FROM DAMAGE CAPS TO DECARCERATION: EXTENDING TORT LAW SAFEGUARDS TO CRIMINAL SENTENCING

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ABSTRACT

The Supreme Court has recognized a civil defendant's substantive due process right not to be subject to grossly excessive punitive damage awards. Such awards—even if furthering legitimate state interests in retribution and deterrence—must not be grossly disproportionate to the compensatory damages that reflect the actual harm suffered by the plaintiffs. More concretely, the "multiplier"—the ratio of punitive to compensatory damages—cannot be too high, with anything exceeding a 10:1 ratio deemed presumptively excessive. This Article is the first to argue that a similar test should guard against grossly excessive criminal punishments; indeed, it seems odd that large corporations committing civil wrongs enjoy greater protection against overpunishment than criminal defendants given the devastating effects of mass incarceration, particularly on communities of color. As we show, there are compelling constitutional, logical, and policy reasons to ensure that criminal punishments are not grossly disproportionate to the harm caused. In turn, although criminal courts might find the task of estimating the harm caused by a crime unfamiliar, we show how this could be done through surveys measuring the prison time that a would-be victim would be willing to endure to avoid the crime. Scholars have used such error-preference surveys in other legal contexts but not yet in determining proportionality of punishment. We offer a survey example as proof of concept and fodder for future research, and we report initial results corroborating the intuition that some crimes routinely trigger sentences grossly disproportionate to harm caused. Whether criminal courts impose due process limits on punishment, litigants, judges, and policy advocates can wield our

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arguments and findings to advocate for lower sentences in individual cases, as well as to push for critically overdue sentencing reform.

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INTRODUCTION

The year 2020 brought renewed urgency to calls for dismantling mass incarceration. The COVID-19 pandemic has exacerbated the health dangers of incarceration, which disproportionately fall on people of color.[1]

Meanwhile, the killings of Ahmaud Arbery, Breonna Taylor, George Floyd, and Rayshard Brooks in a span of six months in early 2020, and others thereafter, propelled the Black Lives Matter movement's calls to defund the police (in proposals ranging from dissolving police unions to mass decriminalization) further into mainstream public discourse.[2] Most recently, the 2020 election created new legislative pathways for reform, building on previous bipartisan efforts at sentencing reform, even for serious offenses.[3]

Yet even with the momentum of this moment, American sentencing practices remain the harshest in the world, and legal doctrines governing criminal punishment do little to temper that harshness.[4]

While a thin majority of the Supreme Court did once strike down a life-without-parole sentence for writing a $100 bad check as violative of the Eighth Amendment's prohibition on "cruel and unusual punishments,"[5] that was an outlier. The Court has upheld a twenty-five-to-life sentence for stealing three

[1] *Covid-19's Impact on People in Prison*, EQUAL JUST. INITIATIVE (Apr. 16, 2021), https://eji.org/news/covid-19s-impact-on-people-in-prison/ [https://perma.cc/DLN5-TULJ].

[2] *See, e.g.*, Rashawn Ray, *What Does 'Defund the Police' Mean and Does It Have Merit?*, BROOKINGS INST. (June 19, 2020), https://www.brookings.edu/blog/fixgov/2020/06/19/what-does-defund-the-police-mean-and-does-it-have-merit/ [https://perma.cc/Q9TT-FSFA] (explaining various aspects of the "defund the police" movement); Jeannie Suk Gersen, *How the Charges Against Derek Chauvin Fit into a Vision of Criminal-Justice Reform*, NEW YORKER (June 17, 2020), https://www.newyorker.com/news/our-columnists/how-the-charges-against-derek-chauvin-fit-into-a-vision-of-criminal-justice-reform (discussing impact of criminal convictions of police officers on movements calling to defund the police); Adam Eichen & Evelyn Li, *It's Not Just Police Brutality. George Floyd's Death Also Must Prompt Prison Reform*, USA TODAY, (June 17, 2020, 11:01 AM), https://www.usatoday.com/story/opinion/2020/06/16/why-george-floyds-death-must-prompt-reform-americas-prisons-column/3190158001/ [https://perma.cc/CZ6R-6FNZ].

[3] For such previous reforms, see, for example, First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (expanding good time credits for some prisoners convicted of violent offenses); and S.B. 1437, 2017-2018 Reg. Sess. (Cal. 2018) (eliminating felony murder liability for certain participants in felonies ending in death). For information about state reforms enacted in the 2020 election, see, for example, Melissa Chan, *From Easing Drug Laws to Increasing Police Oversight, Criminal Justice Reform Won Big in the 2020 Election*, TIME (Nov. 5, 2020, 12:09 PM), https://time.com/5907794/2020-election-criminal-justice/.

[4] *See* Dylan Walsh, *Criminal Punishment Is Harshest in Racially Diverse Counties, Study Finds*, BERKELEYHAAS (Feb. 25, 2020), https://newsroom.haas.berkeley.edu/criminal-punishment-is-harsher-in-racially-diverse-counties-study-finds/ [https://perma.cc/V8Y8-ZVKA] ("With 5% of the world's population and 25% of its prisoners, the United States is the most punitive country in the world. Among developed countries, the disparities are even more striking: The U.S. relies on incarceration for 70% of criminal sanctions, while in Germany, it's 6%.").

[5] Solem v. Helm, 463 U.S. 277, 279, 303 (1983).

$399 golf clubs;[6] a life sentence for writing an $88 bad check;[7] two consecutive twenty-five-to-life sentences for a man with one prior conviction, convicted of two new petty thefts;[8] and a life sentence for a $120 theft, where the man's only two prior offenses were writing a $28 bad check and committing $80 credit card fraud.[9] Indeed, one current Justice has opined that the Eighth Amendment "contains no proportionality principle."[10] And even with modest sentencing reform, there remain habitual offender statutes, conspiracy laws, mandatory minimums, and high statutory maximums, as well as charging, plea bargaining, and judicial practices that inflate average sentences well beyond what they were decades ago and offer no legislative safety valve to avoid overpunishment.[11]

As it turns out, the public's concern over mass incarceration has much in common with the debate over civil punitive damages.[12] In the 1980s, some Supreme Court Justices worried that punitive damage awards were "skyrocketing."[13] Astronomical civil awards back then, like mass incarceration today, were a uniquely American feature. According to one European Union civil lawyer, punitive damage awards brought the United States into "total and utter contempt around the world."[14] Even as awards garnered bad press, the democratic process largely failed to curb the trend.[15]

Unlike today's harsh criminal sentences, harsh punitive damages have been reined in by the Supreme Court. In several cases culminating in *State Farm*

[6] Ewing v. California, 538 U.S. 11, 18, 30-31 (2003).

[7] Bordenkircher v. Hayes, 434 U.S. 357, 358, 365 (1978).

[8] Lockyer v. Andrade, 538 U.S. 63, 67, 77 (2003).

[9] Rummel v. Estelle, 445 U.S. 263, 265-66, 284-85 (1980).

[10] *Ewing*, 538 U.S. at 32 (Thomas, J., concurring).

[11] *See generally* JOHN F. PFAFF, LOCKED IN: THE TRUE CAUSES OF MASS INCARCERATION AND HOW TO ACHIEVE REAL REFORM (2017) (noting convergence of factors fueling mass incarceration); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 546-57 (2001) (explaining how state legislatures have empowered prosecutors to coerce plea bargains and avoid costly trials by making substantive law and punishment harsher).

[12] *See* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 3 (1990) (noting tort reform movement's beginning as response to alleged "insurance crisis" of the 1980s, and how age-old debate about punitive damages became newly "politicized" in same decade); Fred W. Morgan, *The Evolution of Punitive Damages in Product Liability Litigation for Unprincipled Marketing Behavior*, 8 J. PUB. POL'Y & MKTG. 279, 280-81, 281 tbl.1 (1989) (noting increase in punitive damage awards in product liability cases, and efforts to limit them, in the 1980s).

[13] Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part, joined by Stevens, J.).

[14] Adam Liptak, *Foreign Courts Wary of U.S. Punitive Damages,* N.Y. TIMES (Mar. 26, 2008), https://www.nytimes.com/2008/03/26/us/26punitive.html.

[15] *See, e.g.*, Jared Staver, *Statutory Caps and Recent Judicial Intervention May Bring Sky High Verdicts Back to the Ground*, JURIST (Aug. 12, 2018, 7:26 AM), https://www.jurist.org/commentary/2018/08/jared-staver-statutory-caps/ [https://perma.cc/28RZ-V4WW] (noting that only twenty-seven states have punitive damage statutory caps, and such caps have been subject to successful constitutional challenges in several states).

Mutual Automobile Insurance Co. v. Campbell,[16] the Court held that grossly excessive punitive damages violate "substantive due process," exceeding the substantive bounds of what a state may do to someone, even if the state follows all the right procedures in doing so.[17] In *Campbell,* the Court established a 10-to-1 rule of thumb: any punitive damage award that is ten or more times greater than the amount needed to compensate for the harm or risk actually created by the defendant's acts is constitutionally suspect.[18] Applying this new framework, the Court struck down a $145 million punitive damages award against State Farm.[19] The jury had awarded $1 million in compensatory damages for the company's intentional torts against Campbell, whom the company refused, in bad faith, to insure in a wrongful death suit where Campbell was clearly at fault and the victims would have ended up with nothing absent the company's insurance payment.[20]

This Article argues that an overlooked way to combat overpunishment of criminal defendants is to extend *Campbell*'s 10:1 presumptive punitive damages limit to criminal sentencing. The Article makes two contributions. First, it explains why the *Campbell* framework should, as a matter of law, logic, and principle, apply to criminal cases. As we explain, both torts and crimes involve harm or the risk of harm, and both can be punished by the state, for reasons such as retribution and deterrence, beyond any need to compensate a victim. In turn, because criminal sentences and punitive damages share the same justifications, they should share the same limits. More fundamentally, it should not be the case that one-and-a-half years after George Floyd's death, in the midst of a pandemic raging through prisons, in a country that still has the highest incarceration rate in the world,[21] a corporation committing insurance fraud has robust substantive protections against overpunishment, while criminal defendants have almost

[16] 538 U.S. 408 (2003).

[17] *Id.* at 429; *see also* discussion *infra* Section I.A. *See generally* Erwin Chemerinsky, *Substantive Due Process*, 15 TOURO L. REV. 1501 (1999) (distinguishing substantive from procedural due process).

[18] *See Campbell*, 538 U.S. at 425 ("Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."). Citing *Campbell*, state courts have vacated punitive damage awards exceeding the 10-to-1 ratio. *See, e.g.*, Simon v. San Paolo U.S. Holding Co., 113 P.3d 63, 77 (Cal. 2005) (striking down punitive damage award as excessive in part because it was "far outside the 'single-digit neighborhood'" (quoting Bocci v. Key Pharms., Inc., 76 P.3d 669, 675, *modified*, 79 P.3d 908 (Or. Ct. App. 2003))); Gomez v. Cabatic, 70 N.Y.S.3d 19, 31 (App. Div. 2018) (citing "single digit ratio" rule of thumb and deeming damage award excessive under *Campbell*).

[19] *Campbell*, 538 U.S. at 429.

[20] *Id.* at 412-16.

[21] *See* Sintia Radu, *Countries with the Highest Incarceration Rates*, U.S. NEWS & WORLD REP. (May 13, 2019, 12:18 PM), https://www.usnews.com/news/best-countries/articles/2019-05-13/10-countries-with-the-highest-incarceration-rates (measuring number of prisoners per 100,000 people).

none. While a $145 million judgment would no doubt affect State Farm, the effect of a prison sentence on a person is always significant. Even a short prison sentence subjects a person not only to confinement in a cage and separation from family, friends, and employment but also to alarming risks of disease, mental anguish, and sexual assault.[22] Second, the Article offers a concrete way of measuring the "harm-equivalent" part of a criminal sentence (the analog to compensatory damages in a civil case) through survey data and reports initial results of a test survey as proof of concept.

Curiously, no litigant or scholar has yet argued that *Campbell*'s 10:1 limit should apply to criminal sentences. While several scholars have recognized the relevance to the criminal justice sphere of constitutional theories limiting punitive damages,[23] no one has yet explored how *Campbell*'s 10:1 limit could be applied to criminal sentencing, and what sort of sentences we would end up with if we did.[24] To be sure, many cases and articles compare the *relative* heinousness of a crime to *other crimes*, to ensure that a punishment is

[22] *See generally* AMY SMITH, NAT'L ACAD. OF SCIS., HEALTH AND INCARCERATION: A WORKSHOP SUMMARY 7-29 (2013) (describing these detrimental effects of incarceration on prisoners).

[23] *See* Salil Dudani, Note, *Unconstitutional Incarceration: Applying Strict Scrutiny to Criminal Sentences*, 129 YALE L.J. 2112, 2129-58 (2020) (arguing for substantive due process review of criminal sentences using fundamental rights/strict scrutiny approach, and citing *Campbell* in footnotes to show how substantive due process has limited punitive damages); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 598, 608-09 (2005) (citing *Campbell* as one of many "quasi-criminal" doctrines "which raise proportionality issues that are at least analogous, if not directly comparable, to those posed by lengthy prison terms"; concluding that while criminal sentences differ from punitive damages, the differences "cut in both directions"); Adam M. Gershowitz, Note, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249, 1302 (2000) (arguing that Court's more lenient approach to criminal sentences than punitive damages is inappropriate); Pamela S. Karlan, *"Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 883 (2004) (offering explanations for the Supreme Court's divergent approach to criminal sentences and punitive damages); Leo M. Romero, *Punitive Damages, Criminal Punishment, and Proportionality: The Importance of Legislative Limits*, 41 CONN. L. REV. 109, 113 (2008) (proposing legislative limits on punitive damages under a "criminal punishment theory"); Rachel A. Van Cleave, "*Death Is Different," Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages—Shifting Constitutional Paradigms for Assessing Proportionality*, 12 S. CAL. INTERDISC. L.J. 217, 222, 272-78 (2003) (arguing that Court should strive for "greater degree of consistency" between its Eighth Amendment proportionality review and its punitive damage award cases); *cf*. Ewing v. California, 538 U.S. 11, 33-34 (2003) (Stevens, J., dissenting) (analogizing to BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 587 (1996), and punitive damages in explaining how courts could successfully implement Eighth Amendment proportionality review).

[24] However, one commentator has mentioned how *Campbell* might be cited to argue that habitual offender enhancements should not be grossly excessive in comparison to the sentence for the instant offense. Ricardo N. Cordova, Note, *Extending* Gore *and* State Farm*'s Promise of Fairness in Punishment to a Criminal Context*, 58 DRAKE L. REV. 819, 836-41 (2010).

proportional to the penalties meted out for similarly blameworthy conduct.[25] But relative measures of culpability, while addressing sentencing disparities between groups, cannot correct a system that systematically overpunishes *all* who are convicted of crimes. Scholarship has floundered to find a benchmark or justification for the appropriate punishment for a crime of given severity in an absolute sense.[26]

We suspect this absence stems from the siloed nature of civil and criminal practice and scholarship, as well as from two facts that, at first glance, might obscure *Campbell*'s relevance to criminal sentences. First, criminal cases feature notice and procedural protections that civil cases generally lack; and second, criminal law has no obvious analog to "compensatory damages." To the first point, it is true that criminal cases offer unique procedural protections, from the Ex Post Facto Clause to the Eighth Amendment to statutory maximum sentences. But the thrust of *Campbell*'s reasoning was not the lack of notice or procedural protections; rather, the Court made clear that "there are procedural *and substantive* constitutional limitations on these awards,"[27] and that a punitive award far exceeding the actual harm caused is "arbitrary coercion,"[28] regardless of how robust the state's procedures may be. To the second point, it is also true that no one in a criminal case receives "compensatory damages," nor are we

[25] *See, e.g.*, PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW 157-97 (1995) (exploring extent to which criminal codes and punishment levels accurately reflect lay intuitions of moral blameworthiness); ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 71-73 (1976); *see also* Solem v. Helm, 463 U.S. 277, 303 (1983) (deeming life without parole a grossly disproportionate sentence for writing bad check after series of other solely nonviolent priors, based on a comparative analysis). In theory, the most important objective factor in finding a sentence grossly disproportionate under the Eighth Amendment is the "seriousness" of the crime, *Ewing*, 538 U.S. at 28, but in practice this analysis has been highly deferential. *See e.g.*, *id.* (deeming sentence of twenty-five to life not grossly disproportionate for stealing three golf clubs, in light of the "seriousness" of grand theft and the defendant's two "serious" prior offenses); *see also* Romero, *supra* note 23, at 142-48 (discussing Court's willingness, other than in outlier *Solem* case, to uphold nearly any legislatively authorized sentence even for relatively minor offenses).

[26] *See, e.g.*, VON HIRSCH, *supra* note 25, at 135 ("The magnitude of the scale is the next concern. Should the scale, for example, run up to a highest penalty of five years' confinement? or fifteen? or fifty? . . . [T]he principle of commensurate deserts sets only certain outer bounds on the scale's magnitude. . . . Once a scale has been implemented, with its magnitude chosen in somewhat arbitrary fashion, it can then be altered with experience." (emphasis omitted)). Von Hirsch, writing for the Committee for the Study of Incarceration, went on to recommend that the maximum sentence be set for five years except for the crime of murder. *Id.* at 136.

[27] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003) (emphasis added).

[28] *Id.* at 417 (quoting *Gore*, 517 U.S. at 587 (Breyer, J., concurring)); *see also id.* ("To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.").

suggesting they should.[29] Unlike in tort law, then, no obvious benchmark exists in criminal law to measure whether a sentence is grossly disproportionate to the crime's harmful effects. And yet, all crimes, like all torts, cause a particular amount of harm, or at least a risk of harm, to someone or some group.[30] In fact, even the proposition that crimes and torts are conceptually distinct is a debatable one that has inspired a vast literature, with many scholars insisting that criminal law is simply a more punitive means of addressing wrongs that civil damages are insufficient to address.[31] In sum, the barrier to limiting criminal sentences to no more than ten times the harm-equivalent sentence is largely a practical one, not a theoretical one.

To illustrate how *Campbell*'s 10:1 ratio could apply to criminal sentences, this Article offers one concrete way to measure the length of a criminal sentence equivalent to the harm caused. One could use a "contingent valuation" thought experiment[32]—envisioning yourself as the potential victim of a crime, how much time would you be willing to spend in prison to avoid the harmful effects of that crime? The answer provides a rough measure of a "harm-equivalent" sentence for the crime, and could allow a judge or appellate court to disaggregate an imposed criminal sentence into its "harm-equivalent" and "non-harm-related" components. To show the method could work, we ran a short test study on a national sample of research subjects using Mechanical Turk.[33] The initial results, while tentative and intended primarily as proof of concept, suggest that the federal sentencing guidelines for property crimes are about 300 times the length of the harm-equivalent sentence. Sentences involving violent physical contact had a closer relationship—twenty-four times the length of harm-equivalent sentences for simple assault, and five times the harm-equivalent for aggravated battery. In fact, aggravated battery was the only one of the four tested crimes that carries a sentence (under typical state laws) proportionate to the (survey-estimated) harm caused.

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[29] However, victims do sometimes receive "restitution," a remedial measure paid directly to a victim that courts have nonetheless recognized as criminal punishment. *See* Cortney E. Lollar, *What Is Criminal Restitution?*, 100 IOWA L. REV. 93, 122-42 (2014); discussion *infra* Section I.B.

[30] *See* discussion *infra* Section I.B.

[31] *See* discussion *infra* Section I.B (describing distinction between torts and crimes as relatively modern invention).

[32] During our testing, we became aware that two other scholars whose work we admire—Sandra Mayson and Megan Stevenson—had independently conceived of a similar thought experiment for a related but different purpose. Mayson and Stevenson's purpose for asking this question of respondents is to determine what maximum length of pretrial detention is justified to prevent a defendant from committing a crime while released pending trial. *See* Sandra Mayson & Megan Stevenson, *Pretrial Detention and the Value of Liberty*, 108 VA. L. REV. (forthcoming 2022). We thank Mayson and Stevenson for fruitful conversations about our common methodology, and for alerting us to additional examples of such "contingent valuation" survey methods in other contexts. *See* discussion *infra* Section III.A.

[33] We discuss the representativeness of our respondent population, and other limits on the applicability of our initial survey results, in Section III.D.

Whether or not courts are persuaded to apply *Campbell*'s constitutional limits to criminal sentences, the logic of *Campbell* could still inform the arguments of litigants and the sentencing decisions of individual judges. Armed with an estimate of the harm-equivalent sentence and the 10:1 general guideline for gross disproportionality of punishment, litigants could argue for lower term-of-year sentences or fines[34] in a particular case, or make statutory objections to sentences that are not rationally related to legitimate purposes of punishment.[35] Additionally, a litigant could argue, as one author has suggested, that any unnecessary period of incarceration violates the fundamental constitutional right to be free of physical restraint under a "strict scrutiny" analysis.[36]

And even beyond litigation, this Article's arguments and proposed method could still inform criminal justice reforms by illuminating whether traditional justifications for punishment—for example, deterrence, retribution, incapacitation, and rehabilitation—hold up to grounded evidence. Each of these, if assumed to be a legitimate reason for punishment,[37] might merit some additional criminal punishment beyond the harm-equivalent sentence. But it is unclear, given *Campbell*, why they should be thought to support penalties more than ten times greater than the harm. Put differently, each of these (with the arguable exception of incapacitation, which we address) has been used to explain the virtues of civil punitive damages awards as well, but the Supreme Court has nonetheless rejected a civil justice system that relies too heavily on punitive sanctions to address comparatively minor harms.

The Article proceeds as follows. Part I makes the case for applying the Court's substantive due process limits on punitive damages to criminal sentences. We describe the *Campbell* framework, explain how it could theoretically apply to a criminal sentence, and address anticipated objections. Part II explains why limiting criminal sentences to no more than ten times the harm-equivalent sentence would improve criminal justice policy, regardless of the legal viability of a substantive due process challenge. Part III explains how courts could estimate the "harm-equivalent" portion of a sentence through a "contingent

[34] The same analysis could also be applied to punishments without incarceration such as monetary fines. Of course, the Eighth Amendment's Excessive Fines Clause already provides some outer limit on fines as punishment, just as the Cruel and Unusual Punishment Clause offers an outer limit on corporal, carceral, and other punishments. U.S. CONST. amend. VIII. We discuss the intersection of the Eighth Amendment and *Campbell* in Section I.C.

[35] *See, e.g.*, 18 U.S.C. § 3553 (requiring that federal sentences be no longer than necessary to further the statutorily authorized bases of punishment, including retribution, rehabilitation, and general and specific deterrence).

[36] *See* Dudani, *supra* note 23, at 2136-48 (arguing for such an approach).

[37] Prison abolitionists might question whether any incarceration is justified. *See generally* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156 (2015) (envisioning noncriminal means of achieving traditional purposes of punishment). For purposes of showing *Campbell*'s application to sentencing, we assume a world in which a court might legally impose a sentence of incarceration based on typically invoked purposes of punishment.

valuation"-type survey, and offers initial results of a brief test survey to show proof of concept. The Article concludes with policy implications and an agenda for further research on measures of excessive punishment.

I. THE CASE FOR EXTENDING *STATE FARM V. CAMPBELL*'S SUBSTANTIVE DUE PROCESS LIMITS ON PUNITIVE DAMAGES TO CRIMINAL PUNISHMENT

We begin with an explanation of the due process constraints on civil punitive damage awards and the potential to apply the rule to criminal punishment.

A. *Substantive Due Process Limits on Punitive Damages in Tort*

The first priority of a civil torts system is to make the victim whole through the award of compensatory damages.[38] But if a defendant's conduct is duplicitous or egregious enough, plaintiffs can request punitive damage awards that go beyond making them whole. These punitive damages serve other public values beyond compensating the victim, such as deterrence and retribution. Armed with this formidable tool to enforce public mores and channel contempt, juries in the late twentieth century began increasingly to award runaway damages. In one of the more infamous cases, *BMW of North America, Inc. v. Gore*,[39] a jury awarded $4 million in punitive damages to a purchaser of a single BMW based on a corporate cover-up of a defective paint job that required a $4,000 fix.[40]

The Supreme Court greatly constrained the discretion of state courts in a series of cases that found punitive damage awards unconstitutionally excessive.[41] In striking down the large awards, the Court simultaneously used several definitions, creating ambiguity about which, if any, are necessary to the holdings. One definition of *excessive* looks to whether the state has punished the defendant for possible or anticipated conduct outside the set of facts that actually

[38] Civil tort liability shifts money from the defendant to the plaintiff in order to make the plaintiff whole and to deter avoidable accidents. For a description and critique of the twin missions of compensation and deterrence, see Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 555, 559-617 (1985).

[39] 517 U.S. 559 (1996).

[40] *Id.* at 564-65. By the time the case reached the Supreme Court, the Alabama Supreme Court had reduced the punitive damages award to $2 million. *Id.* at 567.

[41] *See, e.g.*, *id.* at 574; Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 18, 23-24 (1991) (upholding punitive damage award but recognizing that there are constitutional limits on such awards when they are excessive); Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 443 (2001); Exxon Shipping Co. v. Baker, 554 U.S. 471, 513 (2008) (suggesting maximum ratio of 1:1 for most maritime cases). In *TXO Production Corp. v. Alliance Resources Corp.*, the Court upheld a punitive damage award with a 526:1 ratio on a rationale that would be applicable to attempted crimes and to other crimes that target a large but ultimately unmaterialized substantial risk of harm. 509 U.S. 443, 460 (1993) ("Punitive damages should bear a reasonable relationship to the harm *that is likely to occur from the defendant's conduct* as well as to the harm that actually has occurred." (quoting Garnes v. Fleming Landfill, Inc., 413 S.E.2d, 897, 909 (1991))).

led to the current litigation.[42] Another asks whether the punitive damage award is out of line with the degree of reprehensibility of the defendant's conduct, including accounting for whether the defendant is a recidivist.[43] A third definition for constitutional limits is to ensure that a defendant has had fair notice that their conduct is not only prohibited but also subject to extraordinary penalties.[44] A fourth definition of *excessive* asks whether the award is in line with other civil and criminal sanctions for similar misconduct.[45]

But the most cited by far, in part because it is the easiest to understand and replicate, is the ratio of the punitive damage award to the compensatory damage amount.[46] Specifically, courts are instructed to ensure that punitive damages have a "reasonable relationship" to the actual harm inflicted on the plaintiff, meaning that punitive damages should not be too many times greater than the compensatory damages.[47] The Supreme Court has said that punitive damage awards that are more than a single-digit multiplier of the compensatory damages are presumptively unconstitutional, suggesting that all other measures of *excess* must play within this 10:1 upper bound. As the Court finally held in *Campbell*, "[o]ur jurisprudence and the principles it has now established

[42] *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 423 (2003) ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . ."). This is particularly so if the expected or anticipated conduct occurs outside the jurisdiction that is dispensing the punishment. *Id.* at 420 (noting that "State Farm was being condemned for its nationwide policies" and "out-of-state conduct" rather than "for the conduct directed toward the Campbells").

[43] *See Gore*, 517 U.S. at 577 ("Our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance.").

[44] We discuss this aspect at length later, but conceptually, notice would do nothing to mitigate the excessiveness of an award, and indeed the animating analyses in *Gore* and *Campbell* would not be cured by clear, statutory notice of otherwise excessive awards. *See* discussion *infra* Section I.C.2.

[45] *See Gore*, 517 U.S. at 575 (looking to "civil penalties authorized or imposed in comparable cases"). This guidepost is also one that courts already use in the criminal context, such as in determining the substantive reasonableness of a lower court's criminal sentence under the federal sentencing statute. *See, e.g.*, Gall v. United States, 552 U.S. 38, 54 (2007) (noting that average sentence for similarly situated defendants is a legitimate factor courts might use in departing from sentencing guidelines). Additionally, it has been used to determine whether a sentence is cruel and unusual for Eighth Amendment purposes. *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 422-26 (2008) (looking to other jurisdictions to determine whether Louisiana's death penalty for child rape is an outlier).

[46] *See Gore*, 517 U.S. at 580 ("The second and perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff.").

[47] *Id. Gore* and *Campbell* leave some confusion about whether reviewing courts should compare punitive damage awards to the plaintiff's actual harm (compensatory damages) or whether instead they should be compared to the potential harm that the plaintiff could have suffered, including unrealized risk of harm. *See* discussion *infra* Section I.C.

demonstrate . . . that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[48] Based on the internal logic of *Campbell* and *Gore* and the cases that have followed them, the other factors of excess (such as reprehensibility and notice) are aggravators or mitigators within a range of ratios that ends at about ten.

B. Campbell*'s Application to Criminal Punishment: The Shared History and Purpose of Civil Damages and Criminal Sentences*

So far as we are aware, no litigant has challenged a criminal sentence on substantive due process grounds based on *Campbell*, and only one commentator—a 2010 note critiquing habitual offender enhancements—has suggested that such a challenge might be viable.[49] And yet, *Campbell* explicitly stated that substantive limits apply to punishment in both the criminal and civil context: "Despite the broad discretion that States possess with respect to the imposition of *criminal penalties and punitive damages*, the Due Process Clause . . . imposes substantive limits on that discretion."[50] Similarly, the *Gore* Court (years before *Campbell*) implicitly recognized substantive due process limits on criminal punishment when it relied on a criminal case in holding that due process might require a lower damage award for a nonviolent tortfeasor than a violent one.[51]

The reason no scholar or defendant has suggested a *Campbell*-based substantive due process challenge to a criminal sentence, we suspect, has little to do with logic or principle. Rather, it may have more to do with the siloed

[48] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

[49] *See* Cordova, *supra* note 24, at 822 (arguing, based on *Campbell*, that "the duration of a habitual offender's enhanced sentence should not exceed the duration of the original sentence by a ratio of more than ten-to-one"); *cf.* Dudani, *supra* note 23 at 2136-58 (arguing for substantive due process limits on criminal sentences, based on strict scrutiny and fundamental-rights analysis but not on *Campbell* grounds).

[50] *Campbell*, 538 U.S. at 417 (emphasis added) (quoting Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 433 (2001)).

[51] *See Gore*, 517 U.S. at 576-77 (citing Solem v. Helm, 463 U.S. 277, 284 (1983), and its due process holding for proposition that sentence in *Solem* was "grossly disproportionate"); *id.* at 573 n.19 (noting that ensuring BMW was not punished for lawful conduct in other states was not in tension with the Court's decisions upholding criminal sentences under habitual offender statutes because such statutes penalize repeated illegal behavior); *id.* at 577 (citing Gryger v. Burke, 334 U.S. 728, 732 (1948), a criminal case involving a recidivist statute, as support for punitive damages for repeated tortious conduct). The Court struck down the sentence in *Solem* on Eighth Amendment, not substantive due process, grounds, *Solem*, 463 U.S. at 303, but *Gore*'s reliance on *Solem* and other criminal cases in its due process analysis suggests that the proportionality analysis for both punitive damages and criminal sentences should be similar, with similar guideposts. *Cf.* Karlan, *supra* note 23 at 920 (suggesting a "pattern" to Court's "overall approach" to constitutional limits on punishment, though not arguing that *Campbell* should apply to criminal cases). We discuss the relevance of the Eighth Amendment to *Campbell*'s potential application to criminal sentences in Section I.C.

nature of civil and criminal law litigation and scholarship, or a communal forgetting of the shared purposes of civil damages and criminal punishment: to account for harm caused[52] and to punish the defendant based on noncompensatory purposes such as retribution and deterrence.

1. The Traditional Role of "Harm" in Both Civil and Criminal Liability

The applicability of *Campbell*'s logic to criminal punishment might be less than obvious because punitive damages are *civil*, and criminal sentences are, well, *criminal*. After all, we are all taught in law school that a criminal case is distinct from a civil lawsuit in that criminal cases do not involve any attempt to compensate a victim for harm; rather, they are actions brought by the sovereign against the defendant whose conduct, "if duly shown to have taken place, will incur a formal and solemn pronouncement of the moral condemnation of the community."[53] Civil lawsuits are instead private matters between a defendant and a suing plaintiff, the primary purpose of which is to make the plaintiff whole.

But this simplistic description of the civil/criminal divide is inaccurate, as the Supreme Court itself has recognized. First, the divide is largely illusory as a matter of history. In fact, the "crime/tort distinction is a largely modern concept."[54] In many early legal systems, the civil/criminal divide was blurry or even nonexistent.[55] For example, under Roman law, robbery and theft were classified as private torts, to be vindicated by private parties.[56] And in early England, both crimes and torts were deemed "breaches of the King's peace,"[57] with "authority to bring proceedings to inflict punishment" in felony breaches "vested in victims rather than in the state."[58] The choice between whether to bring an action as an "appeal of felony" leading to punishment of death or fine for a "crime," or a "writ of trespass" leading to compensation and punishment

[52] By "actual harm" caused by a crime, we mean to capture any harm to individuals, including psychological harm caused by attempted crimes, even if the object is not achieved. This sort of harm is measured equally well by our harm-equivalence survey, described in Part III.

[53] Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 405 (1958); *see also* George K. Gardner, Bailey v. Richardson *and the Constitution of the United States*, 33 B.U. L. REV. 176, 193 (1953) ("It is the expression of the community's hatred, fear, or contempt for the convict which alone characterizes physical hardship as punishment.").

[54] James Lindgren, *Why the Ancients May Not Have Needed a System of Criminal Law*, 76 B.U. L. REV. 29, 29 (1996).

[55] *See, e.g.*, Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 272 (1989) (acknowledging that "the distinction between civil and criminal law was cloudy (and perhaps nonexistent) at the time of Magna Carta").

[56] Carol S. Steiker, *Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 782 (citing Lindgren, *supra* note 54, at 38).

[57] David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 59 (1996).

[58] Gail Heriot, *An Essay on the Civil-Criminal Distinction with Special Reference to Punitive Damages*, 7 J. CONTEMP. LEGAL ISSUES 43, 49 (1996).

for a civil wrongdoing, was up to the victim who would initiate both.[59] Nor did Saxon-era English law distinguish between crime and tort.[60] Instead, a Saxon perpetrator of harmful conduct was required to pay two different amounts—a "bot" to compensate the injured party, and a "wite" to the king, for breaching the peace.[61] Even for homicide, the killer paid with money: a "manbote" to the victim's family and a "blodwite" to the king—a so-called "[a]me[rce]ment," or fine paid to the Crown, "for [b]loodshed."[62] The Crown's pursuit of excessive amercements against political or religious foes after the Norman conquest eventually became a central concern of both the Magna Carta and the English Declaration of Rights.[63] In turn, the modern civil damages system arose from, and replaced, the system of amercements.[64]

Thus, history belies any simplistic attempt to portray crimes as concerned solely with an offense against the sovereign and torts concerned primarily with harm to a particular plaintiff.

Rather, both involved harm potentially requiring compensation to a victim, and both potentially also required atonement to a sovereign.[65] Compensation is not the primary *purpose* of civil law, so much as the *mechanism* by which plaintiffs are encouraged to bring private prosecutions in which the state has an interest.[66] Law and economics scholars in particular have presented an account

[59] Seipp, *supra* note 57, at 60. There were actually four separate writs available to victims of breaches of the King's peace, three labeled as crimes and one (writ of trespass) a tort. *Id.* The victim brought two of the writs; the Crown brought the other two on behalf of the victim, at the victim's request. *Id.*

[60] Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233, 1257 (1987). While the *Browning-Ferris* Court two years after Massey's article declined to apply the Excessive Fines Clause to punitive damages, the Court cited Massey's article and took no issue with the accuracy of its historical account. 492 U.S. at 271 n.17; *see also id.* at 287 (O'Connor, J., concurring) (citing Massey and several other scholars with approval).

[61] Massey, *supra* note 60, at 1258 (citing 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 451 (2d ed. 1898)).

[62] *Id.* at 1258 & nn.140-41 (citing J. COWEL, A LAW DICTIONARY: OR THE INTERPRETER OF WORDS AND TERMS (London, In the Savoy 1727)). The term "amercement" is Norman, but, as Massey explains, the concept had Saxon roots. *Id.* at 1258.

[63] *Id.* at 1259-60.

[64] *See generally id.* at 1259-69 (explaining how practice of amercements was the precursor to punitive damages).

[65] Indeed, the Supreme Court has recognized that civil punitive damages are actually "impos[ed]" by the "State[]" as punishment. *Cf.* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 434 (2001).

[66] Heriot, *supra* note 58, at 52 ("Compensation is thus the tool for the civil law and not merely its ultimate purpose."); *see also* María Guadalupe Martínez Alles, *Tort Remedies as Meaningful Responses to Wrongdoing*, *in* CIVIL WRONGS AND JUSTICE IN PRIVATE LAW 231, 245 (Paul B. Miller & John Oberdiek eds., 2020) (arguing that the proposition that compensatory remedies "seek[] to counterbalance rather than to simply repair the wrong done to [a] claimant" simply shows that the purpose of civil lawsuits is not compensation but rather

of criminal law as merely a "backup" to civil law in cases where civil damages alone are insufficient to achieve the state's purposes.[67] As Richard Posner has put it, "criminal sanctions" are "generally [] reserved, as [economic] theory predicts, for cases where the tort remedy bumps up against a solvency limitation."[68] In short, the obligations of both civil tortfeasors and criminal defendants historically involved "harm" and "non-harm" components; these concepts are not unique to torts.

Modern criminal law is actually quite consistent with the idea that crimes involve a "harm" component just as much as torts. A central requirement of criminal liability is a bad act that transforms what would otherwise be simply an immoral thought into an attempted or completed criminal offense for which one could be charged.[69] This "harm principle," articulated most famously by John Stuart Mill, insists that the "state is *only* morally justified in interfering with the conduct of any of its citizens (e.g. by means of criminalization and punishment) against their will if the intervention would *prevent harm to others* or risk of harm to others, i.e. people other than the agent of the conduct."[70] Even inchoate crimes that never come to fruition (i.e., attempt, solicitation, conspiracy) still involve either a substantial step toward a crime, or risky or immoral preparatory or

"revenge" or "satisfaction" (citing Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387, 1389 (2003))).

[67] *See, e.g.*, Steiker, *supra* note 56, at 792 ("More recently, the victims' rights movement has similarly emphasized the importance of harm, rather than culpability, in criminal law.").

[68] *Id.* at 786 (second alteration in original) (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 205 (3d ed. 1986)); *see also* Richard A. Epstein, *The Tort/Crime Distinction: A Generation Later*, 76 B.U. L. REV. 1, 14 (1996) ("The breakdown of the tort remedial system . . . leads to the creation of the criminal law.").

[69] *See generally* Michael Corrado, *Is There an Act Requirement in the Criminal Law?*, 142 U. PA. L. REV. 1529 (1994) (contesting whether there is a "movement" requirement in criminal law, but noting that crimes must involve "volitional" act or omission, where volition involves mens rea, or culpable state of mind toward the harmful or risky nature of act or omission).

[70] THOMAS SØBIRK PETERSEN, WHY CRIMINALIZE?: NEW PERSPECTIVES ON NORMATIVE PRINCIPLES OF CRIMINALIZATION 17 (2020) (citing JOHN STUART MILL, ON LIBERTY 21-22 (2d ed. London, John W. Parker & Son 1859)); *see also id.* (describing harm principle as "the most well-known and discussed principle of criminalization"). While the principle has always been the focus of academic controversy, the controversy has generally involved the principle's scope and the definition of "harm," rather than whether the state may criminalize innocuous behavior that poses no tangible or intangible harm to anyone, including the perpetrator. *See, e.g.*, DENNIS J. BAKER, THE RIGHT NOT TO BE CRIMINALIZED: DEMARCATING CRIMINAL LAW'S AUTHORITY 56-59 (Routledge 2016) (2011) (arguing that harm to non-human animals also justifies criminalization); H. L. A. HART, LAW, LIBERTY, AND MORALITY 30-32 (1963) (suggesting that harm to oneself is a sufficient justification for criminalization). Some have argued that the principle is redundant because in order to define harms worth preventing through criminalization, the state must resort to moral theory and "once they do that, there is no need for harm principles, as the whole job of justifying what to criminalize can be done by moral theory." PETERSEN, *supra*, at 12. But even under this view, the justification for punishment would be limited and the extent of harm from the act could be measured.

motivational acts that create risk by rendering a harmful act more likely.[71] Indeed, Blackstone himself explained, in defining crime, that "[i]n all cases the crime includes an injury: every public offen[s]e is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community."[72]

To be sure, the harm or risk of harm from a crime may be diffuse and intangible in some criminal cases, just as compensatory damages in a civil case might cover diffuse harm to a large class of plaintiffs or intangible harms like pain and suffering. But even these sorts of crimes are prohibited on the theory that they pose some harm. Thus, so-called victimless crimes of vice, such as drug crimes, gambling, and prostitution, are not really victimless. Rather, we justify them on the assumption that they cause harm not only to the perpetrator himself but also to others who are denied the opportunity to engage in cooperative enterprises because of the self-degradation of the other participants.[73] These laws target harms from the breakdown of both societal cohesion and trust, caused by the collective's failure to condemn immoral, self-defeating acts.[74] Thus, they do not impose punishment in the absence of harmful conduct. Indeed, a legislature would presumably run afoul of due process by defining a criminal offense in a way that triggered liability based on innocuous conduct, posing no harm or risk of future harm, without some mens rea element requiring a guilty mind as to the harm or risk of harm from that conduct.[75] While

[71] *See generally* Paul H. Robinson, *The Role of Harm and Evil in Criminal Law: A Study in Legislative Deception?*, 5 J. CONTEMP. LEGAL ISSUES 299 (1994). Generally, in tort law, claims based solely on unrealized risk are not compensable. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1636-37 (2002). Since the criminal law does (and should continue to) recognize attempts and other culpable creations of risk as legal wrongs, attempts and other inchoate crimes are suitable for the *Campbell* framework. The baseline harm-equivalent sentence would be a risk-of-victimization-equivalent sentence, to which the 10:1 ratio limit could then apply.

[72] 4 WILLIAM BLACKSTONE, COMMENTARIES *5.

[73] *Cf.* Stuart P. Green, *Vice Crimes and Preventive Justice*, 9 CRIM. L. & PHIL. 561, 562 (2015) (describing how statutes criminalizing, for example, drugs and prostitution are today rarely justified in terms of "mere immorality" and are instead justified in terms of their ability to prevent harm).

[74] *See, e.g.*, Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1488-89 (2016) (discussing Durkheim's theory of social cohesion and describing criminal law as "the primary legal institution by which a community reconstructs the moral basis of its social order, its ethical life, in the wake of an attack on that ethical life").

[75] For example, the Supreme Court has declined to interpret 18 U.S.C. § 641 as dispensing with a mens rea requirement because stealing is a common law offense that generally assumes knowledge that one's conduct is morally culpable, and has distinguished modern strict liability regulatory offenses on grounds that they are generally low sentence, low stigma, and cause diffuse harm difficult to capture through individualized criminal liability based on knowledge or intent. *See* Morissette v. United States, 342 U.S. 246, 274-76 (1952) (citing 18 U.S.C. § 641); *see also* Staples v. United States, 511 U.S. 600, 619 (1994) (declining to

some modern regulatory offenses have challenged these common law limits on criminal liability, even such *malum prohibitum* crimes still involve harmful or risky conduct, however diffuse the harm, such as placing adulterated drugs in the stream of commerce.[76]

Moreover, recent reforms to the criminal process reflect criminal law's original historical focus on harm. For example, modern criminal punishments often include restitution, a remedial measure[77] through which "[t]he functions of criminal and of civil cases are combined into one proceeding essentially on economies of scale grounds."[78] Similarly, the modern victims' rights and restorative justice movements have further complicated any attempt to classify criminal law as solely a matter between the state and the defendant.[79]

In sum, criminal law and tort law, while certainly different in approach, share a basic structure and purpose: they both involve conduct that is targeted because —and only because—it is harmful or risky to someone.

2. The Shared Purposes and Limits of Non-Harm-Related Tort Damages and Criminal Sentences

Just as civil damages awards and criminal sentences both have a harm-related component, they also both have a non-harm-related component (the additional punishment, above and beyond what compensates for harm caused) that the state justifies based on the same theories of punishment. Indeed, as *Campbell* recognized, "[punitive damages] awards serve the same purposes as criminal penalties."[80] This section makes explicit what these shared purposes of punishment are. The upshot is that criminal punishment has no additional legitimate function that is absent from the civil context, and thus, has no unique feature that could justify a criminal sentence beyond *Campbell*'s 10:1 ratio.

Retribution. The first legally recognized purpose of punitive damages and criminal sentences is to punish the offender for being morally culpable—to make

interpret federal unregistered firearm law as imposing strict liability with respect to possession of a "machine gun"; defendant must have knowledge of the characteristics that render the gun a "machine gun").

[76] *See* cases cited *supra* note 75 (distinguishing facts of *Morisette* and *Staple*s from modern strict liability, low stigma regulatory offenses involving diffuse harm).

[77] *See* Heriot, *supra* note 58, at 45. *See generally* Lollar, *supra* note 29 (defining criminal restitution).

[78] Heriot, *supra* note 58, at 64.

[79] Steiker, *supra* note 56, at 792 ("More recently, the victims' rights movement has similarly emphasized the importance of harm, rather than culpability, in criminal law. Victims' rights advocates have challenged the traditional notion that criminal and civil law occupy separate public and private spheres."); *see also id.* at 793 ("This increased emphasis on victim participation and recognition of the victim's stake in the proceedings has begun to restructure the traditionally public criminal process into a quasi-private dispute between the victim and defendant resembling a civil action.").

[80] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003).

the offender suffer because he deserves it.[81] Although retribution is a philosophical theme raised more often in the discourse on criminal justice, judicial discussions about punitive damages consistently cite retribution as a core purpose of punitive damages.[82] Indeed, *Campbell* explicitly mentioned "retribution" as a legitimate purpose of such damages.[83] Likewise, the *Gore* Court instructed courts to use the "reprehensibility" of a defendant's conduct as one of three guideposts in determining whether a punitive damages award is grossly excessive.[84] Combining the *Gore* and *Campbell* precedents, awards beyond the bounds of a 10:1 ratio to compensatory damages are presumptively excessive *even when* the conduct is very morally culpable. That is, a morally sympathetic defendant might have punitive damages capped closer to 1:1, while morally egregious conduct could justify a larger ratio but still less than 10:1.[85]

If *Campbell* were applied to criminal sentences, retribution would likely not get the state very far in justifying a sentence exceeding the 10:1 ratio. Where the harm or risk of harm is low, indirect, or diffuse, such as with respect to victimless or *malum prohibitum* offenses, the state's interest in retribution will also be lower, because the conduct is itself not immoral per se. Moreover, punishing "immoral" but relatively harmless conduct is likely to be viewed much more skeptically by the Supreme Court today than when *Gore* and *Campbell* were decided.[86] Judging from recent substantive due process jurisprudence striking

[81] *See, e.g.*, 18 U.S.C. § 3553(a)(2)(A) (noting that federal judges should consider "seriousness" of offense and need for "just punishment" in imposing sentence); Antony Duff & Zachary Hoskins, *Legal Punishment*, STAN. ENCYC. PHIL., Winter 2019, at 14-20 (explaining retributive justification for punishment). Again, we do not assume that such purposes of punishment are beyond debate. Rather, our goal is to argue that such traditional purposes are shared between punitive damages and criminal sentences.

[82] *See, e.g.*, Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432 (2001) (noting that punitive damages are "intended to punish the defendant and to deter future wrongdoing"); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996) ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991) ("[P]unitive damages are imposed for purposes of retribution and deterrence.").

[83] *Campbell*, 538 U.S. at 416.

[84] *Gore*, 517 U.S. at 574-76.

[85] Retribution sometimes bleeds over into the harm-related component of civil damages. That is, sometimes in civil cases, a compensatory damages award might be higher if a tortfeasor acts in a morally reprehensible way. *See* Catherine M. Sharkey, *Crossing the Punitive-Compensatory Divide*, *in* CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES 79, 79-80 (Brian H. Bornstein, Richard L. Wiener, Robert F. Schopp & Steven L. Willborn eds., 2008) (noting that compensatory damages already contain some punitive elements). We suspect that reprehensibility would be accounted for to some degree in a harm-equivalent criminal sentence, too. For example, some people might feel a greater desire to avoid a calculated or hate-based physical attack than they would a random attack by, say, a person with a mental illness. But assuming that is true, even less reason exists to permit a retribution-based sentence enhancement that goes beyond a harm-equivalent criminal sentence. Such a sentence will be excessive because culpability will be double-counted.

[86] *See infra* notes 88-90 and accompanying text.

down same-sex marriage bans,[87] as well as economic regulations of funeral homes[88] and hair braiding salons,[89] federal courts may approach morality codes with greater skepticism and insist on better evidence of actual harm and risk, even under rational basis review. Taken at face value, then, the *Campbell* opinion might portend hostility to the enforcement of morality codes unmoored from demonstrated concrete harm. As the Court put it, "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business."[90]

Vengeance. Vengeance is also a term typically associated with criminal justice rather than tort law. While the term "retribution" captures the need to punish the defendant according to his moral culpability, the term "vengeance" captures the need of a victim or society to feel the satisfaction that comes from the offender's suffering.[91] An oft-cited consequentialist justification for criminal punishment related to vengeance is the need to inflict punishment on an offender to discourage aggrieved parties from resorting to vigilantism.[92] To the extent the desire for vengeance against wrongdoers is hardwired in humans,[93] public institutions might choose to punish in part to meet demands for reckoning.

And yet, vengeance plays an important, if less scrutinized, role in traditional tort theory as well. Emily Sherwin argues that even compensatory damages serve less of a remedial purpose than a vengeance purpose; although many losses are immeasurable or not easily compensated through money, "satisfaction also comes from retaliation against the injurer."[94] As a result, even the compensatory

[87] *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015).

[88] St. Joseph Abbey v. Castille, 712 F.3d 215, 217-18, 227 (5th Cir. 2013) (finding no rational basis for Louisiana rule that only funeral homes can sell caskets in-state).

[89] Brantley v. Kuntz, 98 F. Supp. 3d 884, 887-88, 894 (W.D. Tex. 2015) (finding no rational basis for Texas statute imposing harsh building code requirements on African hair braiding schools); *see also* Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 284-85, 301-02, 304-06 (2015) (discussing rational basis test in context of *St. Joseph Abbey*, *Obergefell*, and *Brantley*).

[90] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 423 (2003).

[91] *See* ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 367 (1981) ("Revenge involves a particular emotional tone, pleasure in the suffering of another, while retribution either need involve no emotional tone, or involves another one, namely, pleasure at justice being done.").

[92] *See* MICHAEL S. MOORE, PLACING BLAME: A THEORY OF THE CRIMINAL LAW 89-90 (2010) (discussing difference between retributivism and consequentialist justification of discouraging self-help).

[93] *See* Avani Mehta Sood & Kevin M. Carlsmith, *Aggressive Interrogation and Retributive Justice: A Proposed Psychological Model*, *in* IDEOLOGY, PSYCHOLOGY, AND LAW 574, 580 (John Hanson ed., 2012) (noting that retributive or revenge motives are extensive and likely underlie other policy choices, such as aggressive interrogation of terrorist suspects, ostensibly justified by other theories).

[94] Sherwin, *supra* note 66, at 1389 ("[T]he object of compensatory remedies is not simply to adjust the absolute position of the claimant, but also to adjust an outcome in which the relative positions of the claimant and the wrongdoer are deemed to be unfair.").

element "has a close affinity to revenge."[95] But punitive damages might be a more natural home for the role of vengeance in tort law. As the Seventh Circuit sees it, punitive damages

> have the additional function of heading off breaches of the peace by giving individuals injured by relatively minor outrages a judicial remedy in lieu of the violent self-help to which they might resort if their complaints to the criminal justice authorities were certain to be ignored and they had no other legal remedy.[96]

Another close cousin of retribution sometimes discussed in the same breath as vengeance[97] is the expressive function of punishment, both in maintaining social cohesion and in signaling the state's vindication of the rights and dignity of victims.[98] As Henry Hart has posited, the *sine qua non* of a crime is that it is "conduct which . . . will incur a formal and solemn pronouncement of the moral condemnation of the community."[99] Again, this function is similarly performed by punitive damages in civil cases. The jury's "imposition of punitive damages is," like the imposition of a criminal sentence, "an expression of its moral condemnation."[100] Or as Judge Posner has put it, "[a]n award of punitive damages expresses the community's abhorrence at the defendant's act."[101]

Thus, while some portion of a criminal sentence might be justified on grounds of vengeance or social cohesion, so might some portion of a punitive damages award. To the extent that *Campbell* deems such awards presumptively unconstitutional beyond the 10:1 ratio to harm, these limits should also apply to criminal sentences defended on similar non-harm-related grounds.

Deterrence. Another shared traditional purpose of punitive damage awards and criminal sentences is deterrence. Deterrence of wrongful activity is explicitly mentioned as a goal of punitive damages in *Campbell* and by

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[95] *Id.*; *see also* Alles, *supra* note 66, at 245 (quoting Sherwin, *supra* note 66, at 1389); John C.P. Goldberg & Benjamin C. Zipursky, *Accidents of the Great Society*, 64 MD. L. REV. 364, 406 (2005); Scott Hershovitz, *Tort as a Substitute for Revenge*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 86, 96 (John Oberdiek ed., 2014); Gabriel Seltzer Mendlow, *Is Tort Law a Form of Institutionalized Revenge?*, 39 FLA. ST. U. L. REV. 129, 133 (2011); Anthony J. Sebok, *Punitive Damages: From Myth to Theory*, 92 IOWA L. REV. 957, 1023-29 (2007); Emily Sherwin, *Interpreting Tort Law*, 39 FLA. ST. U. L. REV. 227, 231-36 (2011).

[96] Kemezy v. Peters, 79 F.3d 33, 35 (7th Cir. 1996).

[97] *See* SANFORD H. KADISH, STEPHEN J. SCHULHOFER & RACHEL E. BARKOW, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 104-09 (10th ed. 2017) (discussing vengeance and social cohesion as "cousins" of retribution in chapter on purposes of punishment).

[98] *See* Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 397, 407-08 (1965); Kleinfeld, *supra* note 74, at 1514-16 (discussing Durkheim's theory of social cohesion).

[99] Hart, *supra* note 53, at 405.

[100] Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432 (2001).

[101] *Kemezy*, 79 F.3d at 35.

numerous other courts and scholars, both in terms of the tortfeasor being sued ("specific deterrence") and future would-be tortfeasors ("general deterrence").[102] Indeed, some have argued that a key purpose of civil law (both compensatory and punitive damages) is to achieve deterrence through the omnipresent threat of private prosecutions.[103] Like punitive damages, criminal punishment is expected to modify the future behavior of the defendant and others by making whatever benefit the person gets from committing the crime not "worth it."[104]

But whatever justifications deterrence theory might offer for lengthy criminal sentences, they would apply just as well to punitive damages, and yet the *Campbell* Court did not determine deterrence theory justifies awards exceeding a certain ratio to harm. If the costs to a would-be defendant of a criminal sentence must exceed the expected gains from the wrongful conduct for such a sentence to effectively deter, a court might reasonably calculate a deterrence-justified sentence based on the risks the defendant created. This is true even if some of the risks were unrealized, based on a low probability of enforcement or on the idiosyncratic gains the defendant expects to receive from criminal conduct. Yet these same calculations could just as well be considered by a jury in imposing a punitive damage award in excess of ten times the actual harm caused. Nonetheless, the legitimacy of such considerations did not stop the *Campbell* Court from imposing a 10:1 ratio limit on punitive damages.[105]

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[102] *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003); *Kemezy*, 79 F.3d at 34 (noting that punitive damages can have deterrent effect by "add[ing] a dollop of punitive damages to make the costs greater"); Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 YALE L.J. 1795, 1847 (1992) ("Deterrence ideology, with its philosophical background of law and economics, became a significant causal factor in the growth of punitive civil sanctions."); Roseanna Sommers, Comment, *The Psychology of Punishment and the Puzzle of Why Tortfeasor Death Defeats Liability for Punitive Damages*, 124 YALE L.J. 1295, 1295 (2015) ("The deterrent function of punitive damages operates both to deter the defendant from reoffending—an objective known as 'specific deterrence'—and to deter others from committing similar tortious acts—'general deterrence.'").

[103] Heriot, *supra* note 58, at 53 ("[M]ost of the law and economics literature on tort law is based on the simple notion that one of the major roles served by tort law and presumably other branches of the civil law is to deter wrongful activity."); *id.* at 60 ("The criminal law and tort law can thus be seen as a pair of mechanisms for deterrence of inappropriate conduct.").

[104] Gary S. Becker, *Crime and Punishment: An Economic Approach*, *in* ESSAYS IN THE ECONOMICS OF CRIME AND PUNISHMENT 1, 13 (Gary S. Becker & William M. Landes eds., 1974) (discussing how all punishments, even prison sentences, can be regarded monetarily to determine cost to offenders).

[105] More precisely, the Court has reserved judgment on whether the multiplier in cases like *Campbell* should apply to the potential damages that the plaintiffs could have suffered rather than the actual damages incurred. 538 U.S. at 424-25 (finding that while 145:1 ratio was too high, higher multiplier might be warranted if crime were more egregious); *see also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996) ("Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example,

Likewise, the underenforcement concern underlying some criminal sentences far exceeding harm equivalence also applies equally to torts. Given that most crimes go undetected, and a proportion of detected crimes go unenforced, an optimally deterrent sentence might have to exceed harm-equivalence so that the expected cost of a criminal sentence to the defendant is roughly the same as the harm the defendant would create through both detected and undetected acts. But, this logic too is not unique to the criminal context. On the contrary, economists and courts explicitly use detection problems as the chief explanation for why punitive damages are efficient.[106] Indeed, in *Campbell,* the plaintiff argued that a 50,000:1 ratio would be fair since "State Farm's actions, because of their clandestine nature, will be punished at most in one out of every 50,000 cases as a matter of statistical probability."[107] The *Campbell* Court rejected this argument, declining to allow a single case to have such an outsized role in deterring or penalizing other undetected illegal conduct (even by the same defendant.)[108]

If anything, the importance of due process limits on punishment justified on general deterrence grounds (making an example out of one defendant in one case) are even more salient in the criminal justice realm; the government should not (and is not, at least under the Court's limited death penalty jurisprudence) permitted to hang someone convicted of petty theft as an example to others.[109] Even outside the capital context, the same logic requires there to be a limit on the amount a state can intensify a criminal sanction for the rare person who happens to be prosecuted.

The deterrence calculus is also no different between the criminal and civil context where the potential offender can get more value from the fruits of a crime than the victim would lose. This might be particularly true for property crimes committed by economically disadvantaged people, for whom a dollar gained may be worth more than the dollar lost to the victim. For a penalty to push a rational would-be offender beyond the point of indifference so that they prefer

a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach."). Yet these modifications are expected to operate under the 10:1 higher bound. The methodology we propose in Part III might already incorporate unrealized risk, given that our vignettes ask survey respondents to imagine being in fear that they do not know the extent of their harm as the criminal activity is unfolding.

[106] *See, e.g.*, Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 677 (7th Cir. 2003) (noting that punitive damages "limit[] the defendant's ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is 'caught' only half the time . . . , then when he is caught he should be punished twice as heavily in order to make up for the times he gets away.").

[107] *Campbell*, 538 U.S. at 415 (quoting Campbell v. State Farm Mut. Auto. Ins. Co., 2001 UT 89, ¶ 55, 65 P.3d 1134, 1153 (Utah 2001)).

[108] *See id.* at 429.

[109] *See* Gregg v. Georgia, 428 U.S. 153, 187 (1976).

to *not* commit a crime, the penalty may have to be much harsher than the resulting harm. One cannot take this logic too far, however. A victim of theft of an $800 smartphone loses not only the value of the phone but confidence that his belongings are secure, his investment in economic life is worth what he thought it was, and he does not need to engage in self-help to protect his valuables. A complete measure of harm caused by a crime (and, thus, the harm-equivalent sentence) should take this into account, just as compensatory damage awards redress emotional distress. In any event, the argument applies just as readily to punitive damages.

Similarly, the variance in how people experience punishment is also no more or less relevant in the criminal than civil context. A criminal sentence equivalent to the harm experienced for one individual may feel more or less oppressive, and therefore offer more or less deterrent value, for another. Conversely, some criminal defendants might have particularly compelling personal reasons to avoid a prison sentence—from maintaining family and employment ties to concerns about sexual assault, race-motivated attacks, or lack of adequate medical care. Yet these considerations too are relevant in the tort context. Courts permit plaintiffs to use evidence of a defendant's extraordinary wealth to justify greater damages since the marginal value of a dollar to the defendant is lower than that for an average person.[110] Again, these considerations did not stop the Supreme Court from imposing a ceiling on the ratio between punitive damages and compensatory awards, even for very wealthy defendants.

Finally, the weaknesses of the assumptions underlying deterrence theory apply to both the criminal and tort contexts. For example, deterrence theory relies on a self-interested rational-actor model of human decision-making.[111] To the extent that humans have "bounded rationality," meaning a capacity for reason necessarily bounded by informational and cognitive limitations,[112] or are motivated by moral and collective concerns, the severity of a sanction may be less meaningful. And while empirical studies suggest that people will alter their behavior if a penalty's harshness is increased, the effect of increasingly harsher sanctions appears limited.[113] There is much stronger evidence that increased

[110] *See, e.g.*, *Campbell*, 538 U.S. at 415 (noting "massive wealth" of State Farm); Kemezy v. Peters, 79 F.3d 33, 35 (7th Cir. 1996) ("To a very rich person, the pain of having to pay a heavy award of damages may be a mere pinprick and so not deter him (or people like him) from continuing to engage in the same type of wrongdoing.").

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

[112] *See generally* Gregory Wheeler, *Bounded Rationality*, STAN. ENCYC. PHIL., Fall 2020 (citing HERBERT A. SIMON, MODELS OF MAN 198 (1957)).

[113] Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. ECON. LITERATURE 5, 32 (2017). For example, even though penalties are much harsher for adults than juvenile offenders, there is no evidence that potential offenders alter their behavior around their eighteenth birthday. *See generally* David S. Lee & Justin McCrary, *The Deterrence Effect of Prison: Dynamic Theory and Evidence*, *in* REGRESSION DISCONTINUITY

detection and enforcement, rather than increased severity of penalty, deters crime.[114] Other heuristics and biases that are well-documented (such as loss aversion) also tend to cut in favor of shorter, rather than longer, criminal sentences.[115] Additionally, some people are already deterred in part by an internal "moral tax" paid when they think they have done something wrong.[116] And deterrence theory might not account for economically disadvantaged people committing crimes of necessity, such as shoplifting food, diapers, and hygiene products.[117] In any event, these arguable flaws in deterrence-based legal models apply equally to both criminal and tort law, and thus offer no reason to treat criminal punishments differently from the *Campbell* ratio restriction that applies to civil actions.

In summary, punishment (both civil and criminal) may deter future law-breaking, and might, therefore, permit punishment exceeding harm equivalence to some extent. But the Due Process Clause nonetheless constrains the state, at least in the civil context, from over-exploiting today's proceeding in order to avoid tomorrow's. In the *Campbell* Court's words, "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis."[118] The same should hold in criminal cases.

Incapacitation. Incapacitation renders future criminal conduct by a person impossible or at least more difficult.[119] This goal is intuitively more relevant to

DESIGNS: THEORY AND APPLICATIONS 73 (Matias D. Cattaneo & Juan Carlos Escanciano eds., 2017) (reporting findings that support "(1) [R]educing the age of criminal majority, (2) increasing the rate at which juveniles are transferred to the adult criminal court, thereby increasing the expected sanction that a juvenile faces, or (3) increasing adult sentences, leaving juvenile sentences fixed").

[114] *See* ANGELA HAWKEN & MARK KLEIMAN, MANAGING DRUG INVOLVED PROBATIONERS WITH SWIFT AND CERTAIN SANCTIONS: EVALUATING HAWAII'S HOPE 29 (2009); Beau Kilmer, Nancy Nicosia, Paul Heaton & Greg Midgette, *Efficacy of Frequent Monitoring with Swift, Certain, and Modest Sanctions for Violations: Insights from South Dakota's 24/7 Sobriety Project*, 103 AM. J. PUB. HEALTH e37, e37 (2013) (noting that "punishment certainty is a stronger deterrent to criminal activity than punishment severity").

[115] *See, e.g.*, Frans van Winden & Elliott Ash, *On the Behavioral Economics of Crime*, 8 REV. L. & ECON. 181, 190 (2012).

[116] *See* Robert Svensson, *An Examination of the Interaction Between Morality and Deterrence in Offending: A Research Note*, 61 CRIME & DELINQ. 3, 5 (2015).

[117] *Cf.* Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315, 335 (1984) (noting that punishment of immoral conduct might be justified based on a need to enforce by "moral inhibition" through the threat of "suffering caused by being blamed by others," excluding "the sense of guilt or remorse that people feel simply because they think they have done the morally wrong thing, even when others are not blaming them," presumably because this moral inhibition against offending exists regardless of imposing punishment).

[118] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 423 (2003).

[119] At least some scholars have argued or assumed as much. *See, e.g.*, Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV.

criminal sentences, where (human, noncorporation) defendants can be physically restrained, than to punitive damages. So, one might argue that *Campbell*'s 10:1 ratio should not apply in the criminal context because criminal sentences must achieve the significant penological goal of incapacitation that is absent from the civil context.

But the fact that incapacitation fits more neatly in the criminal context surely cannot justify insulating criminal sentences from a 10:1 presumptive limit. First, while tort law lacks a perfect analog to incapacitation, courts and scholars have noted that a large enough punitive damages award, or other civil punitive sanction, can indeed have an incapacitating effect by making certain abusive business practices more difficult to sustain or even put the tortfeasor out of business.[120] Second, there is a limit to incapacitation as a justification. After all, the *Campbell* court warned against using punitive damages to address "hypothetical claims" outside the adjudicated facts, and hypothetical future conduct is the central concern underlying incapacitation theory. (Indeed, incapacitation is just a particularly strong form of specific deterrence.)[121] In any case, a prison sentence, or a portion thereof, could not be justified on purely incapacitation grounds if the same incapacitation could be achieved through less punitive constraints. Prison time may achieve a number of punitive goals, but it does so by doing violence to the liberty and dignity of those incarcerated.[122] If incapacitation alone is the goal and is actually critical, a person might be sufficiently restrained through electronic monitoring, ignition interlocks, hormonal therapies, or similar options not involving incarceration.[123]

1393, 1428-29 (1993) ("[C]onsider the standard justifications of punishment: retribution, deterrence, incapacitation, [and] rehabilitation. The last two, incapacitation and rehabilitation, are unlikely to be at issue in punitive damages cases.").

[120] *See, e.g.*, Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 801 (Ct. App. 2003) (noting that punitive damages could "mak[e] such conduct so expensive [that] it put[s] the wrongdoer at a competitive disadvantage," which "might be viewed as increasing from mere admonition toward direct incapacitation"); Cordova, *supra* note 24, at 839 ("[A] large punitive damages award may cripple a civil defendant economically, thereby financially incapacitating a tortfeasor from repeating its conduct."); Andrea A. Curcio, *Painful Publicity—An Alternative Punitive Damage Sanction*, 45 DEPAUL L. REV. 341, 351 (1996) (noting that "incapacitation only occurs with punitive damages in the few cases in which the award forces a company to go out of business" but that punitive awards could achieve incapacitation through negative publicity sanctions); *cf.* W. Robert Thomas, *Incapacitating Criminal Corporations*, 72 VAND. L. REV. 905, 946-56 (2019) (noting many criminal sanctions without incarceration that could "incapacitate" a corporation as a criminal defendant).

[121] *Cf.* Christina Stahlkopf, Mike Males & Daniel Macallair, *Testing Incapacitation Theory: Youth Crime and Incarceration in California*, 56 CRIME & DELINQ. 253, 256 (2010) (noting that rationale behind incapacitation theory is that it removes offenders from society to prevent them from reoffending, and thus, reduces crime).

[122] *See* Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 UCLA L. REV. 1156, 1165 (2015).

[123] *See, e.g.*, Stuart S. Yeh, *The Electronic Monitoring Paradigm: A Proposal for Transforming Criminal Justice in the USA*, 4 LAWS 60, 62, 64-65 (2015); Graeme Wood,

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In sum, we see great promise in thoroughly exploring how criminal punishment would be transformed if it were constrained by the same due process limits applied to punitive damages. If a punitive damages award can be so "grossly excessive" as to constitute an "arbitrary deprivation of property,"[124] even if justified by legitimate nonremedial purposes of punishment, then a criminal sentence—justified by the very same nonremedial purposes—should also presumably reach some point after which it is grossly excessive and arbitrary.

C. *Surmountable Theoretical Objections*

In this section, we address three anticipated objections to carrying the *Campbell* substantive due process rule over to the criminal system. First, that criminal punishment has no obvious counterpart to compensatory damages (the administrability objection); second, that statutory maximum sentences meet whatever limits due process may place on criminal sentencing (the notice and legislative action objection); and third, that the Eighth Amendment corners the market on proportionality and excessiveness analyses (the constitutional redundancy objection). Each are important; none insurmountable.

1. Criminal Law Lacks a Direct Analog to "Compensatory Damages" (The Administrability Objection)

The most obvious objection to applying *Campbell* to criminal sentences will be that criminal punishment does not compensate for, nor purport to neatly measure, harm. Unlike tort awards, which are broken into compensatory and punitive components, a criminal sentence is entirely punitive. Thus, the very concept of enforcing a 10:1 ratio between the punitive and remedial portions of a criminal sentence is incoherent.

This objection is understandable but ultimately unpersuasive for two reasons. First, as explained in the last subpart, criminal liability does, in fact, require a grounding in some harm or risk of harm, however intangible or difficult to measure that harm may be.[125] Indeed, the very justification for criminalization itself is that the defendant has committed a harm or created a risk that is worthy of punishment. If that is true, then it must be the case that *some* of the resulting punishment accounts in some way for the harm. If none of a criminal sentence

*Prison Without Wall*s, ATLANTIC, Sept. 2010, at 86 (discussing impact of technological advancements on greater monitoring of would-be criminals). *But see* Kate Weisburd, *Monitoring Youth: The Collision of Rights and Rehabilitation*, 101 IOWA L. REV. 297, 302-03 (2015) (arguing that electronic monitoring ("EM") is net widening, in part because offenders are diverted to EM who would not otherwise be incarcerated, and in part because EM, especially in juveniles, leads to hypersurveillance and technical violations that result in more prison time than an original sentence would have entailed).

[124] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003).

[125] *See supra* Part I.B.

"compensates" in any way for the harm or risk of harm created by the defendant's actions, that fact should weigh in favor of, not against, applying *Campbell*'s substantive limits to criminal sentences since they would be unmoored from societal harms. This is doubly so since the costs of punishment are borne twice—both in the personal toll to convicted defendants *and* in the public costs required to administer the punishment:

> If a criminal defendant is convicted and executed, his death does not restore his victim's life or benefit the victim in any direct way. If the criminal defendant is imprisoned, this will not result in the emancipation of the victim or anyone else. Indeed, the community must pay for both executions and imprisonments. There is thus every reason to want to avoid mistakenly inflicting punishment, since it will ordinarily impose a cost not only on the defendant but on the community.[126]

In turn, once we acknowledge that *some* of a criminal sentence accounts for the harm caused, the only remaining question for purposes of applying the *Campbell* 10:1 limit is, how much? If we were in Saxon-era England, we would simply ensure that the *wite* was not more than ten times greater than the *bot*.[127] Even for some modern criminal sentences, the disaggregation into harm and non-harm-related components might be fairly straightforward. For example, in a case in which the victim received restitution to compensate for the economic and noneconomic harms caused by a phone theft, and the criminal sentence is a monetary fine, a court could ensure that the fine is not more than ten times greater than the remedial amount. Of course, the question of how much of a prison sentence for, say, stalking is "harm-related" is much more difficult, as is the question of how to measure the harm-equivalent component of sentences for crimes involving diffuse and intangible harm (which, for precisely that reason, would rarely succeed in civil suits). But such difficulties are practical rather than theoretical. The harm-equivalent component exists; the question is how to measure it, a question we take up in Part III.

Second, any difficulty in parsing out the "harm-equivalent" from the "purely punitive" component of a criminal sentence is not unique to the criminal context. Scholars and courts seem to acknowledge that compensatory damage awards often, if not always, contain some punitive aspect, from "satisfaction" or "revenge" to retribution.[128] Conversely, one recognized goal of punitive damage awards is to act as a backup form of compensation, in case some harm suffered by the plaintiff is too difficult to measure or otherwise fails to be captured by the compensatory damage award alone.[129] If courts still subject punitive damage awards to the 10:1 ratio test, notwithstanding the blurred line separating

[126] Heriot, *supra* note 58, at 56-57.

[127] *See supra* text accompanying note 61.

[128] *See, e.g.*, Sherwin, *supra* note 66, at 1389.

[129] *See, e.g.*, Kemezy v. Peters, 79 F.3d 33, 34 (7th Cir. 1996) (noting that one purpose of punitive damages is to cover harm that might be too difficult to measure and thus might not be captured in the compensatory damages award alone).

compensation from punishment, then criminal punishment can support substantive due process limits, too.

2. Statutory Maximums in Criminal Sentencing (The Notice and Legislative Action Objection)

A second anticipated objection to applying the *Campbell* framework to criminal sentences is that criminal cases have numerous procedural protections, the lack of which partially motivated the Court's concern with common law, jury-imposed punitive damage awards.[130] To be sure, criminal defendants benefit from legislatively-set statutory maximums that, at least in theory, alert the public to potentially high sentences (thus offering at least some notice that is lacking in the common law punitive damages context and also cabining judicial discretion). And they enjoy other notice and procedural protections: the Sixth Amendment right to notice of the "nature and cause" of the accusation;[131] the Eighth Amendment;[132] the requirement that statutes must define crimes "with sufficient definiteness that ordinary people can understand what conduct is prohibited" and "in a manner that does not encourage arbitrary and discriminatory enforcement";[133] and Article I's Ex Post Facto Clause.[134]

This objection is also ultimately unpersuasive, however, for several reasons. First, *Campbell* made clear that the 10:1 ratio was a *substantive* limit on punishment. The damning fact in *Campbell* was not that the award was statutorily unspecified, or that the liability finding was somehow unfair, but that the punishment was "grossly excessive" in relation to the harm caused, "further[ed] no legitimate purpose," and thus "constitute[d] an arbitrary deprivation of property."[135] Surely, *Campbell* would not have come out differently if Utah had a well-publicized $150-million statutory cap on punitive damages. The problem with the $145 million award was not simply that State Farm could not have anticipated such an excessively high punitive damage award; it was that they *should not have to* anticipate a grossly excessive award.

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[130] State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003) (citing fact that "defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding" as a reason for heightened "concerns over the imprecise manner in which punitive damages systems are administered"). That said, civil law does have one unique constraint that serves as a notice and procedural protection: the defendant's conduct must actually cause injury to the plaintiff in order for the plaintiff to sue. *See* Heriot, *supra* note 58, at 58 ("A civil plaintiff . . . is limited to the person or persons who proximately caused his injury.").

[131] U.S. CONST. amend. VI.

[132] U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

[133] Skilling v. United States, 561 U.S. 358, 402-03 (2010) (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

[134] U.S. CONST. art. I, §§ 9-10 (prohibiting both federal government and states from passing ex post facto laws).

[135] *Campbell*, 538 U.S. at 417.

Justice Brennan made this very point in a concurring opinion in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*,[136] in which the Court clarified that the Eighth Amendment does not apply to punitive damages:

> I join the Court's opinion on the understanding that it leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties.
>
> Several of our decisions indicate that *even where a statute sets a range of possible civil damages that may be awarded to a private litigant*, the Due Process Clause forbids damages awards that are "grossly excessive," or "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable[.]" I should think that, if anything, our scrutiny of awards made without the benefit of a legislature's deliberation and guidance would be less indulgent than our consideration of those that fall within statutory limits.[137]

Along these lines, in a Seventh Circuit case, a civil litigant argued that a punitive damages award can violate due process under *Campbell* even if the award falls below a statutory cap on damages.[138] The case involved the Telemarketing Sales Rule (TSR),[139] operationalizing the Telemarketing and Consumer Fraud and Abuse Prevention Act,[140] which authorizes monetary recovery for each and every unauthorized telephone call to a consumer from a telemarketer. Various companies run by the defendant DISH Network were found to have placed 147 million such unauthorized calls, giving the trial judge the statutory authority to impose any judgment up to $1.3 trillion.[141] DISH Network sought to vacate the trial court's award of $280 million on the grounds

[136] 492 U.S. 257 (1989).

[137] *Id.* at 280-81 (1989) (Brennan, J., concurring) (emphasis added) (citations omitted) (quoting St. Louis, Iron Mountain & S. Ry. Co. v. Williams, 251 U.S. 63, 67 (1919)); *see also* Sw. Tel. & Tel. Co. v. Danaher, 238 U.S. 482, 491 (1915) ("[T]o inflict upon the company penalties aggregating $6,300 was so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law."); Mo. Pac. Ry. Co. v. Humes, 115 U.S. 512, 522-23 (1885) (finding that railroad company was not deprived of due process of law when adjudged to pay large sum to person who suffered injury rather than to State).

[138] United States v. DISH Network L.L.C., 954 F.3d 970, 979 (7th Cir. 2020), *cert. dismissed*, 141 S. Ct. 729 (2021) (stating DISH's contention that although judgment amount they were required to pay was less than combined amount of all their 66 million violations multiplied by $10,000 per violation maximum statutory penalty, potential maximum penalties still violated Due Process Clause).

[139] 16 C.F.R. pt. 310 (2013).

[140] 15 U.S.C. §§ 6101-6108.

[141] Brief for Defendant-Appellant at 22, *DISH Network*, 954 F.3d 970 (No. 17-3111) ("With 147 million violations multiplied by the maximum authorized recovery, the court had discretion to impose any judgment up to $1.3 trillion.").

that the statutory cap was so high as to offer no meaningful limit or notice on "actual exposure" and that the award itself was in any event grossly excessive.[142]

Second, the formal notice offered by statutory maximums is largely theoretical; the truth is that most would-be defendants are not in a position to pore over state and federal statute books to determine which laws, and which corresponding maximum sentences, their conduct might trigger. Part of that is because of the average criminal defendant's lack of resources and legal sophistication, but part is because of the surprisingly complex web of overlapping federal and state crimes, broad caselaw-created doctrines, such as *Pinkerton* co-conspiracy liability that triggers vicarious liability for the acts of others,[143] and habitual offender and other enhancement statutes that, when combined with a new offense, can trigger mandatory life sentences.[144]

Third, and relatedly, numerous criminal justice scholars have expressed concern that legislatures have deliberately authorized statutory maximums they themselves likely believe to be excessive. If that is true, then defendants likely would never suspect that, to use the substantive law of Washington, D.C., as an example, a first-time drug distribution charge could get them thirty years in prison,[145] or that stealing a car from a person to take it on a joyride, while wielding a pocketknife, carries a mandatory fifteen-year prison sentence and maximum of forty.[146] William Stuntz's seminal article *The Pathological Politics of Criminal Law* theorized that legislatures have increased statutory maximums since the 1970s not because they believe such new maximums reflect appropriate punishment but to give prosecutors leverage in plea bargaining.[147] By making the penalty for exercising the right to trial artificially high, and indeed too high for defendants to risk, legislatures ensure both that defendants will not expect such harshness and that prosecutors will coerce guilty pleas with agreed-upon sentences.[148]

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[142] *See id.* at 29-30 (citing State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2003)).

[143] Pinkerton v. United States, 328 U.S. 640, 647-48 (1946) (holding that where each conspirator committed an act in furtherance of the conspiracy, each co-conspirator can be criminally culpable).

[144] *See, e.g.*, 18 U.S.C. § 3559(c) (codifying the "Three Strikes" provision by requiring mandatory life imprisonment for a third-time violent offender).

[145] D.C. CODE § 48-904.01(a) (2015).

[146] *See id.* at § 22-2803(b)(2) (armed carjacking carries mandatory minimum of fifteen years and maximum of forty years, though any sentence over thirty years must be justified by a finding of at least one aggravating factor listed in D.C. CODE § 24-403.01).

[147] Stuntz, *supra* note 11, at 552.

[148] *Id.* ("Broader criminal liability rules raise the threat value of trial, by raising both the odds the government will win and the sentence the defendant might receive if he loses. That allows the government to get more guilty pleas."); *see also* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 262-63 (2011); Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1270 (2011) (noting that "legislatures in recent decades have been accused of 'overcriminalization'" and citing Stuntz for the

Fourth, statutes do not always give meaningful notice of the sentence a defendant will actually face, given his particular conduct and circumstances. After all, within the allowed range, courts in a given case must consider relevant factors to fashion a sentence so that it is rationally related to legitimate purposes of punishment. Indeed, even when federal judges work within explicit statutory sentencing ranges, they still must justify departures from the guidelines as a statutory matter, and can be reversed for rendering substantively unreasonable sentences.[149] Thus, a defendant who commits a highly sympathetic first-time violation for drug distribution cannot be said to truly be on "notice" that he will receive anywhere near the statutory maximum.

In fact, statutory sentencing limits may inherently offer less meaningful notice than a statutory cap on punitive damages. A criminal defendant knows that if he is sentenced to prison time, that time has a natural limit—a human's lifespan. No one can get more than 140 years in prison for any crime, period. In a morbid, hypertechnical sense, then, criminal sentencing suffers no lack of notice, even without statutory maximums. But the existence of such natural limits should not shield criminal sentences from the substantive due process limits imposed on punitive damages. Rather, a twenty-year sentence, even if well within a statutory range in absolute terms, might be a relatively higher sentence, in terms of the percentage of the defendant's remaining lifespan, than a $145 million judgment against State Farm, and its departure from the actual harm imposed on society may be much more unanticipated, arbitrary, and disproportionate.

Finally, the fact that a criminal sentence is statutorily authorized does not insulate it from constitutional scrutiny under the Eighth Amendment's Excessive Fines Clause or Cruel and Unusual Punishment Clause; so, there would seem little logic in allowing statutory caps to trump the Due Process Clause. The fact is that sometimes legislatures authorize, or fail to repeal, punitive sanctions that are grossly excessive or cruel and unusual. Indeed, every sentence the Court has ever struck down on Eighth Amendment grounds, including the death penalty for child rape,[150] the death penalty for minors,[151] life in prison without parole for

proposition that in doing so, legislatures have effectively delegated decisions about sentencing to prosecutors as part of plea bargaining (citing Stuntz, *supra* note 11, at 509 ("As criminal law expands, both lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long. The end point of this progression is clear: criminal codes that cover everything and decide nothing, that serve only to delegate power to district attorneys' offices and police departments."))); *cf.* Michael D. Dean, *State Legislation and the "Evolving Standards of Decency": Flaws in the Constitutional Review of Death Penalty Statutes*, 35 U. DAYTON L. REV. 379, 381 (2010) (arguing that death penalty legislation is "incapable of accurately measuring society's moral values").

[149] *See* 18 U.S.C. § 3553 (detailing federal sentencing statutory guidelines for courts); Gall v. United States, 552 U.S. 38, 51 (2007) (noting appellate courts' authority to reverse a sentence within statutory range for substantive unreasonableness, albeit under deferential abuse of discretion standard).

[150] Kennedy v. Louisiana, 554 U.S. 407, 445-47 (2008).

[151] Roper v. Simmons, 543 U.S. 551, 578 (2005).

juveniles convicted of nonhomicide felonies,[152] life in prison for an adult convicted of seven relatively minor offenses,[153] and so many other cases, was within the allowable statutory range. Thus, the Constitution imposes limits on a particular sentence notwithstanding the statutory maximum sentence

In sum, the procedural safeguards required in criminal prosecutions are additional prophylactics against substantive abuses, not substitutes for substantive rights. It would be odd if substantive defects in punishment could be entirely cured by hypervigilant procedures, as if substance and procedure shared a sliding scale. Rather, procedural and substantive protections are to justice as hydrogen and oxygen are to water; both are needed, and neither is sufficient on their own. Moreover, it is the profound, liberty-stripping consequences of penal incarceration that make procedural protections more important in the criminal context. That same gravity of incarceration would justify enhanced *substantive* protections, too.

3. The Eighth Amendment (The Constitutional Redundancy Objection)

Finally, we consider whether a substantive due process challenge to excessive criminal punishment is foreclosed by the availability of a more specific constitutional guarantee—the Eighth Amendment's prohibition on cruel and unusual punishment and excessive fines.[154] The argument would be that the Eighth Amendment should "inhabit the field" when it comes to constitutional limits on criminal punishment because the jurisprudence includes a proportionality principle that tests the fitness between a punishment and the underlying crime in addition to some absolute limits on certain condemned forms or applications of punishment. For example, the Supreme Court held in *Albright v. Oliver*[155] that a 42 U.S.C. § 1983 plaintiff could not challenge his prosecution by a detective without probable cause on "substantive due process" grounds; rather, he had to bring such a suit based on the Fourth Amendment or not at all.[156] The Court held that "[w]here a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing' such a claim."[157]

However, there are strong reasons to believe that the Eighth Amendment holds no such monopoly over constitutional review of excessive criminal

[152] Graham v. Florida, 560 U.S. 48, 82 (2010).

[153] Solem v. Helm, 463 U.S. 277, 284 (1983).

[154] The Supreme Court has held that the Eighth Amendment does not apply to punitive damage awards. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 268 (1989); *see also* Ingraham v. Wright, 430 U.S. 651, 671 & n.40 (1977) (Eighth Amendment only applies to criminal defendants and not, say, punishment-like regulatory measures such as paddling of schoolchildren).

[155] 510 U.S. 266 (1994).

[156] *Id.* at 274.

[157] *Id.* at 273 (quoting Graham v. Connor, 490 U.S. 386, 395 (1989)).

sentences.[158] First, the Supreme Court has entertained substantive due process challenges in other legal contexts where another more specific amendment also arguably provides grounds for a challenge.[159] As Justice Souter noted in his concurrence in *Albright*, the mere fact that another amendment more specifically relates to the subject of a challenge should not foreclose an otherwise meritorious constitutional challenge:

> The Court has previously rejected the proposition that the Constitution's application to a general subject (like prosecution) is necessarily exhausted by protection under particular textual guarantees addressing specific events within that subject (like search and seizure), on a theory that one specific constitutional provision can pre-empt a broad field as against another more general one. It has likewise rejected the view that incorporation of the substantive guarantees of the first eight Amendments to the Constitution defines the limits of due process protection. The second Justice Harlan put it this way: "[T]he full scope of the liberty guaranteed by the Due Process Clause . . . is not a series of isolated points . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ."[160]

The problem for Mr. Albright was that the Due Process Clause offered him no additional protections beyond the Fourth Amendment; his argument, that his arrest was unsupported by probable cause, was perfectly cognizable under the "explicit text[]" of the Fourth Amendment and the court's cases.[161] Indeed, where two amendments offer a § 1983 plaintiff identical relief, courts might reasonably fear that allowing both claims to proceed will subject the state to duplicative liability.[162]

In contrast to a § 1983 plaintiff alleging a Fourth Amendment violation, criminal defendants sentenced to a term of years that is not "unusual" but

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[158] *See* Brian J. Foley, *Reframing the Debate Over Excessive Sentences to Move Beyond the Eighth Amendment*, 38 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 6-7 (2012) (arguing that sentencing proportionality should be analyzed outside of confines of the Eighth Amendment, by recognizing right to be free of incarceration as fundamental right and subjecting prison sentences to "strict scrutiny").

[159] *See, e.g.*, Rochin v. California, 342 U.S. 165, 172-73 (1952) (holding that police violated substantive due process by forcibly pumping suspect's stomach to find swallowed morphine for use in criminal prosecution); United States v. Salerno, 481 U.S. 739, 746-55 (1987) (ultimately rejecting, but entertaining as potentially valid, both substantive due process and Eighth Amendment challenges to Federal Bail Reform Act of 1984).

[160] *Albright*, 510 U.S. at 286-87 (Souter, J., concurring) (alterations in original) (citations omitted) (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)); *cf.* Cnty. of Sacramento v. Lewis, 523 U.S. 833, 843-44 (1998) (entertaining § 1983 plaintiff's substantive due process claim for official police misconduct because the misconduct occurred outside a "seizure" and thus was not challengeable under the Fourth Amendment).

[161] *Albright*, 510 U.S. at 281 (referencing past case decisions that did not allow substantive due process claims when they could be brought under other amendments).

[162] *See id.* at. 288 (Souter, J., concurring).

"grossly excessive" under *Campbell* have no other constitutional recourse to make such a claim. Perhaps, if the punishment were purely monetary, and thus subject to the Excessive Fines Clause, a defendant could be forced to bring a claim of arbitrary deprivation of liberty from a monetary punishment under that clause, rather than a substantive due process claim. Even so, he would have a persuasive argument that courts should have to apply *Campbell*'s 10:1 ratio when reviewing monetary sentences. For a term of incarceration, however, the Eighth Amendment offers only a particular prohibition on punishment that is "cruel and unusual."[163] In fact, some Supreme Court justices have held the view that this clause was targeted by the Framers at specific historical abuses and bizarre practices by the King's Bench, and nothing else.[164] And while a thin majority of the Court in *Harmelin v. Michigan*[165] stated in dictum that the Eighth Amendment prohibits "grossly disproportionate" mandatory sentences, it suggested that noncapital sentences would almost never pass this test, however lengthy, and that "individualized sentences" are only required in capital cases.[166] As the Court put it, "[s]evere, mandatory penalties may be cruel, but they are not unusual in the constitutional sense."[167] Even the majority in *Graham v. Florida*,[168] holding that minors cannot be sentenced to a term of life without parole for a nonhomicidal crime, made clear that its holding turned on the unique characteristics of juveniles and the fact that the challenge was a categorical one, more analogous to the "death is different" cases than to cases like *Harmelin*.[169]

Thus, the crux of the argument in *Campbell*—that a defendant's punishment is grossly excessive, given the individual circumstances of the case, such as the reprehensibility of the defendant's conduct and the harm caused—is unavailable to criminal defendants under the Eighth Amendment.[170]

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[163] U.S. CONST. amend VIII.

[164] Harmelin v. Michigan, 501 U.S. 957, 967-68 (1991).

[165] *Id.*

[166] *Id.* at 995 ("Our cases creating and clarifying the 'individualized capital sentencing doctrine' have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties.").

[167] *Id.* at 994; *see also* Rummel v. Estelle, 445 U.S. 263, 274 (1980) ("Given the unique nature of the punishments considered in *Weems* and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative."); Ewing v. California, 538 U.S. 11, 30 (2003) (applying *Harmelin* to uphold life sentence for habitual offender whose instant offense was stealing golf clubs).

[168] 560 U.S. 48 (2010).

[169] *Id.* at 67-68.

[170] Moreover, even the recognition by some members of the *Harmelin* Court of a narrow proportionality principle under the Eighth Amendment's Cruel and Unusual Clause likely would not survive a future case in which the questions were presented, given the current makeup of the Court. Meanwhile, the few state courts post-*Harmelin* that have been willing

Of course, given the Court's hostility to proportionality challenges to noncapital term-of-year adult sentences under the Eighth Amendment, some might argue that a substantive due process challenge to term-of-year sentences should also be precluded for precisely the same reasons. But even the members of the Court most sympathetic to reviving a robust proportionality principle are bound by the textual limit in the Eighth Amendment to "cruel and unusual" nonmonetary punishment. One can argue that legislative prerogatives deserve deference if the question is whether a punishment is "unusual" but not if the question is whether the particular sentence length is grossly excessive compared to the defendant's individual conduct. And the latter is what *Campbell* uniquely speaks to.

II. NONCONSTITUTIONAL ARGUMENTS FOR EXTENDING *CAMPBELL*'S 10:1 HARM-BASED LIMIT TO CRIMINAL SENTENCES

This Part argues that the 10:1 presumptive limit from *Campbell* and *Gore* is good policy, particularly in the context of criminal punishment. Because the rule is consistent with the purported deterrent, retributive, and incapacitation aims of criminal punishment, it should be incorporated into sentencing and prison reform, even if courts refrain from applying a substantive due process limit.

Deterrence. First, keeping criminal sentences below the 10:1 limit would be entirely consistent with what we now know about deterrence theory. In fact, as explained below, a growing body of evidence from multiple disciplines suggests that the severity of punishment often has little impact or even counterproductive effects on crime rates.

Most lawmakers using deterrence theory to justify harsh sentencing schemes rely on a model developed by economist Gary Becker that has since been discredited in key respects. Becker reasoned that to deter crime, punishment should be set so that the expected costs of committing a crime outweigh the expected benefits.[171] The expected costs to the would-be offender are the disutility of going to prison multiplied by the probability of getting caught—pF. So, policymakers have two levers to work with: p (the probability of detection and then prosecution) and F (the punishment the offender will suffer if convicted). Becker himself recommended that policymakers rely on heavy-handed sentences (high F) to avoid taking on the high costs of increasing detection (p).[172] Conveniently, Becker's assumption that prison costs the state

to overturn noncapital sentences on proportionality grounds have largely chosen to tether their decisions to their state constitutions rather than the United States Constitution. *See* Samuel Weiss, Note, *Into the Breach: The Case for Robust Noncapital Proportionality Review Under State Constitutions*, 49 HARV. C.R.-C.L. L. REV. 569, 577-82 (2014).

[171] *See* Becker, *supra* note 104, at 176; *see also* A. Mitchell Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, *in* 1 HANDBOOK OF LAW & ECONOMICS 403, 421 (2007).

[172] Becker, *supra* note 104, at 198 (explaining how statutes permit excessive prison sentences as compared to fines).

less than crime detection[173] dovetailed nicely with then-existing public preferences for retribution through harsh punishment and incapacitation.[174]

But there is now consensus that the Becker model was wrong about the behavioral choices people make when engaging in conduct deemed criminal. On the contrary, a large body of criminology research (as well as research on child development) consistently finds that the probability of law enforcement detection has a much greater effect on behavior than severity of punishment.[175] One reason may be that, given that spending even a single day in jail is highly disruptive and dehumanizing (and even potentially life-threatening), the marginal deterrent effect of each additional day (or week or month) in prison is modest, whereas small changes in the probability of going to prison *at all* are large.[176] By contrast, programs that administer swift, sure, and light punishments for breaches of rules have much lower recidivism rates.[177]

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[173] *See* EXEC. OFF. OF THE PRESIDENT, ECONOMIC PERSPECTIVES ON INCARCERATION AND THE CRIMINAL JUSTICE SYSTEM 36-40 (2016) (citing to empirical literature finding that increased incarceration reduces crime but is less effective than equivalent increased spending on police).

[174] *See generally* Cass R. Sunstein, David Schkade & Daniel Kahneman, *Do People Want Optimal Deterrence?*, 29 J. LEGAL STUD. 237 (2000) (describing literature that suggests "people's judgments about punitive damage awards are a reflection of outrage at the defendant's actions rather than of deterrence").

[175] Reviews of empirical literature consistently find that harsh sentences cannot be justified on deterrence grounds because, while crime rates are highly sensitive to the probability of enforcement, the severity of punishment has no consistent effect. *See, e.g.*, Chalfin & McCrary, *supra* note 113, at 23-29; Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 CRIMINOLOGY & PUB. POL'Y 13, 17 (2011). *See generally* Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 CRIME & JUST. 199 (2013) (investigating whether punishment prevents crime and how punishment prevents crime); Daniel S. Nagin, *Deterrence: A Review of the Evidence by a Criminologist for Economists*, 5 ANN. REV. ECON. 83 (2013) (highlighting important findings and conclusions about deterrence from literature of past twenty years).

[176] *See* Polinsky & Shavell, *supra* note 171, at 416, 419 (discussing optimal penalty-to-detection tradeoff for risk-sensitive individuals or for individuals whose disutility for the first day in prison is greater than disutility for additional days and finding that, in both cases, best penalty is something less than the maximum penalty that would be efficient for risk-neutral individuals).

[177] *See* Chalfin & McCrary, *supra* note 113, at 27-28 (explaining that Hawaii's Opportunity Probation Enforcement program focused on punishing probation violations with warnings or week in jail); Kilmer et al., *supra* note 114, at 37 (describing South Dakota program for DUI offenders where twice-a-day breathalyzer tests is condition of bail). The importance of the temporal proximity of punishment is well established in psychology as a crucial element of child development. *See* JOHN B. WATSON, BEHAVIORISM 183 (1924) (describing that basic learning relies on imitative experiences that depend on temporal signals); Richard H. Walters & Ross D. Parke, *Influence on Response Consequences to a Social Model on Resistance to Deviation*, 1 J. EXPERIMENTAL CHILD PYSCH. 269, 271 (1964) (describing that "imitative responses are *learned* on the basis of contiguous association"); Justin Aronfreed, *Aversive Control of Socialization*, 16 NEB. SYMP. ON MOTIVATION 271, 275

On top of all this, there is growing consensus that being in prison has its own additional criminogenic effect rather than a neutral or rehabilitative effect. Ordinarily, the impact of prison on future behavior is hard to measure because people sentenced to prison share experiences and characteristics different from the people who do not, often ones that we cannot easily observe. But researchers have been able to use a quasi-experiment based on random pretrial judge assignments to better understand the causal relationship between more time in jail and future crime. These studies find that people who happen to be assigned harsher judges and are detained pre-trial are more likely to recidivate than similar people who are not detained.[178] Policymakers should focus more effort and attention to prioritizing what should be criminalized and increasing the likelihood that serious crime will be detected, and spend fewer resources on meting out harsh punishment, if they want to reduce future incidence of crime.

Moreover, the legitimacy of deterrence as a justification for punishment depends on the benefit society receives from deterring the behavior. Particularly for survival crimes committed by economically desperate people or other conduct that may justify criminalization but that involves only a modest amount of social harm, the benefit to society of full deterrence (even if successful) may be marginal at best.

Retribution. Stricter adherence to a 10:1 or lower ratio between a crime's assigned punishment and its social costs would also be wholly consistent with the goals of retribution. As discussed in Part I, a society might legitimately define and reaffirm its shared moral values through collective condemnation of those who have seriously breached, but when the penalty is too harsh, society risks disrupting the very moral order it seeks to maintain, through its own unjustified and immoral use of force.

Nor does a severe sentence of incarceration for most crimes further the goals of social cohesion or discouraging private vengeance. Many defendants subject to high mandatory minimums or life sentences have committed only modest regulatory offenses related to firearms and controlled substances, or conspiracies where the target offense never occurred or, in some instances, never existed.[179]

(1968) ("[W]hen punishment occurs under predictable contingencies, and its occurrence is therefore under some discriminative control by the child, it also has a long-term effectiveness in its enhancement of active and nonpunished forms of behavior. . . ."). *See generally* Adam M. Gershowitz, *12 Unnecessary Men: The Case for Eliminating Jury Trials in Drunk Driving Cases*, 2011 U. ILL. L. REV. 961 (reviewing literature showing that certainty, rather than severity, of DUI punishment holds greatest deterrence potential).

[178] *See* Amanda Y. Agan, Jennifer L. Doleac & Anna Harvey, *Misdemeanor Prosecution* 37 (Nat. Bureau Econ. Rsch., Working Paper No. 28600, 2021) (finding that misdemeanor offenders who were quasi-randomly "assigned" to nonprosecution were much less likely to have subsequent criminal complaints filed against them); Paul Heaton, Sandra Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 718-82 (2017) (using quasi-experiment based on case's timing, such that some arrestees are detained for longer because of week-based cycles).

[179] *See, e.g.*, United States v. Hudson, 3 F. Supp. 3d 772, 778-88 (C.D. Cal. 2014), *rev'd*

Such acts may be socially harmful or risky, but they do not cry out for private vengeance in the same way as common law offenses against the person, such as homicides and sexual assaults. Such common law crimes, perhaps ironically, are more likely to be brought in state court and subject to less draconian sentences.[180] Moreover, restorative justice researchers have begun to question the premise that incarceration, even for reprehensible conduct causing concrete harm, are the best means of meeting victims' need for satisfaction.[181]

Incapacitation. Incapacitation as a theory of criminal justice has less obvious—although still possible—ties to the ratio that we are studying in this Article, as explained in Part I.B. Incapacitation theories presume that some individuals who commit crimes cannot be sufficiently deterred, at least for some relevant time period, through appeals to intrinsic morality or disincentives created by the risk of punishment.[182] A state might legitimately pursue physical incapacitation as an option to constrain the actions of some subset of offenders who have been convicted of multiple crimes or of a single, particularly egregious one, and whose reoffending would present an untenable public safety risk.[183] Then again, as discussed in Part I, a prison sentence is not the only possible form of incapacitation, even for those at high risk of recidivism. Further, a long prison sentence may still be grossly excessive if a defendant would age out of likely criminality before his scheduled release.[184] In any event, the findings and arguments we make here are particularly relevant to first- or second-time offenders of most criminal laws.

sub nom. United States v. Dunlap, 593 F. App'x 619, 620-21 (9th Cir. 2014) (criticizing government practice of enlisting prior offenders through sting operation into conspiracy to rob fake stash houses, triggering high mandatory minimums).

[180] In California, for example, first-degree robbery of a dwelling is punishable by three, six, or nine years in prison. CAL. PENAL CODE § 212.5(a) (West 1995).

[181] *See generally* HEATHER STRANG, REPAIR OR REVENGE: VICTIMS AND RESTORATIVE JUSTICE 1-3 (2002) (arguing that restorative justice may have the capacity to satisfy victim expectations more than formal court proceedings and traditional sentencing); Lara Bazelon & Aya Gruber, *#MeToo Doesn't Have to Mean Prison*, N.Y. TIMES, Mar. 4, 2020, at A27.

[182] Theories of optimal deterrence are not compatible with incapacitation theories. *See* Polinsky & Shavell, *supra* note 171, at 444.

[183] *See, e.g.*, *id.* at 438-39 (providing example of U.S. Sentencing Commission's sentencing guidelines for federal crimes that provides enhanced imprisonment terms and criminal fines for repeat offenders). *See generally* A. Rubinstein, *An Optimal Conviction Policy for Offenses That May Have Been Committed by Accident*, *in* APPLIED GAME THEORY (S.J. Brams, A. Schotter & G. Schwödiauer eds., 1979) (arguing that deliberate repeat offenders should be punished while those who commit an offense by accident should be treated with more leniency); A. Mitchell Polinsky & Daniel L. Rubinfeld, *A Model of Optimal Fines for Repeat Offenders*, 46 J. PUB. ECON. 291 (1991) (offering model for most effective punishment of repeat offenders); C.Y. Cyrus Chu, Sheng-cheng Hu & Ting-yuan Huang, *Punishing Repeat Offenders More Severely*, 20 INT'L REV. L. & ECON. 127, 135 (2000) (finding that "optimal sanctions should be lenient to first-time offenders but severe to repeat offenders if we consider the possibility of the erroneous conviction of innocent offenders").

[184] *See* U.S. SENT'G COMM'N, THE EFFECTS OF AGING ON RECIVIDISM AMONG FEDERAL OFFENDERS (2017) (noting significantly lower reoffense rate of older offenders).

Thus, for a wide range of reasons, good policy demands that we attempt to better measure the harm caused by crime and compare it to the gravity of its punishment. If there is convincing evidence that the criminal sentences for some crimes are more than ten times harsher than the harm caused by the criminal act, this empirical evidence could be used to breathe new life into the *Solem* line of Eighth Amendment proportionality cases. Or it could provide evidence that a state has violated 18 U.S.C. § 3553, requiring that the sentence be reasonably related to legitimate purposes of punishment. Alternatively, it could be valuable for individual defendants who want to show that a particular sentence urged by the prosecution would be inappropriate, or for individual judges who wish to justify a downward departure from guidelines on this basis without fear of misusing their discretion. Looking to the future, legislatures may use the empirical methods described in the next Part to revise the criminal codes, sentencing guidelines, and statutory maximums.

III. IMPLEMENTING THE 10:1 LIMIT: A SURVEY METHOD FOR ESTIMATING THE HARM-EQUIVALENT PORTION OF A CRIMINAL SENTENCE

While Parts I and II of this Article have made the theoretical case for applying *Campbell* to criminal sentences, some might wonder how *Campbell*'s framework as applied to criminal cases would work in practice. After all, applying the 10:1 ratio to punitive and compensatory damages is straightforward. But can a criminal sentencing judge estimate, for purposes of applying the 10:1 ratio in a criminal case, what the "harm-equivalent" portion of a sentence is? This Part offers one possible method, through a survey that asks respondents to estimate the amount of time in prison they would spend to avoid being harmed by particular criminal conduct. There may be other ways to estimate harm-equivalence as well, and it is our hope that this Article will inspire future research on the best way to do so. Our goal is to offer one potentially fruitful method, and more broadly, to persuade readers that practical concerns alone should not be a barrier to reining in harsh sentences as grossly disproportionate to harm caused.

A. *A Proposed Survey Method*

To apply *Campbell*'s 10:1 ratio to criminal sentences, we must estimate the part of a criminal sentence that corresponds to the harm caused by the defendant's conduct. Put differently, we must measure the amount of prison time equivalent to (or that would correspond to) the harm caused, such that a typical[185] person would be in equipoise between the incarceration period and

[185] Of course, there is no "typical" person who is harmed by criminal conduct, just as there is no typical plaintiff whose compensatory damages can be determined in the abstract. Future research in this area should consider whose perspective matters in determining the harm-equivalent portion of a sentence. The individual victim(s) in a criminal case, if there are individual victims? The public, as determined by average survey responses from a particular

experiencing the harm. In turn, one way to find that point of equipoise would be to ask people to directly compare time in prison to harm caused by criminal conduct, and see what amount of prison time they would endure to avoid the harm. That prison time amount could then become the baseline for determining, through the 10:1 ratio, a presumptive substantive due process limit on the criminal sentence. For example, if no one in a survey would be willing to spend more than two months in jail to avoid the harms associated with being robbed of their wallet by an unarmed person, then a defendant should presumably not face more than ten times that amount—twenty months in prison—for the robbery.

While we are the first researchers to suggest this sort of survey in measuring excessive criminal punishment, we learned during the course of this project that similar "contingent valuation" surveys have proven useful in other legal contexts as well. For example, Sandra Mayson and Megan Stevenson are using a similar survey, which they term "Rawlsian cost-benefit analysis," to quantify what length of pretrial detention respondents would be willing to endure to avoid being victimized by various crimes.[186] Their goal is to determine what length of pretrial detention could be justified as a nonpunitive regulatory measure by concerns that a particular defendant might reoffend before his trial date.[187] As Mayson and Stevenson note, a few earlier criminological studies used such surveys to estimate the perceived *monetary* costs to respondents of both crime victimization and incarceration.[188] In addition, a 1993 study by Mossman and Hart purported to measure the cost of civil commitment to those detained by asking respondents to quantify a length of involuntary hospitalization they would be willing to endure to avoid crime victimization,[189] and a 2015 study by Scurich asked respondents questions about error preferences, including comparing the costs of false convictions to false acquittals and the costs of crime victimization to the costs of being incarcerated after a false conviction.[190]

population? The jury? Regardless, averaged survey data, even if an imperfect proxy for the desired perspective, would still be relevant to reformers in arguing how grossly disproportionate average sentences for a particular offense are.

[186] Mayson & Stevenson, *supra* note 32, at 5.

[187] *Id.* at 14.

[188] *Id.* at 22 (citing Mark A. Cohen, *Pain, Suffering, and Jury Awards: A Study of the Cost of Crime to Victims*, 22 LAW & SOC'Y REV. 537, 542 (1988); Mark A. Cohen, Roland T. Rust, Sara Steen & Simon T. Tidd, *Willingness-to-Pay for Crime Control Programs*, 42 CRIMINOLOGY 89, 103 (2004); Mark A. Cohen & Alex R. Piquero, *New Evidence on the Monetary Value of Saving a High Risk Youth*, 25 J. QUANTITATIVE CRIMINOLOGY 25, 33 tbl.5 (2009); David S. Abrams & Chris Rohlfs, *Optimal Bail and the Value of Freedom: Evidence from the Philadelphia Bail Experiment*, 49 ECON. INQUIRY 750, 763-69 (2011)).

[189] Douglas Mossman & Kathleen J. Hart, *How Bad Is Civil Commitment? A Study of Attitudes Toward Violence and Involuntary Hospitalization*, 21 BULL. AM. ACAD. PSYCHIATRY L. 181, 182-87 (1993).

[190] Scurich reports that the median response among respondents who believe (behind a veil of ignorance) that false convictions are worse than false acquittals was that they would "prefer to be violently assaulted 5 times than spend a single day in prison." Nicolas Scurich, *Criminal*

The type of survey we describe here is different from these earlier surveys in that it offers respondents a description of prison before asking them to value the cost to them—or "disutility"—of prison time. Our proposed survey is also novel in that it uses crime vignettes to measure excessiveness of otherwise legitimate punishment of people who have actually committed a crime, and it would offer a unique level of precision in terms of type and circumstances of crime and comparison to existing sentencing ranges for that crime and attendant circumstances.[191]

We note that any survey including descriptions or images of prison confinement, as well as descriptions of being harmed by criminal conduct, will be difficult to read, and more difficult for some respondents than others. Our test survey made clear that participation by respondents was voluntary, that respondents could stop participation at any time or skip any question they felt uncomfortable answering, and could contact the authors if they felt they experienced harm in any way or had any complaint. One of the prison descriptions (the video) is preceded by a trigger warning and the survey was approved by an independent human-subjects research advisory board. No respondent reported any complaint, though the absence of complaints does not mean the survey was not difficult. That said, the goal of such a survey is to take into full account the emotional and physical cost of crimes to the victims of those crimes, and to measure whether criminal punishment is proportional thereto. Moreover, violent or dangerous crimes such as assault, burglary, and robbery are precisely the crimes for which one might imagine judges, prosecutors, or legislators arguing for the highest multipliers. Thus, a survey may be more impactful in reform debates if it takes on such crimes. Again, we raise these issues to guide future researchers.

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We created and ran a short test survey as proof of concept. Our test survey first gave respondents one of three short descriptions (randomly assigned) of a "day in the life" in state prison.[192] The first was written by Jerry Metcalf and

Justice Policy Preferences: Blackstone Ratios and the Veil of Ignorance, 26 STAN. L. & POL'Y REV. ONLINE 23, 31 (2015). Among those who believe false acquittals are worse than false convictions, the median response was to endure thirty days in prison rather than "be violently assaulted." *Id.* However, Scurich's study focused solely on trade-offs with system error; it did not compare the costs of victimization to prison sentences for true convictions, i.e., convictions of the factually guilty.

[191] *See* Andrea Roth & Jane Bambauer, Fair Punishment (last administered June 17, 2020) (unpublished survey instrument) (on file with authors) (providing thorough descriptions of hypothetical day in prison).

[192] Of course, there is no "typical" experience in prison. People who are imprisoned will have very different experiences, in part due to obviously relevant characteristics such as physical attributes, race, gender identity, sexuality, perceived or actual gang affiliations, crime of conviction, prior trauma, and the like. Still, not all respondents will have personal

published by the Marshall Project.[193] The second was crafted by a research assistant, a formerly incarcerated person, who thought the Marshall Project log was unrepresentative in certain respects.[194] The third involved a three-minute excerpt from smartphone video footage, taken by a person in a Florida prison and published by the *Miami Herald*.[195]

Next, respondents were randomly assigned to one of four short vignettes involving criminal conduct: (1) a *simple assault* involving a punch to the eye, causing a temporary bruise; (2) an *aggravated assault* (an assault causing serious bodily injury, here with a dangerous weapon) involving an attack with a baseball bat, causing temporary blindness and requiring reconstructive surgery to repair a broken eye; (3) a *burglary* (entering a dwelling with the intent to commit a theft or felony) involving the taking of an $800 camera from a home while the resident is at work; and (4) the same *burglary* committed while the resident is present, in the backyard, making out the elements of a *robbery* offense (taking property by force or stealth from the person of, or in the presence of, the owner) as well. After reading a description of the act in their assigned vignette, respondents were asked to estimate the maximum time they would be willing to spend in prison to avoid being harmed by the criminal conduct.[196]

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experience with any of the realities of daily prison life, and the survey sought to remedy that lack of information to render the results more credible. Here, we assigned participants randomly to three different tools to mitigate any incompleteness, inaccuracy, or bias in any given description.

[193] Roth & Bambauer, *supra* note 191, at 5-14 (citing Jerry Metcalf, *A Day in the Life of a Prisoner*, MARSHALL PROJECT (July 12, 2018, 10:00 PM), https://www.themarshallproject.org/2018/07/12/a-day-in-the-life-of-a-prisoner [https://perma.cc/Q2TV-W7NK] ("At 1:30 a.m., I'm jarred awake in my cell by an officer wielding the brightest flashlight in the world. He gives me 10 minutes to throw on some clothes and escorts me to the isolation cells, where I strip down again for a thorough search and begin a three-hour suicide watch.")).

[194] *Id.* at 10. Here is an excerpt:

> One thing you quickly realize is that you're not going to do well in prison by relying on state-provided meals. . . . Workers in the kitchen talk of some food products coming in labeled 'Not meant for human consumption.' Whether that's true or not, it's all awful. For example, every year during the Super Bowl we're served a 'special' dinner – sub sandwiches – AKA a sub roll, a bag full of roast beef, with condiments and some veggies. But every bag of meat is filled a quarter of the way with blood, and the meat has a strong green tint to it. This is considered a treat.

Id.

[195] *See* Jack Brook & Romy Ellenbogen, *Secretly Recorded Footage Captured By Florida Inmate Shows Gruesome Conditions*, MIA. HERALD (Oct. 4, 2019, 1:53 PM), https://www.miamiherald.com/article235804527.html (beginning with graphic content warning, video documents indifference of prison guards to incarcerated people engaged in physical fights and experiencing drug overdoses, moldy kitchens, lack of hygiene products, and rodents).

[196] For example, a respondent assigned to vignette #3 would see the following prompt: "You are lounging in your backyard on a weekend morning when a stranger hops your

We avoided giving respondents a detailed description of the purpose of the study; unlike opinion surveys that ask respondents to estimate what a fair sentence would be for a given crime (which would yield responses very likely to be anchored to existing law),[197] the unusual nature of our design may have elicited answers freer from expectation or intuition.[198] Moreover, with the purpose obscured, respondents were presumably less likely to be led solely by their political views (for example, conservatives might be less likely to tune into a response that exaggerates the harms from crime and minimizes the cruelty of prison, and progressives less likely to do the opposite).[199]

backyard fence and runs into your house. By the time you are able to place a call to 9-1-1 from your cell phone, the stranger is running out of your front door with your new camera (valued at approximately $800). What is the maximum amount of time you are willing to spend in prison to prevent this from happening to you?" Roth & Bambauer, *supra* note 191, at 19.

[197] *See, e.g.*, Bert I. Huang, *Law and Moral Dilemmas*, 130 HARV. L. REV. 659, 661-62, 680-99 (2016) (book review) (testing whether the presence of law itself affects lay intuitions of justice).

[198] We added several features to our test survey to counteract potential sources of bias. For example, the prompts for each crime avoided specifying a unit of time because we did not want to anchor respondents. In addition, after the initial prompt, we followed up with a request that the respondent restate their answer using a set of sliders to record their answer in minutes, hours, days, weeks, months, and year. We did this so that the respondent would not be anchored by any specific unit of time that we used to record their answers when they were first prompted to respond. Having the open-ended and highly structured response fields allowed us to compare the two as a check on completeness and accuracy of response, and to detect any bias in responses from the initial less precise prompt about "amount of time" in prison. It also provided an "attention check"—a means to ensure that respondents were answering consistently rather than randomly selecting answers. The attention check function wound up being extremely important; although we collected 1,200 responses, nearly half of them failed the attention check and had to be removed from our analyses. Some responses were obviously wrong upon reading the text in the open-ended data field (for example, respondents who simply copied and pasted text from the vignette). But many respondents typed a number into the field (e.g. "100"), which did not by itself indicate whether the answer was thoughtful and accurate. By comparing the open-ended field to the highly structured field, we could see which open-ended responses had no relation to the second response, as these respondents randomly moved the sliders for all units of time. After removing responses that failed the attention check, we were left with 641 credible responses.

[199] One could try other means of running the survey to see if it makes a difference to the results. For example, respondents could be randomized to either see a criminal vignette or to see the prison description. Respondents who view the criminal vignette could be asked to report an amount they are willing to pay (in dollars) to avoid becoming the victim of the crime. Respondents who view the prison description would report the amount they are willing to pay (in dollars) to avoid spending one day in prison. One could then compare prices to translate the harm experienced by crime victims into an amount of prison time. This method would also allow one to compare results to previous studies that focused solely on monetary valuation of crime avoidance and incarceration.

Once respondents from the test survey reported harm-equivalent sentences, we compared our initial results to the actual sentencing guidelines for the tested crimes in a few sample jurisdictions.[200]

B. *Initial Results*

While we intended our brief test survey as proof of concept rather than as a basis for any robust claims about excessive punishment, our initial results do suggest that criminal punishment for the tested crimes often exceeds *Campbell*'s 10:1 substantive due process ratio by several orders of magnitude. To establish a baseline for judging an imposed sentence's constitutionality, we compared the median and seventy-fifth percentile responses from our survey to the most lenient possible sentence in the federal, Minnesota, and New York sentencing guidelines range for the tested crime.[201] This comparison gave us a conservative (i.e., the most government-friendly possible) interpretation of our results. Table 1 lists our initial results.

More specifically, we found that the sentences for the burglary and aggravated burglary crimes described in the vignettes, neither of which involved assaultive acts, were hundreds or thousands of times more punitive than the harm-equivalent sentences reported by respondents for those crimes. The results for simple assault similarly exceeded, though were much closer to, the 10:1 constitutional line. Sentencing for aggravated assault, by contrast, was within constitutional limits, at least when comparing the minimum sentence to the seventy-fifth percentile response.[202] Notably, although the assaultive crimes we tested had smaller ratios compared to burglary and aggravated burglary,[203] the sentencing guideline ranges for burglary, at least in some states,[204] are on par with (i.e., not significantly lower than) sentences for physical assaults. These

[200] To create conservative estimates, we compared the seventy-fifth percentile survey responses to the lower bound of federal and state sentencing ranges in order to measure how much of a prison sentence is in excess of (that is, goes beyond) the harm-equivalent sentence.

[201] Future testing could be expanded to all U.S. jurisdictions, of course. We chose Minnesota for our initial run because it has sentencing guidelines and has six degrees of assault, suggesting a fine-tuning of sentence to facts. We chose New York because of its statutorily set sentencing ranges and fine-tuned burglary statutes.

[202] First, there is a large difference between the fiftieth and seventy-fifth percentile responses, so any conclusions drawn from the data will be highly sensitive to where a researcher or policymaker decides to place the threshold.

[203] While robbery is traditionally classified as a crime against the person rather than property, *see, e.g.*, CRIMINAL JURY INSTRUCTIONS FOR DC INSTRUCTION 4.300 (2001), our robbery vignette did not involve any physical injury to the victim.

[204] *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-105, 13-702, 13-704, 13-1203, 13-1204, 13-1507 (2015) (sentencing range of two and a half to seven years for burglary of a dwelling irrespective of occupants' presence). The same is true for the New York statutes discussed above.

results, if replicated in future studies, might suggest that the sanctity of the home is less important to Americans than sentencing laws suppose.[205]

[205] Note that this distinction is not necessarily the same as the legal distinction between violent and nonviolent crimes because the implied threat of violence involved in a home invasion when the resident is present sometimes justifies classifying the aggravated burglary as a crime of violence. *See, e.g.*, N.Y. PENAL LAW § 140.25 (McKinney 2021) (burglary of dwelling is class C violent felony for sentencing purposes); CAL. PENAL CODE §§ 459, 1192.7 (West 2021) (burglary of occupied dwelling, where owner is present at time of burglary, is deemed "violent" offense (rather than merely "serious" offense) for three-strikes and other purposes).

Table 1. Harm-Equivalent Sentences.

	5th to 95th Range	50th Percentile	75th Percentile	Proportion responding less than one day	N
Simple Assault	[none-10 months]	10 min	5 days	61%	164
MN[206]: 12 months (guidelines); statutory range: 0-5 years)[207]		52,560:1	73:1		
NY: 0-12 months		N/A	N/A		
Aggravated Assault (Serious Bodily Injury)	[none-31 months]	1 month	6 months	23%	160
MN[208]: 74-103 months (guidelines); statutory range: 0-20 years		74:1	12:1		
NY: 5-25 years		60:1	10:1		
Burglary	[none-5 months]	none	2 days	67%	144
MN[209]: 18 months (presumptive); statutory range: 0-10 years		∞:1	273:1		
NY: 3.5-15 years		∞:1	638:1		
Burglary (Inhabitant Present)	[none-6 months]	1 hour	3 days	59%	174
MN[210]: 21 months (statutory range: 6 months to 20 years)		15,120:1	210:1		
NY: 3.5-15 years[211]		30,660:1	425:1		

Sources for sentencing ranges: N.Y. Penal Law §§ 70.02, 70.15, 120.00, 120.10, 140.25 (McKinney 2021); Minn. Stat. §§ 609.582, 609.12, 609.223 (2021).

[206] Minnesota is unique in that it has six degrees of assault. MINN. STAT. § 609.221 (2021). Inflicting substantial (temporary) bodily harm, without further aggravating factors (such as in our simple assault vignette) is a third-degree assault in Minnesota (with severity level 4 for guideline purposes). *See* MINN. SENT'G GUIDELINES COMM'N, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY 109 (2019). In most states, such an act would be a "simple assault," typically a misdemeanor. *See, e.g.*, D.C. CODE § 22-404 (2021) (nonaggravated assault is 180-day misdemeanor). In turn, the presumptive guideline sentence for third-degree assault, for someone with no criminal history, is twelve months. A trial judge can depart from this presumptive sentence with sufficient justification. *See id.*

We also ran additional statistical tests for insight into whether the responses to our vignettes were influenced by political beliefs, income, and demographic factors, as described in Table 2. We did find some trends; for example, respondents with the least number of years of formal education had a relatively greater tolerance (lower harm-equivalent sentence) for experiencing the harm of a physical assault.

One particularly notable trend was that respondents who identified as women in our test survey had a relatively higher willingness to experience harm, even the harm of an aggravated assault, and a relatively lower willingness to endure prison time than others. This result might run against some readers' assumptions that women experience both greater threat from violent nonhomicidal crime, and fewer potential costs from incarceration. Indeed, some existing research supports the intuition that women (other than transgender women, who might be assigned to a men's prison) would perceive themselves to be less vulnerable than men inside prison and more vulnerable outside of it.[212] However, one could

[207] Sentencing "guidelines" within statutory ranges (such as the federal and Minnesota sentencing guidelines) are only advisory. *See* United States v. Booker, 543 U.S. 220, 233 (2005) ("We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range."). The guidelines still allow a judge to sentence anywhere within the statutory range, so long as they justify departures. *See id.* In New York, the sentencing ranges are set by statute. *See* N.Y. PENAL LAW §§ 70.00-70.15 (McKinney 2021). Also, all the statutory and guideline ranges listed above assume a clean record; many defendants sentenced for these crimes, even assuming the harm to the victim is constant, will be subject to more prison time based on their prior record; even prior nonviolent offenses can affect the sentencing guideline range. *See, e.g.*, D.C. SENT'G COMM'N, VOLUNTARY SENTENCING GUIDELINES MANUAL § 7.5 (2020) (explaining how prior convictions can increase ultimate sentence by increasing offender's "criminal history score"); *id.* at § 8.5 (noting that any misdemeanor with a sentence of ninety days or more counts toward criminal history score); *id.* at § 9.4 (giving shoplifting as example of scored prior offense).

[208] Our aggravated assault vignette, which involves nonpermanent but protracted great bodily harm with a deadly weapon, would be a first-degree or second-degree assault in Minnesota (depending on a prosecutor's and jury's determination of whether the harm was protracted (first-degree) or substantial but not protracted (second-degree)). MINN. STAT § 609.223 (2021).

[209] In New York, unarmed burglary of a dwelling is second-degree burglary. *See* N.Y PENAL LAW § 140.25 (McKinney 2021).

[210] In Minnesota, the presence of the dwelling inhabitant during a burglary changes the offense from second- to first-degree, and significantly changes the guidelines range for a first-time offender. *See* MINN. STAT. § 609.582(1)(a) (2021); *see also 2020 Sentencing Guidelines and Commentary,* MINN. SENT'G GUIDELINES COMM'N, https://mn.gov/sentencing-guidelines/guidelines/ [https://perma.cc/AFW6-T9W2] (last visited Sept. 23, 2021).

[211] New York does not differentiate, in terms of sentencing, between a person-present burglary and a burglary of an inhabited dwelling where the inhabitant is not present.

[212] *See, e.g.*, Rebekah G. Bradley & Katrina M. Davino, *Women's Perceptions of the Prison Environment: When Prison Is "The Safest Place I've Ever Been*,*"* 26 PSYCH. WOMEN Q. 351, 351 (2002) (noting that some women felt prison was the "safest place [they] ha[d]

imagine a few potential explanations. One factor correlated with gender is child care; perhaps separation from dependents, even for a small amount of time, is more taxing for some respondents than others.[213] Alternatively, female respondents might be more inured to, and more able to envision enduring, physical threats, pain, and/or injury from experiences with domestic violence or physical pain (for example, childbirth).[214] These arguably surprising results with respect to gender should certainly be subjected to more testing, but in any event, they are further evidence that social scientists and criminal justice scholars should focus more attention on the special impact of imprisonment on women.

Formal education level had a small but significant effect on responses, and this effect also ran in an arguably counterintuitive direction: respondents without a college degree were relatively less tolerant of prison time in general. The difference, if replicated in further studies, could be explained by job security: even small disruptions could have greater effects on low-income or blue-collar workers than on others. (Note, though, that we found no significant effect from income.) It could also be explained by differences in personal experience if respondents with less formal education have better knowledge, or simply a different understanding, of the prison and victimization experience (either through personal experience or the experience of a friend, neighbor, or family member) than other respondents, because of factors that correlate to formal education level.

The self-reported race/ethnicity of the respondent did not play a role in our initial findings except for the aggravated assault vignette, where Black respondents (like female respondents) were relatively more willing to endure harm and less willing to endure prison. This difference, if replicated in future studies, might be explained by these respondents' lower levels of trust in the criminal justice system as a result of experiences such as illegal stops, false arrests, excessive force, or mass incarceration; greater physical insecurity within prison, including race-motivated attacks; greater knowledge, through personal networks, about the long-term direct and collateral consequences of incarceration; or having been inured to the threat of physical assault by having been disproportionately subject to violence.[215]

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ever been," given the disproportionately high amount of violence to which they were subject outside of prison).

[213] *See* Aleks Kajstura, *Women's Mass Incarceration: The Whole Pie 2019,* PRISON POL'Y INITIATIVE (Oct. 29, 2019), https://www.prisonpolicy.org/reports/pie2019women.html [https://perma.cc/KF9Y-FCP3] (noting disproportionate effect of even short amounts of incarceration on child caretaking responsibilities for the 80% of incarcerated women who are mothers).

[214] *Cf.* David M. Bierie, *Prison Violence, Gender, and Perceptions: Testing a Missing Link in Discretion Research*, 37 AM. J. CRIM. JUST. 209, 217-27 (2012) (noting that female social control agents, such as prison staff, perceive fewer interactions with prisoners as minor "assaults" than do male staff, even in similar factual circumstances).

[215] *See* John Gramlich, *From Police to Parole, Black and White Americans Differ Widely*

Finally, respondents who described themselves as "strongly liberal" had a small but statistically significant preference for enduring harm over enduring incarceration compared with other groups, at least with respect to burglary. Overall, respondents would spend an average of fifteen minutes in prison to avoid a burglary, but the "strongly liberal" subset of respondents were not willing even to spend that long. This result might be explained by a number of factors, such as a lower valuation of property rights among some self-described strong liberals, or a greater perception among strong liberals that burglary is often a crime of desperation among substance users or economically vulnerable people, and thus, that they might experience the crime as less threatening or harmful.

Meanwhile, age, income, reported race/ethnicity other than Black respondents, "strongly conservative" political views, and the varied descriptions of the prison experience all had no statistically significant effect on responses in our initial results. These results indicate that a survey of this kind might have policy relevance in showing the gross excessiveness of some criminal sentences in a way that is not dependent on assumptions about the demographic characteristics of potential crime victims.[216]

in Their Views of Criminal Justice System, PEW RSCH. CTR. (May 21, 2019), https://www.pewresearch.org/fact-tank/2019/05/21/from-police-to-parole-black-and-white-americans-differ-widely-in-their-views-of-criminal-justice-system/ [https://perma.cc/2Z75-LWGY].

[216] *See* Roth & Bambauer, *supra* note 191 (on file with author).

Table 2. Statistically Significant Factors Influencing Responses.[217]

	Full Regression	**Burglary**	**Aggravated Assault**
Constant[218]	**39 minutes** (p<0.000)	**15 minutes**	**25 days**
Burglary, Inhabitant Present (compared to burglary)	**+1 hour 35 minutes*** (p<0.035)		
Aggravated Assault (compared to burglary)	**+13.7 days***** (p<0.000)		
Female (compared to burglary-male)	**-31 minutes***** (p<0.000)		**+1 day***** (p<0.000)
No College high school or less (compared to college graduate)	**-35 minutes*** (p<0.011)		
Some College (compared to college graduate)	**-32 minutes**** (p<0.002)		
Black (compared to White and other)			**+3 days*** (p<0.027)
Strongly Liberal (compared to moderate and independent)	**-29 minutes**** (p<0.007)	**-1 minute*** (p<0.016)	
R^2	**0.25**	**0.22**	**0.16**

* = statistically significant at the 5% level (p<0.05); ** = significant at the 1% level (p<0.01); *** = significant at the 0.1% level (p<0.001).

[217] Blank fields indicate that there was no statistically significant difference that could be explained by the independent variable tested.

Because responses had a skewed distribution, with a long tail of responses stretching into months or years while most responses cluster around a day, we converted the outcome measure into a natural logarithm scale, expressed in so-called "log-points." This is a necessary step for running Ordinary Least Squares regressions (which require normal distributions for meaningful interpretation), but the drawback is results reported in log-points are less intuitive. This table reports the regression coefficients two ways: the first column reports all statistically significant coefficients in log-points. The next two columns report the actual estimates (in time) for respondents with different demographic characteristics who were assigned to the burglary or aggravated assault vignettes, respectively.

Because answers are highly skewed, we use the natural logarithm of the amount of time respondents answered (measured in days) for the dependent variable. Respondents who were unwilling to spend any time in prison were coded as -9 in log-days (equivalent to less than a minute).

[218] Burglary committed by a middle-aged, middle-income, White male respondent.

C. *Implications and Future Work*

As a proof-of-concept study, our test survey demonstrates that proportionality in criminal punishments can be measured. Our tentative findings suggest that, at a minimum, the methodology we have introduced could be expanded and improved to create a reliable base of information to assess whether criminal sentences are grossly disproportional to the harms caused by the offenses. Moreover, our tentative results indicate that the penalties for many crimes, even violent crimes, exceed the 10:1 presumptive limit.

And while our test run included only burglary, robbery, and assault, we predict that further iterations of such a study would indicate that punishments are excessive for many other crimes too. For example, we anticipate that most respondents would not be willing to endure much, if any, prison time to avoid being the victim (or society being the victim) of white-collar crimes (not just those committed by wealthy executives, but those committed by lower-income defendants, such as welfare and mortgage fraud) and regulatory offenses, such as those involving prescription or illicit drugs. Admittedly, these sorts of crimes involve more diffuse harm to a large number of people, rather than a high amount of harm to one individual. But the *Campbell* framework accounts for such diffuse harm, and does not immunize punitive damage awards in cases involving diffuse harm from constitutional scrutiny. Nor should criminal punishment in cases involving diffuse harm be allowed to exceed a reasonable multiplier of harm to individuals. Indeed, the Supreme Court (before the era of draconian mandatory minimum sentences for drug offenses) noted that so-called "public welfare" offenses involving diffuse harm and a lack of specific intent to cause harm are only justified, notwithstanding that they push the traditional boundaries of criminal law, because of their low stigma and low prison terms.[219]

Moreover, the tentative results indicate that any amount of incarceration might be unjustified for certain property crimes (for example, burglary without a weapon). Given that most people were unwilling to spend even a single minute in prison to avoid loss of control over real property and theft of tangible property, even under circumstances of an unjustified home entry, our initial results suggest that much antisocial behavior currently addressed through criminal law should be decriminalized and deterred through other means.[220] We realize that crimes such as burglary are longstanding common law offenses for which prison time has traditionally been a punishment deemed constitutionally legitimate, but the

[219] *See* Morissette v. United States, 342 U.S. 246, 259-76 (1952) (refusing to interpret theft statute as imposing strict liability in absence of guilty knowledge, and distinguishing *malum in se* offense such as theft from modern public welfare offenses that have low stigma, diffuse harm, and low sentences).

[220] Or, if the criminal prohibitions remain in place, lawmakers should consider penalties other than custodial arrest. This is consistent with Rachel Harmon's arguments against the common practice of formal arrest. *See* Rachel A. Harmon, *Why Arrest?*, 115 MICH. L. REV. 307, 309 (2016).

perceived harm from offenses is a function of the victims' experiences and sensibilities, and those experiences and sensibilities can change over time.

We recognize that correcting sentences to bring them below the 10:1 ratio might, if our initial results are any indication, involve dramatic sentencing reform beyond the political will of existing legislative bodies. This, too, is a practical concern worth taking on. First, individual judges in individual sentencing hearings might still be persuaded by such arguments, even if legislators are slower to warm to them. Second, policymakers and civil rights litigants could be strategic about the ordering of sentencing reform. Crimes that produce astronomical ratios between the overall sentence and harm-equivalent sentence (like the property crimes we tested above) could be challenged first so that courts and legislatures have the chance to adjust to the rationale and to study the impact on crime rates before reducing sentences for crimes that cause greater social harm.

A final implication of our study relates to prison conditions, rather than simply prison sentence length. The results of studies like this one, and the arguments for substantive due process limits on criminal punishment, should be leveraged in political and judicial campaigns to improve the living conditions in prison. The fact that so many respondents would refuse to serve even a short prison sentence to avoid harmful crime victimization should drive home that the conditions of American prisons and jails are inhumane, from overcrowding to solitary confinement to sexual assault rates to rates of disease (even before COVID-19 dramatically increased the health risks of incarceration) to inaccessibility of proper medical care.[221] We have focused primarily on one way to restore balance between a crime and its punishment—by reducing the amount of prison time. But sentencing reform should be coupled with reforms that make prison less demeaning and personally catastrophic for people incarcerated.

Turning to guidance for future research, we first recognize some inherent limitations and challenges presented by a survey of this kind. First, all vignette studies are limited by doubts about the integrity of self-reporting by respondents who have few external incentives to take the survey seriously. Moreover, it is difficult in a survey to capture the lived experience of being in prison or being the victim of a crime, even among respondents who are making good faith efforts to answer questions with accuracy and care. The arm's length descriptions of prison and criminal victimhood may not adequately invoke the sort of anxiety that people in prison feel when they are actually incarcerated or that crime victims feel in the moment, when they cannot be sure about the motivation or end result of an encounter. In addition, the shorter the vignette, the more room for assumptions by respondents, some of which may be influenced by demographics or experiences. Future research should explore the salience of

[221] *See generally* Andrew P. Wilper, Steffie Woolhandler, Wesley Boyd, Karen E. Lasser, Danny McCormick, David H. Bor & David U. Himmelstein, *The Health and Health Care of US Prisoners: Results of a Nationwide Survey*, 99 AM. J. PUB. HEALTH 666 (2009) (discussing the lack of adequate health care in U.S. prisons).

factors not specified by vignettes, such as the demographics of the person committing the criminal conduct, or the victim's knowledge (or lack thereof) about the motive of that person. Avani Mehta Sood has explored such factors in testing jurors' responses to sample criminal cases, and a similar methodology could be used in this context.[222]

In addition to facing design challenges, surveys of this kind will also become more complex for crimes that have multiple victims, and even more so for crimes that have diffuse harms such as victimless and inchoate crimes. It is also not immediately obvious whether a harm-equivalent sentence needs to take into account the small amount of harm every member of society experiences based on crimes committed on others, and if so, whether vignettes can effectively capture that. Nevertheless, some of these difficulties apply to constitutional limits on tort damages as well. Compensatory damages will not account for or deter the harms to nonplaintiffs caused by living in an environment with unjustified accidents and intentional torts. And yet, courts still find a way to apply the 10:1 limit in the civil context.

Ultimately, we do not and cannot claim that simple vignettes of the type in our sample survey capture all the information potentially relevant to the measure of harm-equivalence. Rather, our aim is to demonstrate that harm-equivalence *can* be measured, leaving open for future studies the opportunity to improve the test instrument.

CONCLUSION

Over the past decade, there has emerged an American consensus that we have overpunished crime. The potential human costs of incarceration and, more broadly, of aggressive law enforcement have gained new political salience in 2020 in the wake of prisoner deaths from COVID-19 and the defund the police movement.

Still, with the exception of incremental legislative changes such as the First Step Act, statutory requirements that a sentence be related to legitimate penal interests, and individual decisions by "progressive prosecutors" to seek lower sentences, few limits exist on the severity of criminal sentences, so long as they are within the statutory maximum. Under a legal regime that treats criminal sentences as legal so long as they relate to traditional goals of punishment such as deterrence and retribution, "overpunishment" is a term that exists only in political, not legal, discourse.

This Article challenges that view, based on an overlooked, but powerful, argument for limiting criminal sentences on due process grounds if they grossly exceed harm-equivalence. Specifically, we have argued that the same substantive due process limits the Supreme Court has recognized in *Campbell*

[222] *See generally* Avani Mehta Sood, *Attempted Justice: Misunderstanding and Bias in Psychological Constructions of Criminal Attempt*, 71 STAN. L. REV. 593, 594 (2019) (presenting findings of "three original experimental studies on lay constructions of attempt law").

for punitive damage awards should apply to criminal sentences. We have addressed likely logical and legal objections to applying *Campbell*'s 10:1 multiplier test to criminal sentences, and have offered a survey instrument as a means of determining, for particular crimes, what the harm-equivalent baseline sentence would be. Certainly, our survey is only a beginning—but it shows the potential use of contingent valuation studies to criminal sentencing.

Regardless of whether due process challenges to criminal sentences on *Campbell* grounds turn out to be successful, we hope and anticipate that the arguments and survey results set forth here can enrich the policy debate about overpunishment. We also hope they might offer concrete guidance for judges facing the decision whether to depart from sentencing guideline ranges, and for prosecutors explaining to the public why they have asked for a sentence below the guidelines or declined to indict a case in a way that triggers a mandatory minimum.

On a more self-reflective note, we found tremendous value collaborating as a torts scholar and a criminal law scholar. We learned a great deal from each other during the course of this project, and believe there is much more opportunity for cross-fertilization and collaborative research as scholars scrutinize the civil/criminal law divide. We hope this Article further inspires such efforts.