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Invisible Prisons

M. Eve Hanan*

Modern punishment theory is based on an inadequate conceptualization of the severity of incarceration. While the severity of a prison sentence is measured solely in terms of the length of time, the actual experience of imprisonment is often more punishing and more destructive than a simple loss of liberty. Yet, lawmakers and judges evince a surprising lack of institutional interest in understanding the experience of imprisonment and applying this knowledge to sentencing. This lack of official attention to how prison is experienced by incarcerated people is one of the drivers of mass incarceration.

This Article is the first scholarly work to analyze the weaknesses of punishment theory using a new and flourishing branch of political philosophy: epistemic injustice theory. The theory posits that disfavored social groups are excluded from contributing information about their experience that should be relevant to policy decisions. Epistemic injustice theory can be applied to analyze why incarcerated people's accounts of prison's cruelties are ignored or discounted in punishment decisions. As a disfavored group, prisoner accounts of prison's harshness are discredited. As a result, sentencing decisions are made with only the thinnest understanding of the punishment being imposed — number of years of lost liberty — and with no accounting for the actual impact of incarceration on the person sentenced.

* Copyright © 2020 M. Eve Hanan. Associate Professor, University of Nevada Las Vegas, Boyd School of Law, J.D. University of Michigan Law School. I thank Monica Bell, Erin Braatz, Erin Collins, Malcolm Feeley, Thomas Frampton, RaShya Ghee, Miriam Gohara, Daniel Harawa, Alexis Karteron, Benjamin Levin, Kathryn Miller, Teri McMurty-Chubb, Lydia Nussbaum, William Ortman, Shaun Ossei Owusu, Anna Roberts, Ashley Rubin, Maneka Sinha, Kimberly Thomas, Emma Thompson, Robin Walker Sterling, Fred Van Dyk and the organizers of conferences at which I presented this Article, including, the Law and Society Association's annual conference, NYU Law School's Clinical Writer's Program, LatCrit, CrimFest, the University of Colorado Junior Scholars Forum, and the AALS Clinical Conference. I offer special thanks to Elizabeth Manriquez for her exceptional skills as a research librarian locating hard-to-find sources.

Applying the framework of epistemic injustice to explore the thinness of punishment theory serves more than a descriptive function. It also forms the basis for concrete recommendations to improve sentencing policy and practice. To this end, the Article suggests (1) how sentencing authorities can exercise epistemic responsibility in punishment decisions; (2) how incarcerated people can participate in knowledge-creation; and (3) how the problem of variability of prison conditions can be accounted for in sentencing.

TABLE OF CONTENTS

INTRODUCTION	1187
I. THE RELEVANCE OF PRISON'S CRUELITIES TO SENTENCING	1193
A. <i>Punishment as a Number</i>	1197
B. <i>Prison-As-Experienced and the Traditional Goals of Sentencing</i>	1203
1. Proportionality in Retribution.....	1204
2. Parsimony in Deterrence and Incapacitation.....	1206
3. Frustrating Rehabilitation and Specific Deterrence.	1208
C. <i>Towards a Theory of Injustice in Punishment</i>	1210
II. EPISTEMIC INJUSTICE: DISINTEREST AND IGNORANCE	1213
A. <i>The Philosophical Study of Epistemic Injustice</i>	1214
B. <i>Hidden Punishment's Open Secrets</i>	1219
III. EPISTEMIC VIRTUE IN SENTENCING DECISIONS	1223
A. <i>Responsible Listening</i>	1226
B. <i>Incarcerated Voices in Punishment Decisions</i>	1229
1. Participation in Sentencing Policy and Practice	1229
2. Writing from Prison	1233
C. <i>Variation in Prison Experiences</i>	1238
1. Variation as an Epistemic Concern	1238
2. A Proposal for Dealing with Variability: Assume the Worst	1241
CONCLUSION.....	1242

INTRODUCTION

Life inside U.S. prisons is both the object of public fascination and invisible in sentencing policy. On the one hand, popular culture demonstrates an obsession with prison stories.¹ Whether fancifully, such as television shows set in prison,² or seriously, such as journalistic reports of prison conditions,³ impressions of what prison is like are available at our digital fingertips. Beyond what is easily digestible in video, podcast,⁴ and blog⁵ format, are decades of social science studies

¹ See CALEB SMITH, *THE PRISON AND THE AMERICAN IMAGINATION* 6 (2009).

² See, e.g., ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 18 (2003) (remarking upon the widespread belief that we think we know what prison is like because of depictions of prison in television shows like *Oz*). Netflix claimed that over one hundred million viewers have tuned in to watch *Orange Is the New Black*, a television series based on Piper Kerman's memoir of her incarceration in federal prison. Ron Lyons, Jr., *Netflix Says 105 Million Subscribers Have Watched an Episode of Orange Is the New Black*, SLATE (July 19, 2019, 6:33 AM), <https://slate.com/culture/2019/07/orange-is-the-new-black-netflix-105-million-viewers.html> [<https://perma.cc/W73V-9RX3>].

³ For example, The New York Times' two-part series on an Alabama prison, which drew on diverse sources such as photographs and prisoner letters. 'No One Feels Safe Here': *Life in Alabama's Prisons*, N.Y. TIMES (Apr. 29, 2019), <https://www.nytimes.com/2019/04/29/us/alabama-prison-inmates.html> [<https://perma.cc/KZ87-4W62>].

⁴ For example, EAR HUSTLE, <https://www.earhustlesq.com> (last visited Dec. 13, 2020) [<https://perma.cc/MF54-JRZ9>], a podcast made by prisoners in San Quentin Correctional Facility, California.

⁵ See, for example, Byron Case, *The Pariah's Syntax: Unbound Notes from an Innocent Man*, PARIAH BLOG, <http://www.pariahblog.com> (last visited Dec. 13, 2020) [<https://perma.cc/Z3BE-6QUY>] (describing life inside of maximum-security prison); INMATE BLOGGER, <https://inmateblogger.com> (last visited Dec. 13, 2020) [<https://perma.cc/3RXX-FHDG>], a web platform where incarcerated men and women blog about their experiences; PRISON WRITERS, <http://prisonwriters.com> (last visited Dec. 13, 2020) [<https://perma.cc/H6AY-9AAR>], a web platform showcasing the writing of incarcerated people.

on prison life.⁶ Moreover, prisoner memoirs,⁷ poetry,⁸ and newspapers,⁹ provide direct sources of prisoner perspectives on their experiences of incarceration. Some formerly incarcerated people practice as attorneys,¹⁰ and serve as our academic colleagues in law¹¹ and criminology.¹² In short, it is possible to immerse oneself in information about what it is like to be in prison and thereby achieve some understanding, however imperfect, of what I will call prison-as-experienced.

⁶ For a summary of twentieth century studies of prison life, see, for example, Lori Sexton, *Penal Subjectivities: Developing a Theoretical Framework for Penal Consciousness*, 17 PUNISHMENT & SOC'Y 114, 116-118 (2015) (reviewing literature regarding prison studies conducted in the twentieth century). Sexton's article also promulgates a new framework for how prisoners understand their punishment. See *id.* at 128-31.

⁷ See, e.g., JACK HENRY ABBOTT, *IN THE BELLY OF THE BEAST* (1981) (describing incarceration in a series of letters to Norman Mailer); WILBERT RIDEAU, *IN THE PLACE OF JUSTICE: A STORY OF PUNISHMENT AND DELIVERANCE* (2010) (describing the author's experience serving a life sentence at Louisiana's "Angola" prison).

⁸ See, e.g., JIMMY SANTIAGO BACA, *A PLACE TO STAND: THE MAKING OF A POET* (2001) (describing the author's process of becoming a poet while incarcerated); REGINALD DWAYNE BETTS, *FELON: POEMS* (2019) (detailing a formerly incarcerated poet's perspective through a compilation of poetry).

⁹ The most acclaimed prison newspaper was *The Angolite*, published by prisoners in Louisiana State Penitentiary, which received numerous journalism awards. See Stephanie Kane, *An Interview with the Most Rehabilitated Prisoner in America*, 39 LITIG. 16, 16 (2013) (interviewing prison journalist, Walter Rideau, about his work and awards as the editor of *The Angolite*).

¹⁰ See, e.g., Innocence Staff, *Exoneree Jarrett Adams Defends Kevin Bailey's Innocence in Chicago Court*, INNOCENCE PROJECT (Dec. 20, 2016), <https://www.innocenceproject.org/exoneree-back-in-court-as-lawyer/> [<https://perma.cc/43Z3-7KHE>] (profiling Jarrett Adams, an exoneree who went on to become an attorney working with the Innocence Project).

¹¹ See, e.g., *Shon Hopwood*, GEORGETOWN LAW, <https://www.law.georgetown.edu/faculty/shon-hopwood/> [<https://perma.cc/2BSE-795Y>] [hereinafter GEO. LAW] (profiling Georgetown Law Associate Professor Shon Hopwood, whose research includes sentencing policy and practice). See generally Shon Hopwood, *Second Looks and Second Chances*, 41 CARDOZO L. REV. 83 (2019) (investigating ways that the criminal justice system can reform sentences for incarcerated people based on evidence of rehabilitation, in which the author uses his story as an example).

¹² In the emerging discipline of "convict criminology," formerly incarcerated people in academia study criminal justice issues from an "insider perspective." Stephen C. Richards & Jeffrey Ian Ross, *Introducing the New School of Convict Criminology*, 28 SOC. JUST. 177, 182 (2001). The Division of Convict Criminology is a loosely affiliated group of researchers working from this perspective. DIV. OF CONVICT CRIMINOLOGY, <https://www.concrim.org/> (last visited Dec. 13, 2020) [<https://perma.cc/V23G-LYC9>].

Despite variation in prison experiences, which I will say more about later,¹³ there are many similarities.¹⁴ Accounts of incarcerated people depict prison as an environment of isolation, deprivation, violence, and the threat of violence.¹⁵ Incarcerated prison journalist Walter Rideau described imprisonment as being “assaulted psychologically and emotionally, [in a] way in which you are robbed of any dignity as a human being and told in countless ways that you don’t matter.”¹⁶ Degradation results from many aspects of regulated prison life, including the complete loss of privacy that inheres in strip searches and open toilets and showers.¹⁷ Even relatively safe and well-resourced prisons exercise total control over prisoners by regulating almost every aspect of life, including food, sleep, clothing, hygiene, medical care, daily schedule, and social contact. This total control results in total vulnerability.¹⁸

British and U.S. prisons have been demonstrably cruel since at least the eighteenth century, as both the author, Charles Dickens and the prison reformer, John Howard, reported.¹⁹ And prisons remain like this. Steve Martin, a prison reform advocate who has spent forty-six years working in prisons, was asked in an interview, “[I]s it inevitable that prison and

¹³ See *infra* Part III.C.

¹⁴ See, e.g., ERVING GOFFMAN, *ASYLUMS: ESSAYS ON THE SOCIAL SITUATION OF MENTAL PATIENTS AND OTHER INMATES* (1961) (analogizing between mental hospitals and prisons as “total institutions”); GRESHAM SYKES, *THE SOCIETY OF CAPTIVES* (1958) (comparing carceral systems to totalitarian regimes). Both describe aspects of the carceral experience across types of confinement and institutional settings.

¹⁵ See *infra* Part I.

¹⁶ RIDEAU, *supra* note 7, at 338.

¹⁷ See, e.g., DWAYNE BETTS, *A QUESTION OF FREEDOM: A MEMOIR OF LEARNING, SURVIVAL, AND COMING OF AGE IN PRISON 15* (2009) (describing repeated requests for a shower and clean clothes, Betts explains, “[y]ou could beg, but that just made you feel . . . like you weren’t in control of yourself. Worse than that, you could beg and still not get anything”).

¹⁸ See Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 912-13 (2009) [hereinafter *Cruelty*] (describing incarcerated individuals’ complete vulnerability to and dependence on prison administration).

¹⁹ See JOHN HOWARD, *THE STATE OF THE PRISONS IN ENGLAND AND WALES, WITH PRELIMINARY OBSERVATIONS AND AN ACCOUNT OF SOME FOREIGN PRISONS AND HOSPITALS* 5-15 (2d ed. 1777) (documenting violence and deprivation in eighteenth century British prisons). Charles Dickens described his discussions with and observations of prisoners in Philadelphia’s Eastern State Penitentiary with attention to its use of solitary confinement. CHARLES DICKENS, *AMERICAN NOTES FOR GENERAL CIRCULATION* 41 (1842) (“I went from cell to cell that day; and every face I saw, or word I heard, or incident I noted, is present to my mind in all its painfulness.”).

confinement circumstances are gonna be awful?”²⁰ Martin answered, “The short answer is yes.” He went on to say that “what is rarely talked about is how literally debilitating actual confinement is. It is so often cruel, it’s so often brutal, it’s so often violent, and it’s always unforgiving.”²¹ Borrowing from Martin, I will refer to the constellation of prison experiences as prison’s cruelties. I mean the colloquial sense of the word cruelty and leave its constitutional implications for another day.

While, on the one hand, fictional and factual accounts of prison life abound, prison’s cruelties literally and figuratively *do not count* in punishment decisions. As Adam Kolber aptly put it, “We fetishistically focus on the length of prison terms, even though sentence severity cannot just be a function of time.”²² To be clear, I am not addressing (as Kolber does in the article I quote) how each individual defendant may be differently impacted by prison.²³ Troublingly, when judges raise concerns over prison’s cruelties for individual defendants, it is often when they are sentencing wealthy white defendants.²⁴ Rather than focusing on individual differences, I highlight the need for a deeper understanding of prison’s cruelties both when lawmakers enact criminal statutes and when judges think generally about what they are sentencing defendants *to*.

This Article takes a novel approach to analyzing the lack of salience that prison’s cruelties have in punishment decisions by applying a theory based in political philosophy: epistemic injustice. Coined by Miranda Fricker in 2007, epistemic injustice studies how subordination of social groups leads to excluding those groups from producing and

²⁰ *Stay Tuned: Behind Barrs (with Steve Martin, Prison Reformer)*, CAFE (Mar. 28, 2019), <https://cafe.com/stay-tuned-behind-barrs-with-steve-martin-prison-reformer/> [<https://perma.cc/FX4Z-DB92>].

²¹ *Id.*

²² Adam J. Kolber, *Unintentional Punishment*, 18 LEGAL THEORY 1, 2 (2012).

²³ For a thorough and intriguing discussion of considering the individual’s subjective experience of punishment at sentencing, see Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 196-218 (2009) [hereinafter *The Subjective Experience*].

²⁴ See Mark W. Bennett, Justin D. Levinson & Koichi Hioki, *Judging Federal White-Collar Fraud Sentencing: An Empirical Study Revealing the Need for Further Reform*, 102 IOWA L. REV. 939, 947 (2017) (“White-collar defendants received ‘special empathy’ because their position in society was more like the judge’s own position.”) (quoting Daniel Richman, *Federal White Collar Sentencing in the United States: A Work in Progress*, 76 L. & CONTEMP. PROBS. 53, 55 (2013)); Stevens H. Clarke & Gary G. Koch, *The Influence of Income and Other Factors on Whether Criminal Defendants Go to Prison*, 11 L. & SOC’Y. REV. 57, 81 (1976) (finding higher income defendants are less likely to receive prison sentence).

sharing knowledge.²⁵ Prisoners, as an excluded and often reviled group, are not viewed as having trustworthy and relevant information. Their experiences of imprisonment are ignored or discounted, contributing to the dearth of knowledge about prison-as-experienced applied in sentencing decisions. This thin understanding of what prison is like, in turn, fuels the sense that prison-as-experienced is irrelevant to sentencing decisions and, therefore, not worth learning about.

Epistemic injustice provides an analytic lens for viewing the seeming paradox of the wide availability of accounts of prison's cruelties and their lack of influence in sentencing policy and practice. One might wonder whether lawmakers and judges lack information about prison's cruelties or simply think prison's cruelties do not matter to their work.²⁶ The seeming tension between the two explanations is illustrated in a 1984 *Nightline* interview with U.S. Supreme Court Chief Justice Burger, who was invited to debate an incarcerated prison journalist, Walter Rideau.²⁷ Chief Justice Burger argued that lawmakers and judges are unaware of prison's cruelties, and that they should educate themselves about what prison is really like by visiting prisons and speaking face-to-face with men like Mr. Rideau. (It was not much of a debate, as Chief Justice Burger and Mr. Rideau agreed.) Yet, was lack of information about prison's cruelties really the issue? *Nightline's* Ted Koppel told the Chief Justice that people were calling in to the live-cast show saying, "To hell with those people!" While the Chief Justice and Mr. Rideau continued to advocate for education of lawmakers, Mr. Koppel's callers suggested public hostility to prisoners rather than ignorance of their plight in prison. The lack of knowledge and the lack of empathy are mutually reinforcing, as epistemic injustice theory makes clear.

Finally, epistemic injustice theory prescribes practices for including marginalized voices in political decisions. By including incarcerated voices, sentencing policy and practice can take a first step toward understanding what we do when we sentence individuals to prison. Punishment decisions may be lawful and yet unjust from a political perspective. As Judith Shklar argues, accurate theories of injustice

²⁵ See MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER & THE ETHICS OF KNOWING* 1-2, 131 (2007).

²⁶ See generally ROBERT A. FERGUSON, *INFERNO: AN ANATOMY OF AMERICAN PUNISHMENT* 218 (2014) [hereinafter *INFERNO*] (describing how prison narratives illuminate how terrifying and destructive many prison experiences are, and acknowledging the lack of interest or empathy in those narratives, even the prevalence of sexual assault in prison).

²⁷ See *Nightline* (ABC television broadcast June 19, 1984), <https://tvnews.vanderbilt.edu/broadcasts/657005> [<https://perma.cc/USD8-JF3H>].

require cataloguing the harms that people experience in order to determine which harms we consider incidental and which harms we consider the product of injustice.²⁸ The line between the incidental and the unjust is a political line that we can only draw after considering the varieties of harm people experience.

In other words, sentencing authorities should not make punishment decisions based on the assumption that prison is a neutral space where occasional injustice occurs. Prison is defined by its experienced cruelties, and these cruelties must be accounted for in sentencing. No other approach ensures that sentencing policy will be based on a realistic assessment of the damage inflicted by incarceration. To this end, incarcerated people must be active participants in shaping public, collective understanding of prison's cruelties.

Part I has descriptive and normative elements. First, I describe how sentencing theory and practice rely on quantification to measure the severity of punishment. I argue that prison-as-experienced is relevant to sentencing, particularly in light of the traditional goals of punishment and their limiting principles of parsimony and proportionality. I then lay out the broader argument that a political understanding of any injustices involved in the practice of incarceration *cannot* be adequately understood without consideration of prison-as-experienced.

In Part II, I introduce and apply the framework of epistemic injustice to shed light on how prison-as-experienced is overlooked, ignored, and poorly understood precisely because incarcerated people are not viewed as trustworthy and essential producers of knowledge. I explain how the resultant lack of interest and knowledge about prison-as-experienced reinforces the erroneous belief among sentencing authorities that prison's cruelties are not relevant to sentencing. I then make the case for an epistemic correction: the necessity of first-hand accounts of the prison experience to combatting both the interest and information deficits in sentencing policy and practice.

In Part III, I discuss how lawmakers and other sentencing authorities should approach knowing more about prison. I then address how sentencing authorities should apply their knowledge of prison's cruelties to punishment decisions. Because they cannot dictate prison conditions, sentencing authorities should make punishment decisions assuming that the worst of prison's cruelties may befall any person sentenced to prison.

²⁸ JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 50 (1990) (discussing how political theory is "ideally suited to investigate the question of how to separate injustice from misfortune").

I. THE RELEVANCE OF PRISON'S CRUELITIES TO SENTENCING

What prison is like for incarcerated people is relevant to sentencing policy and practice. In this Part, I briefly address some of the generalizable themes of prison's cruelties in order to frame the discussion of relevance. I then critique the current method of measuring the severity of prison sentences solely in units of time. I analyze the relevance of prison's cruelties to the traditional goals of and limits on punishment. Finally, I argue that a full accounting of prison's cruelties is essential to the larger public debate about the carceral response to crime.

To be sure, prison experiences are not homogeneous. People differ in how they experience prison; prison conditions vary by prison and even by unit within the same prison. Yet, despite variation, general themes emerge that may fairly be considered hallmarks of imprisonment.²⁹ Conceived of as an archipelago society of incarcerated people living with one another, prisons and jails constitute the fourth largest city in the United States.³⁰ Cities may vary, but the experience of living in cities has certain constants, as the author Italo Calvino suggests when he writes that there is only one city in the world, broken into an archipelago.³¹ The shared experiences across prisons in the archipelago allow us to — with humility and room for correction — describe prison's cruelties.

First, and ever central to a discussion of U.S. prisons is violence and the fear of violence, which should be understood as both sanctioned and unsanctioned violence. Sanctioned violence occurs in the order to incarcerate,³² disciplinary measures, threats of violence, and actual

²⁹ Although prisoners do not form a monolith, sharing one experience of incarceration, diverse voices can form a "plural subject" when expressing their perspectives in a coordinated way. See generally Margaret Gilbert, *Modelling Collective Belief*, 73 *SYNTHESE* 185 (1987) (theorizing that acceptance of a common experience can define a group as much as a single belief).

³⁰ *Introduction: The American Prison Writer as Witness*, in *FOURTH CITY: ESSAYS FROM THE PRISON IN AMERICA* 1, 1 (Doran Larson ed., 2013).

³¹ See ITALO CALVINO, *INVISIBLE CITIES* 128-29 (William Weaver trans., 1972). In his fictitious account of a conversation between Kublai Khan and Marco Polo, Khan asks Polo why he talks about the cities he visited but will not talk about his hometown. Polo responds, "[e]very time I describe a city I am saying something about Venice." *Id.* at 86.

³² See Robert M. Cover, *Violence and the Word*, 95 *YALE L.J.* 1601, 1607 (1986) (noting that "most prisoners walk into prison because they know they will be dragged or beaten into prison if they do not walk"). To support his claim that judicial orders of incarceration are acts of violence, Cover refers the reader to first-person narratives of prisoners. *Id.* at 1608 n.19 (citing ELDRIDGE CLEAVER, *SOUL ON ICE* 128-30 (1968)); see also JEROME WASHINGTON, *A BRIGHT SPOT IN THE YARD: NOTES AND STORIES FROM A PRISON JOURNAL* 5 (1981).

violence that prison guards may use to secure prisoners' day-to-day compliance.³³ Unsanctioned violence is also a general feature of U.S. prisons. A 2009 study concluded that "[p]hysical and sexual assault are part of the prison experience," with at least 20% of male prisoners experiencing a physical assault during any six-month period.³⁴ Strikingly, almost 50% of the assaults reported were committed by guards.³⁵ It is fair to say that, although officially forbidden, violent — and sometimes sexual — assaults are part of the fabric of prison life, not an exception.³⁶ Put another way, violence in prison is a feature not a bug.

Second, even in the absence of violence, prison places the prisoner in a state of total vulnerability.³⁷ The incarcerated person is at the mercy of the rules and whims of the prison administration and its staff. The rules that tightly control prison life often seem arbitrary and arbitrarily applied,³⁸ provoking "a sense of madness and superfluous cruelty."³⁹ In addition, access to basic physical and psychological necessities, including food, medical and mental health care, and hygiene products may be limited or sporadically available.⁴⁰

Third, the isolation of prison life is often experienced as banishment, permanent exclusion, and civic death.⁴¹ This sense of banishment and

³³ Violence as an expected instrument of prison guards is nothing new. In the early nineteenth century at the Quaker-conceived Eastern State Penitentiary in Philadelphia and New York's Auburn Prison, disobedient prisoners were bound in metal restraints, beaten with a barbed whip, and held in solitary. SMITH, *supra* note 1, at 44.

³⁴ Nancy Wolff & Jing Shi, *Contextualization of Physical and Sexual Assault in Male Prisons: Incidents and Their Aftermath*, 15 J. CORRECTIONAL HEALTH CARE 58, 58 (2009).

³⁵ See RAMONA R. RANTALA, JESSICA REXROAT & ALLEN J. BECK, BUREAU JUST. STAT. U.S. DEP'T JUST., SURVEY OF SEXUAL VIOLENCE IN ADULT CORRECTIONAL FACILITIES, 2009–11 - STATISTICAL TABLES 1 (2014), <https://www.bjs.gov/content/pub/pdf/ssvacf0911st.pdf> [<https://perma.cc/DX4P-N6SQ>].

³⁶ See, e.g., RIDEAU, *supra* note 7, at 155 (explaining that complicit security offenders condone and maintain the existence of sexual violence, an integral part of life in prison).

³⁷ Dolovich, *Cruelty*, *supra* note 18, at 913.

³⁸ See RIDEAU, *supra* note 7, at 338 (describing prison life as "endless aggravation" at the stupidity of administration and "unparalleled boredom").

³⁹ *Id.* at 164.

⁴⁰ See Lori Sexton, *Under the Penal Gaze: An Empirical Examination of Penal Consciousness Among Prison Inmates* 44-45 (Sept. 2012) (unpublished Ph.D. dissertation, University of California, Irvine) (for the U.S. Department of Justice), <https://www.ncjrs.gov/pdffiles1/nij/grants/239671.pdf> [<https://perma.cc/YM49-TDHE>] [hereinafter *Under the Penal Gaze*]. Part of the punishment as experienced, for example, is not only having a medical ailment, but realizing that the prison officials will not arrange medical treatment. See *id.* at 45-46.

⁴¹ Sharon Dolovich, *Creating the Permanent Prisoner*, in LIFE WITHOUT PAROLE: AMERICA'S NEW DEATH PENALTY? 96, 97 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012) ("[T]he American carceral system, once to some extent at least rhetorically

death may be exacerbated by separation from family and community.⁴² Testifying before a Congressional Committee, Piper Kerman showed a scene from *Orange is the New Black* in which an incarcerated woman who had just given birth was returned to prison without her child.⁴³ One Congressman viewing the scene described it as “heart wrenching.”⁴⁴ This “agony of separation” from family has been described by many prisoners, including Nelson Mandela.⁴⁵ Other incarcerated people have described the pain caused by the death of a loved one who cannot be properly mourned from a prison cell.⁴⁶

Fourth, imprisonment produces feelings of physical stress. In interviews with prisoners, imprisonment was characterized as provoking sensations of pressure, weight, tightness, and suffocation.⁴⁷ These sensations fit with the root of the word prison, from the Latin word for “laying hold of” someone,⁴⁸ as if the prisoner is being squeezed inside of a giant hand. This creates an ongoing, psychological discomfort that is palpable when reading prison writing. It is an aspect of the prison experience that is difficult to capture in numbers or other objective measurements.

Fifth, many incarcerated people describe a loss of self, sometimes characterized as a psychological or spiritual death.⁴⁹ Separated from

committed to reintegration . . . has come explicitly to embrace the opposite approach, that of permanent exclusion.”).

⁴² *Id.* at 105. Rideau talks about the “emotional deprivation” of having no real bonds. RIDEAU, *supra* note 7, at 338.

⁴³ *Women in the Criminal Justice System*, CSPAN (July 16, 2019), <https://www.c-span.org/video/?462673-1/women-criminal-justice-system> [<https://perma.cc/UAB7-XHAD>].

⁴⁴ *Id.*

⁴⁵ See Tayari Jones, Opinion, *What Nelson Mandela Lost*, N.Y. TIMES (July 6, 2018), <https://www.nytimes.com/2018/07/06/opinion/sunday/nelson-mandela-tayari-jones-prison-letters.html> [<https://perma.cc/GL5F-VPRY>].

⁴⁶ See, e.g., Faruq (Robert Douglas Wideman), *Lost and Gain*, in LIFE SENTENCES: WRITINGS FROM INSIDE AN AMERICAN PRISON 109 (Norm Conti et al. eds., 2019) [hereinafter LIFE SENTENCES] (“In prison, you cannot go through the process of gathering with relatives and friends to share grief.”).

⁴⁷ See Ben Crewe, *Depth, Weight, Tightness: Revisiting the Pains of Imprisonment*, 13 PUNISHMENT & SOC’Y 509, 522 (2011).

⁴⁸ OXFORD, LEXICO, <https://www.lexico.com/en/definition/prison> (last visited Dec. 9, 2020) [<https://perma.cc/A57D-QBED>]. The Oxford English Dictionary lists the etymology of the Old French *prisun* “the action of taking, imprisonment, captivity” coming from Latin *prehensionem*. *Prison*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

⁴⁹ Loss of identity is experienced in its most basic form as being “just a number.” Sexton, *Under the Penal Gaze*, *supra* note 40, at 52. This resonates with Erving Goffman’s description of the process of inmate “mortification” in any “total institution,” like a prison, where the inmate is stripped of “adult executive competency.” GOFFMAN, *supra* note 14, at 43.

support systems, made totally vulnerable, and enduring trauma and the threat of trauma leads to feelings of being silenced and of being dead or disembodied.⁵⁰

It has been argued that the experience of a loss of self was an intentional part of the rehabilitative script authored by the founders of the first U.S. penitentiaries who believed that the prisoner should undergo a spiritual death and rebirth in prison.⁵¹ While this was the northern penitentiary model, the southern system of convict leasing and plantation prisons was premised on the use of violence to secure submission and labor from Black prisoners.⁵² In both models, however, a fundamental feature was the destruction of the prisoner's sense of self.

Before discussing the relevance of prison's cruelties to sentencing, it is important to say a few words about prison reform initiatives for the reader who may wonder why this is not an Article about prison reform. One possible response to prison's cruelties is to conclude that prisons should be reformed so that they are less cruel and resemble, for example, the prisons of Norway.⁵³ Reforming prisons through policy changes or civil rights suits, however, misses the upstream opportunity to apply knowledge about the harshness of prison to sentencing. Prison-

⁵⁰ An incarcerated person describing the experience of serving a life sentence wrote, "every day, I feel a piece of me die inside. It is a silent steady subtraction of a me that I used to be: a concept of myself that I easily held and comprehended that I now can no longer grasp." Malakki (Ralph Bolden), *Fit to Kill: A Reactionary Existence (Part One)*, in *LIFE SENTENCES*, *supra* note 46, at 60; *see also* RIDEAU, *supra* note 7, at 64 ("I'm buried alive.").

⁵¹ SMITH, *supra* note 1, at 6 (arguing that late eighteenth and early nineteenth century American "poetics of the penitentiary . . . were organized around a narrative of rebirth, and that the narrative required, as a pre-condition, the convict's virtual death").

⁵² After the civil war, slavery was reconstituted in massive prison-farms and convict leasing, neither of which were modeled on the death-rebirth mythology, but simply on the idea of controlling Black bodies and harnessing their labor. *See id.* at 136. Prison violence intersects with racialized patterns of violence in other areas of the criminal system, like policing. *See, e.g.*, TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* (2015) (tracing America's history of violent racism from the institution of slavery through carceral and policing systems); CIVIL RIGHTS DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT (2016), <https://www.justice.gov/opa/file/883366/download> [<https://perma.cc/P9HV-WAAX>] (finding, *inter alia*, targeted, violent policing of African-American residents); CIVIL RIGHTS DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [<https://perma.cc/ZS79-TL33>] (finding the same).

⁵³ I leave aside arguments about whether meaningful prison reform is possible. As Caleb Smith argued, even the most reform-minded incarceration settings are designed to annihilate the individual, to reduce the individual to a spiritual death, albeit in the service of rebirth. *See* SMITH, *supra* note 1, at 208-09.

as-experienced remains relevant to understanding conditions of confinement and their impact on incarcerated people.

It is precisely because of the lack of control legislators and sentencing courts have over the conditions of confinement that some general sense of prison's cruelties should be part of sentencing policy and practice. Sentencing courts have no control over the prison conditions that the defendant will encounter. The court can, however, factor the likely prison experience into their calculations. The sentence-as-experienced may otherwise be much more punitive and destructive than intended in the more formulistic calculation at sentencing. To this end, voices describing their experiences with incarceration provide a sense of prison's cruelties that can be applied to sentencing decisions.⁵⁴

With the above characterization of prison's cruelties in mind, I now turn to a critique of the current practice in which sentencing authorities measure the severity of punishment in units of time.

A. *Punishment as a Number*

Statutes define crimes and set out the parameters of permissible punishment ranges.⁵⁵ Aside from mandatory minimum sentences, statutory sentencing schemes allow judges discretion to determine whether to impose a sentence of incarceration and the length of the sentence.⁵⁶ The severity of the punishment of incarceration — as it is commonly understood among sentencing authorities — can be described in this equation:

$$\text{Loss of Liberty} \times \text{Number of Years} = \text{Punishment}$$

Given the centrality of time to the severity of punishment, sentencing authorities are preoccupied with deciding on the numbers. The lawmaker decides how much time in prison is appropriate for each crime. Prosecutors offer plea deals based on what they decide is an

⁵⁴ See SHKLAR, *supra* note 28, at 50 (discussing the importance of understanding social harms to political theories designed to remedy injustice).

⁵⁵ See, e.g., *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that “any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt”).

⁵⁶ See, e.g., *Williams v. New York*, 337 U.S. 241, 246 (1949) (explaining that a judge exercises “wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law”).

appropriate amount of time.⁵⁷ The judge decides how much time in prison (if any) is appropriate for each defendant.⁵⁸

Deciding on the right number — the right amount of time — is usually done with an eye toward ordinal ranking.⁵⁹ Generally, criminal statutes set up a system of ordinal ranking in which longer prison sentences may be imposed for more serious crimes.⁶⁰ In most sentencing regimes, the seriousness of the crime is weighed in tandem with various factors related to culpability and dangerousness, like the defendant's criminal history,⁶¹ the impact of the crime on the victim,⁶² the defendant's remorse,⁶³ and so forth.⁶⁴ Any of these variables related

⁵⁷ See, e.g., William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2549 (2004) (arguing that “the law that determines who goes to prison and for how long — is chiefly written by prosecutors, not by legislators or judges”).

⁵⁸ See, e.g., Jenny Roberts, *Informed Misdemeanor Sentencing*, 46 HOFSTRA L. REV. 171, 175 (2017) (noting the “enormous discretion” judges have in sentencing people convicted of misdemeanors).

⁵⁹ See Michael M. O'Hear, *Beyond Rehabilitation: A New Theory of Indeterminate Sentencing*, 48 AM. CRIM. L. REV. 1247, 1255-56 (2011) (citing Andrew von Hirsch, *Penal Theories*, in THE HANDBOOK OF CRIME AND PUNISHMENT 659, 668 (Michael Tonry ed., 1998)).

⁶⁰ The federal sentencing guidelines, for example, create a system for scoring the crime, criminal history, and other variables related to the defendant, and use those numbers to locate the advised sentence length on a grid. See U.S. SENTENCING COMM'N, GUIDELINES MANUAL 407 (2018).

⁶¹ See Mona Lynch, *The Narrative of the Number: Quantification in Criminal Court*, 44 L. & SOC. INQUIRY 31, 44-45 (2019) (arguing that, although the federal sentencing guidelines attempted to quantify character in a criminal history score, litigants reframe and qualify the score through narratives designed to provide context and assign meaning).

⁶² See Susan Bandes, *Empathy, Narrative, and Victim Impact Statements*, 63 U. CHI. L. REV. 361, 362 (1996).

⁶³ See, e.g., Susan A. Bandes, *Remorse and Criminal Justice*, 8 EMOTION REV. 14, 14 (2016) (“Evaluations of remorse play a crucial role in a wide range of criminal justice determinations. They influence sentencing hearings; parole, probation, and clemency determinations; forensic evaluations; decisions on whether to try a juvenile as an adult; and even (counterintuitively) determinations of guilt or innocence.”); M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301, 313-14 (2018) (addressing how implicit cognitive biases may affect judges when they decide whether to credit defendants' displays of remorse).

⁶⁴ The jury must consider all mitigating aspects of the defendant and their circumstances that reflect on personal culpability in death penalty cases. See *Penry v. Lynaugh*, 492 U.S. 302, 327-328 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)) (noting that a “moral response” to the crime requires consideration of all aspects of the defendant and their circumstances that reflect on personal culpability and mitigation).

to the crime and the defendant may move the length of sentence up or down in the ordinal ranking.⁶⁵

A time-based ranking of punishments promises two, related benefits. First, sentence length comparisons may help to determine whether a sentence is disproportionately long compared to other sentences in similar cases, the culpability of the defendant, or the severity of the crime.⁶⁶ Second, comparison of length of sentences may uncover disparities in sentencing practices based on jurisdiction, judge, or the race and gender of the defendant.⁶⁷ Without a numeric system of ordinal ranking, it would be difficult to compare cases to determine disproportionality.⁶⁸

Yet, the system of ordinal ranking falls short of its promise of fairness. Consider, for example, the federal sentencing guidelines, which assign numeric values to sentencing variables to locate the appropriate sentencing range on a grid.⁶⁹ Despite expectations, implementation of the federal sentencing guidelines failed to adequately mitigate racial

⁶⁵ See *Williams v. New York*, 337 U.S. 241, 246 (1949) (explaining that judges have discretion to choose the sources and types of evidence they will use to determine the kind and type of punishment imposed within limits fixed by law). Paul H. Robinson has researched and defended popular intuitions about the ordinal ranking of sentence lengths for crimes. See Paul H. Robinson, *Democratizing Criminal Law: Feasibility, Utility, and the Challenge of Social Change*, 111 NW. U. L. REV. 1565, 1594-95 (2017); Paul H. Robinson, Sean E. Jackowitz & Daniel M. Bartels, *Extra-Legal Punishment Factors: A Study of Forgiveness, Hardship, Good Deeds, Apology, Remorse, and Other Such Discretionary Factors in Assessing Criminal Punishment*, 65 VAND. L. REV. 737, 805 (2012) (arguing that lay intuitions about the severity of punishment are “actually quite nuanced and sophisticated”).

⁶⁶ See *Graham v. Florida*, 560 U.S. 48, 61-62 (2010) (describing how life without parole for nonhomicide juvenile offenders is disproportionate under the Eighth Amendment’s punishments clause); *Solem v. Helm*, 463 U.S. 277, 303 (1983) (holding that life without parole was disproportionate punishment for minor crime, and thus violated the cruel and unusual punishments’ clause of the Eighth Amendment).

⁶⁷ See Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, Or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 697-98 (2010) (describing the political shift toward sentencing guidelines as, in part, a way to curb arbitrary and discriminatory sentencing practices).

⁶⁸ See Michael M. O’Hear, *Not Just Kid Stuff? Extending Graham and Miller to Adults*, 78 MO. L. REV. 1087, 1090 (2013) (arguing that the Supreme Court employs ordinal ranking in its proportionality analysis of punishment in juvenile life without parole cases).

⁶⁹ See U.S. SENTENCING COMM’N, *supra* note 60, at 407.

disparity in sentencing.⁷⁰ Quantitative sentencing has not necessarily increased uniformity or reduced disparity in sentencing.⁷¹

Preoccupation with a limited set of quantitative measures in sentencing has reduced judicial consideration of qualitative information about the person being sentenced.⁷² The obsessive focus on time also eclipses another important aspect of the severity of punishment: prison's cruelties. The absence of weight accorded to consideration of the qualitative aspects of imprisonment can be seen in public discussion in high profile cases. For example, public outrage followed U.S. District Court Judge T.S. Ellis III's decision to sentence Paul Manafort to forty-seven months in prison for tax fraud, bank fraud, and other related crimes.⁷³ The media described the sentence as "just under four years," noting that the sentence was surprisingly short in comparison to the federal sentencing guidelines' recommendation of a sentence closer to

⁷⁰ See David B. Mustard, *Racial, Ethnic, and Gender Disparities in Sentencing: Evidence from the U.S. Federal Courts*, 44 J.L. & ECON. 285, 296 (2001) (finding African Americans are incarcerated at higher rates and receive longer sentences in study of federal sentencing practices controlled for income, education, and criminal history); Cassia C. Spohn, *Thirty Years of Sentencing Reform: The Quest for a Racially Neutral Sentencing Process*, 3 POLICIES, PROCESSES, & DECISIONS CRIM. JUST. SYS. 427, 427-28 (2000) (reviewing forty studies demonstrates consensus that racial disparity exists in exercise of judicial discretion whether to incarcerate, but studies varied as to whether evidence confirmed racial disparity in sentence length); Sonja B. Starr & M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of Booker*, 123 YALE L.J. 2, 4-5 (2013) (discussing factors that may have contributed to continued racial disparity in sentencing after implementation of the Federal Sentencing Guidelines).

⁷¹ See Starr & Rehavi, *supra* note 70, at 78; cf. John F. Pfaff, *The Continued Vitality of Structured Sentencing Following Blakely: The Effectiveness of Voluntary Guidelines*, 54 UCLA L. REV. 235, 240 (2006) (finding that voluntary guidelines reduce some of the flexibility that permits biases and other factors leading to sentencing disparity based on a study of state guidelines effectiveness).

⁷² See Mona Lynch, *Institutionalizing Bias: The Death Penalty, Federal Drug Prosecutions, and Mechanisms of Disparate Punishment*, 41 AM. J. CRIM. L. 91, 123 (2013) (discussing how "the Guidelines and statutory mandatory sentencing schemes have aimed to minimize the human aspects of sentencing in ways that excise an individualized and potentially empathic sentencing procedure"). As U.S. District Court Judge Jed Rakoff stated, "the notion that . . . responsibility, can be reduced to the mechanical adding-up of a small set of numbers artificially assigned to a few arbitrarily-selected variables wars with common sense." Sentencing Memorandum and Order of Rajat K. Gupta at 1-2, *United States v. Rajat Gupta*, 904 F. Supp. 2d 349 (S.D.N.Y. 2012) (No. 11 Cr. 907). Judge Rakoff also expressed this view in his article. Jed S. Rakoff, *Why the Federal Sentencing Guidelines Should Be Scrapped*, 26 FED. SENT'G REP. 6, 7 (2013).

⁷³ E.g., Miles Parks & Ryan Lucas, *Paul Manafort, Former Trump Campaign Chairman, Sentenced to Just Under 4 Years*, NAT'L PUB. RADIO (Mar. 7, 2019, 7:04 PM), <https://www.npr.org/2019/03/07/701045248/paul-manafort-former-trump-campaign-chairman-sentenced-to-just-under-4-years> [https://perma.cc/UVS7-CEMS].

twenty years.⁷⁴ Stories circulated on public media of defendants who received longer sentences for stealing quarters from laundromats and for possession of marijuana.⁷⁵

The Manafort outcry raised important concerns about fairness in the ordinal ranking of crime and punishment — like cases being treated alike. If equality among sentence lengths is the metric of fairness (proportionality), then either Mr. Manafort’s sentence should be much longer or most sentences for nonviolent felonies should be much shorter.⁷⁶ Of course, the numeric measurement does not tell us which way the correction should go. One could argue that the sentence for person who stole quarters was fair, and that the only correction should be making Manafort’s sentence longer. On the other hand, one could argue that Manafort’s sentence should stay the same and that the person who stole quarters should receive a shorter sentence. In other words, proportionality only measures the relationship among sentences without providing a broader framework to critique sentencing policy and practice.⁷⁷

⁷⁴ See *id.*

⁷⁵ See Faith Karimi, *Paul Manafort Gets 47 Months. Legal Experts Share Examples of People Who Got More Time for Less*, CNN (Mar. 8, 2019, 8:16 AM), <https://www.cnn.com/2019/03/08/politics/paul-manafort-sentencing-social-media-reaction-trnd/index.html> [<https://perma.cc/QX8Q-QNM6>]. At the same time, others pointed out that Manafort’s sentence was in line with other fraud cases in the Eastern District of Virginia, where defendants were sentenced to between twenty-four and thirty-six months. See Christal Hayes, *Was Paul Manafort’s Sentence Too Light? Here’s How It Compares with Other Cases*, USA TODAY (Mar. 7, 2019), <https://www.usatoday.com/story/news/politics/2019/03/07/paul-manafort-prison-sentence-2017-federal-data/3099176002/> [<https://perma.cc/9XMB-L7EL>]; Justin Jouvenal, Julie Tate & Rachel Weiner, *Is Paul Manafort’s Sentence Too Light? He Fared Worse Than Many Fraudsters, Data Shows*, WASH. POST (Mar. 8, 2019), https://www.washingtonpost.com/local/public-safety/is-paul-manafort-sentence-too-light-he-fared-worse-than-many-fraudsters-data-shows/2019/03/08/388226b6-41c3-11e9-9361-301ffb5bd5e6_story.html [<https://perma.cc/SPU8-PUAB>].

⁷⁶ The idea that everyone convicted of a crime should be sentenced as leniently as a small subset of privileged offenders has been popularly expressed as a call to “level down” prison sentences. When asked how racial disparity in sentencing could be eliminated, for example, musician and criminal justice reform advocate John Legend answered, “Yeah, level down not level up.” Mehdi Hasan, *How to Fix the Criminal (In)Justice System: With John Legend and Patrisse Cullors*, THE INTERCEPT (Feb. 13, 2020), <https://theintercept.com/2020/02/13/how-to-fix-the-criminal-injustice-system-with-john-legend-and-patrisse-cullors/> [<https://perma.cc/R7A3-H95H>].

⁷⁷ See O’Hear, *supra* note 68, at 1090. Proportionality analyses — at least at the constitutional level — have fared no better. The Supreme Court has been loath to find disproportionality based on the comparative length of prison sentences. The Supreme Court has even declined to hold disproportionate sentences of twenty-five years to life in prison for a repeat, nonviolent offense. See *Ewing v. California*, 538 U.S. 11, 29-30 (2003); see also *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (requiring a threshold

Because proportionality is relative, sentence lengths have no built-in ceiling other than in reference to more and less serious crimes. As a result, sentencing by the numbers can easily fall prey to cognitive errors and political pressures, specifically, the cognitive phenomenon of anchoring and political phenomenon of inflation. Cognitive anchoring is a psychological theory that describes how people become attached to the first number mentioned in a negotiation.⁷⁸ Anchoring can affect lawmakers enacting punishment statutes as well as courtroom actors.⁷⁹ If the current penalty for armed robbery is ten years, for example, sentencing reform legislation is unlikely to reduce the penalty to one year because it is too far from the anchoring number.⁸⁰ Anchoring works in tandem with the political phenomenon of sentence inflation to ensure that any change in the punishment is likely to be an increase in sentence length.⁸¹ William Stuntz famously characterized criminal lawmaking as a “one-way ratchet,” with lawmakers pressured to constantly get tougher on crime by criminalizing more acts and lengthening prison terms.⁸² Lawmakers demonstrate that they are tough on crime by arguing for longer prison sentences and face political criticism when they argue for shorter sentences for crimes.⁸³

showing of “gross disproportionality” under the punishments clause of the Eighth Amendment).

⁷⁸ See Mark W. Bennett, *Confronting Cognitive “Anchoring Effect” and “Blind-Spot” Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw*, 104 J. CRIM. L. & CRIMINOLOGY 489, 495 (2014) (defining “anchoring effect” as a term used in cognitive psychology).

⁷⁹ See *id.* at 503-11 (discussing anchoring effect studies of judges in Germany and the U.S.).

⁸⁰ See *id.* at 523-29 (describing how the anchoring effect shapes federal sentencing by anchoring judges to the numbers in the guidelines).

⁸¹ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 530 (2001) (describing how “legislative candidates frequently refer to sentencing policy in their campaigns — a broader death penalty, more prison time for drug dealers”). The federal First Step Act and the Justice Reinvestment Initiatives in various states appear to be an exception to Stuntz’s one-way ratchet observation. See First Step Act of 2018, Pub. L. No. 115-391, § 401, 132 Stat. 5194 (2018) (reducing and restricting enhanced sentencing for prior drug felonies). On closer examination, it is clear that lawmakers’ ability to reduce penalties for certain crimes is conditioned on public perception that the people who commit those crimes are non-violent, non-repeat offenders, and not sexual offenders. See MARIE GOTTSCHALK, *CAUGHT: THE PRISON STATE AND THE LOCKDOWN OF AMERICAN POLITICS* 165 (2015).

⁸² Stuntz, *supra* note 81, at 547 (“[L]egislators will tend to see criminal law as a one-way ratchet.”).

⁸³ See Michael Tonry, *Sentencing in America, 1975-2025*, 42 CRIME & JUST. 141, 150 (2013) (during the tough-on-crime era, “most jurisdictions enacted some or all of

Thus, although the length of a sentence allows for a unified measure to distinguish and rank punishment, it is a thin measure of severity because it obscures the qualitative aspects of prison's cruelties. If one really considers the experience of imprisonment, exclamations like "He only got four years!" seem preposterous. Four years for a living being in a cell is excruciating.⁸⁴ We can perceive four years as *de minimis* only by ignoring the qualitative experience of imprisonment and focusing exclusively on comparisons in the ordinal ranking of lengths of time.⁸⁵

To be clear, I am advocating for a conceptualization of punishment that includes a general understanding of prison's cruelties. I am not suggesting an ordinal ranking of punishment that varies based on prison conditions.⁸⁶ Any individual experience of incarceration will vary based on factors outside of the court's control, such as the defendant's placement within the prison system and the policies of a new warden.⁸⁷ Sentencing courts have little power over conditions of confinement.⁸⁸ If, however, certain generalizations can be made, there is no reason not to consider prison's cruelties in sentencing policy and practice.⁸⁹ The next subpart addresses how prison-as-experienced is relevant to specific aspects of punishment theory that lawmakers and judges consider.

B. Prison-As-Experienced and the Traditional Goals of Sentencing

Traditional punishment theory holds that sentencing may serve any of four purposes: retribution, deterrence, incapacitation, and

mandatory minimum sentence, truth-in-sentencing, 'sexual predator,' 'career criminal,' three-strikes, and [life without parole] laws").

⁸⁴ Incarcerated for five years, the poet Jimmy Santiago de Baca describes numerous harrowing and often life-threatening prison experiences. See JIMMY SANTIAGO BACA, *A PLACE TO STAND: THE MAKING OF A POET* (2001).

⁸⁵ Indeed, some incarcerated people describe an absence of time, or the sensation that time is standing still, while they are incarcerated. See e.g., Sexton, *Under the Penal Gaze*, *supra* note 40, at 104.

⁸⁶ For a thorough and intriguing discussion of considering the individual's subjective experience of punishment at sentencing, see generally Kolber, *The Subjective Experience*, *supra* note 23, at 183.

⁸⁷ See discussion *infra* Part I.C; see also *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).

⁸⁸ See Sharon Dolovich, *Canons of Evasion in Constitutional Criminal Law*, in *THE NEW CRIMINAL JUSTICE THINKING* 111, 134 (Sharon Dolovich & Alexandra Natapoff eds., 2017).

⁸⁹ See generally Kolber, *supra* note 22, at 14-20 (arguing for a "justification-symmetry principle" in which unintentional but anticipated aspects of the pains of imprisonment must also be justified as part of the punishment).

rehabilitation.⁹⁰ The four goals are discussed by courts determining whether a sentence is excessive,⁹¹ and by lawmakers setting parameters for judicial sentencing.⁹² Below, I discuss the relevance of prison's cruelties to each sentencing goal. In general, my argument is that failure to consider prison's cruelties increases the gap between the express purpose of the sentence and its actual impact on the person sentenced.⁹³ This gap — or lack of reality check — also results in sentences that lack proportionality and parsimony.

1. Proportionality in Retribution

Retribution has been a theoretical cornerstone of sentencing in the United States, endorsed by some legal scholars,⁹⁴ and evidenced in popular understanding.⁹⁵ Retribution involves the intentional infliction of pain, but no more pain than deserved for the crime, meaning that retribution should be limited by the principle of proportionality.⁹⁶

Above, I discussed how punishment as a number facilitates analysis of relative proportionality — the comparison of the length of one sentence with the length of another. Yet, the institutional norms regarding sentence length have no inherent logic, which would allow

⁹⁰ See Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 70-74 (2005) [hereinafter *Punishment Purposes*]; see also Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUST. 363, 369-71 (1997) [hereinafter *Sentencing Principles*]. The list of four is not exhaustive and can include other goals such as uniformity. See *Punishment Purposes*, *supra*, at 74.

⁹¹ See *Ewing v. California*, 538 U.S. 11, 25 (2003) (listing deterrence, incapacitation, retribution, and rehabilitation as legitimate penological goals).

⁹² See *Tapia v. United States*, 564 U.S. 319, 325 (2011) (describing that the Federal Sentencing Reform Act cabins sentencing to the four goals of retribution, deterrence, incapacitation, and rehabilitation).

⁹³ Legal scholars correctly point to the gap between the stated goals of sentencing and the realities of mass incarceration. See, e.g., Robert Weisberg, *Reality-Challenged Philosophies of Punishment*, 95 MARQ. L. REV. 1203, 1241 (2012) (describing retribution as the “stock story” of sentencing, and incapacitation the driving force of sentencing policy).

⁹⁴ See MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF CRIMINAL LAW* 91 (1997) (recognizing retribution as a theory of criminal law's function); Herbert Morris, *Persons and Punishment*, 52 MONIST 475, 477-78 (1968) (arguing that humans have a right to punishment and that punishing recognizes offenders as rational humans).

⁹⁵ See generally Robinson, et al., *supra* note 65 (discussing an empirical study of lay views of punishment).

⁹⁶ See Norval Morris, *The Future of Imprisonment: Toward a Punitive Philosophy*, 72 MICH. L. REV. 1161, 1162 (1974) (“Desert: No sanction greater than that ‘deserved’ by the last crime or bout of crimes for which the offender is being sentenced should be imposed.”).

for consideration of whether the sentence is proportional for the defendant in an absolute sense.⁹⁷ As Robert Ferguson puts it, “[t]here is, after all, no particular rationale to the length of a sentence except in rote legal insistence on it.”⁹⁸ Instead, “[t]he length of a term in prison depends not on an absolute standard but on its relative position on a grid containing other sentences for other crimes.”⁹⁹ The numbers tell us nothing about the severity of the punishment other than by comparison to other numbers.

One can imagine how prison-as-experienced could be relevant to determining what punishment is deserved. After all, the punishment is not simply being removed from society for a certain amount of time. It is also the experiences the person will have in prison, including: being either the victim of violence or under threat of violence; vulnerability to the whims of institutional actors; isolation from friends and family; and the loss of identity and sense of self.¹⁰⁰ Adam Kolber makes this point in his analysis of the relevance of individualized, subjective experiences of punishment.¹⁰¹ Kolber offers a compelling description of how individual variations in “sensitivity” to punishment are theoretically relevant to sentencing.¹⁰² The purpose of the punishment is to inflict suffering on the prisoner.¹⁰³ Punishment is more severe the more the incarcerated person suffers.¹⁰⁴ While Kolber’s thesis met with some criticism,¹⁰⁵ Michael Tonry pointed out that the retributivism traditionally accepted the relevance of the subjective experience of punishment to its severity.¹⁰⁶

⁹⁷ See Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571, 588-97 (2005).

⁹⁸ ROBERT A. FERGUSON, *METAMORPHOSIS: HOW TO TRANSFORM PUNISHMENT IN AMERICA* 153 (2018) [hereinafter *METAMORPHOSIS*].

⁹⁹ *Id.*

¹⁰⁰ See discussion *supra* Part I.

¹⁰¹ Kolber, *The Subjective Experience*, *supra* note 23, at 196-98.

¹⁰² See *id.* at 198.

¹⁰³ See John Bronsteen, Christopher Buccafusco & Johnathan Masur, *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1037 (2009) (“When the state punishes a criminal, it inflicts suffering.”).

¹⁰⁴ See Kolber, *The Subjective Experience*, *supra* note 23, at 198.

¹⁰⁵ E.g., David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1617, 1623-25 (2010) (critiquing Kolber’s argument); see also Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 917-22 (2010) (same).

¹⁰⁶ See Michael Tonry, *Is Proportionality in Punishment Possible?*, in *OF ONE-EYED AND TOOTHLESS MISCREANTS: MAKING THE PUNISHMENT FIT THE CRIME?* 1, 19 (Michael Tonry ed., 2019) (arguing that it should not be controversial to claim that the subjective

Application of Kolber's individualized sensibilities to incarceration is complex, and I do not address it here. But similar logic suggests that a general — rather than individualistic — understanding of prison's cruelties is relevant to considering the weight of prison as a punishment. Perhaps no one deserves much of what occurs in prison. It is very possible prison is often harsher and harsher in more ways than legislators and legal actors can keep in mind when making punishment decisions.¹⁰⁷ And, prison's cruelties may be greater than what the sentencing judge intended.¹⁰⁸ The quality of the punishment is not simply an absence of liberty and an absence from society. It is a lived, daily experience of prison for the incarcerated person.

2. Parsimony in Deterrence and Incapacitation

In addition to retribution, punishment has traditionally been justified on the grounds of its capacity to deter crime and incapacitate the perpetrator of a crime.¹⁰⁹ Along with rehabilitation, deterrence and incapacitation are referred to as utilitarian goals of punishment because their value is measured by their outcome.¹¹⁰

Prison's cruelties are relevant to determining the parsimony of a punishment designed to incapacitate the defendant or to deter future crime.¹¹¹ Jeremy Bentham articulated the principle of parsimony, calling it a principle of "frugality."¹¹² According to Bentham, the punishment should inflict no pain greater than what is required to accomplish its goal.¹¹³ In other words, a punishment designed to deter future crime should inflict no more pain than necessary to deter commission of the crime in the future, and a punishment designed to incapacitate someone

experience of punishment is relevant to both Kant's idea of retributivism and Bentham's idea of the frugality principle).

¹⁰⁷ See FERGUSON, *INFERNO*, *supra* note 26, at 103 ("Lawmakers recommend draconian punishments without bothering to share any responsibility for further interpretation or enforcement.").

¹⁰⁸ See *id.* at 127 (arguing that judges are "insulated from the practical implications" of the punishments they order).

¹⁰⁹ See Frase, *Punishment Purposes*, *supra* note 90, at 70-73.

¹¹⁰ See *id.* at 69-70.

¹¹¹ See Morris, *supra* note 96, at 1163.

¹¹² See JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 142 (Batoche Books 1999) (1781). Bentham understood that the magnitude of punishment must be measured not just by its duration, but also by its intensity. See *id.* at 146.

¹¹³ *Id.* at 142.

should inflict no more punishment than necessary to protect the public.¹¹⁴

With regard to incapacitation, I have argued elsewhere that imprisoning someone who is no longer a threat to public safety violates the principle of parsimony.¹¹⁵ Imprisonment, however, does much more than incapacitate. As discussed in the introduction to this Part, prison imposes a set of pains and difficulties that have nothing to do with rendering the incarcerated person harmless to others. Someone could, theoretically, be separated from society but exposed to no further cruelties or hardships.¹¹⁶ A sentence may lack parsimony because it is too long, but also because the very experience of imprisonment in U.S. prisons is extravagantly harsh compared to the modest goal of restraining — incapacitating — behavior.¹¹⁷

Prison's cruelties have similar relevance to deterrence arguments. The goal of specific deterrence is to dissuade the defendant from committing crime in the future by imposing a punishment that makes criminality seem more costly.¹¹⁸ Assuming, for the sake of argument, that prison deters the person punished, mere confinement may accomplish the goal.¹¹⁹ The panoply of prison's cruelties lack parsimony if they exceed what is necessary to deter the incarcerated person from committing the same crime.

The same argument holds true for general deterrence, but with an odd twist. Prison's cruelties may exceed what is needed to deter the public from committing crimes. Oddly, however, ignorance about the qualitative aspects of prison-as-experienced thwarts the goal of general

¹¹⁴ Bentham's strong preference was deterrence, and he expressed great concern that incapacitation through disabling punishments are almost always violative of the principle of frugality. *Id.* at 152-53.

¹¹⁵ See M. Eve Hanan, *Incapacitating Errors: Sentencing and the Science of Change*, 97 *DENV. L. REV.* 151, 187 (2019).

¹¹⁶ See, e.g., Jessica Benko, *The Radical Humanness of Norway's Halden Prison*, *N.Y. TIMES* (Mar. 26, 2015), <https://www.nytimes.com/2015/03/29/magazine/the-radical-humaneness-of-norways-halden-prison.html> [<https://perma.cc/ZPX3-8778>] (describing a prison in Norway designed primarily to support and rehabilitate inmates).

¹¹⁷ Interestingly, Bentham expressed concern that incapacitative punishment would often lack parsimony because it prevents the punished person from doing good in the future. See BENTHAM, *supra* note 112, at 152-53.

¹¹⁸ See Frase, *Sentencing Principles*, *supra* note 90, at 371.

¹¹⁹ It is unclear the degree to which the threat of incarceration deters crime, with some research concluding that the deterrent effect of the threat of apprehension greatly outweighs the threat of lengthy prison sentences. See Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 *CRIME & JUST.* 199, 201 (2013).

deterrence.¹²⁰ If punishment is meant to deter others from committing a similar crime because they fear the punishment they see, hiding aspects of the punishment from the public make it ineffective as a deterrent. From a historical perspective, as punishment moved from the “spectacle of the scaffold” to the interior space of the prison,¹²¹ the general public was left to imagine what imprisonment would be like.¹²² This is arguably why prison is the source of so much curiosity and the setting of so many fictional works.¹²³ Yet, the invisible nature of prison’s cruelties reduces its power as a deterrent. One may be just as likely to hear opinions that prison is too comfortable as one is to hear horror stories about prison’s cruelty and violence.¹²⁴

3. Frustrating Rehabilitation and Specific Deterrence

Another compelling reason exists for considering prison-as-experienced when evaluating the utilitarian purpose of sentencing: to shed empirical light on whether the imprisonment thwarts rehabilitation and specific deterrence. This is not the parsimony or proportionality arguments that I make above, but an argument that the punishment of incarceration may impede rehabilitation or specific deterrence.

Both rehabilitation and specific deterrence aim to change the defendant’s behavior to be more law-abiding.¹²⁵ Imprisonment, however, may accomplish the opposite result by weakening the

¹²⁰ See FERGUSON, *INFERNO*, *supra* note 26, at 58 (discussing how keeping the nature of prison life hidden reduces the intended deterrent effect of seeing someone punished).

¹²¹ SMITH, *supra* note 1, at 13.

¹²² See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 9 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

¹²³ *Cf.* DAVIS, *supra* note 2, at 17-18 (discussing the lack of public outcry to prison expansion is due in part to the realities of prison being hidden).

¹²⁴ Studies find a wide range of popular perceptions of prisons. Kevin H. Wozniak, *American Public Opinion About Prisons*, 38 *CRIM. J. REV.* 302, 314-317 (2014) (noting a survey study failing to support the claim that a majority of Americans think prison is too comfortable but finding that 46.6% of people surveyed believe that prison should be harsher). Public concern that some prisons may be too comfortable to fulfill their punitive purpose seems to have originated after the Watergate scandal when some of the perpetrators were sent to well-resourced, federal prison camps. Evan Osnos, *When Going to Jail, It Pays to Be Rich*, *CHI. TRIB.*, July 14, 2002, at C1. Most media reports, however, dispel the idea that any U.S. prison could be compared to a resort. *See, e.g.*, Lacey Rose, *The Best Places to Go to Prison*, *FORBES* (May 25, 2006), https://www.forbes.com/2006/04/17/best-prisons-federal_cx_lr_06slate_0418bestprisons.html#359611e71716 [<https://perma.cc/4RZQ-4GVJ>] (describing federal prison camps that have no fencing and some amenities).

¹²⁵ See Frase, *Punishment Purposes*, *supra* note 90, at 70.

incarcerated person's ability to make good choices in the future.¹²⁶ In an "institutional paradox beyond contradiction," prison removes almost all opportunities for the incarcerated person to make choices, thereby weakening the person's ability to make good choices upon release.¹²⁷ Likewise, the damage done through prison's cruelties may psychologically damage incarcerated people in ways incompatible with rehabilitation.¹²⁸

Moreover, the arbitrary way in which power is exercised in prison undermines efforts to encourage law-abiding behavior. Arbitrary authority causes people to discount the reasonableness of the authority figure and the benefit of following the rules.¹²⁹ Seeing bad acts go unpunished and innocent behavior punished in prison would lead a rational actor (if such a person exists)¹³⁰ to conclude that there is no benefit to following the rules or abiding by the law.¹³¹ Thus, the harshness, lack of choices, and maddening sense of absurdity that comes from witnessing power exercised in arbitrary ways all thwart efforts to deter or rehabilitate.

The arguments presented in this section about the relevance of prison-as-experienced may be uncontroversial. Quantitative data are routinely gathered to determine, for example, whether the length of the sentence affects recidivism rates.¹³² Accounts of prison-as-experienced

¹²⁶ See Federica Coppola, *Valuing Emotions in Punishment: An Argument for Social Rehabilitation with the Aid of Social and Affective Neuroscience*, *NEUROETHICS* (2018), <https://doi.org/10.1007/s12152-018-9393-4> [<https://perma.cc/JQU2-G53V>] (noting that "incarceration can stimulate the same . . . behavioral tendencies that have been . . . qualified as a risk factor for antisocial conduct").

¹²⁷ FERGUSON, *METAMORPHOSIS*, *supra* note 98, at 137.

¹²⁸ See Coppola, *supra* note 126, at 8 (stating that "incarceration can be not only psychologically devastating, but it is also counterproductive"). Some empirical data suggest that imprisonment does not reduce recidivism. See generally Daniel P. Mears, Joshua C. Cochran, William D. Bales & Avinash S. Bhati, *Recidivism and Time Served in Prison*, 106 *J. CRIM. L. & CRIMINOLOGY* 83 (2016) (discussing mixed recidivism results depending on the length of time served).

¹²⁹ Arbitrary and unjust authority figures are viewed with skepticism and, thus, lack legitimacy. See generally TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006) (discussing why the legitimacy of authority is essential for public compliance); Tom R. Tyler, *The Psychology of Legitimacy: A Relational Perspective on Voluntary Deference to Authorities*, 1 *PERSONALITY & SOC. PSYCHOL. REV.* 323 (1997) (finding a strong correlation between perception of legitimacy and social relationships).

¹³⁰ See generally Richard H. Thaler, *From Homo Economicus to Homo Sapiens*, 14 *J. ECON. PERSP.* 133 (2000) (casting doubt on rational decision-making in favor of context-specific rationality influenced by cognitive errors and other variables).

¹³¹ See Tyler, *supra* note 129, at 323.

¹³² See generally Mears et al., *supra* note 128 (discussing mixed recidivism results depending on length of time served). Quantitative data on recidivism rates and mental

can be understood as another kind of data — qualitative data — that are useful and relevant to sentencing.

Sentencing authorities increasingly acknowledge the relevance of prison's cruelties. The State's Attorney for Chittenden County in Vermont, for example, requires her line attorneys to visit prison.¹³³ The purpose of the prison visit is to make prosecutors "more cognizant of the space you're sending people to when you put an arbitrary number on an offer sheet."¹³⁴ Prosecutors on staff, she told the press, "should also fully understand what prison means, and what a jail sentence means for these individuals. As prosecutors, we get very comfortable with just throwing out numbers as an amount of time."¹³⁵

C. *Towards a Theory of Injustice in Punishment*

Above, I discussed how prison's cruelties provide essential insight into the gap between the realities of prison and the traditional goals and limiting principles of sentencing. Here, I argue that prison's cruelties are relevant to broader critiques of incarceration.

Critiquing what is unjust about incarceration requires an inventory of prison's cruelties. As Sharon Dolovich and Alexandra Natapoff argue:

[A]ny adequate conception of American criminal justice needs to push the boundaries of the standard view, to expose and encompass more of what actually happens on both the front and back ends. This reality is lived by flesh-and-blood human beings, a fact that the standard focus on formal rules and processes tends to ignore, but which must be front and center in any morally adequate understanding of the criminal system.¹³⁶

People's experiences in prison provide information about "what actually happens" and are thus essential to "any morally adequate

health issues among incarcerated people, for example, is regularly gathered and — more controversially — used predictively at sentencing. *See generally* Erin Collins, *Punishing Risk*, 107 *GEO. L.J.* 57 (2018) (critiquing the expansion of the use of risk/needs assessments from correctional agency use to sentencing).

¹³³ Daniel Nichanian, *Prosecutor Sends Staff to Prison, in a Bid to Counter Their Reflex to Incarcerate*, *APPEAL* (Aug. 14, 2019), <https://theappeal.org/polreport/vermont-prosecutor-sends-staff-to-prison-in-a-bid-to-counter-their-reflex-to-incarcerate/> [<https://perma.cc/6S4W-MG6D>].

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ SHARON DOLOVICH & ALEXANDRA NATAPOFF, *THE NEW CRIMINAL JUSTICE THINKING* 9 (2017).

understanding” of injustice at sentencing.¹³⁷ I mean to invoke injustice as Judith Shklar defines it in her seminal work on the subject.¹³⁸ Shklar argues that creating theories of injustice must precede creating theories of justice.¹³⁹ To identify systemic injustices, she argues, one should first attempt to learn about the harms people are experiencing. Cataloguing first-person experiences of harm eventually leads to a “non-ideal theory” of injustice that can be used to evaluate policy and law.¹⁴⁰

In contrast, theories of justice often conflate systemic harms with mere bad luck because the theory assumes justice is the norm.¹⁴¹ If, however, certain harms are widespread, they should be understood as systemic injustices.¹⁴² Shklar’s critique of theories of justice that mistake injustice for bad luck applies to punishment theory. If we imagine prison as an abstract place of confinement, an incident in which a prisoner is beaten or raped will be viewed as an aberration. But if, instead, our view of prison is based on a catalogue of concrete examples of how incarcerated people experience prison, prison violence no longer seems like a random moment of bad luck, but, instead, like a reflection of the baseline injustice of prison itself.

By way of illustration, take, for example, the dignity principle in sentencing. The Supreme Court has stated that punishment must not

¹³⁷ *Id.*

¹³⁸ See JUDITH N. SHKLAR, *THE FACES OF INJUSTICE* 50 (1990) (defining injustice as “an integral part of our social and personal experiences, whether private or public, and that plays an essential part in democratic theory and practice”).

¹³⁹ See *id.* at 80-81.

¹⁴⁰ Note that Shklar describes the political process of identifying injustice, rather than the legal process. See *id.* at 50. Whether prison conditions violate a statute or the constitutional rights of the prisoner is a question circumscribed by doctrinal constraints. See *Farmer v. Brennan*, 511 U.S. 825, 837 (1994) (holding that the “Eighth Amendment does not outlaw cruel and unusual ‘conditions’; it outlaws cruel and unusual ‘punishments’”). See generally Dolovich, *supra* note 18 (discussing the implications of the Supreme Court’s interpretation of the Eighth Amendment). Whether an action or failure to act by prison officials constitutes punishment has been held to depend on the punisher’s mental state. See *Wilson v. Seiter*, 501 U.S. 294, 299 (1991). Current legal doctrine seems to require intent. See *Farmer*, 511 U.S. at 838. This “structural view” of punishment limits what can be challenged as unconstitutional under the Eighth Amendment. See Thomas K. Landry, “Punishment” and the Eighth Amendment, 57 OHIO ST. L.J. 1607, 1610 (1996).

¹⁴¹ See JOSÉ MEDINA, *THE EPISTEMOLOGY OF RESISTANCE: GENDER AND RACIAL OPPRESSION, EPISTEMIC INJUSTICE, AND RESISTANT IMAGINATIONS* 13 (2013) (citing SHKLAR, *supra* note 138, at 17) (“This normal model of justice does not ignore injustice but it does tend to reduce it to a prelude to or a rejection and breakdown of justice, as if injustice were a surprising abnormality.”); see also FRICKER, *supra* note 25, at 39 (arguing that “testimonial injustice is a normal part of discursive life”).

¹⁴² See SHKLAR, *supra* note 138, at 80-82.

be “degrading to human dignity.”¹⁴³ The dignity principle forbids torture, as well as deprivation of “basic sustenance, including adequate medical care.”¹⁴⁴ Dignity is presumed to be the norm (the ideal theory of justice), and departures from dignity the exception.¹⁴⁵ Yet accounts of prison-as-experienced characterize prison life as a continuous assault on human dignity.¹⁴⁶ Calls for a theory of justice based on an enhanced understanding of the dignity principle may thus be premature.¹⁴⁷ What is needed first is a theory of injustice that accounts for systemic assaults on dignity in prisons.¹⁴⁸

To accurately evaluate the ethics and impact of incarceration, prison’s cruelties must be accounted for as part of a system of punishment rather than as an aberration. This accounting may lead to the conclusion that prisons are simply not an ethical response to crime.¹⁴⁹ The problem is not that we have too many people in prison for too long,¹⁵⁰ but that incarceration itself is wrong.¹⁵¹ Allegra McLeod demonstrates this abolitionist orientation in response to systemic violence in criminal legal systems¹⁵² Prosecution and incarceration, she argues, are essentially violent, even before the occurrence of an act of violence in prison. Likewise, if prison’s cruelties are inherent in imprisonment,

¹⁴³ *Furman v. Georgia*, 408 U.S. 238, 281 (1972) (Brennan, J., concurring).

¹⁴⁴ *Brown v. Plata*, 563 U.S. 493, 511 (2011).

¹⁴⁵ See SHKLAR, *supra* note 138, 18-19 (discussing drawbacks of imagining injustice as a temporary absence of justice).

¹⁴⁶ See, e.g., RIDEAU, *supra* note 7, at 338 (describing imprisonment as being “assaulted psychologically and emotionally, [in a] way in which you are robbed of any dignity as a human being and told in countless ways that you don’t matter”).

¹⁴⁷ Jonathan Simon and Jeffrey Fagan have both proposed dignity tests of punishment. See Jeffrey Fagan, *Dignity is the New Legitimacy*, in *THE NEW CRIMINAL JUSTICE THINKING* 311, 316 (Sharon Dolovich & Alexandra Natapoff eds., 2017) (noting the need for a new “set of principles for thinking about the harms of order maintenance”); Jonathan Simon, *Dignity and Risk: The Long Road from Graham v. Florida to Abolition of Life Without Parole*, in *LIFE WITHOUT PAROLE: AMERICA’S NEW DEATH PENALTY?* 282, 285-86 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2012).

¹⁴⁸ See Landry, *supra* note 140, at 1610.

¹⁴⁹ See DAVIS, *supra* note 2, at 83 (situating prison abolition as a response to prison’s systemic injustices).

¹⁵⁰ See generally Benjamin Levin, *The Consensus Myth in Criminal Justice Reform*, 117 *MICH. L. REV.* 259 (2018) (analyzing the meanings behind different articulations of “mass incarceration”).

¹⁵¹ See DAVIS, *supra* note 2, at 50-51.

¹⁵² See Allegra M. McLeod, *Confronting Criminal Law’s Violence: The Possibilities of Unfinished Alternatives*, 8 *HARV. UNBOUND* 109, 113 (2013) [hereinafter *Confronting Criminal Law’s Violence*]; Allegra M. McLeod, *Prison Abolition and Grounded Justice*, 62 *UCLA L. REV.* 1156, 1167-68 (2015).

then all of prison's cruelties must be considered in a normative assessment of the carceral state.

In this Part, I offered a critique of quantitative sentencing insofar as the severity of the punishment is measured by a number — amount of time without liberty. I then discussed the relevance of prison's cruelties to sentencing policy and practice. In the next Part, I return to the puzzle of the lack of actual influence that prison-as-experienced has on sentencing policy. Given its relevance, it is deeply troubling that information about prison-as-experienced has so little purchase in sentencing settings. Epistemic injustice provides a theoretical framework for understanding this failure.

II. EPISTEMIC INJUSTICE: DISINTEREST AND IGNORANCE

Plenty of boys had talked of the secret graveyard before, but as it had ever been with Nickel, no one believed them until someone else said it.¹⁵³

In this Part, I use the framework of epistemic injustice theory to take a deeper look at the relationship between the apparent information and interest deficits among sentencing authorities toward prison's cruelties. Despite widespread accessibility of information about prison-as-experienced, sentencing authorities nevertheless appear to discount, ignore, or deem it irrelevant to punishment decisions. Epistemic injustice scholar, José Medina, frames the question this way: "How do we remain ignorant even when we have a wealth of evidence available? How does this kind of epistemic insensitivity or numbness come about?"¹⁵⁴

Epistemic injustice theory illuminates how and why this happens. Certain groups are excluded from producing knowledge due to disinterest or distrust of those groups.¹⁵⁵ The result is a reduction of both knowledge of and interest in the experiences of the disfavored group.¹⁵⁶ Importantly, a lack of interest also leads to ignorance because accounts from the excluded group are ignored. In other words, not

¹⁵³ COLSON WHITEHEAD, *THE NICKEL BOYS* 5 (2019). In this historical novel, Nickel is a detention facility (prison) for boys adjudicated delinquent based closely on the Dozier School for Boys that operated in Florida for over a century.

¹⁵⁴ MEDINA, *supra* note 141, at 146.

¹⁵⁵ See generally FRICKER, *supra* note 25, at 30-41, 152-60 (discussing stereotypes and hermeneutical marginalization as reasons for epistemic injustice).

¹⁵⁶ See generally *id.* at 161-68 (discussing the effects of hermeneutical injustice on marginalized groups).

caring, not knowing, and construing as irrelevant, function as a mutually reinforcing loop.

Below, I describe the theory of epistemic injustice and its articulation of the epistemic harms caused by excluding certain social groups from knowledge production. I then elaborate upon the unconscious and structural mechanisms that cause people to engage in epistemic injustice. Finally, I illustrate how epistemic injustice works to silence incarcerated voices speaking about prison conditions using the recent account of the children's bodies uncovered in unmarked graves at the Dozier School for Boys — a juvenile prison in Florida.¹⁵⁷

A. *The Philosophical Study of Epistemic Injustice*

Epistemic injustice is a new area of political philosophy that concerns itself with how knowledge production is damaged by excluding or discrediting the speech of certain social groups.¹⁵⁸ It has deep antecedents in feminist,¹⁵⁹ and critical race scholarship,¹⁶⁰ as well as in Continental philosophy.¹⁶¹ Two aspects of injustice relate to how and

¹⁵⁷ The hidden history of the Dozier School for Boys was the basis of Colson Whitehead's novel, *The Nickel Boys*. See WHITEHEAD, *supra* note 153, at 211.

¹⁵⁸ Ian James Kidd, José Medina & Gaile Pohlhaus, Jr., *Introduction to the Routledge Handbook of Epistemic Injustice*, in THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE 1, 1 (Ian James Kidd et al. eds., 2017). The phrase epistemic injustice was coined by Miranda Fricker in EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING (2007).

¹⁵⁹ See, e.g., SANDRA HARDING, WHOSE SCIENCE? WHOSE KNOWLEDGE?: THINKING FROM WOMEN'S LIVES 119 (1991) (arguing for a "standpoint epistemology" that acknowledges that interpretation and assignation of meaning vary depending on one's social position); Nancy Tuana, *Feminist Epistemology*, in THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE, *supra* note 158, at 125, 126-27 (identifying antecedent feminist and anti-colonial philosophy antecedent to epistemic injustice); Kristie Dotson, "Thinking Familiar with the Interstitial": An Introduction, 29 HYPATIA 1, 3 (2014) (describing how the voice of feminist philosophers are often suppressed).

¹⁶⁰ See, e.g., PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 9 (2d ed. 2000) (comparing aims of African American political thought to Marxist goals for equity); Charles W. Mills, *Ideology*, in THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE, *supra* note 158, at 100, 101 (tracing the discussion of epistemic injustice back to Marxist philosophy).

¹⁶¹ See Amy Allen, *Power/Knowledge/Resistance: Foucault and Epistemic Injustice*, in THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE, *supra* note 158, at 187 (arguing that Foucault was "a theorist of epistemic injustice *avant la lettre*" because he studied how structural power relationships affect what we think and what we think we know). Foucault observed that to be credited as valid, the discipline requires that the speaker be qualified to speak and that the speaker communicates in a way that matches the discipline's method, style, and substance. See *id.* at 191 (citing MICHEL FOUCAULT, "SOCIETY MUST BE DEFENDED" 184 (Mauro Bertani & Alessandro Fontana eds., David Macey trans., 2003)). Arguably, Foucault's method of genealogical analysis attempted

what we know: testimonial and hermeneutical injustice.¹⁶² Testimonial injustice occurs when “prejudice causes a hearer to give a deflated level of credibility to a speaker’s word.”¹⁶³ It results from an unwarranted decision that the speaker lacks the credibility or competence to convey information.¹⁶⁴ Not restricted to formal testimony, it refers to any speech designed to convey information to another person.¹⁶⁵ The decision not to credit the speaker’s knowledge is unwarranted because it is not based on a fair assessment of the speaker’s credibility but, rather, on a stereotype about “people like” the speaker.¹⁶⁶ Importantly, the injustice is usually ongoing and pervasive across contexts because it is based on “prejudices that ‘track’ the [speaker] through different dimensions of social activity.”¹⁶⁷

Prisoners fit well as a group against whom identity prejudice is at work. General sentiments that prisoners (“convicts”) are untrustworthy manifests in rules permitting impeachment of witnesses with prior convictions for certain crimes.¹⁶⁸ Skepticism about prisoners’ trustworthiness also manifests in critiques of “frivolous” prisoner civil rights suits.¹⁶⁹ While frivolity refers to a lack of legal merit, which can result from a real harm that is not legally actionable,¹⁷⁰ the frivolity critique also suggests the widespread view that prisoners’ reports of

to excavate and present “knowledges that were disqualified by the hierarchy of erudition and sciences.” *Id.* at 192.

¹⁶² Critically, Fricker follows Judith Shklar’s lead, discussed *supra*, in developing a non-ideal theory of injustice rather than a theory of justice. See FRICKER, *supra* note 25, at 39.

¹⁶³ *Id.* at 1.

¹⁶⁴ See *id.* at 17.

¹⁶⁵ *Id.* at 1.

¹⁶⁶ See *id.* at 23. Fricker addresses the listener’s innocence and culpability at length, but this discussion is not relevant to this Article. See generally *id.* at 20-27 (discussing the listener’s blameworthiness).

¹⁶⁷ *Id.* at 27.

¹⁶⁸ Anna Roberts wrote a trilogy of articles critiquing rules permitting impeachment of witnesses with prior convictions. See Anna Roberts, *Conviction by Prior Impeachment*, 96 B.U. L. REV. 1977 (2016); Anna Roberts, *Impeachment by Unreliable Conviction*, 55 B.C. L. REV. 563, 592-06 (2014); Anna Roberts, *Reclaiming the Importance of the Defendant’s Testimony: Prior Conviction Impeachment and the Fight Against Implicit Stereotyping*, 83 U. CHI. L. REV. 835, 873-82 (2016).

¹⁶⁹ See Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 937-38 (1990) (describing judicial perception of pro se prisoner litigation as largely frivolous).

¹⁷⁰ See Katherine A. MacFarlane, *Shadow Judges: Staff Attorney Adjudication of Prisoner Claims*, 95 OR. L. REV. 97, 114-17 (2016) (listing perception of prisoner civil rights claims as “frivolous” or meritless as one of the psychological hurdles to assuring prisoner access to federal adjudication of their 1983 claims).

their experiences are exaggerated,¹⁷¹ untrue,¹⁷² or simply unintelligible.¹⁷³ Official discussion of prisoner grievances is often cursory with little effort to dig deeply into the facts alleged.¹⁷⁴ In legislative debates about the Prison Litigation Reform Act (“PLRA”), for example, Senator Orrin Hatch characterized prisoners bringing civil rights suits as the central problem with prisoner civil rights litigation. He argued: “Jailhouse lawyers with little else to do are tying our courts in knots with an endless flood of frivolous litigation.”¹⁷⁵ This mistrust of prisoner speech about prison conditions is directly tied to the identity of the speakers as a disfavored and mistrusted group — convicted criminals.¹⁷⁶

Hermeneutical injustice occurs when the speaker is excluded from the project of collective meaning-making.¹⁷⁷ The word, hermeneutic, comes from the Greek word for interpretation. Hermeneutics, in the sociological sense, is understanding the meaning that participants in a

¹⁷¹ See, e.g., Donald H. Zeigler & Michele G. Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in Federal Courts*, 47 N.Y.U. L. REV. 157, 182 (1972) (describing prisoner civil rights complaints as, *inter alia*, reporting to hyperbole).

¹⁷² See, e.g., Wayne T. Westling & Patricia Rasmussen, *Prisoners’ Access to the Courts: Legal Requirements and Practical Realities*, 16 LOY. U. CHI. L.J. 273, 309 (1985) (suggesting that pro se prisoner pleadings bury the claim “in a tangle of facts, extraneous material, unsupported assertions, and fallacious arguments”).

¹⁷³ See, e.g., DONNA STIENSTRA, JARED BATAILLON & JASON A. CANTONE, FED. JUDICIAL CTR., ASSISTANCE TO PRO SE LITIGANTS IN U.S. DISTRICT COURTS: A REPORT ON SURVEYS OF CLERKS OF COURT AND CHIEF JUDGES 21-22 (2011) (survey of sixty-one chief judges finding that they view pro se pleadings by prisoners as often unintelligible).

¹⁷⁴ See Jon O. Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 520-22 (1996) (discussing how a better understanding of the facts in three prisoner suits demonstrated legitimate claims, which a letter by four state attorneys general initially condemned as frivolous). In fact, in order to contain the content of prisoners’ expression of their grievances, almost all federal district courts provide forms for prisoners to use as their initial pleading in § 1983 claims against the prison. See Richard H. Frankel & Alistair E. Newbern, *Prisoners and Pleading*, 94 WASH. U. L. REV. 899, 899, 909 (2017). Troublingly, “[s]eventy-three percent of current form complaints instruct prisoners to state the facts ‘briefly’ or ‘as briefly as possible,’ and discourage them from providing detailed factual allegations.” *Id.* at 905. Although understandable from a legal perspective, the result is to constrain expression of grievances, to reduce elaboration.

¹⁷⁵ 141 CONG. REC. S14, 418 (daily ed. Sept. 27, 1995) (statement of Sen. Hatch).

¹⁷⁶ If we need further proof that prisoners are mistrusted, look no further than evidentiary rules that permit impeachment of witnesses with evidence that they have been convicted of crime. See, e.g., FED. R. EVID. 609 (Impeachment by Evidence of a Criminal Conviction).

¹⁷⁷ See Fricker, *supra* note 25, at 158 (arguing that hermeneutical injustice occurs when “one’s social experience [is] obscured from collective understanding”).

social situation assign to that situation.¹⁷⁸ Fricker uses the term to mean how we arrive at a shared, social meaning of something.¹⁷⁹ Powerful groups in society have an “unfair advantage in structuring collective social understandings,” while disfavored groups have limited access to contributing their perspectives.¹⁸⁰ Exclusion of the perspectives of the marginalized groups depletes conceptual resources necessary for public life and policy development.

Understanding what prison is like is partially a hermeneutical project. Prison can be described objectively, but the experience of incarceration involves more than that. Exclusion of incarcerated people’s voices removes them from the hermeneutical project of defining collective meanings of punishment, including understanding the severity of punishment.

To reiterate, epistemic injustice exists when someone is not seen as competent or credible to provide information (testimonial injustice), or is not able to contribute to a collective understanding of the meaning of things (hermeneutical injustice). In both instances, the exclusion is based on the person’s identity as a member of a disfavored social group.

Both testimonial and hermeneutical injustices act as an “obstacle to truth.”¹⁸¹ The hearer misses the opportunity to learn the information the speaker provides or, on a structural level, information and ideas are “blocked” from circulation.¹⁸² This kind of harm affects our ability to gain knowledge. The basic epistemic requirement for any society is the ability to gather and retain knowledge about facts that impact its survival: what is safe, what is dangerous, and so forth.¹⁸³ So, the first epistemic need of any society is the need to pool true information.¹⁸⁴ If the society is unjustifiably prejudiced against certain speakers, their bias will result in a reduction in collective knowledge that may be necessary for social and political life.¹⁸⁵

A paucity of knowledge can have fatal consequences. Consider, for example, the epistemic harm caused by a failure of officials at a local jail

¹⁷⁸ HANS-GEORG GADAMER, *PHILOSOPHICAL HERMENEUTICS* 15 (David E. Ling ed. & trans., 1976).

¹⁷⁹ See FRICKER, *supra* note 25, at 147-48.

¹⁸⁰ *Id.* at 147.

¹⁸¹ See *id.* at 43.

¹⁸² See *id.* at 54-55. For additional arguments about the harm of testimonial injustice not directly relevant to this Article, see, for example, *id.* at 46, 133, 145.

¹⁸³ See *id.* at 109-10 (citing BERNARD WILLIAMS, *TRUTH AND TRUTHFULNESS: AN ESSAY IN GENEALOGY* (2002)).

¹⁸⁴ See *id.* at 109.

¹⁸⁵ See *id.* at 115-17; see also MEDINA, *supra* note 141, at 121 (discussing how epistemic failures may often be simultaneously ethical and political failures).

to respond to detainees' medical complaints.¹⁸⁶ One study analyzes the death of a detainee in a local jail after the detainee's medical complaints went completely unheeded by the jail's administration.¹⁸⁷ This type of "epistemic neglect" occurs when the listener's uptake of the detainees' speech is either distorted (the guards do not believe the complaints) or where the detainee finds no effective method to speak to the authorities.¹⁸⁸

The medical neglect study revealed that thousands of detainee grievances went completely unanswered.¹⁸⁹ The structure and orientation of the jail administration rendered it almost impossible for jail authorities to listen and accurately understand prisoner accounts of medical need.¹⁹⁰ The obvious epistemic harm was that the jail authorities did not know enough to intervene and save the lives of detainees needing medical attention, or to address adequately other systemic issues affecting detainee well-being in the jail. Similar forms of epistemic harm occur when information about prison's cruelties is ignored or discredited in punishment decisions.

Hermeneutical and testimonial injustice can reinforce one another.¹⁹¹ To give another example, it is a hermeneutical injustice when lawmakers have no idea what male prison is like for a transgender woman because the lawmakers have no exposure to transgender people who have been incarcerated.¹⁹² It is a testimonial injustice when lawmakers discredit or ignore the accounts of imprisonment provided by incarcerated transgender people in memoirs and legislative

¹⁸⁶ José Medina, *Agential Epistemic Injustice and Collective Epistemic Resistance in the Criminal Justice System*, SOCIAL EPISTEMOLOGY 3-4 (2020) [hereinafter *Agential Epistemic Injustice*].

¹⁸⁷ *Id.* (citing José Medina & Matt S. Whitt, *Epistemic Activism and the Politics of Credibility: Testimonial Injustice Inside/Outside a North Carolina Jail*, in MAKING THE CASE: FEMINIST AND CRITICAL RACE THEORISTS INVESTIGATE CASE STUDIES (Heidi Grasswick & Nancy McHugh eds.) (forthcoming)).

¹⁸⁸ *Id.* at 5. It has also been called "pre-emptive testimonial injustice." FRICKER, *supra* note 25, at 130.

¹⁸⁹ See José Medina & Matt S. Whitt, *Epistemic Activism and the Politics of Credibility: Testimonial Injustice Inside/Outside a North Carolina Jail*, in MAKING THE CASE: FEMINIST AND CRITICAL RACE THEORISTS INVESTIGATE CASE STUDIES 27 (Heidi Grasswick & Nancy McHugh eds.) (forthcoming).

¹⁹⁰ See Medina, *Agential Epistemic Injustice*, *supra* note 186, at 5-7 (citing Jennifer Hornsby & Rae Langton, *Free Speech and Illocution*, 4 LEGAL THEORY 21 (1998)).

¹⁹¹ See FRICKER, *supra* note 25, at 159.

¹⁹² See generally Talia Mae Bettcher, *Trans Identities and First-Person Authority*, in "YOU'VE CHANGED": SEX REASSIGNMENT AND PERSONAL IDENTITY 98 (Laurie J. Shrage ed., 2009) (discussing how transgender people have first-person authority over their own gender).

testimony.¹⁹³ In this way, testimonial and hermeneutical injustice are mutually reinforcing.

Assume, for a moment, that these twin injustices are always going on in the background for incarcerated people — the hermeneutical and testimonial injustice in relation to the dominant understanding of the punishment of prison. It now becomes easier to see how we can have a public debate about sentencing policy without ever mentioning what prison is like. The people who would share that information are excluded from the process.¹⁹⁴

B. *Hidden Punishment's Open Secrets*

Epistemic injustice that silences or discredits incarcerated people's accounts of prison adds a layer of secrecy to an already obscured system of punishment. To illustrate the relationship between silencing and secrecy, I draw an analogy to the use of paralytic agents in death penalty protocols.

In their article about secrecy and lethal injection protocols, William Berry and Meghan Ryan argue that the death penalty is shrouded from public view (and thus democratic debate) by three levels of secrecy.¹⁹⁵ First, the executions happen behind prison walls.¹⁹⁶ Second, the protocols for execution are not publicly available.¹⁹⁷ Third, the paralytic agent masks the suffering of the condemned who — prevented from moving any muscle — cannot express in words or actions his suffering.¹⁹⁸ As a result, the subjective pain experienced in execution

¹⁹³ See, e.g., Elliot Oberholtzer, *The Dismal State of Transgender Incarceration Policies*, PRISON POL'Y INITIATIVE (Nov. 8, 2017), <https://www.prisonpolicy.org/blog/2017/11/08/transgender/> [<https://perma.cc/GP88-6B5J>] (detailing the paucity of state laws and policies addressing the needs of transgender prisoners).

¹⁹⁴ Cf. Gaile Pohlhaus, Jr., *Varieties of Epistemic Injustice*, in THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE, *supra* note 158, at 13 (describing how specific “knowers” have been excluded as “knowers”).

¹⁹⁵ See William W. Berry III & Meghan J. Ryan, *Cruel Techniques, Unusual Secrets*, 78 OHIO ST. L.J. 403, 435-36 (2017).

¹⁹⁶ *Id.* at 423 (explaining that executions are “private affairs” conducted within the prison).

¹⁹⁷ See *id.* at 422-23.

¹⁹⁸ *Id.* (citing Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 55-56 (2007)) (describing how the paralytic drug functions “to prevent the offender from screaming and writhing as the state pumps lethal drugs into his veins”).

remains wholly *unknowable*.¹⁹⁹ The defendant is completely silenced by the paralytic agent and then by death.

These three levels of secrecy apply to prison as a punishment. It occurs behind walls and its protocols and techniques are, while sometimes publicly available in the form of agency regulations, often obscured from view.²⁰⁰ In the words of eighteenth century British prison reformer John Howard, “In prison, the awe of the public eye is lost, and the power of the law is spent”²⁰¹ This presents a problem for evaluating our sentencing practices and policy. “If the people cannot see what happens to those who are thrown into the criminal justice system, they cannot be expected to restrain its tendency toward excess.”²⁰²

Berry and Ryan’s third type of secrecy, silencing the condemned with paralytic agents, can be analogized to epistemic injustice. To be sure, unlike executed prisoners, imprisoned people are still alive and able to communicate their experiences. They are not, however, credited when they speak. The barrier to being heard when they speak about their prison experiences is a third level of secrecy, a critical aspect of the invisibility in prisons.

We can see the mechanisms of epistemic injustice at work in the recent discovery of beatings and unexplained deaths in Florida’s Dozier School for Boys, which was in operation as a juvenile detention facility from 1905 to 2011.²⁰³ On the outside, it appeared to be a progressive reformatory school with lawns, educational programming, and few locked doors. But the actual experience of the incarcerated boys was much different and included horrible beatings from the guards under

¹⁹⁹ *Id.* at 424 (citing Eric Berger, *Lethal Injection and the Problem of Constitutional Remedies*, 27 YALE L. & POL’Y REV. 259, 265 (2009)); Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 55-56 (2007).

²⁰⁰ Foucault described how the spectacle of the scaffold was replaced with the enclosed space of the prison. See FOUCAULT, *supra* note 122, at 34, 115-16.

²⁰¹ HOWARD, *supra* note 19, at 24.

²⁰² John F. Stinneford, *The Original Meaning of Cruel*, 105 GEO. L.J. 441, 448 (2017) (citing STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 155 (2002)) (“The notion of hiding punishment from public view would have seemed vaguely tyrannical in the late eighteenth century”); see also LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 75 (1993) (“In the nineteenth century, corrections went private. The walled-off penitentiary replaced the pillory and the whipping post; and most states abolished the public festival of hanging.”).

²⁰³ See Erin Blakemore, *Archaeologists Finally Know What Happened at This Brutal Reform School*, SMITHSONIAN MAGAZINE (Jan. 25, 2016), <https://www.smithsonianmag.com/smart-news/archaeologists-finally-know-what-happened-brutal-reform-school-180957911/> [https://perma.cc/UC7B-3JTC].

cover of darkness, sexual abuse, and mysterious disappearances of boys. Several years ago, the remains of fifty-one boys were uncovered on the Dozier grounds,²⁰⁴ triggering an inquiry into how they died and the actual conditions of confinement at the school.²⁰⁵

While investigative reports and testimonials surfaced on conditions at Dozier from 1903 to the early 2000s,²⁰⁶ few formerly incarcerated boys spoke about their experiences publicly until the graves were discovered. After the graves were discovered, a group of Dozier survivors spoke up, identifying themselves as the “white house boys” because the building where many of the night beatings took place was called the “white house.”²⁰⁷ One recalled the white house as follows:

. . . blood on the walls, bits of lip or tongue on the pillow, the smell of urine and whiskey, the way the bed springs sang with each blow. The way they cried out for Jesus or mama. The grinding of the old fan that muffled their cries. The one-armed man who swung the strap.²⁰⁸

Certainly such violent abuse would lead some boys to fear retaliation should they tell anyone what was happening at Dozier. Indeed, one newspaper article about the Dozier school claims that “outsiders had no idea” what was happening at Dozier.²⁰⁹ Yet, it is also true that Dozier was the subject of prior investigations, and many boys left Dozier, carrying their experiences of abuse with them.²¹⁰ How, then, did the boys’ accounts of abuse remain so hidden from public view?

²⁰⁴ *Id.*

²⁰⁵ Elizabeth Koh, *Entire Dozier School Campus Will Be Searched for Graves, State Officials Say*, TAMPA BAY TIMES (June 20, 2019), <https://www.tampabay.com/florida-politics/buzz/2019/06/20/entire-dozier-school-campus-will-be-searched-for-graves-state-officials-say/> [<https://perma.cc/7VJ5-M8EX>]; see ERIN H. KIMMERLE, E. CHRISTIAN WELLS & ANTOINETTE JACKSON, FLA. INST. FOR FORENSIC ANTHROPOLOGY & APPLIED SCIS., U.S. FLA. REPORT ON THE INVESTIGATION INTO THE DEATHS AND BURIALS AT THE FORMER ARTHUR G. DOZIER SCHOOL FOR BOYS IN MARIANNA, FLORIDA (Jan. 18, 2016), <http://news.usf.edu/article/articlefiles/7173-usf-final-dozier-summary-2016.pdf> [<https://perma.cc/B2PT-LEYW>].

²⁰⁶ See Ben Montgomery & Waveney Ann Moore, *For Their Own Good*, ST. PETERSBURG TIMES (Apr. 19, 2009), https://dartcenter.org/sites/default/files/For_Their_Own_Good_reduced.pdf [<https://perma.cc/8HEY-KVFL>].

²⁰⁷ Greg Allen, *Florida’s Dozier School for Boys: A True Horror Story*, NPR (Oct. 15, 2012), <https://www.npr.org/2012/10/15/162941770/floridas-dozier-school-for-boys-a-true-horror-story> [<https://perma.cc/EET5-EMN8>].

²⁰⁸ Montgomery & Moore, *supra* note 206.

²⁰⁹ *Id.* at 3E.

²¹⁰ See *id.* at 6A.

The absence of incarcerated voices from public discussions of Dozier prior to the discovery of the graves demonstrates how epistemic injustice can lead to systemic violence. Those seeking to commit violence do not fear reprisal because their victims will not be heard or believed.²¹¹ “[T]o communicate, *we all need an audience willing and capable of hearing us.*”²¹² Instead, there may be a “willful hermeneutical injustice” in which the prisoners of the boys’ reformatory clearly attempt to inform others about their conditions of confinement, but the people who could do something to change the situation “continue to misunderstand and misinterpret” what the reformatory is really doing to the boys.²¹³ They insist that it is an educational facility rather than a site of torture, neglect, and even murder. Critically, the boys — members of the disfavored group of juvenile delinquents — were not an active part of the public conversations about the Dozier school until objective evidence of its abuses emerged: the discovery of hidden graves containing the remains of boys. Then, a groundswell of former Dozier inmates coming forward to tell their stories.

To conclude this Part, epistemic injustice occurs when disfavored groups do not have the opportunity to share information or are disbelieved when they attempt to share information. The exclusion of their voices creates gaps in public knowledge. These knowledge gaps have been called hermeneutical lacunas — areas of the social world which are fundamentally misunderstood, areas lacking adequate meaning.²¹⁴ Prison-as-experienced, I argue, is one such area. While exclusion or discrediting of the voices of incarcerated people may occur on an unconscious level, it is also due to structural power arrangements that discourage attention to information that challenge the prevailing world view.²¹⁵ As the Dozier school history illustrates, the result is a visible prison on top of an invisible prison. Efforts to integrate knowledge about the cruelties and abuses of the invisible prison can

²¹¹ See, e.g., HEATHER ANN THOMPSON, *BLOOD IN THE WATER: THE ATTICA PRISON UPRISING AND ITS LEGACY* 249-54 (2016) (documenting how abuse of prisoners continued with impunity after the 1971 Attica uprising, in part because so few observers were permitted inside to interview prisoners).

²¹² Kristie Dotson, *Tracking Epistemic Violence, Tracking Practices of Silencing*, 26 *HYPATIA* 236, 238 (2011).

²¹³ See Gaile Pohlhaus, Jr., *Relational Knowing and Epistemic Injustice: Toward a Theory of Willful Hermeneutical Ignorance*, 27 *HYPATIA* 715, 716 (2012) (emphasis omitted).

²¹⁴ See FRICKER, *supra* note 25, at 158-59.

²¹⁵ See *infra* Part III for a discussion on responsible listening.

take decades — even a century. As one incarcerated journalist puts it, “The walls are thicker than you think.”²¹⁶

In the final Part, I discuss what can be done about epistemic injustice towards incarcerated people and its impact on sentencing policy and practice.

III. EPISTEMIC VIRTUE IN SENTENCING DECISIONS

Given the ethical and epistemological value of first-person knowledge, the voices of incarcerated people are paramount to understanding the qualitative experience of imprisonment. To say that incarcerated voices are paramount is not to say that other sources are illegitimate. To be sure, other methods of inquiry can increase collective knowledge about the qualitative experience of imprisonment. The Guardian, for example, created a virtual-reality experience of solitary confinement that the viewer can experience using a headset and her phone.²¹⁷ This permits the viewer to have a visceral, sensory experience rather than just an intellectual understanding. Moreover, various people affiliated with prisons and prisoners have some insight into prison’s cruelties. Guards and journalists posing as guards, for example, have shared insights about prison-as-experienced.²¹⁸ Both governmental and non-governmental actors tour prison facilities with an eye toward monitoring conditions.²¹⁹ Researchers study prison conditions and qualitative differences between prisons.²²⁰

²¹⁶ *Nightline*, *supra* note 27.

²¹⁷ *6x9: A Virtual Experience of Solitary Confinement*, GUARDIAN, <https://www.theguardian.com/world/ng-interactive/2016/apr/27/6x9-a-virtual-experience-of-solitary-confinement> (last visited Mar. 29, 2019) [<https://perma.cc/QY5V-QTEA>]. Likewise, the Prison and Justice Initiative at Georgetown University installed a replica of a solitary confinement cell that visitors can sit in for up to thirty minutes. *Replica Solitary Confinement Cell Exhibit*, GEO. PRISONS & JUST. INITIATIVE, <https://prisonsandjustice.georgetown.edu/solitarycellreplica/exhibit> (last visited Sept. 23, 2020) [<https://perma.cc/THN2-RRPY>].

²¹⁸ See, e.g., SHAUN BAUER, *AMERICAN PRISON: A REPORTER’S UNDERCOVER JOURNEY INTO THE BUSINESS OF PUNISHMENT* (2018) (illustrating an account of a journalist posing as a prison guard in Louisiana).

²¹⁹ See, e.g., *Who We Are*, CORRECTIONAL ASS’N OF N.Y., <https://www.correctionalassociation.org/about-cany> (last visited Sept. 23, 2020) [<https://perma.cc/BT88-2PLM>] (describing the mandate of the association to provide independent monitoring of New York prisons).

²²⁰ See, for example, Alison Liebling’s large body of work grading prisons’ “moral performance” and effect on incarcerated people. ALISON LIEBLING, *PRISONS AND THEIR MORAL PERFORMANCE: A STUDY OF VALUES, QUALITY, AND PRISON LIFE* (2004); *THE EFFECTS OF IMPRISONMENT* (Alison Liebling & Shadd Maruna eds., 2005).

Yet, non-prisoner sources of information about prison-as-experienced present an ethical challenge because they risk discounting prisoners' ability to provide authoritative information. Incarcerated people are thus treated as objects of study rather than producers of knowledge.²²¹ It is largely unobjectionable to be studied if one can also speak and be heard about one's experiences, thereby contributing to the study.²²² The problem arises when one is studied but not permitted to share knowledge. Fricker compares the silenced, studied person to a tree felled in the forest.²²³ We can study the rings to know its age, but as an object incapable of agency, the tree does not produce knowledge.²²⁴ Likewise, a prisoner and his conditions can be studied — making him the source of information.²²⁵ This is very different from speaking on one's own behalf. The ethical harm then, is to treat someone not like an informant, but merely as a source of information.²²⁶

Further, non-prisoner sources present epistemic challenges in their potential inaccuracy. Non-prisoner accounts of prison, as well as visits to prisons, often present sanitized, ideal versions of the prison experience.²²⁷ At the same time, non-prisoner accounts of prison also

²²¹ See FRICKER, *supra* note 25, at 132.

²²² See *id.* at 133-34. Fricker cites to Martha Nussbaum for the proposition that objectification is only a problem in the Kantian sense, when one is solely the means to an end and not also a subject capable of agency. *Id.* at 133 (citing MARTHA NUSSBAUM, *SEX AND SOCIAL JUSTICE* 214 (1999)). Moreover, excluding the voice of prisoners from debates about prison as punishment has implications for democratic values and anti-subordination theory. Both anti-subordination theory and democratic values, although different, share this non-utilitarian view of the value of including the voices of incarcerated people in the discussion of criminal justice reform. See, e.g., Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in *MARXISM AND THE INTERPRETATION OF CULTURE* (Cary Nelson & Lawrence Grossberg eds., 1988) (discussing anti-subordination theory); Jessica Feerman, *Creative Prison Lawyering: From Silence to Democracy*, 11 *GEO. J. ON POVERTY L. & POL'Y* 249, 252-57 (2004) (describing many ways that incarceration silences inmates).

²²³ FRICKER, *supra* note 25, at 132-33.

²²⁴ See FRANZ FANON, *BLACK SKIN, WHITE MASKS* 109 (Charles Lam Markmann trans., Grove Press 1967) (1952) (noting as Franz Fanon puts it so well, "I came into the world imbued with the will to find a meaning in things . . . and then I found that I was an object in the midst of other objects").

²²⁵ See, e.g., GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* (1958) (sharing the findings from a study of prisoners in maximum security prisons).

²²⁶ FRICKER, *supra* note 25, at 132; see Talia Mae Bettcher, *Trans Identities and First-Person Authority*, in *YOU'VE CHANGED: SEX REASSIGNMENT AND PERSONAL IDENTITY* 98, 113 (Laurie J. Shrage ed., 2009) (discussing the idea that observers from a dominant group can never accurately communicate the experience of the "resistant" group).

²²⁷ See *supra* Part II.B, for discussion of the Dozier School for Boys.

run the risk of conflating fantasy with reality. Prisons feature prominently in the American imagination,²²⁸ existing in both mythology and materiality.²²⁹ Innumerable television shows, movies, and novels are set in prisons. As Angela Y. Davis pointed out in her seminal abolitionist work, *Are Prisons Obsolete?*, everyone who watched the prison show “Oz” thought they knew exactly what prison was like.²³⁰ One risks replacing an understanding of prison-as-experienced with, for example, a mythic idea of a hero trapped in a gothic hell.²³¹ The gothic imaginary excites, and, in the context of the story, it often seems that the other prisoners are so profoundly violent that they certainly belong there.²³²

It follows then that, for both ethical and epistemic reasons, sources of information about the experience of imprisonment should privilege first-person accounts of incarceration with an eye toward understanding general themes about the qualities of incarceration and their variables, rather than privileging sensational narratives. Including voices of incarcerated people in the project of understanding prison-as-experienced requires at least three predicates: (1) the proper epistemic approach to listening; (2) a way for incarcerated people to participate directly in conversations and meaning-making about punishment; and (3) attention to publications of incarcerated people.

Below I briefly discuss responsible listening as an epistemic virtue while noting the challenges posed by unconscious biases, structural oppression, and empathy deficits. I then discuss political and social methods for incarcerated people to participate in shaping a collective understanding of the punishment of imprisonment. I argue that prisoner participation in sentencing policy should have an iterative component in which incarcerated people are directly in dialogue with policymakers as well as a reflective or artistic component, in which attention is paid to the writing of incarcerated people describing their experiences.

²²⁸ See SMITH, *supra* note 1, at 23.

²²⁹ PHILLIP SMITH, PUNISHMENT AND CULTURE 59 (2008).

²³⁰ DAVIS, *supra* note 2, at 18.

²³¹ See Norman Mailer, *Introduction* to JACK HENRY ABBOT, *IN THE BELLY OF THE BEAST* ix, xiii (1981) (indicating that Norman Mailer seems to characterize Jack Henry Abbott this way in his introduction to Abbott’s prison memoirs: “It is that not only are the worst of the young sent to prison, but the best - that is, the proudest, the bravest, the most daring, the most enterprising, and the most undefeated of the poor”).

²³² See, e.g., Bill Yousman, *Inside Oz: Hyperviolence, Race and Class Nightmares, and the Engrossing Spectacle of Terror*, 6 COMM. & CRITICAL/CULTURAL STUD. 265, 265 (2009) (arguing that “Oz’s hyperviolent spectacle legitimizes both the expansion of the prison-industrial complex and the continuing prevalence of inhumane prison environments”).

Finally, I address heterogeneity in prison experiences from epistemic and practical perspectives. Although variation makes it more difficult to arrive at a generalized understanding of prison's cruelties, the heterogeneity does not present more of a challenge than in other areas of social knowledge. Sentencing policy and practice can find a way forward through the variations in prison experiences by taking into account the worst that prison has to offer when making sentencing decisions. In other words, to the extent that experiences of prison conditions are varied, sentencing policy and practice decisions should be made in light of the worst known conditions. This presumption of the worst accords with a non-ideal theory of injustice, in which injustice is understood as the norm rather than a "surprising abnormality."²³³ If prison's cruelties are the norm, they should not be treated as aberrations in sentencing decisions.

A. *Responsible Listening*

Rather than identifying what to listen to and whom to believe, epistemic injustice theorists suggest a general approach of cultivating the virtue of responsible listening.²³⁴ Framed in Aristotelian terms, responsible listening can be seen as a habit that one can cultivate in the pursuit of knowledge.²³⁵ Listening carefully to incarcerated people describe their prison experiences respects them as people with critical knowledge to contribute, knowledge that is otherwise inaccessible.²³⁶

The difficulty that presents itself, however, is how the listener can think critically about the credibility and competence of the information provided without bias or ideological commitments that denigrate the

²³³ MEDINA, *supra* note 141, at 13 (citing SHKLAR, *supra* note 28, at 17) ("This normal model of justice does not ignore injustice but it does tend to reduce it to a prelude to or a rejection and breakdown of justice, as if injustice were a surprising abnormality."); *see also* FRICKER, *supra* note 25, at 39 (arguing that "testimonial injustice is a normal part of discursive life"); SHKLAR, *supra* note 28, at 19 ("Most injustices occur continuously within the framework of an established polity with an operative system of law, in normal times."). Elsewhere, Elizabeth Anderson writes of her book, "This is a work in nonideal theory. I do not advance principles and ideals for a perfectly just society, but ones that we need to cope with the injustices in our current world, and to move us to something better." ELIZABETH ANDERSON, *THE IMPERATIVE OF INTEGRATION* 3 (2010).

²³⁴ *See* MEDINA, *supra* note 141, at 30.

²³⁵ *See* FRICKER, *supra* note 25, at 81 (discussing how Aristotle's idea of "moral training" applies to epistemically virtuous listening).

²³⁶ *See* CHARLES MILLS, *BLACKNESS VISIBLE: ESSAYS ON PHILOSOPHY AND RACE* 27 (1998) (discussing the epistemic significance of "experiential space").

information or the informer.²³⁷ Recommendations offered by epistemic theorists for how to do this seem at once obvious and inadequate. Medina, for example, cautions against familiar barriers to learning like “underestimat[ing one’s] cognitive gaps and limitations,”²³⁸ and resisting “experiences and viewpoints that can destabilize (or create trouble for) one’s own perspective.”²³⁹ The remedy, according to Medina, involves adhering to the three epistemic virtues of humility, “curiosity/diligence,” and “open-mindedness.”²⁴⁰ These are worthy goals, to be sure. Given the barriers of implicit biases, power relationships, and empathy deficits, however, it is not clear whether responsible listening can be achieved. As I discuss in a prior article, much of the prejudice against disfavored groups occurs unconsciously because of implicit biases that are not easy to dislodge.²⁴¹ Even if the ideological exclusion of contrary information is not intentional, information which contradicts the dominant ideology may be discredited or ignored because it seems incoherent to the dominant ideology.²⁴² Moreover, those in positions of power may not want to learn information that challenges existing ideologies and practices.²⁴³ In these instances, there is no shared commitment to the idea of collective knowledge that can be improved by adding voices previously silenced or discredited.²⁴⁴

A related impediment to listening is lack of empathy, defined as the emotional element that “helps us decide what is important, [] moves us to action, and [] helps us to care about the consequences of our

²³⁷ See MEDINA, *supra* note 141, at 127 (suggesting that, at a minimum, responsible agency in relation to knowledge requires three things: self-knowledge, social knowledge, and empirical knowledge about the world).

²³⁸ *Id.* at 57.

²³⁹ *Id.* at 35.

²⁴⁰ *Id.* at 42-44.

²⁴¹ See Hanan, *supra* note 63, at 307. Instead of unconscious bias, Fricker describes the process as judgments that are not “doxastically mediated.” See FRICKER, *supra* note 25, at 36-37, 40 (“[S]tereotypical images held in the collective social imagination . . . can operate beneath the radar of our ordinary doxastic self-scrutiny, sometimes even despite beliefs to the contrary.”).

²⁴² See Charles W. Mills, *Ideology*, in THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE, *supra* note 158, at 107.

²⁴³ See *id.* (“So the idea of common epistemic resources would in this case understate the adversarial dynamic and conflicting group interests involved, and obscure the fact that the subordinate black worldview . . . cannot simply be brought additively into relation with the ideology of white domination, since it is in fundamental opposition to it.”).

²⁴⁴ See *id.* at 108.

decisions.”²⁴⁵ A minimal level of empathy in the form of general interest is necessary to motivate learning.²⁴⁶ Without interest, one does not inquire or listen.

A lack of empathy for prisoners is well documented. Remember the Nightline episode described in the introduction in which people called in to the show to say, “To hell with these people [in prison]” while Chief Justice Berger argued for lawmakers to visit prisons and talk to prisoners.²⁴⁷ It is as if, by virtue of the crime, one assumes the risk of *anything* that might befall one in prison. John Howard noted this objection to his frank report on the inhumane prison conditions in England and Wales in the late eighteenth century:

Those gentlemen who, when they are told of the misery which our prisoners suffer, content themselves with saying, *Let them take care to keep out . . .* forget the vicissitudes of human affairs; the unexpected changes to which all men are liable; and that those whose circumstances are affluent, may in time be reduced to indigence, and become debtors and prisoners.²⁴⁸

In this passage, Howard attempts to engender empathy for prisoners by arguing that fate could land anyone in circumstances leading to incarceration.²⁴⁹ Yet, it can be difficult to imagine oneself as a prisoner if one accepts the dominant characterization of incarcerated people as inherently different because of their criminality.²⁵⁰ The mark of

²⁴⁵ Susan A. Bandes, *Moral Imagination in Judging*, 51 WASHBURN L.J. 1, 18 (2011). While folk understanding may continue to separate emotional and cognitive thought, a body of evidence suggests that emotions play a role in cognition, and cognition plays a role in feeling. See Kathryn Abrams & Hila Keren, *Who’s Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2044 (2010) (summarizing literature on emotion-cognition mixed process).

²⁴⁶ See Judith M. Harackiewicz, Jessi L. Smith & Stacy J. Priniski, *Interest Matters: The Importance of Promoting Interest in Education*, 3 POL’Y INSIGHTS FROM BEHAV. & BRAIN SCI. 220, 220 (2016).

²⁴⁷ *Nightline*, *supra* note 27.

²⁴⁸ HOWARD, *supra* note 19, at 15 (emphasis in original).

²⁴⁹ See *generally id.* at 22 (describing how in 1776, over 4,000 people were incarcerated in England as “felons,” “petty offenders,” or “debtors”).

²⁵⁰ Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 941 (2016) (“Implicit in American punishment is the idea that serious or repeat offenses mark the offenders as morally deformed people rather than ordinary people who have committed crimes.”). The lack of interest in prisoners does not perfectly track the designation of the person as criminal. Pretrial detainees who have been convicted of no crime, as well as people who have been convicted of minor crimes, are subject to similar social disinterest even though it has not been established that they did anything to merit harsh treatment. See Dolovich, *Cruelty*, *supra* note 18, at 919.

criminality justifies all manner of harsh treatment and exclusion from participation in society.²⁵¹ The idea that their punishment is justified seems to negate empathy.

At the same time, some people — particularly wealthy, white defendants — draw public empathy even if convicted of serious crimes.²⁵² Critical race scholars and others studying racial disparities in the criminal legal system argue that the notorious harshness of punishment in American prisons has antecedents in slavery and manifests in post-slavery practices like convict leasing and segregation.²⁵³ As a result, empathy emerges only when those race-based punishment techniques are applied to white, wealthy defendants.²⁵⁴

For the sentencing authority seeking to overcome these barriers, perhaps we can at least say that they should commit to seeking out first-hand information in order to educate themselves about any area of the social world over which they have responsibility yet little direct experience. Even if we are not aware of our unconscious processes, we can remind ourselves of what we need to know to make responsible decisions.²⁵⁵ Moreover, because they have the power to punish, sentencing authorities should be subject to “heightened epistemic responsibility” to ensure that they exercise their power wisely.²⁵⁶ Given the barriers described above, however, encouragement to listen responsibility will not be enough to ensure that incarcerated voices are heard. The below sections address inclusion of incarcerated voices in sentencing policy.

B. *Incarcerated Voices in Punishment Decisions*

1. Participation in Sentencing Policy and Practice

Sustained political participation of incarcerated people in sentencing policy facilitates democratic accountability for our punishment

²⁵¹ See JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 19 (2003).

²⁵² There are certainly exceptions, like the Manafort sentencing debate described *supra* Part I.A.

²⁵³ See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 16-18 (2012); DAVIS, *supra* note 2, at 28-29.

²⁵⁴ I thank Malcolm Feeley for pointing out the relevance of this to my argument.

²⁵⁵ Medina calls this a “thesis of cognitive minimums” about the social knowledge of others and the empirical world. MEDINA, *supra* note 141, at 127, 131 (noting that cognitive minimums are specific to context).

²⁵⁶ See *id.* at 127.

practices.²⁵⁷ It weds the twin concerns of ethical and epistemic injustice by engaging the people most affected by sentencing laws in sentencing. Consider, for example, the birth of KRUM, a prisoner organization in Scandinavia that sparked criminal justice reform.²⁵⁸ In the 1960s Scandinavian prisoners convened a “Parliament of Thieves,” which “told the public and the press what life in prison was like.”²⁵⁹ Importantly, the engagement of prisoners in political and social discussions of criminal legal reform developed into the establishment of a more permanent organization — KRUM, which influenced changes in criminal law and prison administration, including limiting sentence lengths and improving prison conditions.²⁶⁰

Political participation of incarcerated people is already happening in the U.S. As mentioned in the Introduction, some formerly incarcerated people practice as attorneys,²⁶¹ and serve as our academic colleagues in law,²⁶² as well as in the social sciences.²⁶³ Formerly incarcerated people often testify before legislative bodies about criminal justice issues. For example, Cynthia Shank, formerly incarcerated in federal prison before receiving clemency during the Obama Administration, and Piper Kerman, author of the prison memoir, *Orange is the New Black*, testified before a U.S. Congressional Committee about women in prison.²⁶⁴

²⁵⁷ Recent scholarship emphasizes the role of activism in revitalizing the role of the public in criminal legal practices. See, e.g., Jocelyn Simonson, Essay, *The Place of “The People” in Criminal Procedure*, 119 COLUM. L. REV. 249, 256-57 (2019) (discussing “communal contestation” of criminal legal practices from the family and community of the defendant, who can also be seen as “the people” the prosecution should represent); see also Amna A. Akbar, *Law’s Exposure: The Movement and the Legal Academy*, 65 J. LEGAL EDUC. 352, 356-57 (2015) (describing how the Movement for Black Lives presents a democratically-driven challenge to policing and incarceration).

²⁵⁸ McLeod, *Confronting Criminal Law’s Violence*, *supra* note 152, at 121-22.

²⁵⁹ *Id.* at 122 (citation excluded).

²⁶⁰ *Id.* (discussing Norway’s Bastøy Prison Island where prisoners “grow their own food [and] live in humane conditions with access to education, work and skills training”).

²⁶¹ See, e.g., *Innocence Staff*, *supra* note 10.

²⁶² See, e.g., GEO. LAW, *supra* note 11.

²⁶³ See, e.g., Richards & Ross, *supra* note 12.

²⁶⁴ *Women in the Criminal Justice System*, *supra* note 43, at 26.08 (noting as Ms. Kerman states, “[o]ur experiences are essential to understanding the reform that’s needed in the system”); *id.* at 44.40 (including testimony of Cynthia Shank, former federal prisoner granted clemency by the Obama Administration, about being separated from her children and husband); *id.* at 56.42 (indicating that Kerman shows the Committee a video clip from *Orange is the New Black*, depicting a woman who had just given birth returning to prison without her child, which Representative Jerrold Nadler referred to as a “heart-wrenching moment”).

It is, admittedly, easier for formerly incarcerated people to speak to the public than it is for people who are still in prison. Prison policy deliberately limits communication between prisoners and the outside world.²⁶⁵ While prisons may have legitimate reasons for banning cell phones, for example, the policy leaves incarcerated people unable to create any photographs or videography to document prison conditions. Scott Whitney, incarcerated at the Marin Correctional Facility in Florida, spent four years creating a documentary about life inside the prison using a contraband video recorder hidden in his glasses and inside a Bible that he carried close to his chest.²⁶⁶ Some clips from his documentary, titled *Behind Tha Barb Wire*, were obtained by the Miami Herald.²⁶⁷ As far as I can tell, however, the complete documentary was never released. Scott Whitney faced additional charges and his documentary was suppressed.²⁶⁸ While security concerns motivate some restrictions on cameras in prison, the incident highlights the difficulty prisoners have documenting and sharing their prison experiences.

Similarly, prison newspapers, with a few notable exceptions like the *Angolite* published from Louisiana State Penitentiary, have faced censorship challenges limiting the amount the journalists reveal about conditions of confinement.²⁶⁹ U.S. prison journalism emerged out of a debtors' prison in New York City in 1800, with the express purpose of educating the public about the plight of imprisoned debtors.²⁷⁰

²⁶⁵ The seminal case of *Turner v. Safley*, 482 U.S. 78 (1987) held that prison regulations burdening prisoners' First Amendment rights of association and speech will be upheld if the regulations are "reasonably related to legitimate penological interests." *Id.* at 89.

²⁶⁶ Romy Ellenbogen, *Bootleg Film Shows Florida Prison in All Its Danger, Squalor. An Inmate Shot It on the Sly*, MIAMI HERALD (Oct. 4, 2019), <https://www.miamiherald.com/news/special-reports/florida-prisons/article235623292.html> [<https://perma.cc/PZ4M-XP68>].

²⁶⁷ *Id.*

²⁶⁸ Deanna Paul, *An Inmate's Secretly Recorded Film Shows the Gruesome Reality of Life in Prison*, WASH. POST (OCT. 8, 2019), <https://www.washingtonpost.com/nation/2019/10/07/an-inmates-secretly-recorded-film-shows-gruesome-reality-life-prison/> [<https://perma.cc/ET5S-E27U>].

²⁶⁹ See RIDEAU, *supra* note 7, at 112-13 (offering a first-person account of how a prison journalist for *The Angolite* surmounted the prison's culture of institutional censorship).

²⁷⁰ See, e.g., JAMES MCGRATH MORRIS, *JAILHOUSE JOURNALISM: THE FOURTH ESTATE BEHIND BARS* 19-23 (1998) (discussing how in the service of ending debtors' prisons, the prison newspapers sometimes used humor, like its faux correspondence between mother and son: "Dear Son, I am in Jail . . ."; "Dear Mother, God Help you, so am I"). Nathaniel Hawthorne's imprisoned son, Julian, wrote poems and prose for a prison newspaper, *GOOD WORDS*, out of the Atlanta Federal Penitentiary and under the byline No. 4435. *Id.* at 76-77. His prison poems were also published in the *New York Times*

However, due to institutional censorship, prison newspapers often distorted prison experiences rather than revealing them.²⁷¹

Other structural barriers block communication from prison. Many prisoners do not have access to the tools needed for sharing their ideas with the outside world. Computer access is limited, and even stamps must be purchased from commissary. Not all prisoners attained education levels that permit them to give a descriptive, written account of their experience.²⁷² While some incarcerated people write about their experiences in prison,²⁷³ others have inadequate access to educational opportunities in which to cultivate writing and other communication skills, and inadequate access to education programs.²⁷⁴

Moreover, living in prison can require a singular focus on learning and following the rules of survival.²⁷⁵ This, combined with lack of

and Washington Post. Hawthorne labeled the scourge of prison life (in addition to dehumanization and violence) as “aimlessness,” which he viewed as a step on the road to “insanity.” *Id.* at 79-80 (quoting Julian Hawthorne, *Good Words* (Oct. 1, 1913)). Julian Hawthorne’s other targets were the continued use of gratuitous violence by some prison officials, conditions that were officially denied at the time, but which were corroborated through first-person accounts. *Id.* (noting Justice Department records corroborating the use of shackled solitary confinement, which Hawthorne alleged, and the prison denied).

²⁷¹ See *id.* at 54 (describing how papers of its ilk during the reformatory era were carefully edited and directed by prison officials, to the extent that the reader might think that “prison life was often pleasant, invigorating, and improving”); see, e.g., *id.* at 38-41 (describing a newspaper published by prisoners in the Elmira Reformatory in New York in the 1880s took an upbeat tone toward the prospects of rehabilitation and championed the reformatory’s successes).

²⁷² Many incarcerated people test at grade-school levels for literacy, which may limit their ability to adequately convey their experience in the written word. See Thomas C. O’Byrant, *The Great Unobtainable Writ: Indigent Pro Se Litigation After the Antiterrorism and Effective Death Penalty Act of 1996*, 41 HARV. C.R.-C.L. L. REV. 299, 310, 310 n.75 (2006) (noting grade school-level language skills for the majority of state prisoners); see also Jessica Feerman, *The Power of the Pen: Jailhouse Lawyers, Literacy, and Civic Engagement*, 41 HARV. C.R.-C.L. L. REV. 369, 372 (2006) (noting that 14% of federal prisoners did not complete eighth grade).

²⁷³ Discussed *infra* Part III.B.2.

²⁷⁴ See LoCi & Wittenberg University Writing Group, *An Epistemology of Incarceration: Constructing Knowledge on the Inside*, 6 PHILOSOPHIA 9, 14 (2016) (describing limited opportunities for intellectual growth in Ohio prisons).

²⁷⁵ See *id.* at 10-11 (noting that institutional and social aspects of prison life discourage epistemic engagement, but that prisoners also have a unique vantage point from which to analyze prison and punishment practices); see also Patricia Hill Collins, *The Social Construction of Black Feminist Thought*, 14 SIGNS: J. WOMEN CULTURE & SOC’Y 745, 759 (1989) (arguing that marginalized groups often develop a heightened awareness of both their circumstances and the views that dominate public life); Vivian M. May, “Speaking into the Void”? *Intersectionality Critiques and Epistemic Backlash*, 29 HYPATIA 94, 98 (2014) (same); Mills, *supra* note 242, at 107-08 (same).

accesses to the necessary resources, can inhibit incarcerated people from attending to and communicating what they know.²⁷⁶ Faced with difficulty drawing attention to prison conditions, prisoners periodically resort to strikes, like the nationwide strike of 2018.²⁷⁷ Strikes can be seen as last-resort efforts to communicate about intolerable prison conditions.

Successful participation of incarcerated people in sentencing policy requires coordinating with allies outside of prison who can facilitate communication.²⁷⁸ For example, the First Five Grieving Committee at a local jail in Ohio originated as a group of detainees who organized to bring conditions at the jail to the attention of the local community and its leaders.²⁷⁹ Outsiders allied with the First Five Grieving Committee to read detainee letters aloud at city council and county commission meetings, and arranged to have the detainee letters published online and in local print media.²⁸⁰ People who are not incarcerated can thus assist incarcerated people who are trying to participate in public discourse. Without outside help, prisoner participation in public spaces often faces insurmountable barriers.

2. Writing from Prison

The writing of incarcerated people merits separate attention because of its unique epistemic function. Written accounts of prison often contain emotional richness that is difficult to find anywhere else except

²⁷⁶ See LoCi & Wittenberg University Writing Group, *supra* note 274, at 15 (quoting FOUCAULT, *supra* note 122, at 136) (describing this process as “[t]he construction of docile bodies, bodies ‘that may be subjected, used, transformed, and improved’ for the purposes of the institution”).

²⁷⁷ Prison strikes are quintessential efforts to draw attention to what is happening in prison. The prison strikes of 2018 made ten demands, which included improved conditions, access to rehabilitative services, and an end to slave labor. *Prison Strike 2018*, INCARCERATED WORKERS ORG. COMM., <https://incarceratedworkers.org/campaigns/prison-strike-2018> (last visited Sept. 6, 2020) [<https://perma.cc/6M37-WJB3>] (explaining how state prisoners receive an average of twenty cents an hour for their labor, a significant grievance leading up to the nationwide prison strikes in 2016).

²⁷⁸ The abolitionist organization, Critical Resistance, for example, includes in its mission “uplift[ing] and amplify[ing] the perspectives of those most targeted by the prison industrial complex.” *Prisoners Speak Out: Analysis and Perspectives*, CRITICAL RESISTANCE, <http://criticalresistance.org/prisoneranalysis/> (last visited Aug. 12, 2020) [<https://perma.cc/Y654-XD8S>].

²⁷⁹ See Medina, *Agential Epistemic Injustice*, *supra* note 186, at 9-10.

²⁸⁰ *Id.* at 10. Medina notes that allies of imprisoned groups function to amplify prisoner voices when they “lend their voices and epistemic agency as instruments or extensions of the inmates’ own, without interpreting or translating” See *id.*

perhaps in the visual arts.²⁸¹ It is, of course, difficult to share traumatic experiences, especially while living in an environment where survival requires maintaining a certain amount of emotional numbness. Writing provides a mechanism for expressing the emotional and traumatic aspects of imprisonment.²⁸² In the words of Toni Morrison:

Certain kinds of trauma visited on peoples are so deep, so cruel, that unlike money, unlike vengeance, even unlike justice, or rights, or the goodwill of others, only writers can translate such trauma and turn sorrow into meaning, sharpening the moral imagination.²⁸³

Incarcerated people have written and continue to write memoirs, poetry, prose, and letters.²⁸⁴ These texts have been considered and organized into a taxonomy by formerly incarcerated criminologists studying the “insider perspective” sources: anthologies by prison reform advocates, journalists’ accounts of prison life, prison journalism, edited anthologies of prison writing, academic studies of prison life, and prison memoirs.²⁸⁵

²⁸¹ See, for example, Guantanamo Bay prisoner Abu Zubaydah’s drawings of torture. Carol Rosenberg, *What the C.I.A.’s Torture Program Looked Like to the Tortured*, N.Y. TIMES (Dec. 4, 2019), <https://www.nytimes.com/2019/12/04/us/politics/cia-torture-drawings.html> [perma.cc/5JEE-6CJS] (publishing some of prisoner’s drawings of his torture).

²⁸² This point was made by an incarcerated men’s writer’s group in Ohio, whose experience writing provided a rare emotional outlet. See LoCi & Wittenberg University Writing Group, *supra* note 274, at 13.

²⁸³ TONI MORRISON, *THE SOURCE OF SELF-REGARD* ix (2019).

²⁸⁴ See, e.g., BACA, *supra* note 8, at 8-9 (including a poet’s memoir of his time in prison); RIDEAU, *supra* note 7 (including a formerly incarcerated man’s memoir of his time in prison); ALBERT WOODFOX, *SOLITARY* (2019) (including a memoir by man who spent four decades in prison).

²⁸⁵ Richards & Ross, *supra* note 12, at 179; see also *id.* at 182. While formerly incarcerated scholars, such as John Irwin, have written about prisons and engaged in activism, coupling heuristics with academic research, the discipline of convict criminology was not established until 1997. See Greg Newbold, Jeffrey Ian Ross, Richard S. Jones, Stephen C. Richards & Michael Lenza, *Prison Research from the Inside: The Role of Convict Autoethnography*, 20 QUALITATIVE INQUIRY 439, 442-43 (2014). Irwin served five years for burglary, and later became a professor of sociology who “used his ex-convict perspective to champion humanitarian correctional policies . . .” *Id.* at 442. The founders of convict criminology contend that the research conducted by non-convicts “routinely disregards the harm perpetrated by criminal justice processing of individuals arrested, charged, and convicted of crimes.” Richards & Ross, *supra* note 12, at 177.

Prison memoirs provide insight and detail into prison-as-experienced.²⁸⁶ They represent a formidable counterweight to objectification — and dehumanization — of the prisoner. Take, for example, the writings of George Jackson, a member of the Black Panther Party who was incarcerated in California’s prison system from 1961 to 1970, when he was killed by a prison guard.²⁸⁷ Many members of the Black Panther Party were doubly objectified in the media as both criminals and as Black radicals.²⁸⁸ Yet, Jackson’s letters reveal a young man keenly aware of the damages prison was inflicting on him. He wrote:

[Prison] destroys the logical processes of the mind, a man’s thoughts become completely disorganized. The noise, madness streaming from every throat, frustrated sounds from the bars, metallic sounds from the walls, the steel trays, the iron beds bolted to the wall, the hollow sounds from a cast-iron sink or toilet.²⁸⁹

Jackson orients the reader to see him as a subject experiencing prison rather than an object of state control. He later writes about the pain of having not seen a night sky in ten years,²⁹⁰ and engages in many long descriptions of his evolving political perspective.²⁹¹ His letters thus illustrate the way in which prison writing asserts the continued existence and unique, subjective experience of its authors.

While few incarcerated people publish book-length memoirs, others write shorter descriptions of their experiences, often in classes or workshops within prisons.²⁹² Projects like the LoCI writing group in

²⁸⁶ See e.g., BACA, *supra* note 8 (poet’s memoir detailing his time in prison); RIDEAU, *supra* note 7 (detailing the author’s experiences while incarcerated); WOODFOX, *supra* note 284 (detailing the author’s four decades in prison).

²⁸⁷ See GEORGE JACKSON, SOLEDAD BROTHER: THE PRISON LETTERS OF GEORGE JACKSON x (1970).

²⁸⁸ See Judson L. Jeffries, *Local News Coverage of the Black Panther Party: An Analysis of the Baltimore, Cleveland, and New Orleans Press*, 7 J. AFR. AM. STUD. 19, 34 (2004).

²⁸⁹ JACKSON, *supra* note 287, at 21.

²⁹⁰ *Id.* at 313.

²⁹¹ See *id.* at 223 (critiquing non-violent resistance in letter to his attorney); *id.* at 292 (stating, “dialectical materialism is my bag” to Joan (described on p. 278 as a member of the Soledad Defense Committee)); *id.* at 301 (asking Angela Davis to send him books on Marxist political theory).

²⁹² See generally *History, Process, Mission*, AM. PRISON WRITING ARCHIVE, <http://apw.dhinitiative.org/> (last visited Dec. 13, 2020) [<https://perma.cc/U8QX-76PL>] (describing that the American Prison Writing Archive solicits and disseminates essays from incarcerated persons in hopes to “ground national debate on mass incarceration in the lived experience of those who know prisons best”).

Ohio engage prisoners in written reflection to help them develop the epistemic skills of “subversive lucidity” while incarcerated.²⁹³ One of the founders of LoCI, Nancy Arden McHugh, describes her work assisting in the creation of “epistemic communities” in prisons through a prison-based writing group focused on the development of an “epistemology of incarceration” in which “people make knowledge and meaning for themselves.”²⁹⁴ It is a community, she argues, because the people in the writing group have: (1) “developed a shared heightened consciousness”; (2) engaged in intentional efforts to improve their intellectual abilities; and (3) engaged in activities aimed at promoting knowledge and awareness among other incarcerated people.²⁹⁵

Standing next to the influential, published memoirs are hundreds of shorter writings published in anthologies,²⁹⁶ and online sources like blogs,²⁹⁷ and collections of archived prison writing. The American Prison Writing Archive (“APWA”) states its mission in similar terms to the central claim of this Article: that first-person accounts of imprisonment are essential to criminal justice reform, and that “soliciting, preserving, digitizing and disseminating the work of imprisoned people, prison workers and volunteers” will “ground national debate on mass incarceration in the lived experience of those

²⁹³ See LoCI & Wittenberg University Writing Group, *supra* note 274, at 17 (describing “highlighting gaps in how prison is viewed and the reality of life in prison” as one method of epistemic development for incarcerated people). The article generally discusses how incarcerated people can (but do not always) develop epistemic virtues that result in a “subversive lucidity” of carceral knowledge. The term “subversive lucidity” derives from MEDINA, *EPISTEMOLOGY OF RESISTANCE*, *supra* note 141, at 44.

²⁹⁴ Nancy Arden McHugh, *Epistemic Communities and Institutions*, in *THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE*, *supra* note 158, at 270, 275 (arguing that communities rather than individuals produce knowledge). See generally LoCI & Wittenberg University Writing Group, *supra* note 274, at 10 (reflecting the group’s “position on the subversive lucidity that can be generated by people who are incarcerated”).

²⁹⁵ The group explicitly endorses the idea that incarcerated people can and do possess knowledge that is less accessible to people who have not been incarcerated. Alluding to W.E.B. DuBois’ concept of “double consciousness,” and José Medina’s concept of “meta-lucidity,” the LoCI writer’s note that they have lived both outside and inside of prisons, and thus have insights gleaned from both settings that position them as producers of knowledge about how sentencing policy and practice affects its subjects. See McHugh, *supra* note 294, at 275-77.

²⁹⁶ See, e.g., LARSON, *supra* note 30 (providing an anthology of first-person essays written by imprisoned people).

²⁹⁷ See, e.g., Case, *supra* note 5 (providing a collection of blog posts by an imprisoned writer and poet).

who know prisons best.”²⁹⁸ Epistemic clarity about prisons, the APWA argues, requires reading multiple accounts written by the people inside of the prisons.

New journalism methods have yielded additional ways for insider perspectives on incarceration to reach public audiences. In the wake of COVID-19 outbreaks in U.S. prisons and jails, journalists have published podcasts with live interviews of incarcerated people describing coronavirus issues in the prisons.²⁹⁹ And, although newspapers published from prisons are in decline, new publishing formats for reporting on life inside prisons are emerging.³⁰⁰ Websites dedicated to criminal justice journalism publish prisoner reports. The Marshall Project’s Life Inside Series, for example, publishes first-person essays by prisoners, guards, volunteers, and others in the criminal justice system.³⁰¹ Essays from prisoners are personal and, while idiosyncratic, illuminate aspects of imprisonment that may not otherwise be obvious. One essay, for example, tells the story of a prisoner laboring in the fields of Texas in what the writer experiences as a “time warp.”³⁰²

Podcasts provide another format within which incarcerated voices are reaching the public. Ear Hustle, a podcast from San Quentin, has enjoyed national success.³⁰³ Aimed at offering a “nuanced view of people living within the American prison system,” Ear Hustle episodes address a variety of topics about prison life such as parenting from

²⁹⁸ *History, Process, Mission, supra* note 292. Other web-based repositories, like PrisonWriters.org, allow for the collection of thousands of short works by incarcerated people in order to “to give incarcerated people a voice, a chance to be heard and a platform for telling the outside world what is really happening behind those bars.” *About Us*, PRISON WRITERS, <https://prisonwriters.com/> (last visited Dec. 13, 2020) [https://perma.cc/4YVG-5RT5].

²⁹⁹ See, e.g., *Outbreak at San Quentin*, SNAP JUDGMENT (July 23, 2020), <https://snapjudgment.org/episode/outbreak-at-san-quentin/> [https://perma.cc/WR7U-6A7W] (publishing first-hand accounts from incarcerated people within San Quentin as they navigate the COVID-19 pandemic).

³⁰⁰ Organizations like the Prison Journalism Project, founded in 2020, help prisoners develop as journalists and publish their articles online. PRISON JOURNALISM PROJECT, <https://prisonjournalismproject.org/about-pjp> (last visited Dec. 10, 2020) [https://perma.cc/7W3H-8XLA].

³⁰¹ See *Life Inside*, THE MARSHALL PROJECT, <https://www.themarshallproject.org/tag/life-inside> (last visited Aug. 8, 2020) [https://perma.cc/H7FY-QY52].

³⁰² Timothy D.V. Bazrowx, *Fields of Blood: My Life as a Prison Laborer*, THE MARSHALL PROJECT (Jan. 24, 2019, 10:00 PM), <https://www.themarshallproject.org/2019/01/24/fields-of-blood-my-life-as-a-prison-laborer> [https://perma.cc/RLX23-HF5U].

³⁰³ Bay area artist Nigel Poor partnered with formerly incarcerated co-producer Earlonne Woods, and incarcerated co-founder, Antwan Williams, to create and produce the show. See EAR HUSTLE, *supra* note 4.

prison, dating in prison, personal style and grooming, and prisoner perspectives on the politics of crime and punishment.³⁰⁴ As such, it is possible for sentencing authorities to glean knowledge about prison-as-experienced from a wide range of first-person sources. Certainly, the risk remains that people outside of prisons will generalize about prison experiences from exposure to limited sources. At the same time, the accessibility of digital forums in which to submit a short essay or to be interviewed should permit a greater range of incarcerated voices to be heard.

C. Variation in Prison Experiences

1. Variation as an Epistemic Concern

As I discuss earlier, the experience of imprisonment varies depending on the conditions of confinement,³⁰⁵ and the person experiencing the confinement.³⁰⁶ This should come as no surprise. Daily life for everyone is shaped by small variables, like the kindness of others, the quality of the food one eats, and so forth. Prisons are societies in almost every respect. Prison journalist and memoirist Walter Rideau described his discovery that prison is not just a removal from society, but an entry into a new society with the distinctive social elements of a city:

³⁰⁴ But San Quentin is not a maximum-security prison, and, while it addresses serious topics of the pains of imprisonment, it keeps the listener removed from the experience of the raw footage Whitney took from inside of a Florida prison. See Ellenbogen, *supra* note 266.

³⁰⁵ Researcher Lori Sexton identifies “micro-level institutional environments” of prisons that influence the harshness of prison-as-experienced. Sexton, *Under the Penal Gaze*, *supra* note 40, at 23. For example, prisoners’ negative emotions associated with imprisonment were mitigated when prisoners lived in cells circling a central dayroom with regular furniture and had access to amenities like coffee makers and microwaves. *Id.* at 21. Researchers have also documented institutional and era-based variety in attitudes toward imprisonment. See generally CANDACE KRUTTSCHNITT & ROSEMARY GARTNER, MARKING TIME IN THE GOLDEN STATE: WOMEN’S IMPRISONMENT IN CALIFORNIA (2005) (documenting the changes in penal policy in California between the 1960s and 1990s).

³⁰⁶ Sexton, *Under the Penal Gaze*, *supra* note 40, at 83-84. And, it is a sad truth that certain carceral conditions may be better than the conditions available to someone outside of prison. See, e.g., MARTHA GRACE DUNCAN, ROMANTIC OUTLAWS, BELOVED PRISONS 28-30 (1996) (noting a theme in prison memoirs of long-term incarceration producing feelings of comfort and familiarity in the prison setting); CAROLYN SUFRIN, JAILCARE: FINDING THE SAFETY NET FOR WOMEN BEHIND BARS 3 (2018) (documenting stories of pregnant women who were unable to secure prenatal care anywhere but in the San Francisco jail).

Like almost everyone else, before I found out firsthand what prison was like, I thought it was just a purgatory where criminals were warehoused and punished before being returned to society. I was surprised to learn that it was a world unto itself, with its own peculiar culture, belief system, lifestyle, power structure, economy, and currency.³⁰⁷

In other words, varied experiences and relationships can happen in all populated, semi-stable societies, including in prisons.

Developing a non-ideal theory of the injustices of incarceration does not require a monolithic description of injustice. Instead, the non-ideal theory attends to accounts of experience in a “particularistic, fallibilistic, and melioristic fashion.”³⁰⁸ The injustice theory laid out in this Article seeks specifics; is open to correction; and strives to ameliorate everyday injustices without over-reliance on imagined, ideal states of justice.³⁰⁹ Because the line between what is considered unjust and what is considered bad luck is a “political choice,”³¹⁰ the line can be moved by a better understanding of the harm. Understanding the harms that befall others (in order to decide whether they should be considered an injustice) is not easy. Shklar offers, “[i]f injustice is as complex and as intractable as seems likely, a less rule-bound phenomenology suggests itself as a better way of exploring the matter.”³¹¹ It is the job of political theory to consider every aspect of injustice as experienced at the individual, interpersonal, and governmental levels.³¹² Multiplicity of voices is thus a strength, not a weakness, when developing theories of injustice.

Variability has long been seen as complicating, yet enhancing knowledge by scholars of feminist epistemology,³¹³ intersectionality,³¹⁴

³⁰⁷ RIDEAU, *supra* note 7, at 87.

³⁰⁸ MEDINA, *supra* note 141, at 13; *see also id.* at 12 (“We need a *theory of injustice* more than a theory of justice.” (emphasis in original)).

³⁰⁹ *See id.* at 11-12.

³¹⁰ SHKLAR, *supra* note 28, at 5 (“But we must recognize that the line of separation between injustice and misfortune is a political choice, not a simple rule that can be taken as a given.”).

³¹¹ *Id.* at 28.

³¹² *Id.* at 50.

³¹³ *See* HELEN LONGINO, *SCIENCE AS SOCIAL KNOWLEDGE* 215-16 (1990) (noting that “contextual empiricism” describes how scientific knowledge can be partially structured by social and cultural contexts yet nevertheless transcend relativism and pure subjectivity).

³¹⁴ *See* Ann C. McGinley & Frank R. Cooper, *Identities Cubed: Perspectives on Multidimensional Masculinities Theory*, 13 *NEV. L.J.* 326, 328-29 (2013) (describing

and, now, epistemic injustice.³¹⁵ Multiple sources produce a plurality, but it functions as a mosaic.³¹⁶ From this perspective, the goal is not to identify a unified voice, but to encourage the friction caused when “eccentric voices and perspectives are heard and can interact with mainstream ones, [so] that the experiences and concerns of those who live in darkness and silence do not remain lost and unattended.”³¹⁷

An analogy can be made between engaging with the friction created by differing views and what qualitative researchers call triangulation: comparing multiple sources to find patterns, themes, and to establish reliability.³¹⁸ Attention to heterogeneous prison experiences, however, need not be cast as a scientific project. Rather, it is an epistemic and imaginative project designed to expand moral imagination through a deeper understanding of the harms caused by incarceration.

Although I am trumpeting pluralistic virtues, I remain mindful of Patricia Hill Collins’ caution against prioritizing subjective, individualistic experience over understanding how social hierarchies produce experiences in subordinated groups.³¹⁹ Even though prison experiences vary, incarcerated people speak about themes of harm and degradation that flow directly from the shared experience of belonging to a subordinated group largely at the mercy of the carceral apparatus.³²⁰ Prison’s cruelties should not be relegated to one of many idiosyncratic punishment possibilities out of an excessive fear of generalization.³²¹ Especially when incarcerated people work together to make their

multidimensionality theory using the metaphor of a Rubik’s cube, which suggests that identity has multiple socially constructed variables in constant and related motion).

³¹⁵ See José Medina, *Toward a Foucaultian Epistemology of Resistance: Counter-Memory, Epistemic Friction, and Guerilla Pluralism*, 12 *FOUCAULT STUD.* 9, 12 (2011) (supporting “vibrant and feisty pluralism” as the hallmark of epistemic function).

³¹⁶ See *id.*

³¹⁷ *Id.* at 21. Mills calls this the creation of “experiential space.” CHARLES MILLS, *BLACKNESS VISIBLE: ESSAYS ON PHILOSOPHY AND RACE* 27 (1998).

³¹⁸ Nancy Carter, Denise Bryant-Lukosius, Alba DiCenso, Jennifer Blythe & Alan J. Neville, *The Use of Triangulation in Qualitative Research*, 41 *ONCOLOGY NURSING. F.* 545, 545 (2014).

³¹⁹ Patricia Hill Collins, *Intersectionality and Epistemic Injustice*, in *THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE*, *supra* note 158, at 119 (“[T]he discourse on identity politics that potentially empowers subordinated groups disappears within a linguistic shift from collective identity to multiple subjectivities.”).

³²⁰ See, e.g., Dolovich, *Cruelty*, *supra* note 18, at 912-13 (describing vulnerability to the prison administration as a generalized feature of incarceration).

³²¹ There is, of course, a risk that, in attempting to identify themes in the experiences of prisoners, sentencing authorities will unwittingly engage in epistemic injustice. This risk always present when “speaking for others.” This concern highlights the importance of direct participation of incarcerated people in sentencing decisions.

experiences intelligible to outsiders, as in the First Five Grieving Committee,³²² their views can be seen as those of an intentional “plural subject” articulating a unified perspective.³²³

2. A Proposal for Dealing with Variability: Assume the Worst

While epistemic injustice theory welcomes it, variability in prison-as-experienced can nonetheless pose a problem for sentencing authorities who wish to take prison’s cruelties into consideration in sentencing policy and decisions. Given that prison conditions vary based on day-to-day decisions of prison officials, sentencing authorities may argue that they have insufficient general knowledge about prison’s cruelties to consider them as part of sentencing policy and practice. Moreover, a change in the prison administration could dramatically change prison conditions in the future. The variability of prison experiences among prisons, prison units, and over time makes it difficult to consider prison-as-experienced in sentencing decisions.

One possible solution is for lawmakers setting punishments and judges setting sentences to inform themselves about the experiences of prisoners in the prisons in their jurisdiction and then assume that the worst conditions known will occur. This practice of assuming the worst accords with the nonideal theory of injustice. The sentencing authority accepts that injustice may be the norm rather than an exception, and that, as Shklar states, “[m]ost injustices occur continuously within the framework of an established polity with an operative system of law, in normal times.”³²⁴ No other approach will ensure that the punishment-as-experienced fits its intended goals and is no harsher than intended. Generalizations about prison’s cruelties can be applied at sentencing in spite of the fact that prison conditions may sometimes be better than expected, as explained below.

Given that a judge cannot control what prison conditions the defendant will experience, the sentence should take into account the worst known conditions that could befall any person sentenced to prison in their jurisdiction.³²⁵ Sentencing judges have almost no authority over the prisons where defendants will be placed or their

³²² See Medina, *Agential Epistemic Injustice*, *supra* note 186, at 9-10; *supra* Part III.B.1.

³²³ See MARGARET GILBERT, ON SOCIAL FACTS 18 (1992).

³²⁴ SHKLAR, *supra* note 28, at 19.

³²⁵ My argument is based on the court’s inability to control for the defendant’s prison experience through rulings made at sentencing. See, e.g., *Olim v. Wakinekona*, 461 U.S. 238 (1983) (holding prison administrators may order for prisoner to be transferred to other prisons without implicating the prisoner’s due process rights).

conditions of confinement.³²⁶ Legislators have more control through funding and oversight of prisons, but they have limited ability to intervene in the day-to-day decisions of the prison administration.³²⁷ With no control over the sentence after administered, sentencing policy and practice should err on the side of the defendant, just as criminal law errs on the side of the defendant in its other principles, such as the principle of lenity.³²⁸ Assuming the worst prison experience may mean that the defendant is punished less if the prison is better than expected, but it protects against the defendant being punished *more* than intended.

Some may argue that the most sensible place to consider prison's cruelties is in prison reform, through legislation and litigation. As I discussed in Part I, an exclusive focus on prison reform underestimates centuries of failed prison reform and misses the upstream opportunity to consider prison's cruelties at sentencing.³²⁹ Prison reform has been carried out for centuries and yet, as Martin tells us, prisons are still fundamentally cruel and brutal.³³⁰ It is precisely because sentencing courts cannot control for prison conditions that they should factor the likely prison experience into their sentencing calculations, understanding that it is, in general, characterized by harshness that is beyond the current imagination of many judges. The sentence-as-experienced will often otherwise be much more punitive and destructive than intended by the more formulistic calculation at sentencing.

CONCLUSION

I began with the puzzle of why available information about the cruelties of prison-as-experienced exists but is not applied in any sort of systematic way by legislatures setting punishments for crimes or by

³²⁶ See FERGUSON, *INFERNO*, *supra* note 26, at 58 (citing Foucault's discussion of the "punishment gap" between sentencing and the actual sentence meted out by the prison administration).

³²⁷ Giovanna Shay, *Ad Law Incarcerated*, 14 BERKELEY J. CRIM. L. 329, 331-32 (2009) (characterizing prison life as governed by administrative regulations "formulated outside of public view").

³²⁸ For example, ambiguities in statutes are resolved in favor of the accused. See Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 940-41 (2004) (rejecting notice and legislative supremacy as complete justifications for the rule of lenity, and arguing for a broader lenity rule justified as a method of reining in tendencies to over criminalize conduct).

³²⁹ See *supra* Part I.

³³⁰ *Stay Tuned: Behind Barrs* (with Steve Martin, *Prison Reformer*), *supra* note 20.

judges imposing sentences. In this Article, I have explored the puzzle using the philosophical framework of epistemic injustice and offered some ways in which the qualitative experience of imprisonment might be known and then considered in sentencing policy and practice. The very existence of sources like the American Prison Writing Archive and the Marshall Project's Life Inside suggest growing interest in obtaining and perhaps deploying a more accurate and empathetic understanding of what we are doing when we sentence people to prison.³³¹ Yet, disbelief, disinterest, and contempt for prisoners present obstacles to understanding prison's cruelties, and thus, distort punishment decisions.

Epistemic injustice theory offers an overarching framework that demonstrates how ignorance and lack of interest (or active hostility) can be mutually reinforcing, shedding light on how prison-as-experienced can slip to the background of seeming irrelevance to sentencing decisions. Moreover, epistemic injustice theory provides a framework for thinking about the normative questions — ethical and epistemological — about sentencing policy and practice.

First-person participation in knowledge creation is an ethical and an epistemological responsibility.³³² It is ethical because it acknowledges the speaker's status as a person who can provide information.³³³ It is epistemic because it produces unique and necessary knowledge. Prisoners are a social group with first-hand experience of the pains of imprisonment. They are an invaluable source of information about what prison is like, offering empirical information in the sense that they offer information based on lived experience.³³⁴

Prisoner voices are essential to assessing the punishment of imprisonment. Prison surely means different things to senators, judges, and incarcerated people. As a result, it is important to begin to build some sort of collective idea about prison that is grounded in prison-as-experienced. If legal and policy actors responsible for sentencing decisions do not have a robust sense of prison-as-experienced,

³³¹ See *supra* Part III.A.

³³² See *supra* Part II.A.

³³³ See FRICKER, *supra* note 25, at 44-47.

³³⁴ While some empiricists see knowledge as a product of both the senses and innate ideas, others see all knowledge, including ideas that appear to us to be neutral principles generated internally as the product of sensory experience. See, e.g., DAVID HUME, ENQUIRY CONCERNING HUMAN UNDERSTANDING 12-13 (1748) (proposing that causes and effects are only knowable by experience, not by reason); WILLIAM JAMES, ESSAYS IN RADICAL EMPIRICISM 57-58 (1912) (describing knowledge as a purely experiential process).

sentencing decisions will continue to be unmoored from ethical considerations of the actual harms of incarceration.

While I support efforts to create better theories of sentencing, and have called for just that in another article,³³⁵ I am now persuaded that efforts to find a just theory of sentencing are premature. If sentencing as currently practiced is systemically unjust, the first step is to articulate what makes the current system of imprisonment unjust, cataloging the depth and scope of the harms of incarceration. As I discussed in Part I, Shklar's theory of injustice posits that, without a granular study of the harms people experience, we will be unable to understand injustice. Instead, we will treat injustice as discrete moments of departure from the norm of justice, and thus, conflate injustice with bad luck.³³⁶ Prison's cruelties, now cast as incidental to punishment decisions, should be catalogued and considered as injustices that are endemic to the practice of incarceration. Only after this task can we fairly evaluate incarceration as a practice and its theoretical justifications as a method of punishment.

Learning from incarcerated people is difficult because it requires both virtuous listening and removing the practical barriers to prisoner speech. It remains to be seen whether lawmakers and judges will become more virtuous listeners despite structural and unconscious mechanisms that silence incarcerated people. Responsible, unbiased listening is difficult. As such, opportunities must be created for incarcerated people to engage in the process of political and legal decisions about punishment.

³³⁵ M. Eve Hanan, *Incapacitating Errors: Sentencing and the Science of Change*, 97 DENV. L. REV. 151, 203 (2019).

³³⁶ SHKLAR, *supra* note 28, at 17 ("This normal model of justice does not ignore injustice but it does tend to reduce it to a prelude to or a rejection and breakdown of justice, as if injustice were a surprising abnormality."); *see also* FRICKER, *supra* note 25, at 39 (arguing that "testimonial injustice is a normal part of discursive life").