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Understanding the United States' incarceration rate

What has caused prison sentences to climb so sharply and consistently in the last four decades?

by WILLIAM T. PIZZI

Introduction

It is no secret that the United States has an alarming rate of incarceration. Even the popular press has jumped on the fact that the U.S. incarceration rate has reached multiples of the rates in other western countries. A 2010 story on the topic in *The Economist* featured a dramatic cover illustration of Lady Liberty herself peering out from behind the bars of a prison cell.¹ The article intoned that "[n]o other rich country is nearly as punitive as the Land of the Free." As proof of that fact, it noted that the United States' incarceration rate is five times greater than Britain's, nine times greater than Germany's and twelve times greater than Japan's.²

In 2008, the *New York Times* also published a feature article on the topic of the U.S. incarceration rate, complete with an interactive chart that allowed readers to click on different countries around the world and compare incarceration rates.³ When one clicked on the United States and then on other countries, one saw quickly why the article was entitled *Inmate Count in U.S. Dwarfs Other Nations*.⁴ While the U.S. rate had climbed to 751 citizens per 100,000, the rates in other western countries were far, far lower. England's incarceration rate was only 151. Canada's

rate was 108, and Germany incarcerated only 88 citizens per 100,000.⁴

The *Times* article also included a timeline showing the U.S. incarceration rate from 1925 until 2006.⁵ What is fascinating and puzzling about the rate is the fact that the chart showed the U.S. rate holding rather steady through the period between 1925 and 1975 with an incarceration rate of roughly 150 to 175 citizens incarcerated per 100,000. Starting in the late 1970s, the rate began to climb sharply and consistently for the next four decades, until it reached its present lofty level.

This historical trend line is somewhat baffling. In those decades of the early and middle twentieth century, when racial discrimination was widespread and when constitutional protections for criminal suspects were comparatively weak, the U.S. incarceration rate stayed steady. Yet, in the period since the 1970s, when our criminal justice system seemed much improved, and we had made considerable strides in our efforts to eliminate racial discrimination, the United States began incarcerating more and more of its citizens for longer and longer periods of time.

The key question is: what has caused prison sentences in the U.S. in the last four decades to become - in the words of criminologist Michael

Tonry—"far harsher than in any country to which the United States would ordinarily be compared"?⁶

The standard response is to blame politicians. Thus, the *Economist*, after noting that the U.S. incarceration rate has quadrupled since 1970, explains that since then,

... the voters, alarmed at a surge in violent crime, have demanded fiercer sentences. Politicians have obliged. New laws have removed from judges much of their discretion to set a sentence that takes full account of the circumstances of the offence. Since no politician wants to be soft on crime, such laws, mandating minimum sentences, are seldom softened. On the contrary, they tend to get harder.⁷

Certainly, horrifying crimes have often led the public to demand tougher sentencing laws. Thus, the killing of Jenna Grieshaber in New York by a parolee led to the passage of "Jenna's law," which requires that those convicted of violent offenses serve 85 percent of their maximum sentence before becoming eligible for parole.⁸ "Jessica's law," increased

1. *Rough Justice*, THE ECONOMIST July 22, 2010, available at http://www.economist.com/node/16640389?story_id=16640389

2. *Id.*

3. See Adam Liptak, *Inmate Count in U.S. Dwarfs Other Nations*, NEW YORK TIMES, April 23, 2008, available at: http://www.nytimes.com/2008/04/23/us/23prison.html?_r=1&fta=y.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Too Many Laws, Too Many Prisoners*, THE ECONOMIST, July 22, 2010 available at: http://www.economist.com/node/16636027?story_id=16636027

8. See Evelyn Nieves, *Our Towns: Lost Crusader Inspires 'Jenna's Law'*, NEW YORK TIMES, May 3, 1998, available at: <http://www.nytimes.com/1998/05/03/nyregion/our-towns-lost-crusader-inspires-jenna-s-law.html>

sentences for sex offenses in Florida (and inspired similar legislation in many other states) after a nine-year old was abducted, raped and killed in that state.⁹ Finally, the horrific murder of Polly Klaas, a twelve-year old dragged at knifepoint from a slumber party at her mother's home, paved the way in California for the passage of the so-called "three strikes" law in that state which mandated a life sentence upon a third conviction.¹⁰

But the *Economist's* explanation is ultimately incomplete. First, it is not just sentences for violent crimes that have escalated, but for all crimes. The *New York Times* article points out that if lists were compiled based on annual admissions to prisons per capita, some European countries would be higher on the list than the United States.¹¹ The U.S. incarceration rate stems from the fact that those sentenced to prison for almost all crimes receive much longer sentences than they would receive in other countries.

Second, if harsher laws were passed after 1970 because politicians feared appearing to be "soft on crime," does this suggest that politicians in earlier decades found political advantage in being soft on crime? And, if one makes the reasonable assumption that brutal and sensational crimes occur from time to time in all western countries, why is it that the politicians in these other countries are not continually passing laws mandating, in *The Economist's* words, "fiercer sentences" upon those convicted?

This Article will suggest that an important, and often overlooked, factor in the rise in our incarceration rate is the fact that the United States bought heavily into the theory that harsh punishments deter criminal behavior. The Article will suggest that several factors came together to encourage this dangerous sentencing philosophy, and to permit it to take hold in this country. The Article will also show why harsh deterrent sanctions, once introduced, will tend to push all sentences higher.

At the same time, this Article is

not intended to absolve politicians for the dramatic and swift rise in our incarceration rate. Certainly, they deserve plenty of blame for an incarceration rate that is an embarrassment among western countries. But once a country begins to accept the principle that harsh sentences that are not proportional to the crime in question are permissible to deter crime, this puts tremendous pressure on even conscientious legislators to pass such laws.

A. The Emergence of "Harsh Deterrence" as a Sentencing Philosophy

General deterrence has a long and distinguished history, stretching back at least to 1764, when the Italian political philosopher Cesare Beccaria published his famous essay *ON CRIMES AND PUNISHMENT*, which expressed a theory of punishment based heavily on deterrence as a goal of punishment.¹² In Chapter XII, on *The Purpose of Punishment*, Beccaria wrote:

The purpose of punishment, therefore, is none other than to prevent the criminal from doing fresh harm to fellow citizens and to deter others from doing the same. Therefore, punishments and the method of inflicting them must be chosen such that, in keeping with proportionality, they will make the most efficacious and lasting impression on the minds of men with the least torment to the body of the condemned.¹³

As a result of passages such as this one, Beccaria is credited with the insight that punishment has, at least in part, a preventative function, namely deterring others from committing crime. But notice that Beccaria is not endorsing deterrence through the imposition of *harsh* penalties. Rather, Beccaria declares that punishments must be chosen such that "*in keeping with proportionality*," they will deter others from committing the same crime. Beccaria believed that deterrence results from the certainty of punishment under a system of laws that mandated mild punishments.¹⁴ (Beccaria himself was a strong opponent

of cruel punishments, including the death penalty.)¹⁵

In the United States, deterrence as a justification for punishment has, over the last four decades, become divorced from any obligation that deterrent punishments be "in keeping with proportionality." As a result, draconian sentences have become rather common in the United States. Their laudable goal is to deter the crime in question, but this is a distortion of traditional deterrence that has been unleashed on our citizens.

This variant of deterrence, which I shall refer to as "harsh deterrence," is largely an American phenomenon. In *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE*, Professor James Whitman explains why statutes visiting harsh sanctions on offenders, such as three-strikes laws, would be "impossible" in European systems.

The European systems all subscribe to some version of the principle of proportionality. This principle holds

9. See Chris Hawke, *Fla. Gets Tough New Child Sex Law*, CBS News, May 2, 2005, available at: <http://www.cbsnews.com/stories/2005/05/02/national/main692465.shtml>

10. See FRANKLIN E. ZIMRING, GORDON HAWKINS, AND SAM KAMIN, *PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA* (2001).

11. See Adam Litak, *supra* note 3.

12. See CESARE BECCARIA, *ON CRIMES AND PUNISHMENTS, AND OTHER WRITINGS*, translated by Aaron Thomas and Jeremy Parzan (2008) [Translation of *Dei delitti e delle pene*, published 1764].

13. *Id.* at 28 (Chapter XII).

14. See JOHN HOSTETTLER, CESARE BECCARIA: THE GENIUS OF 'ON CRIMES AND PUNISHMENTS' 124 (2011). In thinking that mild punishments will deter crime if the risks of being caught and convicted are high, and the punishment is mandated, Beccaria was anticipating social science research that indicates that an increase in the detection, arrest, and conviction rate has a great deterrent effect than an increase in the severity of punishment. See Raymond Paternoster, *The Deterrent Effect of the Perceived Certainty and Severity of Punishment*, 42 JUSTICE QUARTERLY 173 (1987). See also Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and crime: Can both be reduced?*, 10 CRIMINOLOGY & PUBLIC POLICY 13 (2011).

15. See JAMES WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 50 (2003) ("... Beccaria believed that punishment, while it should be unbending, should generally be mild with relatively brief terms of incarceration and relatively light punishments of other kinds.")

that sentences, though indeterminate, cannot be disproportionate to the gravity of the offense; the legal system takes it very seriously; and it means that sentences of American severity are effectively impossible.¹⁶

Why then did the United States come to give free rein to harsh deterrence, and dispense with the obligation of proportionality? This is a complicated question, but let me suggest several factors that worked together to encourage harsh deterrence in the United States.

B. Loss of Confidence in Judicial Sentencing

The first factor contributing to harsh deterrence was a general crisis over sentencing that began in the early 1970s. Traditionally, trial judges in the United States had tremendous power over the fate of defendants when it came to sentencing. It was not unusual for a defendant at the time of sentencing to face a judge with the power to impose a sentence for most felonies anywhere in a range from zero to ten, fifteen, or even fifty years in prison. Moreover, this power was almost completely unlimited; as long as the sentence was within legal

limits, there was no appellate review.

Not surprisingly, this system—though still in place in many jurisdictions today—came under attack. One of the most influential critics of sentencing at that time was Marvin E. Frankel, a federal judge in New York City, who called for reform in a book published in 1973. Judge Frankel attacked the broad sentencing discretion that had been vested in judges, which resulted in wide disparities in the sentences imposed on similar situated defendants.¹⁷ Because he was an outstanding judge and scholar, and because he wrote from “inside” the federal system, Frankel’s exposé of the sentencing system was very influential.

During the same period, there were also studies published that showed—not surprisingly—that judges given the exact same sentencing files arrived at very different, sometimes wildly different, sentencing decisions.¹⁸

In other common law countries, the sorts of disparities that occurred in the United States from judge to judge did not occur with the same frequency. Individual sentences have always been subject to appellate review in other countries¹⁹ and there were frequently appellate opinions offering very detailed guidance on the sentences that should be imposed on offenders who have committed a particular offense.²⁰ In short, if a sentence was out of line with that normally given for a particular crime, a defendant had options to get the sentence corrected that were traditionally not available in the United States.

This does not mean that the relationship between the judicial branch and the legislative branch over sentencing has been smooth in other countries. The public everywhere thinks sentences are too lenient in the wake of horrible crimes, and there has been pressure in many countries for greater legislative control over sentencing through mandatory minimums, sentencing guidelines, and other restrictions on judicial sentencing power. But the judiciary in other countries is better equipped

to defend its sentencing practices because there usually exists a substantial jurisprudence on sentencing that is missing in the United States. Thus, the sort of sharp restrictions on judicial sentencing that are common in the United States, such as high mandatory minimums, have been much less successful to date in those countries.

C. The Allure of Economic Proofs That Harsh Sentences Deter

Another factor contributing to the emergence of harsh deterrence in the United States was a love affair with economics, a love affair that is on the rocks as a result of the financial meltdown. We now know that *homo economicus*, a theoretical construct in human form, that acts on the basis of rationality, self-interest and knowledge, has much less in common with *homo sapiens* than we thought. Many of our decisions, even some of our basic moral judgments, are based on emotion,²¹ and emotions are sometimes a better guide for action than reason.²² And, as former Federal Reserve Board Chair Alan Greenspan confessed to Congress after the 2008 meltdown, some of our economic models—so lovely and elegant in theory—have been shown to be “flawed” when put into practice.²³

Most of the last four decades were heady times for economists. One indication of the rise in stature of this field is the fact that, in 1969, a Nobel Memorial Prize in the Economic Sciences began to be awarded, chosen in the same way as other prizes, though endowed by a bank, not the Nobel Foundation. It also appeared in this period that economists had at their disposal powerful mathematical tools—which they were only too happy to display for the legal establishment—that could answer important questions, such as the deterrent effect of harsh sanctions. The formula seemed simple and powerful; take a number of data sets, convert the data into variables, and regression analysis will then grind out a rather precise mathematical answer to your question. Economics encouraged

16. *Id.* at 57.

17. See MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973).

18. See Alan M. Dershowitz, *Background Paper in FAIR AND CERTAIN PUNISHMENT* 67, 102-05 (1976).

19. Thus, for example, the Canadian criminal code provides that “[w]here an appeal is taken against sentence, the court of appeal shall... consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive, ...vary the sentence within the limits prescribed by law for the offence of which the accused was convicted.” Section 867, *CRIMINAL CODE OF CANADA*.

20. For an excellent summary of the history of sentencing decisions in England, including guideline judgments, see ANDREW ASHWORTH, *SENTENCING AND CRIMINAL JUSTICE*, 34-39 (5th ed. 2010).

21. See Joshua D. Greene, R. Brian Somerville, Leigh E. Nystrom, John M. Darley, Jonathan D. Cohen, *An fMRI Investigation of Emotional Engagement in Moral Decisionmaking*, 293 *SCIENCE* 2105 (September 14, 2001).

22. See Benedict Carey, *In Battle Hunches Prove to be Valuable*, *N.Y. TIMES* July 27, 2009 available at <http://www.nytimes.com/2009/07/28/health/research/28brain.html>

23. See, e.g., PBS Newshour, Greenspan Admits “Flaw” to Congress, Predicts More Economic Problems, October 23, 2008, available at: http://www.pbs.org/newshour/bb/business/july-dec08/crisishearing_10-23.html

legislatures to pass harsh deterrent sentences by “proving” the deterrent power of harsh sentences.

In 1975, the economist Isaac Ehrlich published a paper in which he used data from the period 1933-1969 and found that there was a statistically significant negative correlation between the murder rate and execution rate, meaning that there was a deterrent effect from the death penalty.²⁴ He estimated that for each execution approximately seven or eight murders were deterred.²⁵

In the years following publication of the Ehrlich study, there were numerous articles in economics journals and law reviews that challenged Ehrlich’s methodology and his conclusions.²⁶ Critics claimed that Ehrlich’s data was skewed by the seven-year period from 1963-69, and that Ehrlich had claimed that executions in that period had triggered a decline in homicides during those same years.²⁷ However, the decline in homicides in that period had taken place across all states, including those that did not have the death penalty, so Ehrlich’s model did not show a correlation between executions and murders.²⁸

This ebb and flow of “proof” and then counterattack on the proof continues almost to the present, with proofs claiming that the death penalty deters five²⁹ or even 18³⁰ homicides a year, followed up by strong attacks showing that the variables were not independent, that other factors accounted for the decline, etc.³¹

D. The “Deterrence Wager”

The problem with the debate among economists over the deterrent effect of the death penalty or other deterrent penalties is that the counterattacks do not resolve the issue. Consider, for example, the conclusion of a report of a panel put together by the National Academy of Sciences to evaluate Ehrlich’s work. The panel concluded that “the available studies provide no useful evidence on the deterrent effect of capital punishment.”³² The panel then went on to

state that “research on the deterrent effects of capital sanctions is not likely to provide results that will or should have much influence on policy makers.”³³

Exposing the weaknesses of a study does not prove the opposite. What the panel, in the wake of the Ehrlich study, was telling legislatures was, “Don’t look to us for answers one way or the other as to the deterrent effect question.” The same is true of those economists exposing the weaknesses of more recent claims of strong deterrent effects.³⁴

This helps explain the pressure on legislatures to pass harsh deterrent sanctions. Once freed from any obligation of proportionality, and presented with a harsh law aimed at child molestation (or whatever horrible crime rouses public ire), what is the reason for not passing the law? This is a contemporary version of Pascal’s Wager, namely the deterrence wager. If it is *possible* that a harsh minimum will deter ten or twenty such crimes each year, why should a legislator vote against such a law in the absence of proof that it will *not* deter?

E. The Rising Tide of Sentences

The emergence of harsh deterrent sentences certainly explains some of the rise in our prison population. Some of the more famous harsh deterrent laws passed over the last

decades include drug laws mandating ten or fifteen year minimum sentences, or habitual offender laws that have been passed in probably every state. But why is it that punishment for all crimes seems to have risen over the last four decades?

This is a complicated issue, but let me offer two reasons why harsh deterrence, once unleashed, will raise all sentences. The most obvious is that it is hard to put a limit on crimes deserving harsh deterrent sanctions. If it is possible that a harsh sentence will deter those who might start to experiment with drugs, why shouldn’t a legislature increase the sentence for carjacking, or robbery, or crimes with a gun, in an effort to lower the rate of those crimes as well?

But there is another subtle, yet powerful, force at work that helps explain why judges will tend to sentence other crimes more harshly even if the number of harsh deterrent sanctions in the jurisdiction is few and judges retain broad sentencing discretion. The starting point for understanding this phenomenon is the research of Professor Paul Robinson and others who have demonstrated that, even across demographic, gender, and cultural lines, citizens possess broadly shared intuitions about the relative blameworthiness of different criminal acts.³⁵ Given these shared intuitions,

24. See Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AMER. ECON. REV. 397 (1975).

25. Id.

26. See, e.g., Peter Passell & John B. Taylor, *The Deterrent Effect of Capital Punishment: Another View*, 67 AMER. ECON. REV. 445 (1977).

27. Id.

28. See John Donohue & Justin Wolfers, *The Death Penalty: No Evidence for Deterrence*, ECONOMISTS’ VOICE, 1, 2 (April 2006) at <http://www.bepress.com/cgi/viewcontent.cgi?article=1170&context=ev>

29. See H.Naci Mocan & R. Kaj Gitting, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J. L. & ECON. 453 (2003).

30. See Hashem Dezhbakhsh, Paul H. Rubin, and Joanna Shepherd, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Post-mortem Panel Data*, 5 AMER. L. AND ECON. REV. 344 (2003).

31. See, e.g., Jeffrey Fagan, *Death and Deterrence Redux: Law and Causal Reasoning on Capital Punishment*, 4 OHIO S. J. CRIM. L. 255 (2006);

Richard Berk, *New Claims About Executions and General Deterrence: Déjà vu All Over Again*, 2 J. EMPIRICAL LEGAL STUD. 303 (2005); John J. Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005).

32. NAT’L ACADEMY OF SCIENCES, DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 3, 9, 12 (Alfred Blumstein et al. eds., 1978).

33. Id.

34. In their 2005 article exposing the weaknesses of articles claiming to show a deterrent effect from capital punishments, Professors John Donohue and Justin Wolfers state that “as to whether executions raise or lower the homicide rate, we remain profoundly uncertain.” See Donohue & Wolfers, *supra* note 28, at 843.

35. See Paul H. Robinson, Robert Kurzban & Owen D. Jones, *The Origins of Shared Intuitions of Justice*, 60 VAND. L. REV. 1633 (2007); Paul H. Robinson & John M. Darley, *Intuitions of Justice: Implications for Criminal Law and Justice Policy*, 81 S. CAL. L. REV. 1 (2007).

one should expect that powerful deterrent punishments for even a handful of crimes would eventually have an impact on the sentences for crimes that everyone would consider far more serious. Thus, if five years is the required minimum sentence for possession of cocaine, it will put tremendous pressure on judges to sentence at something close to that level (or even higher) for the many crimes that we would generally consider far more serious crimes.

In short, though we do not have a strong societal understanding of the exact sentence that crimes like aggravated assault, robbery, or sexual abuse of a minor deserve as "just dessert," we know quite well that these crimes are more serious than possession of cocaine, and sentences will tend to reflect our strongly ingrained instincts about the relative blameworthiness of different criminal acts. Thus, even in a jurisdiction where judges retain considerable sentencing discretion for most crimes, sentences will over time be influenced by even a few harsh deterrent punishments for particular crimes.

F. The Importance of Proportionality

The sad lesson the United States demonstrates is that, once a country abandons the requirement of proportionality in sentencing and permits harsh deterrence to take

hold on its soil, harsh deterrence will push all sentences higher, limited only by the resources a jurisdiction can commit to staffing and running prisons.

Public pressure for harsher sentences in response to horrifying crimes is, of course, not limited to the United States, and incarceration rates have gone up in some other countries. But they have avoided the extremes seen in the United States because there is usually a much stronger commitment to proportionality in sentencing. Mention was made earlier of the commitment to proportionality in European systems. But another country that may have more to teach us about proportionality is Canada, our neighbor to the north, which shares our common law tradition, and has crime rates that generally track with the ebb and flow of the U.S. rate.³⁶ Yet that country's incarceration rate remains roughly what it was forty or fifty years ago, slightly more than a 100 people incarcerated per 100,000.³⁷

What has enabled Canada—so far—to keep its incarceration rate so low compared to the United States? This is a complicated question that would be well worth a longer examination than is possible here. But one thing that has certainly helped is the strong commitment in Canada to proportionality in sentencing. Section 718.1 of Canadian Criminal Code, under the heading "Fundamental principle," requires that: "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."³⁸ This principle plays a pivotal role in sentencing jurisprudence in Canada. One can see this principle directly in the way courts review individual sentences,³⁹ but also indirectly in the willingness of the Canadian Supreme Court to strike down a mandatory minimum of seven years for importing drugs as violative of the protection against cruel and unusual punishment in § 12 of the Charter of Rights and Freedoms.⁴⁰

In the United States, proportionality in sentencing has come to be viewed as simply an option rather

than a mandate. Too many citizens pay a heavy price as a result.

Conclusion

Putting the blame for our shocking incarceration rate solely on the backs of politicians is both unfair and unproductive. This Article maintains that a number of factors came together to permit, and even encourage, the escalation of sentences in the United States. One of those factors was acceptance of the illusion that harsh deterrent sanctions will deter undesirable social conduct. Sadly, harshness breeds harshness and harsh deterrent sentences will push all sentences higher.

If we wish to reform the system, there are many options. So far, the Supreme Court has been unwilling to see our constitutional protection against cruel and unusual punishment as a shield from brutally long sentences.⁴¹ But we are at the point where the threat of a harsh deterrent sentence is undercutting other constitutional rights. What good are trial rights such as the assistance of counsel, the right to confront witnesses, and the right to have a jury decide one's fate, if the risk of conviction is too steep to allow a defendant, even one with a strong defense, to exercise these rights? ★

36. See Anthony N. Doob & Cheryl Marie Webster, *Countering Punitiveness: Understanding Stability in Canada's Imprisonment Rate*, 40 *LAW & Soc'y REV.* 325, 327-29 (2006).

37. *Id.* at 331.

38. *Id.*

39. One can see the importance of § 718.1 in a case like *R. v. Priest*, 1996 CarswellOnt 3588, 110 C.C.C.(3d) 289, 30 O.R. (3d) 538, 93 O.A.C. 163, 1 C.R. (5th) 275, where the appellate court vacated a one-year prison sentence imposed on a first-time offender on the ground that the sentence was wholly disproportionate to the crime and the offender under the circumstances.

40. See *R. v. Smith* (Edward Dewey), [1987] 1 S.C.R. 1045. In his opinion, Justice Lamer stated: This does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender...but only that the resulting sentence must not be grossly disproportionate to what the offender deserves. 1 S.C.R. 1045 at 1073.

41. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957 (1991).

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