-CV-76, 2005 WL 1802415, at *3 (W.D. Tenn. July 27, 2005) (finding pain from being choked and slightly bleeding wrists from handcuffs were de minimis injuries); McMiller v. Wolf, No. 94-CV-0623E(F), 1995 WL 529620, at *2 (W.D.N.Y. Aug. 28, 1995) (finding laceration of a prisoner's finger a with broken mirror was a de minimis force); DeArmas v. Jaycox, No. 92 Civ. 6139, 1993 WL 37501, *4 (S.D.N.Y. Feb. 8, 1993) (finding the punching of a prisoner in the arm and kicking him in the leg was de minimis), *aff'd*, 14 F.3d 591 (2d Cir. 1993); Olson v. Coleman, 804 F. Supp. 148, 150 (D. Kan. 1992) (finding a single blow to the head of a handcuffed prisoner was de minimis force).

90. *See* Hernandez v. Jones, No. 06 CV 3738 ARR, 2006 WL 3335091, at *2 (E.D.N.Y. Oct. 10, 2006) (collecting cases); *see also* Jennings v. Mitchell, 93 Fed. App'x 723, 725 (6th Cir. 2004); Jackson v. Morgan, 19 Fed. App'x 97, 102 (4th Cir. 2001); Jones v. Shields, 207 F.3d 491, 496-97 (8th Cir. 2000); Davis v. Marengo County Jail, No. 07-0662-CG-C, 2008 WL 3852664, at *8 (S.D. Ala. Aug. 18, 2008); Hart v. Celaya, 548 F. Supp. 2d 789, 804 (N.D. Cal. 2008).

91. *See supra* notes 29-44 and accompanying text.

between prison conditions that reflect management principles and prison conditions that are punitive in nature. In Part III, I address how proportionality principles might be applied in conditions litigation to counterbalance this excessive deference.

III. Bringing Proportionality Analysis into Conditions of Confinement Litigation

In what way could the lessons from proportionality be brought into conditions of confinement litigation? I can only begin to suggest answers in this paper. Part III begins with a discussion of some of the general principles from proportionality analysis that might be applied with beneficial effect to conditions litigation, and then proceeds to discuss three specific examples. I close by discussing some of the more obvious drawbacks to merging elements of proportionality analysis with conditions jurisprudence.

A. The Broad Advantages of Proportionality Analysis

The most glaring difference between proportionality and conditions jurisprudence is the relevance of prison officials' state of mind to establishing an Eighth Amendment violation. In conditions of confinement litigation, there is always a requirement that the prisoner-plaintiff establish that prison officials acted with a sufficiently culpable state of mind.[92] In proportionality litigation, in contrast, there is no consideration of the state of mind of the entity imposing punishment—the only concern is whether the experience of the prisoner fits the offense of conviction. The state of mind requirement in conditions litigation is often a difficult hurdle to overcome.[93] Thus, at least one benefit of reuniting proportionality litigation with conditions of confinement analysis could be a reduced emphasis on subjective states of mind of prison officials.

92. The level of culpability required will depend on whether the prisoner alleges that excessive force was used, medical care was not provided, or conditions like overcrowding are present. *See supra* notes 57-58. This aspect of conditions of confinement analysis has been subject to some criticism form the outset. Estelle v. Gamble, 429 U.S. 97, 116 (1976) (Stevens, J., dissenting) ("[W]hether the constitutional standard has been violated should turn on the character of the punishment rather than the motivation of the individual who inflicted it.").

93. *Cf.* Eva Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. Davis L. Rev. 111, 119, 146 (2007) ("By refusing to examine prison conditions that do not derive from a particular official's deliberate or reckless indifference, the Court has effectively removed much of prison life from Eighth Amendment protection.").

Looking to proportionality litigation might also refocus attention on the ample deference that courts give to prison administrators to make decisions that have a substantial impact on the living experience of confined prisoners. In both proportionality and conditions litigation, courts require substantial deference to the coordinate political branches, but the justification for that deference is different in significant ways. In the context of prison conditions litigation, courts grant such deference because of the role of prison administrators in exercising the judgment necessary "to preserve internal order and discipline and to maintain institutional security."[94] In proportionality litigation, the deference is to legislative judgment regarding the appropriateness of particular sentences.[95]

If the conditions experienced by prisoners are seen as "punishment" in the same way as a sentence of a fixed period of imprisonment, however, then the question of deference becomes more difficult. Indeed, the popular conception of what legitimizes punishment, from a political theory perspective, is the majoritarian process of law-making.[96] It thus bears investigation into what legitimates the imposition of conditions of confinement which equate to punishment. On one theory, the legislature could be considered to have delegated the authority to punish to prison officials. But, depending on one's view of agency expertise and administrative law, such delegation may have limitations, especially in light of the clear delegation to the judiciary of the authority to impose a sentence within the range prescribed by the legislature.[97] Moreover, de-

94. Bell v. Wolfish, 441 U.S. 520, 547-48 (1979); *see also, e.g.*, Rhodes v. Chapman, 452 U.S. 337, 351 n.16 (1981) (referring to "complex and intractable" problems of prison administration which "are not readily susceptible of resolution by decree").

95. *See* Ewing v. California, 538 U.S. 11, 24 (2003) (referring to the "longstanding" deference to "important policy decisions" regarding criminal sentencing); Hutto v. Davis, 454 U.S. 370, 374 (1982) ("By affirming the District Court decision after our decision in *Rummel*, the Court of Appeals sanctioned an intrusion into the basic line-drawing process that is properly within the province of legislatures, not courts.") (internal quotation marks omitted); Rummel v. Estelle, 445 U.S. 263, 274 (1980) ("Given the unique nature of the punishments considered in *Weems* and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative."). *But see* Baze v. Rees, 128 S. Ct. 1520, 1531 (2008) (referring to the fear that the Court might "substantially intrude on the role of state legislatures in implementing their execution procedures").

96. *See* Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 312-13 (2004).

97. The judiciary's role in entering a sentence against a criminal accused has a long pedigree. So long as a court acts within the statutory framework, it is free to exercise its discretion based on facts and evidence particular to the defendant. *See* United

pending on one's theory of legitimate political process, the judiciary may be more or less justified in interfering with conditions of confinement as a limitation on the State's ability to impose inhumane conditions of confinement.[98] That is, while it might make sense to defer to prison officials' judgment about what conditions are necessary to guarantee security and safety in prison, it may make less sense to defer to prison administrators' judgment about what is appropriate "punishment" for a particular offender. Teasing out the appropriate amount of deference would require a more expansive discussion of administrative law principles than there is room for here, but there is at least the possibility that viewing conditions as "punishment" in the proportionality sense would be suggestive of a less deferential posture for state courts.[99]

Moreover, a focus on proportionality has the potential to broaden the discussion about whether certain prison conditions are beneficial to penological goals.[100] If the conditions inquiry becomes part of the sentencing proceeding, there could be many ramifications, including increased public attention regarding conditions prevalent in prisons, the possible different postures that judges may take in endorsing particular conditions *ex ante* rather

States v. Booker, 543 U.S. 220, 233 (2005) ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range."); Apprendi v. New Jersey, 530 U.S. 466, 481 (2000) (collecting cases supporting exercise of judicial discretion in sentencing). In New York State, by contrast, it is unclear whether the Department of Corrections or its Commissioner can be said to have been delegated the power to punish. N.Y. CORRECT. LAW § 112(2) (McKinney 2003) (correctional facilities are established for the purpose of "providing places of confinement and programs of treatment for persons in the custody of the department" for the "objective of assisting sentenced persons to live as law abiding citizens"); *id.* § 112(1) (delegating to Commissioner the "superintendence, management and control of the correctional facilities"); *id.* § 137(1) (directing the Commissioner to establish "program and classification procedures" so that prisoners are assigned "to a program that is most likely to be useful in assisting him to refrain from future violations of the law").

98. Dolovich, *supra* note 96, at 411-12. Dolovich argues that the State is obliged to impose humane punishment, unless imposing inhumane punishment is necessary to achieve relevant penological purpose. *See id.* Even where an inhumane punishment may be permitted, it may not be, "in either duration or form, more severe than necessary" to achieve the desired result. *Id.*

99. Despite the fact that federal courts are perceived to be more and more conservative, prisoner advocates continue to be reluctant to rely upon state courts for relief for familiar reasons such as concerns about procedural rules, comparative competence, and the problem of relying on a popularly elected judiciary. *See* Sturm, *Legacy*, *supra* note 74, at 732-33. Reliance on principles developed in proportionality litigation may make advocates more open to pursuing relief in state courts.

100. *See* Haney, *supra* note 81, at 265 (criticizing the prison conditions debate for focusing on harm inflicted by prison conditions rather than whether any of them produce a benefit).

than *ex post*, and the possibility of favorable comparisons to alternative sentencing regimes. Relatedly, there is the possibility that state courts would be more active in moderating prison conditions if they approached them from the perspective of proportionality. There have been some examples of "new Federalism" in the Eighth Amendment proportionality context that could carry over if state courts were asked to review conditions under a similar framework.[101] Indeed, in the nineteenth century, state courts were much more active than federal courts in regulating the permissibility of legislatively-mandated punishments.[102]

B. Three Specific Illustrations of the Potential Link Between Proportionality and Conditions Litigation

What does it mean, practically, to integrate proportionality principles into conditions litigation? In Part III.B, I discuss three examples of varying levels of generality. First, I discuss the possibility that elements of proportionality analysis could be used to review the permissibility of prison disciplinary measures. Second, I show how proportionality analysis might inform general conditions litigation so as to call into question the emphasis on defendants' state of mind in conditions of confinement cases. Finally, I discuss the possibility that proportionality review might inform sentencing and classification decisions and, in particular, examine the controversial possibility that the permissibility of conditions of confinement could depend on a particular prisoner's crime of incarceration.

1. *Proportionality and Disciplinary Measures*

When prisoners commit infractions in prison, they are subject to various kinds of discipline, the most serious of which is disciplinary segregation, sometimes called "SHU" for "Special Housing Unit." SHU typically involves restrictive conditions of confinement, such as being restricted to one's cell for twenty-three hours a day, deprivation of human contact, solitary confinement, and reduced "privileges."[103] Prisoners who are held in disciplinary segregation generally can challenge their isolated confinement in two ways: ei-

101. *E.g.*, People v. Bullock, 485 N.W.2d 866 (Mich. 1992) (holding that the statute upheld in *Harmelin* violated Michigan's "cruel *or* unusual" punishment clause); State v. Davis, 79 P.3d 64 (Ariz. 2003) (holding a fifty-two year prison sentence for sexual misconduct crimes was unconstitutional under state law).

102. *See supra* notes 23-26.

103. *See, e.g.*, Ortiz v. McBride, 380 F.3d 649, 655 (2d Cir. 2004) (describing SHU conditions in New York prisons).

ther by claiming that the conditions in punitive segregation violate the Eighth Amendment because they deprive prisoners of the minimum needs recognized by society,[104] or by arguing that the procedures by which they were placed in SHU did not provide sufficient due process.[105] The first category of challenge is rarely successful: most courts are hesitant to find that even the most restrictive conditions of confinement in SHU violate Eighth Amendment standards.[106] The second kind of challenge does not implicate the conditions or length of confinement in SHU, except insofar as the nature and duration of SHU confinement is relevant to whether the prisoner has been deprived of a liberty interest sufficient to trigger due process protections.

Therefore, courts currently exercise minimal oversight over the use of SHU confinement in prisons. If the prison has provided sufficient process, and the conditions on SHU are not extremely outrageous, prison administrators can sentence individuals to SHU confinement of any length of time, provided it does not result in their detention in prison after the expiration of their sentence. In this framework, prisoners are routinely sentenced to lengthy periods of time in SHU, sometimes stretching to decades, without any ground for challenge by prisoner-plaintiff.[107] Yet placement in solitary confinement or SHU is common. In 1989, forty percent of

104. A prisoner challenged the conditions of confinement in Wisconsin's supermax prison, *see* Jones 'El v. Berge, No. 00-C-421-C, 2001 WL 34379611 (W.D. Wis. Aug. 14, 2001), resulting in a settlement in which the state agreed to take steps to improve conditions and remove mentally ill prisoners from the prison. Courts have generally been more receptive of challenges to restrictive conditions of confinement brought on behalf of mentally ill prisoners. *See, e.g.*, Madrid v. Gomez, 889 F. Supp. 1146 (N.D. Cal. 1995).

105. *See* Sandin v. Conner, 515 U.S. 472, 482-83 (1995).

106. In *Hutto v. Finney*, 437 U.S. 678 (1978), the Supreme Court affirmed an order by the district court restraining Arkansas from imposing solitary sentences of more than thirty days, because of the detrimental conditions of confinement in isolation cells. *See id.* at 682-83. Because the Court was reviewing the lower court's factual findings under a deferential standard of review, however, *Hutto* does not stand for the proposition that confinement in solitary for more than thirty days will always violate the Eighth Amendment. *See id.* at 686.

107. The average confinement in SHU in New York is six and a half months, although the number is much higher (thirty-eight months) for individuals with mental illness. *See Hearing on Special Housing Units Before the Corrections Comm. of the New York State Assemb.*, 2003 Assemb. (N.Y. 2003) (testimony of Jennifer Wynn, Director, Prison Visiting Project, Correctional Association of New York), http://www.correctionalassociation.org/publications/download/pvp/testimony/2003_SHU_testimony.pdf. In addition, SHU sentences of many years are becoming increasingly common throughout the Nation's prisons. *See* Elizabeth Vasiliades, *Solitary Confinement and International Human Rights: Why the U.S. Prison System Fails Global Standards*, 21 AM. U. INT'L L. REV. 71, 76 & n.25 (2005).

prisoners in maximum security prisons were being placed in solitary confinement,[108] and one can only expect that number to have grown since then.

The lessons of proportionality could prove instructive here. Rather than ask courts to condemn SHU conditions in absolute terms under the Eighth Amendment, a difficult proposition, prisoner-plaintiffs could instead argue that the length of their SHU sentence is disproportionate to their infraction. Under traditional conditions of confinement litigation, inquiry into disciplinary decisions by prison administrators is off-limits, because of the deference owed to their judgment as to the penological needs. On the other hand, Eighth Amendment jurisprudence accepts the proposition that the lived experience of prisoners can be construed as "punishment" under the Eighth Amendment, and SHU confinement is itself treated as a form of punishment within prison walls. Therefore, requiring some "fit" between the punishment and the offense may be consistent with the judiciary's role under the Eighth Amendment.

If proportionality principles were brought to bear on lengthy SHU detention, several new sources of authority may emerge as relevant to the inquiry. For instance, the fact that states have uniformly rejected the imposition of solitary confinement for crimes of any kind, even for much shorter periods than are typically imposed in prisons,[109] could be relevant as to whether using solitary as a form of punishment in prison is consistent with evolving standards of decency. If every state has rejected solitary confinement as a means of punishment for violations of the penal code, then there is a legitimate question as to whether it is permissible to use solitary confinement to punish violations of prison regulations. Moreover, the empirical evidence that serious psychological harm from solitary confinement has been observed after confinement of less than

108. Bryan B. Walton, *The Eighth Amendment and Psychological Implications of Solitary Confinement*, 21 LAW & PSYCHOL. REV. 271, 285 (1997).

109. *See* Craig Haney & Monal Lynch, *Regulating Prisons of the Future: A Psychological Analysis of Supermax and Solitary Confinement*, 23 N.Y.U. REV. L. & SOC. CHANGE 477, 481-87 (1997). Such an argument would have to grapple with the notion that the difference between living outside of prison and living inside prison is much more significant than the difference between being in general population and being confined in SHU. *See* Wolff v. McDonnell, 418 U.S. 539, 572 n.19 (1974) (distinguishing between liberty interests at stake in the transition from freedom to general population and from general population to SHU); *see also* Adam J. Kolber, The Comparative Nature of Punishment (Sept. 10, 2008) (unpublished manuscript, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266158) (arguing that severity of punishment should be measured according to a subjective baseline).

thirty days raises questions as to the "fit" between the increasing length of solitary confinement and the seriousness of the infractions justifying that confinement.[110] For those prisoners who are placed in solitary confinement, there are serious ramifications, such as stress from sensory deprivation, psychosis, the inability to communicate, difficulty eating, and paranoid hallucinations.[111] It makes prisoners more violent and undisciplined.[112] The experience of prisoners held in supermax facilities is similar.[113] In some circumstances, the placement of individuals in solitary confinement is arguably disproportionate punishment.[114] In those facilities where gang members are placed in isolation, individual prisoners may argue that such treatment is disproportionate to their crime.[115] Finally, international standards may inform the use of solitary confinement as punishment, because international law almost uniformly condemns lengthy sentences in solitary confinement for prisoners.[116] Thus, in the particular case of the use of solitary or SHU confinement, proportionality analysis could provide advocates with more avenues for relief.

2. *Revisiting Deference in Conditions of Confinement*

Incorporating proportionality analysis into challenges to solitary confinement or SHU is a focused approach to using proportionality to make up for the limitations of current conditions of confinement

110. *E.g.*, Nilsen, *supra* note 93, at 129 (noting that prisoners in solitary confinement experience increases in suicidal ideation and mental illness).

111. *See* Walton, *supra* note 108, at 277-80; *see also* Nan D. Miller, Comment, *International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?*, 26 CAL. W. INT'L L.J. 139, 163 (1995) (reviewing studies that indicate that solitary confinement alone, even in the absence of physical brutality or other detrimental conditions, can cause emotional and psychological damage and interfere with rehabilitation); Christine Rebman, Comment, *The Eighth Amendment and Solitary Confinement: The Gap in Protection from Psychological Consequences*, 49 DEPAUL L. REV. 567, 581-84 (1999) (describing research documenting the deleterious psychological impact of solitary confinement).

112. *See* Walton, *supra* note 108, at 281.

113. *See* Nilsen, *supra* note 93, at 128 (noting that prisoners in supermax experience profound psychological isolation).

114. For instance, the Court has in the past considered the length of confinement in solitary confinement to be relevant to determining whether such a condition violates the Eighth Amendment. *See* Hutto v. Finney, 437 U.S. 678, 686-87 (1978).

115. *See* Nilsen, *supra* note 93, at 129 (noting some states use isolation units solely because of a prisoner's status as a gang member).

116. *See* Miller, *supra* note 111, at 168. There is also support in international law for recognizing the cruelty inherent in the "death row phenomenon," in which condemned prisoners experience long delays on death row. *See* David Heffernan, *America the Cruel and Unusual? An Analysis of the Eighth Amendment Under International Law*, 45 CATH. U. L. REV. 481, 554-57 (1996).

jurisprudence. But elements of proportionality jurisprudence could also influence how we approach conditions of confinement litigation in general, and in particular could help resolve the tension between the meaning of "punishment" in proportionality and conditions jurisprudence. For instance, imagine a legislature that passes a criminal statute that, along with announcing terms of imprisonment, also imposes the following conditions of confinement:

> for those serving life sentences, one in five will be randomly selected to be victims of a sexual assault;[117]
>
> all prisoners will be forcibly administered medication that causes increased blood pressure;[118]
>
> some proportion of prisoners will be selected to be exposed to infectious diseases like tuberculosis;[119] and
>
> all prisoners will be sprayed in the face with pepper spray once every six months.[120]

This is, thankfully, a difficult statute to imagine being passed. It would appear obviously unconstitutional in that it, in the least, imposes cruel and unusual punishment.[121] Yet there is also little seri-

117. It is estimated the 20% of prisoners serving life sentences will be sexually assaulted in prison. *See* Nilsen, *supra* note 93, at 125-26. The sexual assault rates are difficult to quantify because of low self-reporting among some prisoners. With sexual assault comes, of course, trauma and the risk of sexually transmitted diseases. Moreover, even those who are not assaulted experience fear and anxiety from the prospect of assault. Congress has responded to the reality of sexual assault in prison by passage of the Prison Rape Elimination Act of 2003. *See* 42 U.S.C. §15601 (2000 & Supp. III 2004). This Act provides for information gathering more than anything else. *See id.* §§ 15603-15604.

118. Overcrowding leads to increased blood pressure among prisoners, creates debilitating physical and psychological stress, and leads to increased disciplinary violations. Haney, *supra* note 81, at 271; *see also* Terence P. Thornberry & Jack E. Call, *Constitutional Challenges to Prison Overcrowding: The Scientific Evidence of Harmful Effects*, 35 HASTINGS L.J. 313, 332-36 (1983) (reviewing studies that, in general, showed that a reduction in the number of square feet of living space per inmate corresponded with a significant and substantial increase in both the number and rate of disciplinary infractions, and also in assaults).

119. Thornberry & Call, *supra* note 118, at 337-39. In general, overcrowding will lead to increased complaints of illness. *Id.* at 339-42.

120. A variation of this hypothetical was discussed *supra* Part II.B

121. The examples listed in the hypothetical statute are just a sampling of the harms caused by prison conditions that are unfortunately prevalent in many states. For instance, overcrowding has serious consequences that go beyond the effects of spatial limitations to impact medical and programming availability. *See* Haney, *supra* note 81, at 267. It can make it difficult or impossible to screen or treat mentally ill prisoners. *See id.* at 273. It leads to increased idleness because of the lack of prison jobs, which itself has harmful psychological and behavioral consequences. *See id.* at 274-75 (noting that less than twenty percent of the national prison population works). Significant amounts of idle time can contribute to increased incidence of prison rape. *See*

ous question that the existence of these same conditions alone, experienced by some prisoners on a daily basis, would not be declared unconstitutional when evaluated under traditional conditions of confinement analysis. In part, this is because of the state of mind requirement in conditions of confinement jurisprudence, but the state of mind requirement is intimately connected to the view of "punishment" that is implicit in proportionality and conditions litigation. As discussed above, the intent to punish is presumed in proportionality litigation (or else is not even required), whereas a plaintiff must prove a particular state of mind with respect to the punishment in conditions litigation.

This paradox also points to the difference between the deference afforded prison officials and the deference afforded legislators. Courts disavow both the ability and intention to question the expertise of prison officials in managing their facilities. They also recognize the separation of powers barrier to overly restrictive review of legislative choices about appropriate punishments. But as the absurd hypothetical demonstrates, when reviewing legislative versus prison administrators' imposition of certain "punishments", arguably more deference is shown to prison administrators.

Thus, the different approaches to proportionality and conditions of confinement litigation force us to question whether the deference afforded prison administration is grounded in appropriate principles. Is it possible that courts should defer to prison administrative choices that address the need to manage prisons, but not the administrative choices relating to the need to punish? Is it possible to separate these two strands from each other? If so, perhaps it is less appropriate to defer to administrative choices about punishment. Perhaps it is not appropriate at all to defer to these choices.

If a turn toward proportionality will have an impact on conditions of confinement, it may do so by convincing courts to reimagine the ways in which the experience of prison can be conceived of as punishment.[122] Looking to proportionality analysis has the potential to move courts towards a vision of punishment that

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id. at 276. There is also evidence of an increased risk of death by suicide or violence linked to high prison populations and overcrowding. *See* Thornberry & Call, *supra* note 118, at 348-50.

122. *See* James J. Park, *Redefining Eighth Amendment Punishments: A New Standard for Determining the Liability of Prison Officials for Failing to Protect Inmates from Serious Harm*, 20 QUINNIPIAC L. REV. 407, 433-36 (2001) (positing that thinking of treatment by prison officials as punishment is a break from traditional analytical theory of punishment which focuses on a judge's punishment through sentencing).

takes into account the entire picture of prison life, collateral consequences, and the like.[123]

3. *Proportionality and Offender-Specific Conditions of Confinement*

Just as proportionality could help courts reimagine the deference that is to be given to prison officials in conditions cases, it also could help broaden the notion of punishment in conditions cases. As the doctrines currently stand, proportionality jurisprudence regulates the connection between particular offenses and particular sentences. By definition, some sentences will be too harsh for some crimes, but appropriate for other crimes. Once a prisoner is incarcerated, however, punishments, as experienced through prison conditions, are all-or-nothing: they are either consistent with minimum standards of decency or not.

Proportionality jurisprudence offers another approach, although it is admittedly controversial. Take a typical challenge to overcrowded conditions of confinement, such as *Rhodes v. Chapman*.[124] In *Rhodes*, the Supreme Court found that the plaintiff class had failed to provide sufficient evidence that overcrowding and associated conditions resulted in objectively serious injuries, in the form of increased violence in the prison or inadequate medical care or nutrition.[125] The argument made by the plaintiff class and contemplated by the Court rested on the proposition that the overcrowded conditions were either constitutional or unconstitutional, for all prisoners. But proportionality analysis might suggest that the conditions could be constitutionally imposed as punishment for some classes of prisoners, but not constitutionally imposed on a different class of prisoner, either because of their crime of incarceration or particular characteristics.

There is some limited evidence that courts are willing to engage in the proportionality analysis I suggest here. For instance, in challenges to conditions of confinement in supermax prisons, courts have found that for certain subsets of populations—mentally ill prisoners—conditions of confinement can rise to the level of an

123. Nilsen, *supra* note 93, at 142 (identifying the problem with Eighth Amendment jurisprudence after *Weems*, *Trop*, and *Estelle* to be that "a challenged punishment will never be considered holistically. Instead, the Court will divide it up into parts, each to be analyzed separately without regard to the punishment's cumulative, spirit-crushing impact").

124. 452 U.S. 337 (1981).

125. *See id.* at 348-49.

Eighth Amendment violation.[126] This is consistent with that strand of proportionality analysis in the capital punishment area that has found the death penalty to be an unconstitutional punishment for particular categories of defendants, such as those who are mentally retarded or those who committed their crimes under the age of eighteen.[127] If particular conditions of confinement are first challenged as unconstitutional as applied to particular categories of prisoner, it may begin bridging the gap between proportionality and conditions litigation. For instance, mentally ill detainees may argue that segregation in prison is inevitable because of difficulty complying with prison rules, leading to exacerbation of some mental illness, and requiring a modification of disciplinary rules that takes account of mental illness and perhaps even a limitation on the ability to imprison the mentally ill in the first place.[128]

Conclusion

There are many barriers to importing proportionality analysis into conditions jurisprudence. To begin with, some headway will have to be made against the "death is different" doctrine that limits judicial review of noncapital sentences for proportionality.[129] Moreover, as the Supreme Court's analysis suggests, proportionality in the prison context is quite limited, perhaps even more so than proportionality in the punitive damages context.[130]

Perhaps more troubling, there is a double-edged aspect of importing proportionality theories into conditions litigation. Differentiating among different kinds of offenders in terms of the kinds of conditions that might be permissible could wreak havoc in the administration of prisons, and also could be pernicious in sug-

126. *See* Mikel-Meredith Weidman, Comment, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. Rev. 1505 (2004) (discussing opinions in *Jones 'El v. Berge*, No. 00-C-421-C, 2001 WL 34379611 (W.D. Wis. Aug. 14, 2001), *Ruiz v. Johnson*, 37 F. Supp. 2d 855 (S.D. Tex. 1999), and *Madrid v. Gomez*, 889 F. Supp. 1146 (N.D. Cal. 1995)).

127. *E.g.*, Roper v. Simmons, 543 U.S. 551 (2005) (prohibiting the death penalty for those who committed crimes under the age of eighteen); Atkins v. Virginia, 536 U.S. 304 (2002) (prohibiting the death penalty for the mentally retarded).

128. *See* Nilsen, *supra* note 93, at 131-32.

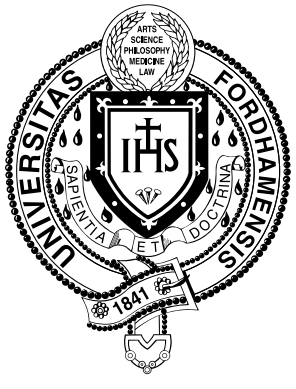
129. *See id.* at 152-53.

130. *See* 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, 1290-91 (2000).

gesting that the "worst" prisoners could be subject to the worst conditions of confinement.[131]

Nonetheless, proportionality jurisprudence has something to offer conditions of confinement litigation. In particular, a close look at the links between the two doctrines can help expose some of the more difficult barriers to court supervision of prison conditions of confinement. Should courts continue to defer to prison administrators in areas of "punishment," in the absence of a clear delegation of the authority to punish by the legislature? Should courts continue to impose high standards of subjective liability for prisoners who seek to establish the unconstitutionality of certain prison conditions? This paper suggests that there are some reasons, grounded in proportionality doctrine, to consider the answers to these questions contestable.

131. *Cf.* Weidman, *supra* note 126, at 1542 (discussing the danger of Eighth Amendment jurisprudence which suggests that more restrictive conditions of confinement could be permissible for "more resilient inmates"); *see also* Haney & Lynch, *supra* note 109, at 557 ("[T]his extraordinary threshold of cognizable Eighth Amendment psychic pain, limited to those things that create a high risk that everyone exposed to them will become seriously mentally ill, could legitimize virtually any form of degrading, inhumane, and psychologically abusive treatment in prison, no matter how extreme and otherwise harmful.").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