MANDATORY SENTENCING AROUND THE WORLD AND THE NEED FOR REFORM

*Anthony Gray**

This article considers the increased use of mandatory sentencing provisions in a range of jurisdictions, including Canada, Australia, the United States, and United Kingdom/Europe. It finds that, whereas some courts have struck out mandatory sentencing laws, often mandatory minimum penalties have been validated. This jurisprudence is considered through a range of themes, including notions of arbitrariness, the doctrine of proportionality, the relevance of objectives of the criminal justice system, and broader questions regarding the separation of powers.

Keywords: *mandatory sentencing, Eighth Amendment, proportionality, arbitrariness, cruel and unusual punishment, separation of powers*

INTRODUCTION

The use of mandatory sentencing around the world has increased in recent years. Governments have responded to community perceptions that some courts have been "too soft" on crime, or that sentencing outcomes are unpredictable and uncertain, by introducing minimum mandatory sentencing provisions. These are designed to create certainty in sentencing, and lead to sentencing outcomes considered more reflective of community

* Anthony Gray is Professor of Law at the University of Southern Queensland, Australia. He received his LLB and LLM from Queensland University of Technology and his PhD from the University of New South Wales. His major research interests are in the area of human rights, constitutional law, and comparative law. He thanks the anonymous reviewer and the Editor of the Review for helpful comments on an earlier draft of this article, and the copy editor for their diligent work.

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standards. However, their use has been challenged on constitutional and human rights grounds, on the basis that they may lead to cruel and unusual punishment, and/or arbitrary outcomes, and may not achieve any of the goals traditionally pursued by criminal justice systems. They may also subvert the traditional role of courts.

Part I of this article involves a survey of the current law relating to minimum mandatory sentencing in a range of jurisdictions. The discussion will be focused on several themes, in particular questions of arbitrariness, proportionality, the extent to which such regimes meet criminal justice goals, and separation of powers questions. We will see that most jurisdictions have some kind of prohibition on cruel and unusual, and/or arbitrary, punishment, though there has been a wide divergence in how these prohibitions have been interpreted, with Canada interpreting these prohibitions most broadly. Part II considers these themes in more detail and considers how arguments favoring mandatory sentencing regimes can be met. The Conclusion will offer some insights on the existing state of the case law, and what kinds of reforms are needed.

I. MANDATORY SENTENCING AROUND THE WORLD

Case law on mandatory sentencing from a range of jurisdictions will now be studied. In so doing, the article will make particular note of the following principles in the case law, given the themes of the article developed later: (a) the extent to which concepts of arbitrariness influence a court's decision regarding whether mandatory sentencing is valid; (b) the extent to which concepts of proportionality influence a court's decision regarding whether mandatory sentencing is valid, and how proportionality is measured; (c) the extent to which the purpose of the incarceration, and whether it meets any traditional goal/s of the criminal justice system, determines the validity of provisions; and (d) the extent to which separation of powers principles have been utilized in relation to mandatory sentencing provisions.

A. Canada

The Canadian Supreme Court first struck out a mandatory sentencing regime as being contrary to the Canadian Charter of Rights and Freedoms

in *Smith v. The Queen*.[1] There the offender pleaded guilty to drug importation, which attracted a minimum jail term of seven years. He argued the provision was contrary to the Canadian Charter, specifically § 9 forbidding arbitrary detention and punishment and § 12 forbidding cruel and unusual punishment. A majority of the Court held the offense provision was forbidden by § 12, and not saved by § 1.[2]

The Court confirmed that, although the legislature had broad power to prescribe offenses and the penalties to be applied for such offenses, there were limits; specifically, § 12 prohibited a legislature from imposing a punishment that was grossly disproportionate.[3] In assessing whether or not a punishment breached this requirement, relevant factors included the gravity of the offense, personal characteristics of the offender, and the particular circumstances of the case to determine an appropriate range to fulfil legitimate penological objectives like punishment, rehabilitation, deterrence, or community protection.[4] Although minimum mandatory sentences did not always breach the requirements of § 12, there was a breach on this occasion because the offense applied to numerous different substances involving various degrees of dangerousness, and did not take into account the quantity of drug imported.[5] The purpose of the importation also was not taken into account.[6]

1. *Smith*, [1987] 1 S.C.R. 1045.

2. Dickson CJ, Lamer, Wilson, Le Dain, and La Forest JJ; McIntyre J dissenting. The Court had earlier clarified its approach to § 1, which provides the rights enshrined in the *Charter* are guaranteed, subject to such reasonable limits as can be justified in a free and democratic society. The Court found § 1 required the government firstly to identify an important objective to which the challenged legislation is aimed, which could justify overriding the human right involved. Then it would need to show the measures had been carefully designed to achieve that aim, and not arbitrary, unfair, or irrational; they were rationally connected to that objective and minimally invaded the right affected, and there was proportionality between the effects of the measures and the identified objective: *R v. Oakes* [1986] 1 S.C.R. 103, 138–39 (Dickson, Chouinard, Lamer, Wilson, and Le Dain JJ). McIntyre J found that the prohibition in § 12 was absolute, not subject to proportionality analysis in § 1 (1108), with whom Le Dain J agreed (1111).

3. *Smith*, 1072 (Dickson CJ and Lamer J) (with whom La Forest J agreed).

4. *Id.* at 1073 (Dickson CJ and Lamer J) (with whom La Forest J agreed); McIntyre J also found that punishment that went beyond what was necessary to achieve a valid social aim, having regard to legitimate purposes of punishment and the adequacy of alternatives, would breach § 12 (1098), with whom Le Dain J agreed (1111).

5. *Id.* at 1078 (Dickson CJ and Lamer J) (with whom La Forest J agreed).

6. *Id.*

The measures could not be saved under § 1 because they failed the second aspect of proportionality analysis[7]—although clearly the fight against drug offending was an important objective in relation to § 1 analysis, it was not necessary to impose a mandatory minimum jail term of seven years to deter drug offenders.[8] The legitimate objective could be achieved through a more narrowly circumscribed offense having regard to the particular drug, particular quantities, and/or repeat offenders.[9] There was difference of opinion among justices as to whether notions of arbitrariness were relevant to a determination of whether punishment was cruel and unusual in § 12.[10] Some justices considered whether the law "outraged" or "shocked" the public conscience.[11]

A minimum mandatory sentencing regime applied to firearms offenses was recently struck out by the Supreme Court as being contrary to the requirements of 12 of the Charter, and not saved by § 1.[12] The minimum mandatory provision (three years' jail for a first offense, five for a subsequent offense) applied to a person in possession of a firearm either without a license or where the firearm was unregistered.

7. In *R v. Oakes* [1986] 1 S.C.R. 103, 138–39 (Dickson CJ, for Chouinard Lamer Wilson and Le Dain JJ), the Supreme Court had adopted a two-stage approach to a challenge to laws that prima facie violated the *Charter*. Once such a violation had been discovered, it was for the authorities to explain an objective that the legislation was designed to serve that was sufficient to override a constitutionally protected right or freedom. Secondly, the authorities would have to show that the means chosen were reasonable and demonstrably justified. This suggested a proportionality approach, involving a balancing of societal, group, and individual interests. It included consideration of whether the measures adopted were carefully designed to achieve the designated objective, and not arbitrary, unfair, or irrational. They should minimally impair the relevant right or freedom. There should be proportionality between the effects of the measures limiting the right or freedom and the designated objective.

8. *Smith*, 1080 (Dickson CJ and Lamer J) (with whom La Forest J agreed).

9. *Id.* at 1081 (Dickson CJ and Lamer J) (with whom La Forest J agreed).

10. Dickson CJ and Lamer J held notions of arbitrariness comprised a "minimal factor" ([1076]); in contrast McIntyre J said an arbitrary law (one not applied on a rational basis in accordance with identifiable standards) would contravene § 12 ([1098]), as did Wilson J ([1109]) and Le Dain J ([1111]); La Forest J expressly declined to express a view on the matter ([1113]).

11. McIntyre J ([1097]), Wilson J ([1109]), and Le Dain J ([1111]).

12. R v. Nur [2015] 1 S.C.R. 773 (McLachlin CJ, Le Bel, Abella, Cromwell, Karakatsanis, and Gascon JJ; Rothstein, Moldaver, and Wagner JJ dissenting).

All justices reiterated that § 12 prohibited the imposition of grossly disproportionate sentences.[13] Relevant to this consideration were the nature of the offense, circumstances of the offender, and the objectives of the relevant criminal law legislation.[14] It stated that a proportionate sentence was a highly individualized exercise, having regard to the gravity of the offense, blameworthiness of the offender, and harm caused by the crime. Mandatory minimum sentences could threaten proportionality in sentencing because:

> They emphasize denunciation, general deterrence and retribution at the expense of what is a fit sentence for the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime. They function as a blunt instrument that may deprive courts of the ability to tailor proportionate sentences at the lower end of a sentencing range. They may, in extreme cases, impose unjust sentences, because they shift the focus from the offender during the sentencing process in a way that violates the principle of proportionality.[15]

The majority noted the law as framed could catch offending that carried little or no moral fault, and little or no danger to the public.[16] It was "out of sync" with the norms and objectives set out in the criminal legislation, and legitimate expectations in a free and democratic society.[17] A five-year jail term for an offender against weapons legislation was beyond what was needed to protect the public, what was needed to express moral condemnation of the offender, and what was necessary to achieve deterrence.[18] The penalty could conceivably be imposed on a person who, not having a license, had innocently come into possession of a firearm. Such an offender would have caused no harm, and was not a risk to public safety,

13. *Nur*, 798 (McLachlin CJ, Le Bel, Abella, Cromwell, Karakatsanis, and Gascon JJ); 843 (Moldaver, Rothstein, and Wagner JJ). The dissenters concluded that the prosecutor's discretion to charge an alleged offender with an offense not attracting the mandatory minimum saved the mandatory minimum scheme from invalidity, as they concluded that "a decision to prosecute by indictment that would give rise to a grossly disproportionate sentence represents a per se abuse of process in violation of § 12" (845).

14. *Id.* at 798 and 801 (McLachlin CJ, Le Bel, Abella, Cromwell, Karakatsanis, and Gascon JJ).

15. *Id.* at 800 (McLachlin CJ, Le Bel, Abella, Cromwell, Karakatsanis, and Gascon JJ).

16. *Id.* at 815 (McLachlin CJ, Le Bel, Abella, Cromwell, Karakatsanis, and Gascon JJ).

17. *Id.*

18. *Id.* at 823 (McLachlin CJ, Le Bel, Abella, Cromwell, Karakatsanis, and Gascon JJ).

yet would be subject to the minimum mandatory sentencing regime. This would be draconian.[19] The law was not saved under § 1 using the *Oakes* approach identified above.[20] The majority noted numerous studies to the effect that minimum mandatory sentencing regimes did not deter criminal behavior.[21] Further, the law was not minimally invasive of human rights; it was not necessary to impose the harsh mandatory minimum penalties to achieve the legitimate objective of gun control. The minimum mandatory penalties applied to too broad a range of offenses, with widely varying degrees of culpability and seriousness.[22]

Canada's constitutional commitment to proportionality in sentencing was recently reconfirmed by all justices.[23] The Court confirmed that "laws that curtail liberty in a way that is arbitrary, overbroad or grossly disproportionate do not conform to the principles of fundamental justice,"[24] and that legislators could not require sentencing courts to impose grossly disproportionate punishment.[25] In so stating, the Court noted the link between proportional sentencing and the public's confidence in the judicial system,[26] itself critical to its continued functionality.

B. Australia

Prior to considering the Australian case law, it must be borne in mind that the country lacks a national bill of rights. There is no constitutional provision expressly prohibiting the imposition of cruel and unusual

19. *Id.*

20. *See supra* note 7.

21. *Id.* at 826 (McLachlin CJ, Le Bel, Abella, Cromwell, Karakatsanis, and Gascon JJ).

22. *Id.* at 827 (McLachlin CJ, Le Bel, Abella, Cromwell, Karakatsanis, and Gascon JJ). To be clear, the Court did not find that the sentences given to the particular offenders who challenged the law in *Nur* were grossly disproportionate, but that the provisions were invalid because they would facilitate the imposition of grossly disproportionate punishments in reasonably foreseeable cases (805).

23. R v. Safarzadeh-Markhali [2016] SCC 14, [22](the Court); see also R v. Ipeelee [2012] 1 S.C.R 433, stating that "proportionality is the sine qua non of a just sanction" and noting its indispensability in ensuring that the public retained confidence in the judicial system ([37]) (Le Bel J, for McLachlin CJ, Binnie, Deschamps, Fish, and Abella JJ).

24. *Safarzadeh-Markhali*, [22](McLachlin CJ, for the Court); and R v. Ipeelee [2012] 1 S.C.R. 433, where the Court noted that a fundamental aspect of sentencing was that it was proportionate: [36](Le Bel J, for McLachlin CJ, Binnie, Deschamps, Fish, and Abella JJ).

25. *Id.* at [71](McLachlin CJ, for the Court).

26. *Id.* at [70](McLachlin CJ, for the Court).

punishment, and/or disproportionate sentencing. It is possible that the Bill of Rights Act 1689 (U.K.), including its prohibition on cruel and unusual punishment, could be taken to have been received into Australian law. However, the section has received virtually no attention in the Australian case law, and its status in Australian law is very weak.[27]

Apart from the very limited range of express human rights provisions found in the Australian Constitution, none of which are relevant here, the main way in which constitutional protection of human rights can be sought is, indirectly, through the principle of the separation of powers. Like the Constitution of the United States (upon which it was modelled), the Australian Constitution provides for an express separation of powers between the executive, legislative, and judicial functions.[28] Somewhat unexpectedly, this has become the main avenue for the protection of fundamental human rights in Australia. The Australian High Court has found that legislation is vulnerable to constitutional challenge where it requires, or authorizes, a court to depart from traditional judicial method.[29] A law that undermines the institutional integrity of a court is constitutionally invalid.[30] The Court has relied on American authorities such as *Mistretta v. United States*[31] in articulating this principle, specifically that the legislature may not borrow the judiciary to "cloak" its work in the neutral colors of judicial action.[32]

As this phenomenon is recent, the Court continues to articulate the precise characteristics of traditional judicial method, departure from which might trigger unconstitutionality. So far, we know laws that leave a court no discretion other than to make an order sought by the executive are constitutionally invalid on this basis,[33] as are laws prohibiting a court from

27. A rare case in which it was mentioned was *R v. Smith; Ex Parte Cooper* [1992] 1 QdR 423.

28. Chapter I of the Australian *Constitution* deals with Legislative Power, Chapter III with Executive Power, and Chapter III with Judicial Power.

29. Bass v. Permanent Trustee Co. Ltd. (1999) 198 CLR 334, 359 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne, and Callinan JJ).

30. Wainohu v. New South Wales (2011) 243 CLR 181, 206 (French CJ and Kiefel J), 228–29 (Gummow, Hayne, Crennan, and Bell JJ).

31. *Mistretta*, 488 U.S. 361, 407 (1989) (Blackmun J, for Rehnquist CJ. White. Marshall. Stevens. O'Connor. Kennedy. and Brennan JJ).

32. For example, Kable v. Director of Public Prosecutions (NSW) (1997) 189 CLR 51, 133 (Gummow J); South Australia v. Totani (2010) 242 CLR 1, 172 (Kiefel J); Kuczborski v. Queensland [2014] HCA 46, [228](Crennan, Kiefel, Gageler, and Keane JJ).

33. South Australia v. Totani (2010) 242 CLR 1.

giving reasons for its decisions,[34] and laws requiring a court to hear an application in the absence of the other party to the proceeding.[35] A law that sought to remove a superior court's ability to overturn a decision for jurisdictional error would also be invalid.[36] It is possible that, via these means, other characteristics of a common law judicial process that are considered fundamental characteristics of judicial process—like presumption of innocence, right to silence,[37] right to confront witnesses, and right to open courts[38]—would be constitutionally protected.

On minimum mandatory sentencing, it might have been open to the court to find such provisions undermine a key characteristic of judicial power. It might be argued that sentencing, which has been recognized as an exclusively judicial function in the separation of powers realm,[39] is characterized by a judge considering a range of factors in determining an appropriate sentence that is proportionate to the gravity of the offense, circumstances of the offense, and circumstances of the offender. Traditionally, this is how sentencing has been carried out by courts based on the common law system. And a law that short-circuited much of that process, by simply requiring a court to impose a sentence crafted in the abstract by the legislature in a situation necessarily removed from actual facts and circumstances of a given case, would be anathema to traditional judicial process, and for that reason unconstitutional.[40] Such an argument enjoys academic

34. Wainohu v. New South Wales (2011) 243 CLR 181.

35. International Finance Trust v. New South Wales Crime Commission (2009) 240 CLR 319.

36. Kirk v. Industrial Relations Commission (2010) 239 CLR 531.

37. X7 v. Australian Crime Commission (2013) 248 CLR 92, 140–41 (Hayne and Bell JJ), 153 (Kiefel J).

38. Russell v. Russell (1976) 134 CLR 495.

39. Chu Kheng Lim v. Minister for Immigration (1992) 176 CLR 1, 27, where Brennan, Deane, and Dawson JJ refer to the "exclusively judicial function of adjudging and punishing criminal guilt," with whom Mason CJ agreed (10).

40. Such an argument finds support in past Chapter III case law. For example, Gaudron J stated in *Re Nolan; Ex Parte Young* (1991) 172 CLR 460, 497 the key role that the judicial process played in protecting an individual from "arbitrary punishment"; two justices in *Nicholas v. The Queen* (1998) 193 CLR 173 found legislation directing a court to ignore that evidence was obtained unlawfully in determining what weight ought be given to it was unconstitutional, as it purported to direct the court in the exercise of its discretion. In *Chu Kheng Lim v. The Commonwealth* (1992) 176 CLR 1, 36–37, three members of the Court found an attempt by parliament to direct the courts as to the manner and outcome of the exercise of their discretion would be constitutionally invalid (Brennan, Deane, and Dawson JJ).

support,[41] and the endorsement of the Law Council of Australia[42] and the Judicial Council of Australia, the umbrella organization of Australia's judges.[43]

Indeed, elsewhere, and recently, the High Court had declared unconstitutional legislation that effectively required a court to make a control order with respect to an individual who was a member of an organization deemed criminal by the government. The court had no discretion to refuse to make the order; a majority found the legislation constitutionally invalid.[44]

However, that is not how the challenges to minimum mandatory sentencing have fared—to date, at least. The first case considering the constitutionality of minimum mandatory sentencing in Australia in detail was *Palling v. Corfield*.[45] It must be noted this decision was rendered at a time when the full implications of the separation of powers principles of the Australian Constitution had not been recognized. There the challenged legislation provided for a mandatory seven-day jail term if a person did not attend a medical examination relating to conscription. In validating the provision, Barwick CJ conceded mandatory sentencing was "unusual" and "undesirable," but noted:

> It is beyond question that parliament can prescribe such penalty as it thinks fit for the offences which it creates. It may make the penalty absolute in the sense that there is but one penalty which the court is empowered to impose

41. Desmond Manderson & Naomi Sharp, *Mandatory Sentences and the Constitution: Discretion, Responsibility and Judicial Process*, 22 SYDNEY L. REV. 585 (2000).

42. *Policy Discussion Paper on Mandatory Sentencing* (2014).

43. Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*.

44. South Australia v. Totani (2010) 242 CLR 1, French CJ, Gummow, Hayne, Crennan, Kiefel, and Bell JJ, Heydon J dissenting. For example, the view of Crennan and Bell JJ that "legislation which draws a court into the implementation of government policy, by confining the court's adjudicative process so that the court is directed or required to implement legislative or executive determinations without following ordinary judicial processes, will deprive that court of the characteristics of an independent and impartial tribunal (and would be constitutionally invalid)" (157).

45. *Palling* (1970) 123 CLR 52. The matter had been considered briefly in *Fraser Hemleins Pty. Ltd. v. Cody* (1945) 70 CLR 100, where the High Court quickly dismissed an argument that a minimum mandatory penalty was unconstitutional; Latham CJ on the basis "it had never been suggested" (119), Starke J on the basis that if the legislature could prescribe a maximum, it could also prescribe a minimum (122), and Williams J on the basis the legislature could provide whatever punishment it wished (139).

> and . . . it may lay an unqualified duty on the court to impose that penalty. The exercise of the judicial function is the act of imposing the penalty consequent upon conviction of the offence which is essentially a judicial act. If the statute nominates the penalty and imposes on the court a duty to impose it, no judicial power or function is invaded.[46]

The question was raised once again recently in *Magaming v. The Queen*.[47] The challenge concerned § 233C of the Migration Act 1958 (Cth), providing a minimum mandatory penalty of five years' imprisonment for someone who arranged for the entry into Australia of non-Australian citizens with no lawful right to enter the country (commonly known as "people smugglers"), where they brought at least five people in at once. By majority of 6-1, the High Court rejected the challenge.

The joint reasons stated the court's sentencing function was not unbounded, but was constrained by statutory limitations. Sentencing had to take place according to law. They agreed judges needed "sentencing yardsticks"; provision of a minimum mandatory penalty was merely one of those, albeit a rare and exceptional form.[48] The joint reasons agreed:

> the sentence imposed must be proportionate in the sense that it properly reflects the personal circumstances of the particular offender and the particular conduct in which the offender engaged when those circumstances and that conduct are compared with other offenders and offending.[49]

However, notwithstanding this, the joint reasons concluded the mere fact a sentence may be judged to be "harsh" did not mean it was constitutionally invalid.[50] Nor was it clear the basis upon which a court might find a sentence "harsh"[51] or beyond what was necessary to achieve a particular purpose, such as deterrence.

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46. *Palling*, *supra* note 45, at 58; Windeyer, Owen, Walsh, and Gibbs JJ agreed. Menzies J was slightly ambivalent, conceding that parliament "can, to some extent" validly control the exercise of judicial power (64), and that courts must act within the framework of the laws made by parliament "unless the *Constitution* otherwise provides" (65).

47. *Magaming*, (2013) 252 CLR 381.

48. *Id.* at 396 (French CJ, Hayne, Crennan, Kiefel, and Bell JJ); 414 (Keane J).

49. *Id.* at 397 (French CJ, Hayne, Crennan, Kiefel, and Bell JJ).

50. *Id.* at 398 (French CJ, Hayne, Crennan, Kiefel, and Bell JJ).

51. *Id.* at 397 (French CJ, Hayne, Crennan, Kiefel, and Bell JJ); Gageler J (dissenting) invalidated the legislation on the basis that because the prosecutor had the choice of charging a person either with an offense under § 233C (containing the minimum mandatory penalty) or a lesser offense (comprising essentially the same conduct less one aggravating

C. United States

Given the large number of American cases concerning the Eighth Amendment, the discussion following will focus on what are considered to have been the main developments in Eighth Amendment jurisprudence over the years, particularly having regard to the themes identified at the beginning of this Part of the article.

The United States Supreme Court established in the early twentieth century that the Eighth Amendment prohibition on "cruel and unusual punishment," derived from the Bill of Rights Act 1689 (U.K.), could apply to length of imprisonment and condition of imprisonment, as well as to methods of punishment.[52] That case, *Weems v. United States*, involved imposition in the Philippines (with a provision identical to the Eighth Amendment, and which the court determined should be interpreted to mean the same as the Eighth Amendment) of a minimum 12 year jail term for fraud. The offender was to be chained, would be expected to participate in "hard and painful labor," derive no assistance from friend or family, have no marital authority or parental rights, or rights of property. The Court established that a proportionality analysis should be applied to Eighth Amendment questions. The provision in *Weems* was unconstitutional because it was "cruel in its excess of imprisonment" and because of the "degree and kind" of punishment imposed.[53] In considering proportionality, the Court noted that degrees of homicide were punished less severely than the minimum mandatory punishments applicable to this case.[54]

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factor), this choice to be made by a member of the executive infringed the system of separation of powers for which the *Constitution* provided. The State of Queensland has implemented a system of minimum mandatory sentencing with respect to offenses committed by participants in criminal associations. The minimum mandatory sentence is 15 years for specified offenses committed in the course of the association's activities, as well as any sentence for the actual wrongdoing, and a minimum 25 year jail term if the person who conducted the activities is an office bearer in the association (*Vicious Lawless Association Disestablishment Act 2013* (Qld) (VLAD Act)). A constitutional challenge to the scheme of which these laws are a part was dismissed in *Kuczborski v. Queensland* [2014] HCA 46, although the case did not deal with the minimum mandatory sentencing aspects of the regime, because the High Court had decided that such schemes were constitutionally valid the year before in *Magaming*, even if the sentences in the *VLAD Act* are more severe than in *Magaming*.

52. *Weems v. United States* 217 U.S. 349 (1910).

53. *Weems*, 377 (McKenna J, for the Court).

54. *Id.* at 380 (McKenna J, for the Court).

There was also a brief indication that concepts of proportionality could or would be shaped by purposes of punishment,[55] a theme to which the Supreme Court would return in later cases.

In subsequent cases proportionality became entrenched in Eighth Amendment case law. Its meaning was substantially considered in *Solem v. Helm*,[56] where the Court referred to proportionality as "deeply-rooted" in common law jurisprudence, citing Magna Carta and its interpretation in British case law as incorporating proportionality analysis.[57] The Court laid out criteria for determining whether or not a sentence was proportionate, including the gravity of the offense, its magnitude, the harshness of the penalty, sentences imposed on other criminals in the same jurisdiction, and sentences imposed for the same crime in other jurisdictions.[58] If more serious crimes were subject to the same penalty, or less serious penalties, this could suggest excessive punishment.[59] Courts could competently judge the gravity of an offense, at least in relative terms,[60] and could compare different sentences in a meaningful way.[61] Intention, or lack thereof, was relevant.[62] The court found a sentence of life imprisonment without parole for a seventh felony was contrary to the Eighth Amendment. Helm's offense here was relatively trivial, that of passing a valueless check with a face value of $100. Although Helm was a repeat offender, and a state was entitled to treat a repeat offender more harshly, his prior offending was all non-violent.[63]

55. *Id.* at 381 (McKenna J, for the Court).

56. *Solem*, 463 U.S. 277 (1983).

57. *Id.* at 284–85 (Powell J, for Brennan, Marshall, Blackmun, and Stevens JJ).

58. *Id.* at 290 (Powell J, for Brennan, Marshall, Blackmun, and Stevens JJ; Burger CJ, White, Rehnquist, and O'Connor JJ dissenting).

59. *Id.* at 291 (Powell J, for Brennan, Marshall, Blackmun, and Stevens JJ).

60. *Id.* at 292 (Powell J, for Brennan, Marshall, Blackmun, and Stevens JJ).

61. *Id.* at 294 (Powell J, for Brennan, Marshall, Blackmun, and Stevens JJ).

62. *Id.* at 293 (Powell J, for Brennan, Marshall, Blackmun, and Stevens JJ; Burger CJ, White, Rehnquist, and O'Connor JJ dissenting).

63. *Id.* at 296–97 (Powell J, for Brennan, Marshall, Blackmun, and Stevens JJ). However, in that same year the Court validated a mandatory life sentence on a repeat property crime offender on the basis that such a penalty was not "grossly disproportionate": *Rummel v. Estelle* 445 U.S. 263 (1980) (Rehnquist J, for Burger CJ, Stewart, White, and Blackmun; Powell, Brennan, Marshall, and Stevens JJ dissenting). It is conceded that, in *Rummel*, the offender subjected to a life minimum mandatory sentence was required to have twice been imprisoned for felonies, and the possibility existed that he could be released after serving 12 years' imprisonment, unlike the situation in *Solum*. In *Rummel* the Court also acknowledged some

An apparent attack on the principle of proportionality occurred in *Harmelin v. Michigan*,[64] where Scalia J, joined by Rehnquist CJ, denied proportionality, was a general principle of Eighth Amendment law,[65] and sought to confine the meaning of "cruel and unusual punishment" to methods of punishment,[66] with an exception in relation to the death penalty where proportionality could be used.[67] It was claimed the original framers intended that the clause would be confined to unprecedented or unauthorized *methods* of punishment,[68] and did not mean the prohibition of "cruel and unusual punishment" to apply to disproportionate sentences.[69] Notably, they declined to specifically prohibit "disproportionate" punishments.[70] Scalia J noted that the 1689 Bill of Rights Act, upon which American colonial provisions (and subsequently the Eighth Amendment) were based, did not expressly prohibit disproportionate punishments.[71] His reading of the history suggested the purpose of the relevant clause in the Bill of Rights Act 1689 was to prevent the infliction of punishments that were "beyond power" and arbitrary, in the sense that they were unprecedented and unauthorized.[72]

Scalia J found that his narrow interpretation of the Eighth Amendment was workable—there was clear historical evidence regarding the use of particular methods of punishment;[73] and in contrast, there were no objective measures of gravity by which a court could apply a principle of proportionality.[74] For this reason, he rejected the proportionality analysis

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of the practical difficulties involved in that part of proportionality analysis calling for comparison of penalties across states. Without declaring such analysis illegitimate, it referred to its complexities: "absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other state" (282). Of the judges who heard both cases, only Blackmun J validated one provision and invalidated the other.

64. *Harmelin*, 501 U.S. 957 (1991).
65. *Id.* at 965.
66. *Id.* at 985.
67. *Id.* at 994.
68. *Id.* at 979.
69. *Id.*
70. *Id.* at 985.
71. *Id.* at 967.
72. *Id.* at 968.
73. *Id.* at 985.
74. *Id.* at 988.

described in *Solum*, involving a comparison of sentences in other jurisdictions for the same offense, or comparison with offenses regarded as of similar severity within the one jurisdiction.[75]

The other majority justices in the result emphasized the deference due to legislatures in their assessment of the gravity of particular offending, and that enforcement of minimum mandatory sentences by courts ought to be the general position, and the setting aside of such sentences on proportionality grounds very much the exceptional case.[76] Minimum sentencing provisions should not be set aside on the basis they were considered to be unwise. The Eighth Amendment did not mandate acceptance of any particular penological theory, and the principles underpinning systems of criminal justice, and their relative importance, change over time. One of the advantages of a federal system was that it permitted different states to pursue their own policies in this regard; this made interstate comparisons complicated.[77] Some judges suggested narrowing the use of comparative sentencing in other jurisdictions to confirming an initial impression that a sentence was grossly disproportionate, rather than deciding whether it was so.[78] And care must be taken, in applying the "gross disproportionality" doctrine, that the court was not entering into a subjective analysis of the sentence it thought appropriate, rather than an objective assessment of the punishment chosen by the legislature.[79]

Applying these principles, a majority of the Court validated a mandatory life sentence without the possibility of parole on an offender in possession of a large quantity of cocaine (1.5 pounds). On the reasoning of Scalia and Rehnquist CJ, imprisonment was clearly not a "cruel and unusual" *method* of punishment. On the reasoning of Kennedy, Souter, and O'Connor JJ, the state was entitled to view large-scale drug possession seriously; drug offending was closely related to other types of offending.[80] The punishment was graded according to the quantum of drugs involved, and there was an "escape hatch" from the minimum mandatory sentences in exceptional cases.[81] Seven justices confirmed a principle of gross disproportionality

75. *Id.* at 988–89.
76. *Id.* (Kennedy J, for O'Connor and Souter JJ).
77. *Id.* at 999–1000 (Kennedy J, for O'Connor and Souter JJ).
78. *Id.* at 1005 (Kennedy J, for O'Connor and Souter JJ).
79. *Id.* at 1007 (Kennedy, O'Connor, and Souter JJ).
80. *Id.* at 1003 (Kennedy, O'Connor, and Souter JJ).
81. *Id.* at 1007 (Kennedy, O'Connor, and Souter JJ).

should continue to apply to Eighth Amendment challenges, and not just in capital cases.[82] This remains the position.[83]

Many Eighth Amendment challenges have involved the death penalty. The Court has ruled that imposition of the death penalty does not necessarily breach the Eighth Amendment,[84] it having been a longstanding feature of English law, of American law at the time the Eighth Amendment was ratified, and being reflected in the text of the Fifth and Fourteenth Amendments.[85] However, a *mandatory* death penalty will be unconstitutional,[86] because it would not permit the consideration of any mitigating circumstances, and the Court has taken the position that, at least for capital cases, this is required.[87] Attempted imposition of the death penalty for a non-homicide offense is contrary to the Eighth Amendment, the Court accepting it was disproportionate given that most states did not impose it for non-homicide, and the fact juries were extremely unlikely to order such a penalty for a convicted rapist when they had the legal authority to do so, both being evidence of community standards and values, which are relevant to questions of gross disproportionality.[88]

The Eighth Amendment also precludes the imposition of the death penalty on a minor[89] or a person with a mental disability.[90] Evidence the

82. *Id.* at 996 (Kennedy, O'Connor, and Souter JJ) (concurring in the decision); 1018 (White, Blackmun, and Stevens JJ) and 1027 (Marshall J).

83. Lockyer v. Andrade 538 U.S. 63, 72 (O'Connor J, for Rehnquist CJ, Scalia, Kennedy, and Thomas JJ) (2003).

84. Gregg v. Georgia 428 U.S. 153, 169 (Stewart, Powell, and Stevens JJ; Burger CJ, Rehnquist, White, and Blackmun concurring) (1976).

85. *Gregg*, 176–77 (Stewart, Powell, and Stevens JJ; Burger CJ, Rehnquist, White, and Blackmun JJ concurring) (1976).

86. Roberts v. Louisiana 431 U.S. 633 (1977).

87. Lockett v. Ohio 438 U.S. 586 (1978).

88. Coker v. Georgia 433 U.S. 584, 593–95 (White J, for Stewart, Blackmun, and Stevens JJ) (1977).

89. *Roper v. Simmons* 543 U.S. 551 (2005), on the basis that a majority of states do not provide it for juveniles, and the number of states doing so is diminishing, the fact that a juvenile lacks maturity and may be prone to reckless behavior, subject to peer pressure and whose character may be incompletely formed (570), because international opinion is generally against it (578) and because it is not adequately justified by criminal justice objectives of deterrence or retribution (570–71) (Kennedy J, for Stevens, Souter, Ginsburg, and Breyer JJ).

90. *Atkins v. Virginia* 536 U.S. 304 (2002), because of the number of states that precluded it, and the trend was toward legislation precluding it, because of the majority in state

penalty is being applied in a discriminatory or arbitrary fashion could suggest the law is unconstitutional,[91] as effecting "unusual" punishment. Similarly, the fact that a punishment is pointless,[92] that it is not serving a penological purpose more effectively than a lesser punishment,[93] can suggest a law that breaches the Eighth Amendment, even if the Court has not yet by majority decided that the death penalty is generally unconstitutional and offensive to the Eighth Amendment.

The "gross disproportionality" test in the Eighth Amendment has not prevented what were on any measure extremely harsh sentences on particular offenders. It did not prevent the imposition of an effective 40-year jail term on a person convicted of the supply and possession of nine ounces of marijuana worth $200,[94] imposition of a 25-year-to-life jail term under a three-strikes law where the accused stole $1200 in merchandise with prior property convictions,[95] or theft of video tapes worth $200

legislatures that had voted to preclude it (315–16), because those suffering a mental disability may also exhibit some of the characteristics of juveniles that make imposition of the death penalty on them inappropriate (such as impulsivity) (318), and this fact also makes it more difficult for the state to justify the death penalty on a person with a mental disability on the basis of either retribution or deterrence (319–20) (Stevens J, for O'Connor, Kennedy, Souter, Ginsburg, and Breyer JJ).

91. Furman v. Georgia 408 U.S. 238, 245 (Douglas J), 274 (Brennan J), 309–10 (Stewart J), and 364 (Marshall J) (1972).

92. Coker v. Georgia 433 U.S. 584, 592 (White J, for Stewart, Blackmun, and Stevens JJ) (1977); Graham v. Florida 560 U.S. 48, 67 (2010) (Kennedy J, for Stevens, Ginsburg, Breyer, and Sotomayor JJ).

93. Furman v. Georgia 408 U.S. 238, 279 (Brennan J), 312 (White J), and 359 (Marshall J) (1972).

94. Hutto v. Davis 454 U.S. 370 (1982) (Burger CJ, White, Blackmun, Rehnquist, and O'Connor JJ (on the basis that a legislature's choice of penalty was entitled to deference (373), court intervention on the basis that a mandatory sentence was grossly disproportionate should be "exceedingly rare" (374), a court's decision that a prison sentence was excessive was inherently subjective in nature (373)), Powell J concurring in the judgment (considering gravity of offense, precedent such as *Rummel*, past convictions); Brennan, Marshall, and Stevens JJ dissenting on the basis the sentence represented a "patent abuse of judicial power" (388)).

95. Ewing v. California 538 U.S. 11 (2003) (O'Connor J, for Rehnquist CJ and Kennedy J (deference to legislature, *Constitution* does not prescribe any particular penological theory states have a valid interest in incapacitating and segregating habitual criminals (25) and high recidivism rates in state (26), offender's long criminal history (29), with whom Scalia and Thomas JJ concurred in the judgment; Stevens, Souter, Ginsburg, and Breyer JJ dissenting).

in circumstances of prior property convictions, leading to imposition of a 50-year jail term.[96]

More generally, the Court has reflected that in earlier times, mandatory sentencing (often the death penalty) held sway; however the nineteenth-century movement away from such sentencing "marked an enlightened introduction of flexibility into the sentencing process. It recognized that individual culpability is not always measured by the category of crime committed. This change in sentencing practice was greeted by the Court as a humanizing development."[97] At the same time, the law moved away from a focus on retribution, in favor of reformation and rehabilitation.[98] Despite these sentiments, moves to create more standardized sentencing culminated in development of the Sentencing Guidelines providing a standard range of penalties for particular offenses, subject to exceptions. However, these were held to be merely advisory, rather than mandatory,[99] and departures from the guidelines subject to a broad reasonableness standard.[100]

The most recent Eighth Amendment cases suggest a slightly broader reading of the prohibition than previously evident. In *Miller v. Alabama* the Supreme Court found imposition of a mandatory life sentence on a juvenile violated the Eighth Amendment.[101] In so doing, it reiterated proportionality in sentencing was a "basic precept of justice."[102] This precluded mismatches between the culpability of a class of offenders and the severity of a penalty, and imposition of mandatory capital punishment that took no account of the individual's personal circumstances.[103] This finding

96. Lockyer v. Andrade 538 U.S. 63 (2003) (O'Connor, for Rehnquist CJ, Scalia, Kennedy, and Thomas JJ) (sentence not "objectively unreasonable" (76): Souter Stevens Ginsburg and Breyer JJ dissenting). The majority stated that the gross disproportionality principle applied to "only the extraordinary case" (77) (and the present case was not such a case); the minority stated that if this offender's sentence was not disproportionate, "the principle has no meaning" (83).

97. Woodson v. North Carolina 428 U.S. 280, 298 (1976) (Stewart J, for Powell and Stevens JJ; Brennan and Marshall JJ concurred in the judgment).

98. Williams v. New York 337 U.S. 241, 248 (1949) (Black J, for Vinson, Reed, Frankfurter, Douglas, Jackson, and Burton JJ)

99. United States v. Booker, United States v. Fanfan 543 U.S. 220 (2005).

100. Kimbrough v. United States 552 U.S. 85 (2007).

101. *Miller*, 132 S.Ct 2455 (2012) (Kagan J, for Kennedy, Ginsburg, Breyer, and Sotomayor JJ; Roberts CJ, Scalia, Thomas, and Alito JJ dissented).

102. *Id.* at 2463 (Kagan J, for Kennedy, Ginsburg, Breyer, and Sotomayor JJ).

103. *Id.*

extended the previous finding in *Roper* that mandatory imposition of the death penalty on a juvenile was offensive to the *Eighth Amendment* because of the peculiar aspects relating to juveniles, such as possible impulsiveness and recklessness, proneness to peer pressure, and the fact that character was still being formed.[104] By parity of reasoning, a mandatory life sentence on a juvenile was also disproportionate. Their prospects for rehabilitation were stronger than for an adult offender,[105] and other goals of criminal justice, such as retribution, deterrence, and incapacitation, had to be applied in a manner sensitive to the offender's age.[106]

The Court took a similar position in *Graham v. Florida*.[107] Reiterating the centrality of the principle of proportionality to the issue of cruel and unusual punishment,[108] the Court noted:

> The judicial exercise of independent judgment requires consideration of the culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question.[109]

The Court noted that, although thirty-seven states had legislated permitting life sentences without parole on juveniles, in practice such penalties were very rarely applied.[110] It reiterated that punishment that did not serve penological goals was vulnerable to Eighth Amendment challenge, and found that a sentence of life without parole on a juvenile non-homicide offender was not justified on any theory of criminal justice.[111] Inherently, concepts of retribution, deterrence, incapacitation, and rehabilitation had to be applied in a manner that was sensitive to the fact that the offender was

104. *Id.* at 2464 (Kagan J, for Kennedy, Ginsburg, Breyer, and Sotomayor JJ).

105. *Id.* at 2465 (Kagan J, for Kennedy, Ginsburg, Breyer, and Sotomayor JJ).

106. Specifically, the majority noted that because retribution related to blameworthiness, the case for retribution was weaker in the case of a juvenile offender, and that because a juvenile offender may be more impulsive than an adult offender, the deterrent value of a jail sentence was also weaker, and in relation to incapacitation, it was more difficult to argue that a juvenile offender was "incorrigible": *Id.* at 2465 (Kagan J, for Kennedy, Ginsburg, Breyer, and Sotomayor JJ).

107. *Graham*, 560 U.S. 48 (2010), holding that a life imprisonment without parole sentence on a juvenile offender convicted of armed burglary with assault, and attempted robbery, was offensive to the Eighth Amendment.

108. *Id.* at 59 (Kennedy J, for Stevens, Ginsburg, Breyer, and Sotomayor JJ).

109. *Id.* at 67 (Kennedy J, for Stevens, Ginsburg, Breyer, and Sotomayor JJ).

110. *Id.* at 62 (Kennedy J, for Stevens, Ginsburg, Breyer, and Sotomayor JJ).

111. *Id.* at 71 (Kennedy J, for Stevens, Ginsburg, Breyer, and Sotomayor JJ).

a juvenile.[112] In reaching this conclusion, the Court also noted that the practice of sentencing a juvenile convicted of a non-homicide crime to life without parole had been "rejected the world over."[113]

It remains to be seen whether the recent decisions in *Miller* and *Graham* will be applied more broadly to Eighth Amendment jurisprudence, or will be confined to their factual contexts. There is much work for them to do outside the field of juvenile offenders; it was recently noted that 27 states currently have mandatory life-without-parole for at least one offense.[114] In principle, their reasoning—including strong re-assertion of proportionality principles, disfavor of punishment that is not justified by any theory of criminal justice, and disfavor of sentencing that takes no account of the individual circumstances of the offender—is considered applicable beyond cases involving the death penalty, and/or cases involving juveniles.

D. United Kingdom and Internationally

England has long shown concern about harsh punishments. The Magna Carta refers to proportionality in how an individual is treated by the criminal justice system, at a time when fines were imposed for criminal activities.[115] There are references to proportionality in sentencing in the case law in the Middle Ages[116] and the seventeenth century, once the modern criminal justice system, including prisons, had been established.[117] Section 10 of the Bill of Rights Act 1689 (Eng.) forbids cruel and unusual punishments; shortly afterward the House of Lords found that a fine was "excessive and exorbitant [*sic*], against magna charta, the common right of the subject, and the law of the land."[118]

112. *Id.* at 71–73 (Kennedy J, for Stevens, Ginsburg, Breyer, and Sotomayor JJ).

113. *Id.* at 80–82 (Kennedy J, for Stevens, Ginsburg, Breyer, and Sotomayor JJ).

114. Mirko Bagaric & Sandeep Gopalan, *Saving the United States from Lurching to Another Sentencing Crisis: Taking Proportionality Seriously and Implementing Fair Fixed Penalties*, 60 ST. LOUIS U. L.J. 169, 182 (2016).

115. "A free man is not to be amerced for a small offence save in accordance with the manner of the offence, and for a major offence according to its magnitude . . . earls and barons are not to be amerced save by their peers and only in accordance with the manner of their offence" (Clause 14).

116. Le Gras v. Bailiff of Bishop of Winchester, Y.B. Mich. 10, Edw. II, pl.4 (C.P., 1316).

117. Hodges v. Humkin 2 Bulst. 139, 140, 80 ER 1015, 1016 (K.B., 1615): "imprisonment ought always to be according to the quality of the offence" (1316).

118. Earl of Devon's Case, 11 State Tr. 133, 136 (1689).

The Privy Council found Ceylonese (Sri Lankan) legislation infringed the separation of powers principle enshrined in that country's Constitution. One noteworthy aspect of the impugned legislation was its imposition of a minimum mandatory jail term of 10 years' imprisonment on those involved in an aborted coup. In finding the legislation unconstitutional, the Court discussed this minimum mandatory sentencing aspect:

> Their aim was to ensure that the judges in dealing with these particular persons on these particular charges were deprived of their normal discretion as regards appropriate sentences. They were compelled to sentence each offender on conviction to not less than ten years' imprisonment . . . even though his part in the conspiracy might have been trivial . . . if such Acts as these are valid the judicial power could be wholly absorbed by the legislature and taken out of the hands of the judges.[119]

In *Reyes v. The Queen*, the Privy Council interpreted a provision of the Belize Constitution preventing the imposition of inhuman or degrading punishment or other treatment to prohibit the mandatory imposition of the death penalty. The Council concluded that "a non-judicial body cannot decide the appropriate measure of punishment to be visited on a defendant for a crime they have committed."[120]

Some challenges to minimum mandatory sentencing in the United Kingdom have involved articles of the European Convention on Human Rights, given the reflection of that Convention in the Human Rights Act 1998 (U.K.); specifically, Article 6, preserving the right to a fair hearing before an independent and impartial tribunal, and Article 3, prohibiting the use of torture, inhumane or degrading treatment or punishment.

An example of a successful challenge was *R (Anderson) v. Home Secretary*.[121] There the appellant had been sentenced to mandatory life jail terms

119. Liyanage v. The Queen [1967] A.C. 259, 291 (Lord Pearce, for the Council).

120. Reyes v. The Queen [2002] 2 A.C. 235, 258 (Lord Bingham, for the Council). In several cases the Inter-American Commission on Human Rights has indicated that imposition of a mandatory death penalty is inconsistent with the *American Declaration of Human Rights*: *Edwards v. Bahamas*, 4/4/2001, Report 48/01, *Downer and Tracey v. Jamaica* 4/13/2000, Report No 41/00); see also the Human Rights Committee with respect to the issue in Saint Vincent (*Thompson v. Saint Vincent and the Grenadines* (2000) UN Doc CCPR/C/70/D/906/1998). The Privy Council found that a mandatory life sentence was manifestly disproportionate, arbitrary and unconstitutional in *de Boucherville v. State of Mauritius* [2008] UKPC 70.

121. *R (Anderson)* [2003] 1 A.C. 837.

for murder. The legislation permitted the Home Secretary to set a minimum time to be served by such offenders, known as the "tariff," in consultation with judges and departmental officials. The Home Secretary fixed a tariff period greater than that recommended to him, and the appellant challenged the consistency of the practice with the European Convention.

The House of Lords (as it then was) found in favor of the challenger. Lord Bingham held the practice in effect amounted to a member of the executive determining the minimum sentence that a particular prisoner should serve; this was a judicial task, and thus Article 6 had been breached.[122] Lord Steyn agreed only a court could determine the punishment of a convicted person, and this had been the position since at least 1688, and was required by the rule of law.[123] Lord Hutton said the Home Secretary's power was difficult to reconcile with separation of powers principles.[124]

The European Court has applied a "gross disproportionality" test to determine whether a sentence amounts to inhuman or degrading punishment contrary to Article 3.[125] Further, continued imprisonment may be problematic where it no longer effectively serves any legitimate penological purpose,[126] bearing in mind that rehabilitation is reflected in international norms and has become more important.[127] The Court has spoken negatively about mandatory sentencing regimes, acknowledging they deprive the defendant of placing mitigating or special circumstances before the court,[128] and that for this reason, they are "much more likely" to be grossly disproportionate.[129] A life

122. *Id.* at 880 (with whom Lord Nicholls (883), Lord Hobhouse (901), Lord Scott (902) and Lord Rodger (902) agreed).

123. *Id.* at 890–91 (with whom Lord Nicholls (883), Lord Scott (902) and Lord Rodger (902) agreed).

124. *Id.* at 899 (with whom Lord Nicholls (883), Lord Hobhouse (901), Lord Scott (902) and Lord Rodger (902) agreed). In *R v. Offen* [2001] 1 W.L.R. 253, 276–77, the Court of Appeal indicated that a provision mandating the imposition of a life sentence on a repeat offender might offend Article 3 of the European Convention by being arbitrary and disproportionate.

125. Harkins and Edwards v. United Kingdom [2012] ECHR 45, [133]; Vinter v. United Kingdom [2013] ECHR 645, [102](Grand Chamber); Murray v. Netherlands [2016] ECHR 408, [99](Grand Chamber).

126. *Harkins and Edwards*, [2012] ECHR 45, [138]; *Vinter*, [2013] ECHR 645, [111]; *Murray*, [2016] ECHR 408, [100](Grand Chamber).

127. *Murray*, [2016] ECHR 408, [102](Grand Chamber).

128. *Harkins and Edwards*, [2012] ECHR 45, [138].

129. *Id.* at [2012] ECHR 45, [138].

sentence without the possibility of parole is likely to infringe Article 3 (and Article 5) of the European Convention as being arbitrary and disproportionate.[130] If release from life imprisonment is based on evidence the person detained has been rehabilitated, the state must provide the treatment necessary for rehabilitation to take place; failure to do so breaches Article 3.[131] It may be noted that the successful challenges to minimum mandatory sentencing laws under the European Convention have tended to target extreme laws involving life imprisonment without parole, in contrast to Canada, for instance, where laws providing for imprisonment of less than 10 years have been struck out on proportionality and arbitrariness grounds.

Courts have found minimum mandatory sentencing provisions to be unconstitutional in, for example, India,[132] Sri Lanka,[133] South Africa,[134] Mauritius.[135] and Papua New Guinea.[136]

130. R v. Lichniak [2003] 1 A.C. 903, 909 (Lord Bingham) (with whom Lord Nicholls (913), Lord Steyn (914), Lord Hobhouse (919), Lord Scott (919) and Lord Rodger (919) agreed); R (Wellington) v. Secretary of State for the Home Department [2009] 1 A.C. 335.

131. *Murray*, [2016] ECHR 408.

132. *Mithu v. State of Punjab* [1983] 2 SCR 690, "a provision of law which deprives the court of the use of its wise and beneficent discretion in a matter of life and death, without regard to the circumstances in which the offence was committed and, therefore, without regard to the gravity of the offence, cannot but be regarded as harsh, unjust and unfair" (704) (Articles 14 and 21 of the Indian Constitution regarding equality of treatment and punishment according to law).

133. The court found that minimum mandatory punishment was cruel, inhuman, and degrading: *Re Supreme Court Special Determination Nos 6 and 7 of 1998* [1999] 2 LRC 579.

134. *S v. Makwanyane* [1995](3) SA 391, 433: "proportionality is an ingredient to be taken into account in deciding whether a penalty is cruel, inhuman or degrading"; *The State v. Thoms* [1990](2) SA 802 (A), commenting that mandatory sentencing "reduces the court's normal sentencing function to the level of a rubber stamp. It negates the ideal of individualization. The morally just and the morally reprehensible are treated alike. Extenuating and aggravating factors both count for nothing"; the country's highest court read down an indeterminate sentence given to a repeat offender from an indeterminate sentence to a 15-year maximum on the basis of disproportionality, in that a non-violent offender could otherwise be jailed for life.

135. *State v. Philibert* [2007] SCJ 274, where the Supreme Court of Mauritius found a mandatory 45-year jail term for murder was disproportionate and invalid.

136. In Papua New Guinea (*Special Constitutional Reference No1 of 1984: Re Minimum Penalties Legislation*) [1985] LRC (Const) 984 PNGLR 314, three judges said such provisions amounted to cruel punishment and/or arbitrary decision making, contrary to the Constitution; minimum mandatory sentences have been found contrary to constitutional bars on cruel, inhuman, and degrading punishment in *The State v. Vries* [1997] 4 LRC 1 and *The State v. Likuwa* [2000] 1 LRC 600.

II: THEMES IN THE MANDATORY SENTENCING DEBATE

Several themes are relevant in the case law discussed above that has considered mandatory sentencing regimes. They include: questions regarding the status of arbitrariness in lawmaking and legal outcomes; questions regarding proportionality and gross disproportionality, including their meaning, indicia, and status in discussion of notions of what is "cruel and unusual"; the relevance of the goals of the criminal justice system in determining the validity of minimum mandatory sentencing provisions; and the interplay between such regimes and constitutional doctrines like the separation of powers principle. These themes are now considered in more depth below.

A. Arbitrariness versus Rule of Law

Law and society have long struggled with exercise of power characterized by arbitrariness. English monarchs could unilaterally suspend the operation of a law, or exempt an individual from it. This tended to give discretion a bad name.[137] According to some legal historians, at least, it was the arbitrariness of the purported (ab)use of power (by both the monarch and the judiciary) in the late seventeenth-century in England[138] that led to the admonition against cruel and unusual punishment (together with abolition of the monarch's dispensation power) in the Bill of Rights Act 1689 (Eng.), and led to its adoption in United States colonies, the United States Bill of Rights, and subsequently in human rights instruments around the world in later centuries. Arbitrary use of monarchical power underpinned the Glorious Revolution of 1688. The rule of law, together with the separation of powers principles, was one of the supposed antidotes to dangers or arbitrariness in the exercise of power. Arbitrary exercise of power is usually proscribed in international human rights provisions.[139]

It has been something of a paradox that dissatisfaction has grown with the exercise by judges of discretionary sentencing powers. Inevitably, the

137. "Abuse of the royal dispensing or suspending power made the idea of dispensation as a means of individualised application of law odious in the English-speaking world": Roscoe Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case*, 35 N.Y.U. L. Rev. 925, 930 (1960).

138. William Blackstone 4 Commentaries on the Laws of England 448 (1765–1769).

139. For example, Article 9(1) *International Covenant on Civil and Political Rights*, and Article 9 *Universal Declaration of Human Rights*.

criticism has been that judges have been "too soft" on offenders, or that they had "too much" power.[140] Another common criticism is that there is wild inconsistency and unpredictability in sentencing.[141] This led to calls for greater uniformity in sentencing, including the development of the Sentencing Guidelines in the United States, and increased use of mandatory sentencing legislation in the United States and elsewhere around the world. The inevitable result has been massive increases in prison population numbers, and the associated economic and social cost.[142]

The problem is that these developments have not removed the characteristic of arbitrariness in sentencing. Even if the Sentencing Guidelines (though interpreted eventually as merely advisory)[143] did produce greater uniformity in sentencing, and even if mandatory sentencing did the same, both of which are highly contestable claims, they have simply had the effect of shifting the arbitrariness in the decision making from the judiciary to the legislature.[144] Legislation containing mandatory penalties for particular behavior is, by definition, arbitrary, because it cannot take into account the particular circumstances in which a particular offense has been committed, and the existence of mitigating or aggravating factors, explanations, or nuance in the circumstances.[145] Prosecutors often have broad discretion

140. Rachel Barkow, *Recharging the Jury: The Criminal Jury's Constitutional Role in an Era of Mandatory Sentencing*, 152 U. PA. L. REV. 33, 84, 88 (2004).

141. *Id.* at 88; U.S. SENT'G COMMISSION, REPORT TO CONGRESS: MANDATORY MINIMUMS IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 85 (2011).

142. Mary Price, *Mill(er)ing Mandatory Minimums: What Federal Lawmakers Should Take from Miller v. Alabama*, 78 MO. L. REV. 1147 (2013), notes the number of defendants subject to mandatory minimums has increased from 6681 in 1990 to 19,896 in 2010. Using an average per annum cost to detain a prisoner of approximately $28,000, and an average minimum mandatory sentence length of almost 12 years, she estimates that all prisoners subject to a minimum mandatory sentence cost $5,627,416,473.60 to house; see also Nathan James, Congressional Research Service, R42937, *The Federal Prison Population Buildup: Overview, Policy Changes, Issues and Options* (2013). Recently Congress has moved to reduce some mandatory minimum sentences: *Smarter Sentencing Act 2015*.

143. Booker v. United States 543 U.S. 220 (2005).

144. William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 586 (2002): "the *Guidelines* are arbitrary; morally similar cases yield very different sentences."

145. "The life of today is too complex and its circumstances are too varied and too variable to make possible, in practice, reduction to rules of everything with which the regime of justice according to law must deal": Pound, *supra* note 137, at 927; Stephen Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 221 (1993): "uniformity backfires because true mandatoriness produces pervasive inequity."

regarding who will be charged with offenses attracting the mandatory minimum sentence, and use this as a bargaining chip in plea bargain negotiations.[146] This prosecutorial discretion inevitably leads to arbitrary outcomes.[147] Racial minorities and the economically or socially disadvantaged may be particularly unfairly impacted.[148]

History should have taught us the illusion of uniformity promised by supposedly mandatory, inflexible rules.[149] Langbein noted, of a time when English law provided every felony offender shall be hanged, that "no feature of English criminal law became more notorious, or aroused more indignation, than the nominally capital character of small thefts."[150]

Development of the jury system in England in the fourteenth century provided flexibility in the application of the law. History shows us that during the time when the United Kingdom had a large number of offenses attracting a mandatory death penalty, jurors found ways to acquit the accused, even if they believed them to be guilty—the so-called "pious perjurer" jurors, to avoid what they considered unfair, disproportionate penalties.[151] The common law developed the "benefit of clergy" doctrine, again softening the offender's punishment from what it otherwise might have been.[152] Judges continue to note that a consequence of minimum mandatory sentence provisions is juror reluctance to convict.[153] The sometimes harsh outcomes of strict application of common law rules were obviated by courts of equity, providing discretionary remedies and

146. This was noted by Dickson CJ and Lamer in *R v. Smith* [1987] 1 S.C.R. 1045, 1083; and by McLachlin CJ, Le Bel, Abella, Cromwell, Karakatsanis, and Gascon JJ in *R v. Nur* [2015] 1 S.C.R. 774, 820.

147. Gary Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 CALIF. L. REV. 61, 107–10 (1993); U.S. SENT'G COMMISSION, *supra* note 141, at 96.

148. U.S. SENT'G COMMISSION, *supra* note 141, at 101.

149. "All legal systems which have endured have had to develop, by experience, principles of exercise of discretion": Pound, *supra* note 137, at 927.

150. John Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 36 (1983).

151. Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 CRIME & JUST. 65, 72 (2009). There are also suggestions this practice was followed at a time when the Sentencing Guidelines were considered mandatory, jurors on occasion refusing to convict because they believed the sentence that would apply if they found the accused guilty to be unjust: Barkow, *supra* note 140, at 80.

152. Langbein, *supra* note 150, at 38; Manderson & Sharp, *supra* note 41, at 619–20.

153. *R v. Smith* [1987] 1 S.C.R. 1045, 1081 (Dickson CJ and Lamer J).

permitting courts to "do justice." If the definition of insanity is doing the same thing over and over and expecting a different result, it is regrettable that our lawmakers have not learned the lesson of history that it is ill-advised to seek to achieve certain legal outcomes by imposing mandatory, inflexible rules. Either other pieces in the system will work to subvert this plan,[154] or gross injustice will result,[155] or both.

In terms of the separation of powers principles as applied to the criminal justice system (to be discussed later in this article), this doctrine is designed to operate so as to avoid arbitrary exercise of power. This is why bills of attainder are prohibited. Legislatures can create certain crimes, and provide guidelines about what appropriate sentences might be for those who commit such crimes. The executive, in the form of the police, enforces these laws. But it is the judicial arm that determines whether or not a person is guilty, whether the person has been accorded procedural fairness, and the punishment that the offender should receive for committing the crime. This separation of functions serves to reduce the risk of an arbitrary exercise of power by any of the arms of government, providing needed checks and balances.[156] We interfere with this delicate system of criminal justice at our peril.

B. Disproportionality and Gross Disproportionality

The idea that the punishment should fit the crime is as old as Western civilization.[157]

The concept of proportionality as applied to sentencing is axiomatic.[158] It appears in the Code of Hammurabi, traced to 1760 BC.[159] It has Biblical

154. For example, by the use of judicial discretion. For instance, the United States Sentencing Commission concluded that existing minimum mandatory provisions regarding child pornography offenses "may be excessively severe and *as a result* (emphasis added) are being applied inconsistently": U.S. SENT'G COMMISSION, *supra* note 141, at 365.

155. "Unbending rules rigidly administered may not merely fail to do justice, they may do positive injustice": Pound, *supra* note 137, at 928.

156. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127 (2000).

157. John Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 927 (2011).

158. Weems v. United States 217 U.S. 349, 367 (1910) (McKenna J, for the Court); the Australian High Court referred to it as a "basic principle" of sentencing law: *Hoare v. The Queen* (1989) 167 CLR 348, 354 (Mason CJ, Deane, Dawson, Toohey, and McHugh JJ).

159. Morris Fish, *Proportionality as a Moral Principle of Punishment*, 28 OXFORD J. LEGAL STUD. 57 (2008).

roots in the book of *Exodus*[160] and *Leviticus*.[161] Aristotle viewed inequality as a synonym for injustice.[162] Notions of proportionality in punishment are evident during the reign of Edward the Confessor (1042–1066) in England.[163] It appears in Magna Carta after the king had abandoned well-established proportionality principles in a pragmatic revenue-raising exercise. The writ *de moderata misericordia* was used in the thirteenth and fourteenth centuries to successfully challenge harsh penalties.[164] A preface to a 1553 statute reflects proportionality principles,[165] and an early seventeenth-century English case includes statements on proportionality.[166] At least one of the targets of the "cruel and unusual punishment" prohibition in the 1689 Bill of Rights was disproportionate penalties.[167] The doctrine finds impressive intellectual support in the eighteenth century.[168] Notwithstanding this, in the eighteenth century English criminal law contained a large number of

160. *Exodus* 20:23–25: "you are to take life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, bruise for bruise."

161. *Leviticus* 24:20: "fracture for fracture, eye for eye, tooth for tooth."

162. "What the judge aims at doing is to make the parts equal by the penalty . . . impose(d)": ETHICS 148–49 (Penguin Classics ed., 1955).

163. "We do forbid that a person shall be condemned to death for a trifling offence. But for the correction of the multitude, extreme punishment shall be inflicted according to the nature and extent of the offence": BOYD C. BARRINGTON, THE MAGNA CARTA AND OTHER GREAT CHARTERS OF ENGLAND 181, 199 (1900).

164. 3 MATTHEW PARIS, ENGLISH HISTORY FROM THE YEAR 1235 TO 1273, 444 (J.A. Giles trans., 1854); Le Gras v. Bailiff of Bishop of Winchester, Y.B 10 Edw. 2, pl 4 (C.P., 1316), reprinted in 20 SELDEN SOCIETY 3 (1934); Stinneford, *supra* note 157, at 929–30.

165. "And Laws also justly made for the preservation of the Commonwealth, without extreme punishment or great Penalty, are more often for the most part obeyed and kept": 1 Mary 1, c.1 (1553).

166. "Imprisonment ought always to be according to the quality of the offense": *Hodges v. Humkin* 2 Bulst. 139, 140, 80 ER 1015 (K.B., 1615) (Croke J). I am grateful to the work of Anthony Granucci for bringing these primary sources to my attention: *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839, 846–47 (1969).

167. Granucci, *id.* at 860.

168. For example, Cesare Beccaria, *On Crimes and Punishment* 43–44 (W. Paolucci ed., 1963) referred to the "essential proportion" between the crime and the punishment; Montesquieu similarly recognized the essentiality of proportionality (*The Spirit of the Laws* 87 (1748)), as did Sir William Blackstone (*supra* note 138, at 3), "the wise legislator will mark the principle divisions, and not assign penalties of the first degree to offenses of an inferior rank" (12); see also generally Deborah Schwartz and Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783 (1975); see also Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the*

offenses that carried mandatory penalties, including death, although as noted above, in practice this was ameliorated through a combination of the jury system, actions by the judiciary, and doctrines such as the "benefit of clergy."

Of course, there is a link between the risk of disproportional sentences and minimum mandatory sentences.[169] As Stuntz put it, "it seems hardly surprising that sentencing rules devised in the abstract lead to 'tougher' sentencing practices. The abstraction means those devising the rules need not look hard at the individuals they are sentencing to prison."[170] The United States Sentencing Commission criticized the existing minimum mandatory system on the basis that aspects of it "apply too broadly, are set too high, or both, to warrant the prescribed minimum penalty for the full range of offenders who could be prosecuted."[171]

Judges should, and must, be prepared to apply a robust doctrine of disproportionality in assessing whether particular sentences breach the requirement. It is hardly necessary to justify the fact that punishments and sentences must be proportional to the crimes with which they deal. It makes intuitive sense; it appeals to an ordinary person's sense of fair play. Not surprisingly, it is a doctrine of ancient vintage in our civil and political society. Of course, a judicial system delivering results that do not accord with society's sense of fair play is vulnerable to losing the support and confidence of the people, which imperils even more important objectives than justice to a particular individual. A justice system not generally respected and supported by the people is fatally undermined.[172]

Science of Right 198 (W. Hastie transl., 1887/1974): "a sentence can be pronounced over all criminals proportionate to their internal wickedness."

169. This was noted by the Judicial Conference of the United States. It commented that the effect of minimum mandatory sentences was that "a severe penalty that might be appropriate for the most egregious of offenders will likewise be required for the least culpable violator . . . the ramification for this less culpable offender can be quite stark, as such an offender will often be serving a sentence that is greatly disproportionate to his or her conduct": U.S. SENT'G COMMISSION, *supra* note 141, at 92. The Report refers to a Department of Justice submission acknowledging "significant excesses" in the system of minimum mandatory penalties (93).

170. Stuntz, *supra* note 144, at 587.

171. U.S. SENT'G COMMISSION, *supra* note 141, at 345.

172. The Law Council of Australia's *Policy Discussion Paper on Mandatory Sentencing* (2014) criticizes the use of such sentencing practice for many reasons, including that it "wrongly undermines the community's confidence in the judiciary and the criminal justice system as a whole" (4).

Although it is appropriate that the judiciary defers to legislative judgment to some extent in the field of criminal justice, they have a constitutional duty (in some jurisdictions) and are bound by human rights instruments elsewhere to avoid cruel and unusual punishments. There is strong historical evidence that such admonition was not confined to methods of punishment,[173] and included considerations of proportionality in sentencing.[174]

It has been seen in Part I that each of the jurisdictions studied applies a principle of proportionality, to a greater or lesser extent, in assessing the constitutional validity of sentences. In Canada, *R v. Nur* provides a recent example of the Court striking down a minimum mandatory sentencing law on the basis of disproportionality through its § 1 analysis, as has occurred in the United States in *Graham* and *Miller* in the context of the Eighth Amendment. In the author's view, a sensible application of the concept of "gross proportionality" or "proportionality," taking into account relevant factors like the gravity of the offense, circumstances of the offender and the offense, comparable sentences elsewhere, and purposes of imprisonment, would mean that sentences of mandatory life for small-time, though repeated, property crime,[175] a 40-year jail term for possession and sale of drugs,[176] mandatory life without parole for drug possession,[177] a 25-year jail term under a three-strikes law for theft of $1200 worth of golf clubs (with circumstances of past property crime convictions),[178] and a total 50-year jail term under a three-strikes law for theft of $200 worth of videotapes (with circumstances of past property crime convictions)[179] would be unconstitutional. Frankly, it is difficult to accept that some jurists would find such sentences not grossly disproportionate to the crime. It certainly suggests the practical impossibility of meeting the standard in the context of non-capital crimes.[180] It is difficult to identify what penological purpose

173. Cf Harmelin v. Michigan 501 U.S. 957. 979 (Scalia J, with whom Rehnquist CJ agreed) (1991).

174. Earl of Devon's Case, 11 State Tr. 133, 136 (1689).

175. Rummel v. Estelle 445 U.S. 263 (1980).

176. Hutto v. Davis 454 U.S. 370 (1982).

177. *Harmelin*, 501 U.S. 957(1991).

178. Ewing v. California 538 U.S. 11 (2003).

179. Lockyer v. Andrade 538 U.S. 63 (2003).

180. Carol Steiker and Jordan Steiker refer to the "insurmountable hurdle for Eighth Amendment challenges to long prison terms": *Opening a Window or Building a Wall? The*

is served with such sentences. As has been discussed above, in a range of jurisdictions this conclusion is typically an indicator that the sentence breaches constitutional and human rights norms.

Clearly, the United States Supreme Court has been much more prepared to uphold Eighth Amendment challenges in capital cases, compared with non-capital cases. The strongly bifurcated attitude of the United States Supreme Court to Eighth Amendment challenges, according to whether a capital punishment or non-capital punishment is imposed, is very difficult to support. Pithy statements that "death is different" do not make the argument. Clearly, nothing in the text of the Eighth Amendment justifies such a different approach to capital and non-capital cases. The Court says that it is applying the same test of gross disproportionality, and is concerned with arbitrariness, and with punishment that does not reflect any penological theory. Reasoning applied to argue that imposition of the death penalty in a particular case would be offensive to the Eighth Amendment is equally applicable, but strangely ignored, in the context of the imposition of an extremely daunting custodial sentence.[181] Criticism of this strictly bifurcated approach to Eighth Amendment case law is already widespread,[182] so will not be elaborated upon here.

To the extent that comparative sentence consideration is relevant when considering proportionality, there is evidence that the Australian minimum mandatory sentences applied to "people-smugglers" is highly disproportional. As noted above, this regime imposes a minimum mandatory sentence of three-to-five-year jail terms. In contrast, of 515 individuals convicted of people smuggling prior to the introduction of the legislation, just 39 were sentenced at or above the now-prescribed mandatory level of

Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly, 11 U. PA. J. CONST. L. 155, 186 (2009).

181. Michael O'Hear, *Just Kid Stuff? Extending* Graham *and* Miller *to Adults*, 78 MO. L. REV. 1087 (2013).

182. Rachel Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 117 MICH. L. REV. 1145, 1146 (2009): "in non-capital cases . . . the Court has done virtually nothing to ensure that the sentence is appropriate. Mandatory punishments proliferate with no attention to an individual's particular culpability, sentences are frequently disproportionate given the actual conduct and culpability of the offender, and arbitrariness abounds"; Steiker and Steiker lament the "jarring contrast" in the application of the *Eighth Amendment* to capital and non-capital cases: *supra* note 180, at 188.

imprisonment.[183] Yet in the very same case where the Australian High Court recognizes that "the sentence imposed must be *proportionate*,"[184] it then proceeds to validate legislative regime applying to people smuggling that clearly, according to the statistics, results in *disproportionate* sentencing.

C. What Purpose Lengthy Minimum Jail Terms?

Deprivation of a person against their will is one of the most serious steps that a state can take against an individual. Clearly, it is highly invasive of that person's liberty in a state that generally accepts freedom of will, freedom of association, and so on. As a result, clear and careful justification must be provided for the fact of, conditions of, and length of such incarceration. In criminal justice circles, typical rationales for state responses such as incarceration have included deterrence, retribution, incapacitation, and rehabilitation. So while, and to the extent that, one or more of these goals justifies incarceration, little concern is raised. However, as the cases, particularly in the United States,[185] Canada,[186] and Europe,[187] have reflected, difficulties arise when incarceration cannot, or can no longer, be justified on any of these grounds. It is at this point that serious questions are asked regarding whether such incarceration is cruel and unusual, arbitrary, or otherwise contrary to human rights norms.

Applying these considerations to minimum mandatory sentencing regimes, researchers have noted that reducing prison terms does not necessarily relate to an increase in recidivism.[188] There is also abundant evidence to suggest that the imposition of minimum mandatory jail terms does not deter criminal behavior.[189] Proportionality is again relevant here, it being noted that:

183. Andrew Trotter & Matt Garozzo, *Mandatory Sentencing for People Smuggling: Issues of Law and Policy*, 36 MELBOURNE U. L. REV. 553, 564 (2012).

184. Magaming v. The Queen (2013) 252 CLR 381, 397 (French CJ, Hayne, Crennan, Kiefel, and Bell JJ) (emphasis added).

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

186. R v. Nur [2015] 1 S.C.R. 773, 823.

187. Harkins and Edwards v. UK [2012] ECHR 45, [138].

188. Todd Clear & James Austin, *Reducing Mass Incarceration: Implications of the Iron Law of Prison Populations*, 3 HARV. L. & POL'Y REV. 307, 309–311 (2009).

189. Schulhofer, *supra* note 145; Stephen Schulhofer & Ilene Nagel, *Negotiating Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months* 27 AM. CRIM. L. REV. 231

> Punishments may now be rendered self-defeating through disproportionality. The goal of deterrence, which is as critical to the project of incarceration today as it was in the 1820s, cannot adequately be achieved if there is no relationship whatsoever between offenses and the lengths of prison sentences.[190]

As has been pointed out elsewhere, there are highly questionable assumptions involved in any thesis linking reductions in crime rates with tougher and/or mandatory sentences, including that would-be criminals are rational actors who calmly weigh the expected benefits of their criminal behavior with the risk of being caught, and that they are actually aware of the likely sentence they will receive if proven guilty.[191] And it is most unlikely that a system of long minimum mandatory sentences claims rehabilitation to be one of its goals.[192]

Recent research on the minimum mandatory sentencing provisions applicable to so-called people smugglers, often ferrying asylum seekers to Australia by boat via Indonesia, suggests most of those affected by the legislation and subject to minimum three-to-five-year jail terms are uneducated, poor, and illiterate Indonesians, often pressured into committing

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(1989); Paul Cassell, *Too Severe? A Defense of the Federal Sentencing Guidelines and a Critique of Federal Mandatory Minimums*, 56 STAN. L. REV. 1017 (2004); Ian Weinstein, *Fifteen Years After the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 AM. CRIM. L. REV. 87 (2003); VALERIE WRIGHT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VERSUS SEVERITY OF PUNISHMENT (2010) (Sentencing Project); N. Morgan, *Mandatory Sentences in Australia: Where Have we Been and Where are we Going?*, 24 CRIM. L.J. 164 (2004); Anthony Doob & Carla Cesaroni, *The Political Attractiveness of Mandatory Minimum Sentences*, 39 OSGOOD HALL L.J. 287 (2001); OLIVER ROEDER ET AL., WHAT CAUSED THE CRIME DECLINE? (Brennan Centre for Justice, 2015): "since 2000, the effect on the crime rate of increasing incarceration . . . has been essentially zero" (4).

190. Note: *The Eighth Amendment, Proportionality and the Changing Meaning of "Punishments,"* 122 HARV. L. REV. 960, 978 (2009); Sir Leon Radzionwicz & Roger Hood, *Judicial Discretion and Sentencing Standards: Victorian Attempts to Solve a Perennial Problem*, 127 U. PA. L. REV. 1288, 1294 (1979), noted the classic penological view that "deterrence, in order to be effective, must be related as closely as possible to degrees and shades of guilt."

191. Sara Taylor, *Unlocking the Gates of Desolation Row*, 59 UCLA L. REV. 1810, 1852–53 (2012).

192. "Determinate sentencing's principal goal has been the elimination of unwarranted disparity . . . accordingly, most jurisdictions have abandoned rehabilitation, once the central purpose of the indeterminate sentence, as a principal end of punishment": Lowenthal, *supra* note 147, at 63.

a crime, or unaware of the purposes for which their services are sought, then being taken out to sea and told what they will be doing, where they might feel unable to refuse. They are typically not aware of the minimum mandatory penalties their stewardship of the vessel will attract.[193] And, though the flow of boats travelling to Australia has indeed stopped, this is because of new government policies, contentious in themselves, to the effect that no one who arrives in Australia irregularly by boat will be settled in the country, regardless of whether they can show they are a refugee or not, and because of a government policy of towing back boats with refugee seekers to the country of origin (subject to a non-refoulement obligation). The introduction of minimum mandatory penalties has not caused the boats to stop, and adherents of minimum mandatory penalties cannot use this example to assert that such penalties deter undesired behavior.

And this meets the objections that appear in some of the American case law,[194] and in the High Court of Australia,[195] that there is no objective basis upon which a court can determine whether or not a particular punishment is harsh, unjust, cruel, or disproportionate. Judges sometimes express concern that, in the guise of applying notions of "proportionality," some courts will, because such a concept has no inherent firm meaning, use this doctrine essentially to impose whatever penalties they see fit, regardless of what the legislature has prescribed.

The answer is that a sentence is "cruel and unusual" and/or disproportionate where it cannot be seriously argued that detention for that length of time, or continued detention, meets any legitimate penological objective. So a 40- or 50-year jail term for a non-violent, though repeat, offender may not serve any legitimate objective. If the offender is "deterrable," a much shorter jail term would likely have achieved the goal. It does not take 40 to 50 years to rehabilitate a wrongdoer (assuming that the criminal justice system makes a serious attempt to do so). And it is hard to justify such

193. Trotter & Garozzo, *supra* note 183; "there is . . . no evidence to suggest that the prosecution of people smugglers in Australia has had any measurable deterrent effect on those most commonly engaging in or likely to engage in smuggling activities": Andreas Schloenhardt & Colin Craig, *Prosecutions of People-Smugglers in Australia 2011–2014*, 38 Sydney L. Rev. 49, 82 (2016).

194. Harmelin v. Michigan 501 U.S. 957, 988 (1991) (Scalia J, with whom Rehnquist CJ agreed).

195. Magaming v. The Queen (2013) 252 CLR 381, 397 (French CJ, Hayne, Crennan, Kiefel, and Bell JJ); 414 (Keane J).

a lengthy jail term as truly legitimate "punishment" for non-violent crime. Clearly, incarceration is one of the most invasive interferences with an individual's liberty, and it must be closely and comprehensively justified. Again, the Canadian Court has been most willing to apply this theory to set aside minimum mandatory sentencing laws. In Europe, the argument has (to date) only been accepted in relation to life sentences, whereas it might equally be applied to sentences of shorter duration.

D. Arguments in Favor of the Constitutional Validity of Minimum Mandatory Sentencing Regimes

It should be conceded that legislatures are entitled to deference in relation to decisions they make regarding the criminal law. Legislatures are accountable to the people, and the community is entitled to ask its representatives to enact policy prescriptions that will make society as safe as possible and to minimize criminal behavior. Legislators are charged with the complex task of weighing a multitude of interests and values in determining the content of their jurisdiction's criminal laws. Legislators are entitled to make decisions regarding whether they value punishment more highly than rehabilitation, whether they believe tougher sentences will reduce crime, whether, and to what extent, repeat offenders should be treated more harshly than first-time offenders. Their choices are entitled to judicial respect and deference. Criminologists and sociologists, and non-experts, will have their views on the best policy prescriptions to deal with criminal behavior, and people will legitimately disagree on what works and what does not.

As the United States Supreme Court has noted, the Constitution does not reflect any particular theory of criminal justice, and legislators are prima facie free to pursue particular theories and policies in this regard. The same may be said of the Canadian Charter, the Australian Constitution, and the European Convention on Human Rights. This freedom will be more easily observable in jurisdictions that embrace a federal structure, including the United States, Australia, and Europe, with state legislatures[196] pursuing

196. However, note that § 91 of the Canadian Constitution 1867 gives the federal government of that country constitutional power with respect to criminal law; this is in contrast with the United States and Australia, where criminal law is primarily a state constitutional responsibility. In Europe, member countries generally have the power to legislate their own criminal laws.

a range of policy prescriptions in the criminal justice space, placing different weight on different theories of punishment.

It should be conceded that members of society are often fearful of levels of criminal activity, and legislators will face pressure to "get tough" on criminal offending. One of the ways in which they might do so is to introduce high minimum mandatory jail terms, often on the basis of a perception that judges are "too soft" on offenders. Of course, this perception is inherently subjective in itself, and may or may not be based on knowledge of all of the facts of particular cases, knowledge of the costs (financial and otherwise) of incarceration, and/or an understanding of the limitations of incarceration as a criminal justice tool, and so on. And it should be admitted that, on occasion, judges impose sentences that many people think is "too soft" and that do not reflect community values. It is accepted that legislators sometimes face real pressure to respond to community concern about perceived high crime levels, and that judges should commence with a position of deference to the criminal justice policy options that particular legislators may have chosen within a jurisdiction.

Further, one of the reasons why legislators may be pushed to consider the introduction of minimum mandatory sentences is that some may believe that the sentencing process is something of a lottery, with wide disparity in sentencing outcomes for different offenders, dependent on the judge or court involved. This may have been exacerbated by the fact that it has sometimes been extremely difficult to practically appeal sentences thought to be contrary to past relevant precedents. No attorney or legal scholar would want a system where the outcome of sentencing discretion was unpredictable and idiosyncratic. In that light, a policy of minimum mandatory sentencing has understandable appeal, even if it is a false solution, because the minimum mandatory sentencing regime does not remove the discretion and uncertainty in the system; it simply transfers it elsewhere, to a place that may be less visible.

Further, it might be argued that some judges have pushed the Eighth Amendment jurisdiction too far, setting aside sentences on the basis that they disagree with the sentence imposed, rather than, in truth, on acceptable constitutional grounds around "cruel and unusual." And some might criticize use of the "proportionality" test in Eighth Amendment cases on the basis it gives reviewing judges too much discretion to do just that, in effect, given that the test may be said to be inherently uncertain in meaning and subject to a wide degree of interpretation. Some may argue that, for

this reason, Eighth Amendment review should be limited to methods of punishment only; obviously, if this were the position, harsh minimum terms of imprisonment could not be the subject of a successful constitutional challenge. Alternatively, they may interpret the test of "gross disproportionality" so narrowly that effectively no custodial sentence meets it. Again, if this were the position, harsh minimum terms of imprisonment could not be successfully constitutionally challenged. This would at least create greater certainty in the application of the Eighth Amendment, would effectively take any suggestion of subjectivity out of Eighth Amendment jurisprudence, and would reflect very strong deference to the policy choices of the democratically elected legislature.

On the other hand, community clamor for strong action against those perceived as wrongdoers is not new. The genius of those who designed the Bill of Rights and other international human rights instruments was to recognize, and to get enough others to agree, that all societies were vulnerable to such outcry, but that there were some principles that stood, or that should stand, above the fray. They were not negotiable. Anyone accused of wrongdoing would have the right to due process, regardless of how bad the wrong they were alleged to have committed.[197] And, it is submitted, anyone actually convicted of a crime, and liable to punishment, has a right not to be subject to cruel and unusual punishment, even when convicted in circumstances of aggravation, such as a serious crime or a repeat offender.

There is a balance of competing roles. On the one hand, there is the right of a legislator to define what is criminal and to legislate for punishment for those found guilty of the defined crime. On the other, the courts must apply and uphold the Constitution and fundamental human rights standards, including the right not to be punished disproportionately. Legal systems have sought to ward against the imposition of disproportionate sentences for centuries. Of course, scholars and judges will have different views as to the extent of deference owed to the legislature, and the robustness with which constitutional and human rights standards should be enforced. However, the court stands between the legislator, which might be tempted to subvert due process or to mandate draconian penalties for

197. Hamdi v. Rumseld 543 U.S. 507, 532 (2004): "it is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested" (O'Connor J, for Rehnquist CJ, Kennedy, and Breyer JJ).

populist ends, and the individual. It is a court's constitutional duty to prevent legislative overreach, however popular that overreach might be. Sometimes, as the drafters of the Bill of Rights knew, the will of the majority does not reflect what is right.

E. Mandatory Minimum Sentences Infringe the Principle of Separation of Powers

It is axiomatic that sentencing is an exclusively judicial function.[198] This creates a potential constitutional argument against minimum mandatory sentencing regimes in jurisdictions that recognize the principle of a separation of powers between the legislature, executive, and judiciary.[199] It can be argued that a legislature that mandates to the judiciary what the punishment must be for a person convicted of a particular crime infringes the separation of powers, because it purports in effect to exercise what is a judicial function, namely that of sentencing.

It is argued that such regimes reduce the judge to the status of an officeholder applying a rubber stamp to a result pre-ordained by the legislature, once a finding of guilt has been made. This undermines a key plank of the constitutional structure, that of checks and balances between different arms of government. A judiciary that is, in effect, directed as to what sentence to impose does not act as a check and balance on legislative overreach. Just as legislators cannot arrogate to themselves the function of determining an individual's guilt, so too they cannot arrogate to themselves the function of determining an individual's punishment. Acceptance of either proposition would obviate the need for courts. Both offend the principle of separation of powers. A court is not simply there to rubber-stamp a legislative or executive determination of guilt; nor is it there to rubber-stamp a legislative or executive determination of punishment. Courts have a substantive, not decorative, role in the constitutional design.

The argument made here has not featured in much of the American writing on minimum mandatory penalties. Understandably, most of that writing has focused on interpretation of the Eighth Amendment. However,

198. Chu Kheng Lim v. Commonwealth (1992) 176 CLR 1, 27 (Brennan Deane and Dawson JJ, with whom Mason CJ agreed (10)); R v. Nur [2015] 1 S.C.R 773, 816 (McLachlin CJ, Le Bel, Abella, Cromwell, Karakatsanis, and Gascon JJ).

199. For example, the United States, Australia, India, Sri Lanka, and South Africa.

some scholars have made the argument.[200] Perhaps the strongest example of judicial support for such an argument appears in the judgment of the Privy Council in *Liyanage v. The Queen*.[201] As indicated above, the Council invalidated a Ceylonese law providing for a minimum mandatory jail term of 10 years for particular offenders, because of the disproportionality in sentencing that resulted. The Court found the provision was invalid because it infringed the separation of powers principle enshrined in the Ceylonese Constitution. It did so by imposing a "legislative judgment": rather than the sentence being determined by the judiciary, it was determined by the legislature. If such laws were permitted, judicial power could be "wholly absorbed by the legislature and taken out of the hands of judges."[202] The separation of powers arguments against minimum mandatory provisions were also accepted and applied by the United Kingdom courts in *Reyes v. The Queen*[203] and in *R (Anderson) v. Home Secretary*.[204]

Some support for this is taken from *United States v. Booker*,[205] wherein the Court ruled the Sentencing Guidelines were literally that, rather than mandatory rules. However, it must be conceded that in the decision, the Court could have strongly based its decision on separation of powers principles, but it did not, and the case has not been considered subsequently to constitutionally preclude systems of minimum mandatory sentencing on separation of powers grounds.[206]

Articulation of the separation of powers argument against minimum mandatory sentencing appears elsewhere. The Judicial Council of Australia, an umbrella organization of Australian judges, made a submission to a Senate Standing Committee suggesting the unconstitutionality of minimum mandatory regimes, on this:

200. Kieren Riley, *Trial by Legislature: Why Statutory Mandatory Minimum Sentences Violate the Separation of Powers Doctrine*, 19 B.U. PUB. INTEREST L.J. 285, 302 and 310 (2010): "these laws deprive the judiciary of its basic constitutional function, which is weighing facts in each case to ensure a just outcome for each criminal defendant. This violates the constitutional doctrine of separation of powers"; Rachel Barkow, *Separation of Powers and the Criminal Law*, 58 STANFORD L. REV. 989 (2006).

201. *Liyanage*, [1967] A.C. 259.

202. *Id.* at 290–91 (Lord Pearce, for the Council).

203. *Reyes*, [2002] 2 A.C. 235, 258 (Lord Bingham, for the Privy Council).

204. *R (Anderson)*, [2003] 1 A.C. 837.

205. *Booker*, 543 U.S. 220 (2005).

206. Riley, *supra* note 200, at 294.

> Mandatory minimum sentences impact upon the separation of powers between the legislative and judicial arms of government, and upon the quality of justice dispensed by the courts . . . mandatory minimum sentences sometimes require the sentencing judge . . . to impose a sentence which . . . is disproportionate to the circumstances of the offence . . . the administration of justice . . . can be compromised by a mandatory minimum term . . . there is the practical inevitability of arbitrary punishment as offenders with quite different levels of culpability receive the same penalty.[207]

Manderson and Sharp reach a similar conclusion. They argue that mandatory sentencing

> is a process which cannot be described as judicial, since it lacks any form of justification, which it is the purpose of the judicial involvement to bestow. It is not retribution. It is not deterrence. It is not rehabilitation. It bears no relationship to any sentencing principles outlined by the courts. But it is not parliament which is thus being required to behave in an arbitrary manner. It is the courts. And the courts' hard-won legitimacy and authority are therefore jeopardized by legislative fiat.[208]

Thus, several arguments are being made in relation to minimum mandatory sentencing and the separation of powers principle. Firstly, that sentencing is an exclusively judicial function, so that when legislators start telling judges what sentence must be imposed, this is offensive to the constitutional design. It undermines the fundamental idea that the best way of limiting government power against an individual is to separate it in different arms, each acting as a check and balance on the others. The courts cannot fulfil their constitutional role as a check and balance on the legislature if they are required to rubber-stamp a pre-ordained decision by the legislature regarding penalty. And secondly, that courts, by being required to apply this rubber stamp, are not acting as judges typically do. Power is legitimate partly because of the way in which it is exercised, and the power to incarcerate someone is one of the most significant powers that exists. It must only be exercised when justified according to traditional concepts of criminal justice. It is not justified simply by being mandated

207. Submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry Into the *Migration Amendment (Removal of Mandatory Minimum Penalties) Bill* 2012; Trotter & Matt, *supra* note 183, at 589–601; Law Council of Australia, Policy Discussion Paper on Mandatory Sentencing (2014).

208. Manderson & Sharp, *supra* note 41, at 612.

by legislative fiat. Again, this undermines the role of the court in the carefully crafted constitutional design. The legitimacy of judicial proceedings is compromised.

Acceptance of the argument that minimum mandatory sentencing is contrary to the separation of powers principles enshrined in the Constitution, and thus *un*constitutional, is most pressing in the Australian context, given the absence of any express constitutional provision forbidding cruel and unusual punishment. In the United States, it is less so given the presence of the Eighth Amendment, and the constitutional "solution" to minimum mandatory sentencing in the United States is primarily considered to reside in a more expansive view of that Amendment. However, if the Court were not minded to re-interpret this provision in a more expansive way, given the precedents that have now been created, an alternative would be for the Court to find that minimum mandatory regimes generally offend the principle of separation of powers. This is because of the way in which they remove judicial discretion, and amount to a purported exercise by the legislature of power that is, in essence, judicial in nature, and because of the gutted role that a court is then expected to play, a role hard to recognize as being in substance judicial in nature. This compromises the court's legitimacy and integrity. Although the mandatory nature of the Sentencing Guidelines has been "read out" in *Booker*, as noted above, the majority of the states in the United States still have at least one offense on their books that attracts a minimum sentence of life without parole. There is thus significant scope for this doctrine to be applied.

CONCLUSION

This article has reached several conclusions in relation to minimum mandatory sentencing. It has noted that despite the existence of numerous international and domestic human rights instruments proscribing cruel and unusual, harsh, unfair, and/or arbitrary punishment, minimum mandatory sentencing continues to feature in United States and Australian law, in particular. The Canadian courts, and courts in other countries, have more strongly protected individuals from the perils of minimum mandatory sentencing through the robust use of the proportionality principle, requiring that imprisonment demonstrably meet penological objectives and not be arbitrary in nature. Cases where the European Court of Human

Rights has raised human rights objections to minimum mandatory sentencing have tended to be at the extreme end involving life imprisonment without the possibility of parole. Persistence of extremely long sentences for relatively minor (but repeated) criminal activity is a lamentable feature of the American case law, and surprising in the context of an express constitutional prohibition on cruel and unusual punishment (which unarguably involves a proportionality element).

This article has argued that some of the legislation studied, in particular that from Australia and the United States, demonstrates a refusal to learn the lessons of history, in particular the dangers of arbitrary exercise of power. It is somewhat ironic that, in the name of reducing what is said to have been the arbitrary exercise of judicial discretion, the result has been the arbitrary exercise of power by the legislature, deeming specific penalties without the benefit of the knowledge of the particular circumstances in which a particular crime was committed by a particular offender. Not surprisingly, the consequence has been skyrocketing prison populations, and skyrocketing costs associated with building and maintaining prisons, for highly questionable returns.

Courts in Australia and the United States must be much more prepared to apply a robust doctrine of proportionality in assessing the validity of a minimum mandatory sentencing regime, albeit through different paths: an Australian court through the doctrine of the separation of powers, and an American court through the Eighth Amendment. The role of a judge in the criminal justice system is critical; it cannot and must not be reduced to that of a rubber stamp approving whatever punishments populist legislatures dream up. Judges are not automatons; they should not accede to extremely lengthy jail terms for relatively minor, non-homicide, non-violent offenses, even when repeatedly committed. It is perfectly acceptable for a legislature to punish repeat offending more severely, but there are limits; 40- to 50-year jail terms for this kind of offending surely exceeds them on any reasonable measure. The Supreme Court has robustly applied proportionality analysis in death penalty cases; there is no principled basis upon which it should not do so in non-capital cases.

Advocacy of this position does not mean that judges have or should have absolute *carte blanche* in determining penalties. The response to arbitrary legislative penalty setting should not be a race to the other extreme of arbitrary judicial discretion. Judges must not overturn sentencing decisions simply because they themselves would have imposed a different penalty, or

because they disagree with what the legislator has enacted on policy grounds. The choices of the legislature are indeed entitled to judicial deference in this respect. They are democratically elected and constantly accountable to the people. They are entitled, within limits, to adopt particular criminal justice policies with which others might disagree, and to legislate for punishment for particular offenses that others might view as too harsh.

However, as part of the constitutional design, the courts have a meaningful role in enforcing limits. One line that the legislature must not be permitted to cross is with respect to imprisonment that has no legitimate penological purpose. There is much evidence to suggest that minimum mandatory sentencing cannot be supported on deterrence grounds. It is most unlikely to be supported by rehabilitation grounds. This leaves retribution and community protection. These can support incarceration in many cases, but again subject to a proportionality requirement. And again, 40- to 50-year jail terms cannot be justified as being genuinely retributive or necessary to protect the community from a person who has committed non-homicide, non-violent offenses. And in the case of the European Court, it is not just life-without-parole sentences that cannot be justified on genuine penological grounds; that Court must be more prepared to apply these principles to cases other than those involving life without parole.

Finally, this article has argued that in those jurisdictions whose Constitution provides expressly for a separation of powers between the judiciary and non-judicial arms of government, the Court can and should find that legislation mandating the imposition of particular penalties for proven particular activity, and requiring the court to rubber-stamp legislature-approved outcomes created without regard to specific cases, is unconstitutional. Such laws potentially gravely undermine the separation of powers that the creators of many constitutions carefully enacted to avoid the arbitrary, capricious exercise of power. They require judges to exercise judicial power in a way that is not legitimate and that undermines the authority and integrity of a court. A judiciary that refuses to hold the line against such legislative incursions on the judicial role risks surrendering its fundamental role in the broad constitutional scheme.