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PAST, PROLOGUE, AND CONSTITUTIONAL LIMITS ON CRIMINAL PENALTIES

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Most criminal prosecutions occur at a level that is both neglected by many legal scholars and central to the lives of most people entangled in the criminal legal system: the level of the state. State v. Citizen prosecutions, which encompass most crimes ranging from robbery to homicide, are governed both by the federal constitution and by the constitution of the prosecuting state.

This is no less true for sentences than for prosecutions. When it comes to sentences, state courts are bound by the Eighth Amendment to the United States Constitution, which famously proclaims that no American shall be subjected to "cruel and unusual punishment." But state constitutions may go further than the federal constitution. States may adopt constitutional provisions analogous to the Eighth Amendment that establish even more effective guards against unreasonable or vindictive punishments.

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One state—Illinois—has so chosen. At Illinois's most recent constitutional convention in 1970, a group of statewide delegates agreed to reconsider the limits set by the state's constitution on criminal punishments.

From that convention emerged a revolutionary idea: that Illinois should adopt in its constitution the strongest known language in the nation limiting a government's ability to mete out extreme punishments to those citizens who have transgressed the criminal law—and clearly identifying the purpose of those criminal sentences as rehabilitation. Thus was born what appears in Illinois's constitution today: the so-called proportionate-penalties clause. That clause, codified in 1970 as Article 1, Section 11 of the Illinois Constitution, proclaims that "all penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. No conviction shall work corruption of blood or forfeiture of estate. No person shall be transported out of the State for an offense committed within the State."

This Article traces the origins of the proportionate-penalties clause back to the 1970 constitutional convention, using floor debate transcripts and other contemporaneous sources to establish that its authors did, indeed, intend Illinois sentences to serve rehabilitative purposes. To interrogate the context of those documents, this Article also examines the surrounding historical events of late 1960s-era Chicago, as well the lives and identities of the delegates who propelled this clause forward.

This Article uses the authors' words as prescient calls for a new interpretation of the proportionate-penalties clause that hews to their vision —and that can serve as a model for rethinking the guardrails around criminal punishments nationwide. Indeed, a constitutional scheme that insists that criminal penalties be directed at rehabilitative ends can and must carry implications for many of the statutes and rules that sustain our current system of mass incarceration.

INTRODUCTION

While most criminal justice scholars remain fixated on the U.S. Supreme Court and federal law, the vast majority of criminal prosecutions occur at the state and local level.[1] *State v. Citizen* prosecutions, which encompass most crimes ranging from robbery to homicide, are governed both by the federal Constitution and by the constitution of the prosecuting state. This includes constitutional limits on sentencing. When it comes to sentences, state courts are bound by the Eighth Amendment to the United States Constitution, which famously prohibits "cruel and unusual punishment."[2] But state constitutions may go further than the federal Constitution.[3] States may adopt constitutional provisions analogous to the Eighth Amendment that establish even more effective guards against unreasonable or vindictive punishments.[4] They may do more to protect

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[1] *See* Lauren-Brooke Eisen, *Criminal Justice Reform at the State Level,* BRENNAN CENT. FOR JUST., (Jan. 2, 2020), https://www.brennancenter.org/our-work/research-reports/criminal-justice-reform-state-level. [https://perma.cc/24U6-R4M9]

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

[3] *See generally* Katharine M. Janes, Note, *Life or Death: Employing State Constitutional Principles of Proportionality to Combat the Extreme Sentencing of Emerging Adults*, 108 VA. L. REV. 1897, 1901 (2022) (noting that state constitutionalism is underappreciated but can also be utilized to advance proportionality claims); *see also* Paul S. Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 DENV. U. L. REV. 85, 88 (1985) (noting that state courts may expand rights under their state constitutions beyond federal constitutional minimums and state decisions based on more expansive state constitutional rights will generally be respected by federal courts).

[4] Robert J. Smith, Zoe Robinson & Emily Hughes, *State Constitutionalism and the Crisis of Excessive Punishment*, 108 IOWA L. REV. 537, 546–47 (2023) (Nearly every state has "an Eighth Amendment analogue, many with unique constitutional language and original meaning that go even further than the federal charter. As a result, state courts have the power to cause

people from the anger of the mob, and may even do more to turn the purpose of incarceration and criminal sentencing itself from punishment to rehabilitation.[5]

Illinois provides a clear example. At Illinois's most recent constitutional convention in 1970, a group of statewide delegates reconsidered the state constitution's limits on criminal punishments.[6] For decades, the courts had interpreted the Illinois Constitution to offer the same protections as the Eighth Amendment, but nothing more. This group decided to change that and did so in explicit terms.

From that convention, and from its people, emerged a revolutionary idea: Illinois should adopt in its constitution the strongest known language in the nation limiting a government's ability to mete out extreme punishments—and clearly identify rehabilitation as the purpose of those criminal sentences. To that end, Illinois adopted the "proportionate-penalties clause." That clause, codified in 1970 as Article 1, Section 11 of the Illinois Constitution, proclaims that:

> All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. No conviction shall work corruption of blood or forfeiture of estate. No person shall be transported out of the State for an offense committed within the State.[7]

To this day, Illinois's proportionate-penalties clause contains among the most rehabilitation-focused language to be found in any state constitution—language entirely absent from the federal constitution. Indeed, as Delegate Leonard Foster explained on the convention floor, "I feel that with all we've learned about penology that somewhere along the line we ought to indicate that in addition to looking to the act that the person committed, we also should look at the person who committed the act and determine to what extent he can be restored to useful citizenship."[8]

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wide-sweeping criminal law reform. Unconstrained by federalism concerns, they are able to focus exclusively on their own state's interests. Movements to re-situate criminal justice reform to the local level, then, should include state courts as a critical change agent, supporting state courts as independent arbiters of state constitutions in support of broader criminal justice reform.").

[5] *Id*.

[6] ELMER GERTZ, FOR THE FIRST HOURS OF TOMORROW: THE NEW ILLINOIS BILL OF RIGHTS 93 (1972).

[7] ILL. CONST. art. I, § 11.

[8] 3 REC. OF PROC., Sixth Ill. Const. Convention 1391 (1970) [hereinafter 3 REC. OF PROC.]. The debate turned to whether the amendment would prohibit the death penalty. Among the very first questions:

State constitutions may go further in protecting their citizens than the federal Constitution does.[9] In Illinois, after a period of debate, delegates—and ultimately, voters—adopted a constitutional provision against punishment for its own sake, and towards the rehabilitative ideal of punishment.[10] They did so amidst a historical context aimed at securing civil rights. This Article argues that the Illinois state constitution's proportionate-penalties clause—as seen through its text, its intent, and its history—requires courts that interpret laws and legislatures that pass them to consider rehabilitation in determining punishments.[11]

This Article traces the proportionate-penalties clause's origins back to the 1970 constitutional convention, using floor debate transcripts and other contemporaneous sources to establish that its authors intended (1) to guarantee that Illinois sentences serve rehabilitative purposes, and (2) to create an obligation on both the courts and the legislature to enforce that guarantee.[12] To interrogate the context of those documents, Part I examines

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MR. YOUNG: I would like to ask Delegate Foster a question. The phrase, "and to the objective of restoring the offender to a useful citizenship"—do you feel that that would have any effect on the death penalty?

MR. FOSTER: I think it probably might, but I would just as soon not open that can of worms. I don't think this would necessarily preclude the death penalty, although I wish it could. I think that if the offense were considered so overwhelmingly outrageous that the General Assembly wanted to impose the death penalty, I think they could do so; but if they wanted to impose something less than the death penalty, then I think the judge would be required to consider the use of parole, probation, and would even go to what we did in our prisons, in terms of having people learn how to do something more useful than make license plates.

Id.

[9] Smith et. al, *supra* note 4, at 546–47.

[10] *See, e.g.*, 3 REC. OF PROC., *supra* note 8, at 1422 ("MR. RABY: Thank you, Mr. Chairman. fellow delegates, I rise hesitantly to speak to this issue because I have—in the course of this Convention—tried to be cognizant of time and tried not to be redundant; but I feel very strongly about it and feel that I have an obligation to impose upon this Convention to express the feelings that I have. First let me say that I never conceive of any apparatus or the function of penal institutions, whether it is in capital punishment or any other form, as being punitive. I view it as institutions which ought to be rehabilitative, and that every function of those institutions ought to be toward that end."). For a more in-depth examination of the national turn towards rehabilitation in the 1970s, see DAVID GARLAND, THE CULTURE OF CONTROL 34–35 (2001) (describing the penal-policy framework as one oriented towards rehabilitation and focused on rehabilitative interventions, rather than penal ones, and describing the rehabilitative ideal as the hegemonic, organizing principle).

[11] *See* ANN LOUSIN, THE ILLINOIS STATE CONSTITUTION: A REFERENCE GUIDE 57 (2011) [hereinafter LOUSIN, THE ILLINOIS STATE CONSTITUTION] (clarifying that the federal counterpart is "very different").

[12] Andrea D. Lyon & Hannah J. Brooks, *Stepping Toward Justice: The Case for the Illinois Constitution Requiring More Protection than Not Falling Below "Cruel and Unusual" Punishment*, 41 N. ILL. UNIV. L. REV. 47, 53–55 (2021).

the surrounding historical events of late 1960s-era Chicago. The 1970 constitutional convention included a diverse group of delegates, and it was one such delegate, Leonard Foster, who proposed the proportionate-penalties clause's language on the convention floor.[13] After describing the surrounding historical events, this Part then examines Leonard Foster's life, background, and professional identity to provide necessary and additional context for the clause he propelled forward. Supported by renowned civil rights lawyer Elmer Gertz (famed for freeing Nathan Leopold from prison), Al Raby (a prominent Black activist who, among other things, had served as the Chicago "point person" for Reverend Dr. Martin Luther King, Jr.'s organization), and a host of other delegates, this diverse group found common cause around directing criminal punishments towards rehabilitative, and not merely punitive, purposes.[14] As Gertz wrote about the task at hand: the "state bill of rights might perform important functions. We might go beyond what was required by the Fourteenth Amendment. We could not give our citizens less, but we could give them more. Would we?"[15] This group of delegates did so.

And they did so while advancing other proposals expressly aimed towards eliminating racial discrimination. Part II describes their work on the Civil Rights Committee by excavating contemporary sources including debate transcripts, newspaper articles, and other accounts. Part II discusses the proceedings within the committee, first. It, then, provides a historical account of convention floor debates, detailing the conversation, the questions, and the intent behind the textual change. Thus, Part II establishes the origins of Illinois's proportionate-penalties clause.

This Article then proceeds in Part III to examine Illinois case law and legislation to assess whether courts have applied the proportionate-penalties clause in a manner consistent with its authors' original vision. After an examination of the case law, the Article concludes the courts have failed to consistently apply the text and intent of the proportionate-penalties clause. This Article then calls for a new interpretation of the proportionate-penalties clause that can serve as a model for rethinking the guardrails around criminal punishments nationwide. Indeed, a constitutional scheme that insists on rehabilitative ends for criminal sanctions can and must carry implications for many of the statutes and rules that drive our mass incarceration crisis, including mandatory minimum sentences, lifetime sex offender registries, and other tools that only punish rather than reform. It is with this hope that we offer this Article as an exegesis of the types of voices and ideas that can

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[13] *See* GERTZ, *supra* note 6, at 24–25; 3 REC. OF PROC., *supra* note 8, at 1391.

[14] 3 REC. OF PROC., *supra* note 8, at 1391–92; *see also* GERTZ, *supra* note 6, at 20, 28, and 32 (discussing Gertz, Raby, and other delegates).

[15] *Id.* at 12.

promote a broader and more progressive vision of criminal punishments—not only in Illinois, but around the country.

I. THE 1970 ILLINOIS CONSTITUTIONAL CONVENTION: TASK, DELEGATES, CONTEXT

The need for a new constitution was acute.[16] On December 8, 1969, a group of delegates gathered in a room in Springfield, Illinois to create a new constitution for their state.[17] The existing Illinois constitution, drafted in 1870, had been amended hundreds of times and had become largely unworkable, causing at least one scholar to declare that Illinois was "in the worst position of any state in the nation" in terms of its constitutional provisions.[18] A constitutional convention met from 1920 to 1922, and a new draft had been submitted to the electorate, but voters "overwhelmingly rejected" it.[19] A few decades later, calls intensified again for a new, modern constitution that reflected the changing sentiments held by the state's

[16] One expert said many in "Illinois government and commentators outside government decried the rigid, antiquated provisions in the 1870 Constitution." Ann Lousin, *Where Are We At? The Illinois Constitution After Forty-Five Years*, 48 J. MARSHALL L. REV. 1, 2 (2014) [hereinafter Lousin, *The Illinois Constitution After Forty-Five Years*]; *see also* LOUSIN, THE ILLINOIS STATE CONSTITUTION, *supra* note 11, at 16–17 (describing the national and state push for new constitutional conventions, which convened in large part to meet the challenges posed by what had become obsolete state constitutions: challenges resulting from the Great Depression, upheavals after World War I, and the demographic changes to large northern cities after World War II).

[17] ILL. GEN. ASSEMBLY, LEGISLATIVE RESEARCH UNIT, 1970 ILLINOIS CONSTITUTION ANNOTATED FOR LEGISLATORS ix (5th ed., 2018) [hereinafter 1970 ILL. CONST. ANN.]. For an authoritative history on the Illinois State Constitution, see generally Lousin, *The Illinois Constitution After Forty-Five Years*, *supra* note 16; and LOUSIN, THE ILLINOIS STATE CONSTITUTION, *supra* note 11 (tracing the history of the Illinois's constitution from statehood in 1818 to the adoption of its fourth constitution in 1970, and describing how Illinois's four state constitutions reflect the values of its citizenry).

[18] Irving Dilliard, *Review*, 79 ILL. HIST. J. 63 (1986) (reviewing ELMER GERTZ & EDWARD S. GILBRETH, QUEST FOR A CONSTITUTION: A MAN WHO WOULDN'T QUIT, A POLITICAL BIOGRAPHY OF SAMUEL WITWER OF ILLINOIS (1986)). Before the ratification and adoption of the 1970 Illinois Constitution, the state had three others: 1818, 1848, and 1870, products of similar conventions. 1970 ILL. CONST. ANN., *supra* note 17, at ix. The 1862 convention, "embroiled in partisan controversy," produced work that was eventually adopted at the convention of 1868 and ratified in the 1870 constitution. Samuel Witwer, *Introduction to the 1970 Illinois Constitution*, *in* 1 RECORD OF PROCEEDINGS OF THE SIXTH ILLINOIS CONSTITUTIONAL CONVENTION vii (1972).

[19] Witwer, *supra* note 18, at vii. Thus, the 1970 convention was the sixth Constitutional Convention in Illinois, though it produced the fourth adopted Constitution. *Id.*

changing citizenry.[20] Finally, in 1968, the electorate approved another constitutional convention; two delegates were elected from each of the 58 state senatorial districts the following year, and the delegates met recurringly from late 1969 through September 3, 1970.[21]

The contemporary era was indeed complex. For present purposes, we will distill legions of 1960s-era history, through which those delegates had just lived, into a short summary, with a particular focus on the civil rights movement and the origins of our nationwide carceral state.

Across the nation, the 1960s saw escalating tensions between law enforcement and Black people who were commonly subjected to terrible urban living conditions, including regular police brutality. High-profile incidents included a 1964 New York City clash in which a white police officer killed a young Black teenager while onlookers did nothing. Protests ensued, anger reigned, and many were arrested and injured.[22] New York was not alone; the infamous Watts Riots gripped Los Angeles the next year, followed by similar unrest in Cleveland in 1966. In 1967, in "more than 160 American cities and towns, the most ruinous riots lead[] to 43 deaths in Detroit and 26 in Newark."[23] Police often triggered these conflagrations; in

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[20] *See* Ann M. Lousin, *Article XIV, Section 3 of the Illinois Constitution: A Limited Initiative to Amend the Article on the Legislature*, 48 LOY. U. CHI. L. J. 899, 900–03 (2020) (providing a historical overview of Illinois's various Constitutions and the amendment process). Despite efforts to modernize the 1870 constitution—Governor Adlai E. Stevenson's 1949 proposal for a convention, for example, failed in the legislature—it wasn't until 1968, when, through "a series of flukes," the General Assembly agreed to put the issue to voters. *Id.*; Witwer, *supra* note 18, at viii. The two issues that dominated the campaign were the call for a modern document, and a more workable amending process for the future. Lousin, *supra*, at 903.

[21] *See* JANET CORNELIUS, CONSTITUTION MAKING IN ILLINOIS, 1818–1970 146 (1972).

[22] Clyde Haberman, *The 1968 Kerner Commission Report Still Echoes Across America*, N.Y. TIMES (Oct. 7, 2020), https://www.nytimes.com/2020/06/23/us/kerner-commission-report.html. [https://perma.cc/QHL3-PWSU] (referencing Theodore Jones, *Negro Boy Killed; 300 Harass Police*, N.Y. TIMES (Jul. 17, 1964), https://timesmachine.nytimes.com/timesmachine/1964/07/17/issue.html [https://perma.cc/HHQ3-AT8L].

[23] *Id.* As discussed below, police-citizen interactions often brought simmering tensions in Black communities to a boil. The Watts Riots began after a highway patrol officer responded to a call of reckless driving in the Watts section of Los Angeles on the evening of Wednesday, August 11, 1965. James Queally, *Watts Riots: Traffic Stop Was the Spark That Ignited Days of Destruction in L.A.*, L.A. TIMES (July 29, 2015), https://www.latimes.com/local/lanow/la-me-ln-watts-riots-explainer-20150715-htmlstory.html. [https://perma.cc/CD64-2HSU] A crowd gathered as the driver, twenty-one-year-old Marquette Frye, failed a sobriety test. *Id.* Because police were going to tow Frye's car, his stepbrother left the scene and returned with Frye's mother. *Id.* Tensions began to rise; Frye resisted an officer's attempt at arrest, and his mother "jumped onto an officer's back." *Id.* An officer struck Frye, causing him to bleed. *Id.*

Newark, for instance, unrest began the day after officers assaulted a Black taxicab driver.[24] And Illinois's largest city, Chicago, was no exception. In May 1967, thirty Chicagoans were arrested and several injured, including three police officers, after riots began following a memorial celebration honoring the recently-assassinated Malcolm X on what would have been his birthday.[25]

Amidst this unrest, President Lyndon Johnson convened the National Advisory Commission on Civil Disorders, a group chaired by Illinois Governor Otto Kerner, Jr.[26] On February 29, 1968, the Kerner Commission, as it had become known, released a report that plainly identified racism as a central driver of unrest in poor Black urban neighborhoods: "[W]hite society is deeply implicated in the ghetto," the predominantly white Commission wrote.[27] "White institutions created it, white institutions maintain it, and white society condones it."[28] It went on to squarely address police brutality:

The crowd soon swelled to nearly 1,000, as [Frye, his stepbrother, and mother] were all taken away in handcuffs. . . . [P]olice arrested a man and a woman in the crowd on allegations that they had incited violence. A rumor quickly spread that the woman was pregnant and had been abused by the arresting officers. *Id.* Violence then broke out. *Id.*

At the Seventy-Niners' Café in the Cleveland's Hough neighborhood, the white owner's refusal to serve multiple Black patrons on a hot summer afternoon in July precipitated the six-day-long Hough Riots, which resulted in four deaths, dozens of injuries, and hundreds of fires. MARC E. LACKRITZ, THE HOUGH RIOTS OF 1966, at 1 (1968). As in many cities, racial tensions were high, and police were unresponsive to white-on-black violence. *Id.* at 32–33. Just weeks before the riot, Cleveland officials noted that there "was no danger of a Watts riot" in the city. *Id.* at 33. In the weeks and months following the violence, officials and citizens vigorously debated the causes of the Hough Riots. *See id.* at 20–23.

[24] Tim Adams, *The Big Picture: Bud Lee Captures the 1967 Newark Riots*, GUARDIAN (May 21, 2023, 2:00 PM), https://www.latimes.com/local/lanow/la-me-ln-watts-riots-explainer-20150715-htmlstory.html [https://perma.cc/N682-TZL9] ("The immediate cause was the arrest and beating in custody of a local cab driver, John William Smith, but the sustained outpouring of anger that followed was an expression of lifetimes of ill treatment of the city's majority Black population at the hands of the police and the courts.").

[25] *30 Arrested in Chicago Melee at Service Honoring Malcolm X*, N.Y. TIMES, May 22, 1967, at L26, https://timesmachine.nytimes.com/timesmachine/1967/05/22/82159288.html?pageNumber=26 [https://perma.cc/P385-4F3J].

[26] *See* U.S. DEP'T OF JUST., REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS v (1968) [hereinafter KERNER REPORT]. Otto Kerner Jr., served as Governor of Illinois from 1961 until 1968, when he resigned to accept President Johnson's nomination to the Seventh Circuit Court of Appeals. Seth S. King, *Otto Kerner Goes to Jail Today, His Once-Shining Career at End*, N.Y. TIMES, July 29, 1974, at 47, https://www.nytimes.com/1974/07/29/archives/otto-kerner-goes-to-jail-today-his-onceshining-career-at-end-income.html. [https://perma.cc/FU7L-FM3E]. Kerner was convicted of multiple counts of mail fraud in 1974 and subsequently resigned his judgeship. *Id.*

[27] KERNER REPORT, *supra* note 26, at 1.

[28] *Id.*

> The police are not merely a "spark" factor. To some [Black people,] police have come to symbolize white power, white racism, and white repression. And the fact is that many police do reflect and express these white attitudes. The atmosphere of hostility and cynicism is reinforced by a widespread belief among [Black people] in the existence of police brutality and the double standard of justice and protection—one for [Black people] and one for white [people].[29]

As for the broader criminal legal system, the Commission came out strongly against "assembly line justice in teeming lower courts; against wide disparities in sentences; against antiquated correctional facilities; [and] against the basic inequities imposed by the system on the poor—to whom, for example, the option of bail means only jail."[30] It emphasized that criminal legal reform was necessary to racial equality, including revision of sentencing laws and policies.[31]

The Commission's report, unfortunately, did not stem the tide. Only weeks after the Commission released its report, Rev. Dr. Martin Luther King, Jr. was assassinated, sparking mass protests and riots in more than 100 cities.[32] In Chicago alone, more than 48 hours of unrest centered in the city's East Garfield Park neighborhood left at least 9 people dead, 200 more

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[29] *Id.* at 5; *see also id.* at 4 ("What the rioters appeared to be seeking was fuller participation in the social order and the material benefits enjoyed by the majority of American citizens. Rather than rejecting the American system, they were anxious to obtain a place for themselves in it."). The Commission found that of those injured during the riots, the majority were African-American. *Id.* at 3.

[30] *Id.* at 157; *see also* Nicole Lewis, *The Kerner Omission: How a Landmark Report on the 1960s Race Riots Fell Short on Police Reform*, MARSHALL PROJECT (Mar. 1, 2018, 8:45 PM), https://www.themarshallproject.org/2018/03/01/the-kerner-omission. [https://perma.cc/8WXY-96KN] Decades later, the last surviving member of the Kerner Commission, former Oklahoma Senator Fred Harris, put it simply: "We were against the militarization of the police. We thought that tanks and automatic weapons had no place in urban areas. We thought the police ought to enforce the law on behalf of the community." KERNER REPORT, *supra* note 26, at 11.

[31] *Id.* at 183. ("No program of crime prevention . . . will be effective without a massive overhaul of the lower criminal courts. The range of needed reforms recommended in [the President's Commission on Law Enforcement and the Administration of Justice] report is broad: Increasing judicial manpower and reforming the selection and tenure of judges; providing more prosecutors, defense counsel and probation officers and training them adequately; modernizing the physical facilities and administration of the courts; creating unified State court systems; coordinating statewide the operations of local prosecutors; improving the informational bases for pretrial screening and negotiated pleas; revising the bail system and setting up systems for station-house summons and release for persons accused of certain offenses; revising sentencing laws and policies toward a more just structure.").

[32] JASON SOKOL, THE HEAVENS MIGHT CRACK: THE DEATH AND LEGACY OF MARTIN LUTHER KING JR. 10–11 (2018).

injured, and more than 2,000 people arrested.[33] Approximately 10,000 police were sent to quell the protesters, along with more than 6,700 Illinois National Guard troops.[34] And thousands of those troops returned to the city just months later, when Chicago hosted the Democratic National Convention and police and protesters clashed over the Vietnam War.[35] Chicago became the epicenter of the clash between people—often poor residents of color—and armed authorities, a clash that continued following police raids and killings of Black Panthers on the city's West Side.[36] And the result of these clashes—which were instigated by police violence—was a shift in federal authorities' response.[37] These events induced the federal government to abandon the Commission's recommendations.[38]

Racial, social, and criminal justice were tied together even before the 1960s.[39] Indeed, from the late nineteenth century, the high rates of incarceration and arrest within African American communities created a racist "statistical discourse" about Black crime that was used to justify the perpetual expansion of the American prison system, sustained harsh sentencing practices, informed decisions surrounding capital punishment, and sanctioned racial profiling in general.

Furthermore, "[i]n cities like New York and Chicago, local law enforcement policies and policing practices further strengthened common associations between Black people and criminality by routing illegal activities and informal economies to police-patrolled vice districts in black neighborhoods."[40]

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[33] Tony Briscoe & Ese Olumhense, *Rage, Riots, Ruin,* CHI. TRIB., https://graphics.chicagotribune.com/riots-chicago-1968-mlk/index.html (last updated Aug. 16, 2018). [https://perma.cc/VG46-XA3K]

[34] Christen Gall, *What Happened During the West Side Riots of April 1968*, CHI. MAG. (Apr. 5, 2018, 4:46 PM), https://www.chicagomag.com/city-life/April-2018/What-Happened-During-the-West-Side-Riots-of-April-1968/ [https://perma.cc/8W3A-32FD].

[35] SOKOL, *supra* note 32, at 10–11.

[36] *See generally* SIMON BALTO, OCCUPIED TERRITORY: POLICING BLACK CHICAGO FROM RED SUMMER TO BLACK POWER 190–221 (2019) (detailing how "the CPD's relationship to black Chicago dropped to its nadir" when violence erupted during the late 1960s).

[37] Alice George, *The 1968 Kerner Commission Got It Right, But Nobody Listened*, SMITHSONIAN MAG. (Mar. 1, 2018).

[38] *Id.*

[39] *See generally* KHALIL GIBRAN MUHAMMAD, THE CONDEMNATION OF BLACKNESS: RACE, CRIME, AND THE MAKING OF MODERN URBAN AMERICA (2011) (chronicling the historical link between racism and Black Americans' experiences in the criminal legal system, after Emancipation and during the migration).

[40] Elizabeth Hinton & DeAnza Cook, *The Mass Criminalization of Black Americans: A Historical Overview*, 4 ANN. REV. CRIMINOLOGY 261, 269 (2021) (citations omitted).

The Kerner Commission's honest identification of racism as the prime cause was overlooked. Instead, government actors began financially and politically targeting protesters by—among other things—suppressing unrest through brutal means, supporting the militarization of police, and sowing the seeds for what would grow into the carceral state.[41] As the Kerner Commission had forewarned, the apparatus of criminal justice was well on its way to becoming a racist system of distrust and hostility.[42]

A. LEONARD FOSTER

The unrest in Chicago, particularly on its West Side, was unfolding virtually in the backyard of one Leonard Foster: the Illinois constitutional convention delegate who introduced the proportionate-penalties clause. To better understand and provide context for a bill of rights amendment that strikes right at the center of social justice, racial justice, and criminal justice, we explore in greater detail proponent Foster's life and background. From 1967 to 1970, Foster, a Black man, was a member of the 28th Ward Democratic Organization of Chicago, which centered around the city's East Garfield Park neighborhood—the very blocks hit hardest by the riots following Dr. King's murder[43]—and served as a member of the neighborhood's Garfield Park Community Organization.[44] Through his deep community engagement, Foster demonstrated a response to civil unrest similar to that of the Kerner Commission and national civil rights leaders: rather than demand a punitive crackdown, Foster emphasized legal policies that would both ensure public safety and allow convicted people to return to freedom fully woven back into the social fabric.[45]

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[41] *See, e.g.*, The Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197 (1968) (authorizing $400 million in federal grants to cover up to 90% of the costs of a state's riot prevention program—including the acquisition of surplus military gear (such as tanks and vests) for police use).

[42] KERNER REPORT, *supra* note 26, at 4.

[43] Ann Marie Lipinski, *King's Assassination, Election Day Give West Siders Reason to Reflect*, CHI. TRIB. Apr. 4, 1989, at D1, https://chicagotribune.com/1989/04/04/kings-assassination-election-day-give-west-siders-reason-to/ [https://perma.cc/D822-K34E].

[44] *See E. Garfield Resident Gets Home Improvement Grant***,** CHI. DAILY DEF., Dec. 18, 1967, at N2.

[45] As Foster argued on the convention floor:

> Traditionally the constitution has stated that a penalty should be proportionate to the nature of the offense. I feel that with all we've learned about penology that somewhere along the line we ought to indicate that in addition to looking to the act that the person committed, we also should look at the person who committed the act and determine to what extent he can be restored to useful citizenship.

3 REC. OF PROC., *supra* note 8, at 1391.

Leonard Foster was raised in Glencoe, an idyllic suburb perched on the shore of Lake Michigan north of Chicago.[46] His father, Albon Langston "A.L." Foster, had moved to the city in 1925,[47] and the family settled in Glencoe in 1940.[48] For a time, Glencoe was unusually integrated: The village had been home to a sizeable African-American population, including independent businesspeople and homeowners, such as Homer Wilson.[49] Homer Wilson hosted meetings of the nascent St. Paul African Methodist Episcopal (AME) church, founded in 1884, in his home for over a year.[50] When the group expanded, the Wilsons mortgaged their home and purchased a lot for the church.[51] In 1920, around the time of Leonard's birth, nearly 700 of Glencoe's approximately 6,300 residents were Black, but by the 1930s, the Black population had dropped by half.[52]

It was in this environment that Leonard Foster came of age, and in which his father became a noted community leader. Looking briefly at A.L.'s life, it is no surprise that his son Leonard would come to be a prominent civic leader in his own right.[53]

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[46] *See Glencoe Man Receives Advance Law Degree*, CHI. TRIB., July 7, 1963, at N7.

[47] A.L. Foster, *Other People's Business*, TRI-STATE DEF., June 23, 1962, ¶ 4.

[48] ROBERT A. SIDEMAN, AFRICAN AMERICANS IN GLENCOE: THE LITTLE MIGRATION 89 (2010) (interviewing A.L. Foster).

[49] Joe Coughlin, *'Glencoe Black Heritage' Opens up on the Good and Bad Racial Past of the Community*, REC. N. SHORE (Oct. 5, 2022, 1:22 PM), https://www.therecordnorthshore.org/2022/10/05/glencoe-black-heritage-opens-up-on-the-good-and-bad-racial-past-of-the-community/ [https://perma.cc/J6DA-S9TY].

[50] *History*, ST. PAUL GLENCOE AME CHURCH, https://stpaulglencoeamec.wordpress.com/about-us/history/ [https://perma.cc/R3RQ-EPG2].

[51] GLENCOE HIST. SOC'Y, SEVENTY-FIVE YEARS OF GLENCOE HIST., 1835–1944, at 21 (1945). The Wilsons purchased the lot from Morton T. Culver, who had graduated from Northwestern University Law School in 1871. SIDEMAN, *supra* note 48, at 15.

[52] *See* Erica Gunderson, *'Glencoe's Black Heritage' Uncovers History of Shrinking Black Community in North Shore Suburb*, WTTW (Apr. 1, 2023, 5:30 PM), https://news.wttw.com/2023/04/01/glencoe-s-black-heritage-uncovers-history-shrinking-black-community-north-shore-suburb [https://perma.cc/KC5X-RLJP].

[53] *See, e.g.*, *Realtors Unit Holds Tenants-Owner Clinic*, CHI. DEF., Sept. 4, 1965, at 24 (announcing Foster's founding of the "West Central Real Estate Board, a group of real estate brokers and allied professionals interested in the rehabilitation of the Westside," which operated a free clinic where people could get "advice on property values, mortgage financing, consumer credit, and eviction actions"). Leonard also believed in civic engagement. He wrote: "I believe that the war, if it is a war, in Chicago, will be worn out not by acts of heroism in the midst of danger and excitement, but by the quiet acts of mature adults who are determined to exercise their full rights." A.L. Foster, *Other People's Business*, CHI. DEF., July 2, 1966.

A.L. Foster was born in 1893 to parents descended from formerly enslaved people.[54] A star athlete in high school who graduated *magna cum laude* from Wilberforce University in 1916, he worked as a teacher and for the YMCA before serving as an army lieutenant in World War I.[55] From all reports, A.L. spent his life working for the civic and professional improvement of the Black community.[56] From 1922 to 1925, A.L. was the executive secretary of the Urban League of Canton, Ohio, and then moved to Chicago where he served in the same position for the Urban League until 1946.[57] In his capacity as the executive director of the Cosmopolitan Chamber of Commerce, a consortium of 350 businesses committed to doing business in the Black community, A.L. was a prominent leader.[58]

He protested racial segregation through letters, demands, and even legal action.[59] As a resident of Glencoe and then-executive secretary of the Chicago Urban League, he participated in a 1942 lawsuit that led to the integration of the Glencoe Park District's Park Avenue beach—the only one in the village.[60] One compelling encapsulation of A.L.'s persona and outlook

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[54] Roi Ottley, *Community to Honor One Who Serves It*, CHI. DAILY TRIB., Dec. 6, 1958, at 16. A.L.'s father left (escaped?) Placquemine, La., at the age of 14, headed north, and changed his family last name from Fortenna, a name imposed by slave owners, to Foster. *Id.* A.L. married Mildred Randolph, a graduate of Columbia Teacher's College in New York City and real estate broker. *Id.*

[55] *Id.*; Thomas Hall, *Foster Helps Merchants, Dropouts*, CHI. TRIB., Mar. 24, 1966, at IND11.

[56] Ottley, *supra* note 54, at 16.

[57] *Id.* A.L. was far ahead of his time. In a 1933 speech to the International Congress of Women in Chicago, Foster cited figures showing the disparity education funding for Black and white children in the United States and called for the abolition of separate schools funded by public tax dollars. He declared:

Since America, with all of its boasts of freedom and justice and equal opportunities for all, segregates and discriminates against a large portion of its population, it should at least force every state in the Union to accept its responsibility to educate all of the people living within the state. It is unfair to ask philanthropy to assume the burden of the municipality. If members of the Race are to achieve the high standards of American citizenship toward which they are constantly striving, separate schools must go.

Demands Abolishment of Jim Crow Schools, CHI. DEF., July 29, 1933, at 11.

[58] *Id.*

[59] Celia, *Researching Glencoe's Racial Past*, SHOREFRONT J. (Dec. 28, 2018), https://shorefrontjournal.wordpress.com/2018/12/28/researching-glencoes-racial-past/ (citing *Court Opens Glencoe Beach to Negro Family: Injunction Granted Against Official of Park District*, CHI. SUN-TIMES, July 10, 1942).

[60] *Id*. Attorney Nelson M. Willis filed suit on behalf of A.L. and his family after members of the Glencoe Park District refused to issue beach tickets to the Fosters on account of their race. *Id.* Mr. Willis, who earned a Bachelor of Laws, or LLB, from the University of Chicago, was the Law School's first Black graduate. Victor Hollenberg, *'Firsts Knock Down the Door'*,

can be found in a 1945 letter that he sent to the manager of Kelly's Hotel, a small establishment in Iola, Kansas. Copying the Governor of Kansas and the mayor of Iola on Chicago Urban League letterhead, A.L. protested the manager telling him to sit in the rear of a restaurant reserved for African-Americans. "In these days when we are fighting for democracy (I am a veteran of the last World War) you lend encouragement to Hitler and all that he stands for when you deliberately insult Americans because their ancestors happen to come from Africa," he wrote.[61]

In many ways, Leonard Foster was his father's son. Like A.L., contemporaneous sources reveal that Leonard Foster was a civic and political leader, albeit an idiosyncratic one who both worked within and critiqued political establishments and reform movements—and whose fight for extending the benefits of first-class citizenship to Black Chicagoans was, consequently, often solitary.[62] In short, Leonard Foster's contemporaries

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UNIV. OF CHI. L. SCH. (Oct. 23, 2019), https://www.law.uchicago.edu/news/firsts-knock-down-door. His graduation in 1918 came just twenty-two years after the Court in *Plessy v. Ferguson*, 163 U.S. 537, 548 (1896), upheld the constitutionality of racial segregation in public accommodations, and thirty-six years before the Court's first decision in *Brown v. Board of Education*, 347 U.S. 483, 494–95 (1954). *Id.*

[61] A.L. Foster to the Manager of Kelly's Hotel in Iola, Kansas (Mar. 9, 1945), *in* KAN. MEMORY, https://www.kansasmemory.org/item/216806. [https://perma.cc/JEE2-WBVU]. In full, A.L.'s letter reads:

My dear Sir:

On February 23rd I was a passenger on the bus from Ft. Scott to Wichita which stopped in Iola for lunch. The manager of your dining room insulted and attempted to humiliate and embarrass me by suggesting that I "sit in a rear section provided especially for colored people."

It happens that I lived in Kansas for a number of years and am a graduate of the Wichita High School and I had never before experienced a thing of this kind.

At the risk of being immodest, I think that I should explain that I am regarded as a person of culture and refinement; a holder of degrees from Wilberforce and Ohio State Universities and have traveled extensively in Europe. Under those circumstances your manager could not have assumed that my presence in the dining room would prove offensive to others, none of whom—if one is to judge from their conversation—had had very few cultural advantages.

In these days when we are fighting for democracy (I am a veteran of the last World War) you lend encouragement to Hitler and all that he stands for when you [deliberately] insult Americans because their ancestors happen to come from Africa rather [than] from some part of Europe and Asia.

Id.

[62] GERTZ, *supra* note 6, at 28. Leonard himself even expressed these things publicly, writing for his father's *Chicago Defender* column when A.L. fell ill:

I . . . am saddened by the realization that the Movement in Chicago has almost become a one-man operation. . . . The work here is important. It is so important that nothing ought to be allowed to interfere with it. It is so important that every thinking citizen, and especially those

remember him as a man of "singular gifts" who "seemed to be in emotional turmoil much of the time."[63]

An attorney with degrees in law, psychology, sociology, and music (he was a talented violinist),[64] Leonard Foster served as an assistant corporation counsel for the City of Chicago; later, he was one of a handful of Black assistant state's attorneys in a Cook County office otherwise filled with white prosecutors.[65]

Despite being a public employee, Leonard was a perennial candidate for office who often ran on outsider themes of ending city government corruption and ensuring accountability. In 1966, he ran as an independent for alderman of Chicago's 28th Ward[66] but, like thirteen other Black candidates, he was thrown off the ballot by the Board of Elections in a move some thought was the result of "pressure by the Democratic political machine."[67] He did, however, serve as a member of the 28th Ward Democratic Organization from 1967 to 1970—giving him a front-row seat to the unfolding street clashes between police and protesters on Chicago's West Side—and he ran for and was elected delegate to the 1970 constitutional convention from the 18th Ward, also on the unrest-riddled West Side.[68]

In addition to his political work, Leonard was an advocate for racial equality. He was, according to one local leader, "unreconciled to the way of bigots."[69] Leonard's particular passion was the advancement of community-based, neighborhood-led movements to end racial discrimination,

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who feel themselves oppressed and exploited, must work hard and long at it. It is so important that it should not depend on any one man or group of men.

Foster, *supra* note 53.

[63] GERTZ, *supra* note 6, at 28.

[64] GERTZ, *supra* note 6, at 28; *Glencoe Man Receives Advanced Law Degree*, CHI. TRIB., July 7, 1963, at N7 (announcing Leonard's graduation from DePaul).

[65] Robert McClory, *Carey Seeks Blacks for Attorneys*, CHI. DEF., Mar. 24, 1973, at 7 (describing the Cook County State's Attorney's office as including six Black attorneys among the 235 currently employed and highlighting Leonard as a recent hire).

[66] *Machine Men, Independents in Alderman Races*, CHI. DEF., Nov. 30, 1966, at 4.

[67] Sam Washington, *Barred Aldermanic Hopefuls Ask U.S. Help: Hoke, Savage in Last-Ditch Effort*, CHI. DEF., Jan. 23, 1967, at 1; *see also Daley Critic Savage Wins Place on Ballot*, CHI. TRIB., Feb. 4, 1967, at A4 (reporting the Cook County Circuit Court's decision upholding the board of election commission's decision to disqualify Leonard because of "improper nominating petitions"). Just weeks earlier, a local paper reported that forty-seven Black men stood for election in thirteen of Chicago's wards. *Negroes A Cinch to Win 8 Races, Maybe 9,* CHI. DEF., Jan. 12, 1967, at 4. Leonard also ran an equally unsuccessful campaign for Cook County State's Attorney in 1971, after his time as a Convention delegate, raising issues around public corruption and inefficiency. *See* George Tagge, *2 Hanrahan Foes Hail Ruling*, CHI. TRIB., Dec. 18, 1971, at 4.

[68] *Con-Con Delegate Petitioners Listed*, CHI. TRIB., July 8, 1969, at B5.

[69] GERTZ, *supra* note 6, at 28.

particularly in the areas of housing and employment.[70] While he believed strongly in the messages of national leaders like Rev. Dr. Martin Luther King, Leonard was fundamentally an everyman who distrusted the "star system of civil rights work" and warned strongly against institutional capture of those movements.[71] Too many of Chicago's civil rights leaders, he wrote, ended up taking "very good jobs in the power structure, and lost any interest they had in the good of the community."[72]

While his willingness to challenge both the Cook County Democratic political machine and "established" activist movements made Leonard, at times, a man without a country, he was also present for significant moments in civil rights history. In 1966, both Leonard and his father participated in a summit between Mayor Richard J. Daley and Rev. Dr. Martin Luther King, Jr.[73] The summit followed weeks of demonstrations on Chicago's West Side, and was part of an effort to end unrest and address the Chicago Freedom Movement's demands to end housing discrimination.[74] Not only did the

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[70] *See, e.g.*, *Realtors Unit Holds Tenants-Owner Clinic*, CHI. DEF., Sept. 4, 1965, at 24 (announcing Foster's founding of the "West Central Real Estate Board, a group of real estate brokers and allied professions interested in the rehabilitation of the Westside," which operated a free clinic where people could get "advice on property values, mortgage financing, consumer credit, and eviction actions"); John Elmer, *18th District Con-Con Candidates Battle to Survive*, CHI. TRIB., Oct. 26, 1969 (reporting that Leonard supported "granting city governments like Chicago more authority to govern themselves, including the power to raise revenue," "favor[ed] a progressive state income tax, noting that corporations should pay more taxes than individuals," "eliminating the personal property tax and the sales tax on food, clothing, and medicine," and, finally, "would like to see the tax burden shifted from the real estate tax to the state income tax").

[71] Foster, *supra* note 53.

[72] *Id.*

[73] *See* Kathleen Connolly, *The Chicago Open-Housing Conference*, *in* CHICAGO 1966: OPEN HOUSING MARCHES, SUMMIT NEGOTIATIONS, AND OPERATION BREADBASKET 93–94 (D. Garrow ed., 1989) (listing all summit attendees and their affiliations); John McKnight, *The Summit Negotiations: Chicago, August 17, 1966–August 26, 1966*, *in* CHICAGO 1966: OPEN HOUSING MARCHES, SUMMIT NEGOTIATIONS, AND OPERATION BREADBASKET 111–12 (D. Garrow ed., 1989) (sharing a detailed, firsthand account of the Chicago Freedom Movement negotiations).

[74] The Chicago Freedom Movement, an alliance formed by Al Raby, James Bevel, and Dr. King, became the first significant movement to address housing issues facing African-Americans in northern cities. *See* David Bernstein, *Martin Luther King Jr.'s 1966 Chicago Campaign*, CHI. MAG. (July 25, 2016, 9:41 AM), https://www.chicagomag.com/chicago-magazine/august-2016/martin-luther-king-chicago-freedom-movement/. [https://perma.cc/8BJN-HFR7] In early 1966, Raby and Bevel convinced Dr. King to move to Chicago's West Side, where they organized to protest slums, the city's underenforcement of fair housing law, and harassment by police. *Id.* The Movement not only called for people to boycott businesses that discriminated against Black people, but also organized rent strikes, conducted workshops

summit lead to the 1968 Fair Housing Act,[75] it also brought Foster into contact with key members of the 1970 constitutional convention with whom he would serve.[76] And it was there at the constitutional convention, they wrote, that "he was one of the most eager and useful members" in attendance.[77]

B. THE 1970 BILL OF RIGHTS COMMITTEE

The sixth constitutional convention hosted the most diverse delegation in Illinois history. "The delegates who gathered in Springfield . . . on December 5, 1969 were more varied in occupation, sex, and race than any previous constitutional convention delegation in Illinois."[78] Leonard Foster was not the only delegate at the convention with a background relevant to social justice. Indeed, "a delegation like this," which included women and

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on nonviolence with youth gangs, and sponsored tenants' unions—similar to the one Leonard formed in 1965. *Id*70. When their efforts failed to gain traction, leaders organized marches beginning on July 28, 1966. *Id.* The demonstrations sometimes became violent; on August 5, Dr. King was struck with a rock. *Id.*

In response to the unrest, leaders of the Chicago Freedom Movement and the City of Chicago met for nine days in August. McKnight, *supra*, at 112. Press was not invited. *Id.* Each party had clear goals: The Freedom Movement demanded a moratorium on housing and racial discrimination, and Mayor Daley demanded the end of protests led by Black people. *Id*. Dr. King said: "Yes, the demonstrations in the neighborhoods might stop but we have demands also in the areas of education and employment and you are hearing here only our demands in the area of housing." Daley said: "If we do all we can as a city, then why can't the marches stop. I thought this was supposed to be a kickoff for a conference table." *Id.* at 116.

At the height of the civil rights movement particularly—amidst the protests and the riots—law enforcement disproportionately targeted and criminalized Black people. Throughout the 1900s and beyond, and in response to targeted policing practices, Black activists and reformers . . . contested crime-control policies and practices. . . . Yet in the wake of the mainstream civil rights movement in the 1950s and 1960s, federal, state, and local law enforcement forces persistently mobilized against civil rights protestors, black power militants, and urban activists dubbed by authorities as domestic insurgents. Law enforcement officials justified the occupation, patrol, and surveillance of high-risk, low-income neighborhoods of color with mounting media and government reports of mass protest, fear of crime, and civil violence in the late 1960s.

Hinton & Cook, *supra* note 40, at 263–64 (2021) (citing JORDAN T. CAMP, INCARCERATING THE CRISIS: FREEDOM STRUGGLES AND THE RISE OF THE NEOLIBERAL STATE (2016)).

[75] This was all happening in the years after the national Civil Rights Act of 1964 (prohibiting discrimination on the basis of race) was signed into law and after the passage of the Fair Housing Act, which was signed into law just hours after Martin Luther King's assassination. *See* 42 U.S.C. § 2000e (codifying the Civil Rights Act of 1964, Pub. L. 88–352, 78 Stat. 241); 42 U.S.C. §§ 3601–3619 (codifying the Fair Housing Act of 1968, Pub. L. 90–284, 82 Stat. 73).

[76] *See* discussion *infra* Part I.B.

[77] *Id.*

[78] CORNELIUS, *supra* note 21, at 147.

Black men, "had never before been convened."[79] And, the delegates on the Bill of Rights Committee—the group tasked with considering the proportionate-penalties clause, among other provisions—included people from diverse religious backgrounds and urban and rural backgrounds; it included republicans, democrats, and independent democrats; it included lawyers, a teacher, a politician, a priest, and a woman who worked as a homemaker.[80]

Among the committee's Black delegates was Albert A. Raby, a key leader of the Chicago Freedom Movement with whom Leonard had worked at the earlier summit to address housing discrimination.[81] If Foster's advocacy was more reserved, Raby was explicit in his denunciation of white racism: "[Raby] was a fighter for the rights of his people and disadvantaged people, and he stood up firmly for every cause dear to him."[82] With a background as a Chicago teacher and organizer, Raby was, by 1970, a leading civil rights activist who was instrumental in racial justice movements throughout the Chicago area and nationally, including serving as a key Chicago partner for the work of Dr. King.[83] During the debate on section 11, Raby spoke out about rehabilitation as the purpose of punishment.[84] Interestingly, at the convention, both Foster and Raby refused to caucus with the other Black delegates, perhaps out of an unwillingness to side with those who were more affiliated with—or beholden to—the established Democratic machine.[85] Unlike Foster, however, Raby was considered among the most left-leaning members of the delegation.[86]

On December 30, 1969, convention President Samuel Witwer announced the names of the delegates whom he had chosen to chair various

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[79] GERTZ, *supra* note 6, at 24–25.

[80] *Id.* at 24–25.

[81] *See supra* note 74.

[82] GERTZ, *supra* note 6, at 32.

[83] As a convener of the Coordinating Council of Community Organizations, Raby co-chaired the Chicago Freedom Movement and marched alongside Rev. Dr. King through white neighborhoods that "hated the very thought of a non-segregated society." *Id.*

[84] *See* 3 REC. OF PROC., *supra* note 8, at 1422. ("MR. RABY: Thank you, Mr. Chairman, fellow delegates, I rise hesitantly to speak to this issue because I have—in the course of this Convention—tried to be cognizant of time and tried not to be redundant; but I feel very strongly about it and feel that I have an obligation to impose upon this Convention to express the feelings that I have. First let me say that I never conceive of any apparatus or the function of penal institutions, whether it is in capital punishment or any other form, as being punitive. I view it as institutions which ought to be rehabilitative, and that every function of those institutions ought to be toward that end.").

[85] Simeon B. Osby, *Black Unit at Con Con*, CHI. DAILY DEF., Aug. 3, 1970, at 4.

[86] GERTZ, *supra* note 6, at 25.

committees.[87] For the Bill of Rights Committee, which would tackle issues including criminal sentencing, Witwer appointed Chicago attorney Elmer Gertz as Chair.[88] Gertz was famed for his loud civil rights advocacy and for taking on controversial criminal cases, including securing the parole of Nathan Leopold.[89] Indeed, Gertz's appointment was met with derision by establishment newspapers who considered Gertz to be a leftist irritant; the *Chicago Tribune* described him as a "maverick" who had "a long record as a noisy, ineffective busy-body."[90] The *Tribune* went on to warn:

> The Illinois constitution now contains a perfectly good bill of rights. Many eminent citizens have urged that it be left as it is and labor leaders have warned that they will fight any changes. If the bill of rights committee turns its hearings into a hunting ground for ideological freaks and peddlers of utopian schemes, the whole Convention is likely to be discredited in the eyes of the voters.[91]

With this warning doubtless ringing in their ears, and with the winds of unrest and, perhaps, change swirling through Chicago's neighborhoods, the

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[87] *Id.* at 20.

[88] *Id.*

[89] Gertz was involved in some of the most famous legal cases in the twentieth century. *See* Eric Pace, *Elmer Gertz, a Top Lawyer, Is Dead at 93; Won for Leopold, Ruby and Henry Miller*, N.Y. TIMES (Apr. 29, 2000), https://www.nytimes.com/2000/04/29/us/elmer-gertz-a-top-lawyer-is-dead-at-93-won-for-leopold-ruby-and-henry-miller.html. He advocated and obtained parole for Nathan Leopold, who spent 33 years in prison for the 1924 murder of 14-year-old Bobby Franks. *Id.* Leopold, along with Richard Loeb, gained notoriety for their attempt to commit the "perfect crime." Caught within eight days of the murder, the pair confessed and, at the guidance of their defense attorney, Clarence Darrow, entered a guilty plea to avoid the death penalty. *See The Leopold and Loeb Trial*, PBS, https://www.pbs.org/wgbh/americanexperience/features/monkeytrial-leopold-and-loeb-trial/. [https://perma.cc/UMQ2-UTMD] At the sentencing hearing, Darrow famously gave an impassioned closing argument lasting twelve hours, resulting in the punishment of life imprisonment. *Id.* In 1958, Gertz argued that Leopold, who was 19 at the time of the murder, had been fully rehabilitated. *See* Pace, *supra*.

In 1964, Gertz represented Jack Ruby on appeal after he was convicted and sentenced to death for murdering Lee Harvey Oswald, the man who assassinated J.F.K. Ruby died before the retrial could occur. *See* Pace, *supra*; Rubenstein v. State, 407 S.W.2d 793, 795 (Tex. Crim. App. 1966) (finding error in the lower court's refusal to grant a change of venue—instead remanding for trial—despite excessive publicity). Gertz also participated in two cases before the Supreme Court. *See Elmer Gertz*, OYEZ, https://www.oyez.org/advocates/elmer_gertz. [https://perma.cc/5EZU-7VSH] The first, *Furman v. Georgia*, invalidated capital punishment as unconstitutional under the Eighth Amendment. 408 U.S. 238, 240–41 (1972). In the second, *Moore v. Illinois*, advocates successfully invalidated the defendant's death sentence. 408 U.S. 786, 800 (1972).

[90] GERTZ, *supra* note 6, at 20–21 (first quoting John Elmer, *Witwer Picks Chairmen of Con-Con Units*, CHI. TRIB., Dec. 31, 1969, at 3; and then quoting Editorial, *Surprising Con-Con Appointments*, CHI. TRIB., Jan. 3, 1970, at S6).

[91] *Id.*

Bill of Rights Committee—including Leonard Foster, Al Raby, and Elmer Gertz—went to work. The group set themselves a task: revisiting the Bill of Rights in the Illinois constitution.[92] But as the delegates did so, they understood that—as the Tribune had warned—voters had not signaled a great demand for a changed bill of rights when they voted for a constitutional convention.[93] Many people seemed pleased with the status quo embodied in the 1870 Bill of Rights.[94] Thus, the delegates approached change with caution: their watchwords were "stop, look, and listen."[95]

The ever-present benchmark for the task, of course, was the federal Bill of Rights.[96] The Bill of Rights Committee, accordingly, considered a significant part of their task to debate whether to go above and beyond the protections already guaranteed by the federal constitution.[97] Indeed, delegates understood that each of them were citizens of a larger union, and "most of our individual rights stem from the federal tree."[98] However, as Gertz noted, the "state bill of rights might perform important functions. We might go beyond what was required by the Fourteenth Amendment. We could not give our citizens less, but we could give them more. Would we?"[99]

Some commentators urged the delegates to simply leave the 1870 Bill of Rights in place. Indeed, there was a long history behind those provisions: Not only did the 1870 Bill of Rights track the federal Constitution, but the provisions were almost entirely derived from the state constitution of 1848, and eighteen of the twenty sections traced back to Illinois's first constitution in 1818.[100] And by 1970, those provisions had long gone undisturbed: in the century following the adoption of the 1870 constitution, there had been no amendments to the Bill of Rights.[101] Some observers, accordingly, pointed out that the 1870 Bill of Rights was within the norm of "states' bills of rights generally," and argued it should be left untouched.[102]

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[92] *Id.* at 45–48.

[93] *Id.* at 7.

[94] *Id.* at 20–21.

[95] *Id.* at 7.

[96] *Id.* at 12 ("[M]ost of our individual rights stemmed from the federal tree.").

[97] *Id.* at 5 ("The prime questions would be: What do those federal amendments provide, and why are they not sufficient for all purposes here in Illinois?").

[98] *Id.* at 12.

[99] *Id*.

[100] *Id.* at 14.

[101] *Id.*

[102] *Id*.

But other members of the Bill of Rights Committee felt that changing times, and changing social considerations around racial justice, required a re-examination. As Elmer Gertz later noted:

> What neither [academics] nor the other commentators observed was that, despite the hoary years of the basic guarantees, [the Bill of Rights was] ignored with respect to the race held in servitude supposedly in the South alone . . . The lesson in this is that traditional language must be reexamined by those drafting new constitutions in order to make certain that the rights are truly operative for all . . . [How] could we assure due process and equal protection of the laws, so that we had not verbalisms but realities, secure against the most authoritarian officials? . . . How could we achieve progress in these areas constitutionally?[103]

The 1970 Bill of Rights delegates aimed to answer this question. Recurringly and regularly, considerations of criminal and racial and social justice animated discussions around reforming the Bill of Rights.

Delegate Kemp, a Black man who served as vice-chairman of the Bill of Rights Committee, sought to ban discrimination and wiretaps after having experienced both.[104] For his part, Al Raby, "conscious of those on the lower rungs of the social ladder, felt that there ought to be a pronouncement that all persons are entitled to the basic necessities of life."[105] Indeed, as the President of the convention later recalled, Al Raby encouraged other delegates to consider racial discrimination: On the convention floor, and off, "He was an authentic voice of the 1960s Civil Rights Movement, as the leading independent . . . for minorities in Illinois."[106]

Another delegate, Bernard Weisberg, "did not want anyone to be committed to jail, whether through bail or fine, simply because he was poor."[107] Indeed, a strong cohort of members spent a considerable amount of time debating whether the new Bill of Rights should include a right to bail or a right to attain automatic full citizenship after completion of a sentence.[108]

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[103] *Id.* at 14–15.

[104] *Id.* at 49.

[105] *Id.*

[106] Samuel Witwer, *A Special Remembrance of Special Man*, CHI. TRIB., Dec. 11, 1988, at C2.

[107] GERTZ, *supra* note 6, at 49. In addition to such progressive delegates, other members, like Frank Lawlor, supported "an unchanged constitution and [was] against innovation, a mortal sin in his eyes," according to Gertz. *Id.*

[108] *Id.* at 120–24. Compare this with Article III, Section 2, which allowed restoration of the right to vote to every person who completed their sentence. ILL. CONST. art. 3, § 2. The Illinois Attorney General later stated that this provision applied to those who were out on probation or parole. *See* Ill. Att'y. Gen. Op. S-1056 (1976) at 3; ILL. REV. STAT. ch. 46, para. 3-5 (1987). This was not considered controversial at the Convention. *See* Ann Lousin, *The 1970 Illinois Constitution: Has It Made a Difference?* 8 N. ILL. UNIV. L. REV. 571, 592 (1988) [hereinafter Lousin, *The 1970 Illinois Constitution*].

Gertz, Raby, and Weisberg, for instance, proposed a revision to the bail clause of section 7.[109] Their concerns, as noted in the minority report, related to ensuring that the accused was not incarcerated or confined simply as a result of poverty.[110] Weisberg and Raby, among others, also argued that fines and fees should be unconstitutional if used to imprison those unable to pay them.[111] Still, other members displayed further commitment to lessening

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[109] GERTZ, *supra* note 6, at 120.

> The money bail system leads each year to the jailing, solely because of their poverty . . . ." These practices, we said, have been condemned by two presidential commissions and lead to the feeling, among the poor, that "lower courts in our urban communities dispense "assembly line" justice; that from arrest to sentencing, the poor and uneducated are denied equal justice with the affluent, that procedures such as bail and fines have been perverted to perpetuate class inequities.

Id. (quoting KERNER REPORT, *supra* note 26, at 183). The proposed revision was: "All persons shall be bailable, except for capital offenses where the proof is evident or the presumption great. Security shall be required only to assure the appearance of the accused and shall not exceed the financial." 3 REC. OF PROC., *supra* note 8, at 1660. During the proceedings, Delegate Weisberg read from the minority report:

> Now, the suggestion has been made that since the bail reform legislation was adopted in Illinois in 1963, that we have adequate law on the books in order to deal with the problem of discrimination against the poor under our bail bond system. The facts, however, indicate that, despite the adoption of this legislation, that these problems are apparently just as serious as ever . . . post bail, and there were over 170,000 confinements in those jails during that year. [I]n some of these jails, the confinements of these prisoners averaged longer than the inmates who were serving out fines or sentences; and in ten of these county jails, the average pretrial detention was found to be more than two months.
>
> [T]he main point is that it is still very apparent, I think, and documented by all the students of the subject, that, in fact, we still do have a bail system which results in the jailing each year and the punishment without trial of tens of thousands of persons to whom it appears clearly that their jailing is simply because they are poor. This kind of jailing not only involves punishment without conviction of a crime and, of course, that is particularly offensive where the defendant is ultimately not convicted of any crime or where he is ultimately not sentenced to a prison term, but it ends up, of course, that he had in fact served a prison term and frequently served it under jail conditions which are much worse than the typical state penitentiary.

Id.

[110] 3 REC. OF PROC., *supra* note 8, at 1678 ("The minority proposal is intended to end the practice under which poor defendants convicted of an offense and filed are imprisoned because of their poverty, while financially able defendants in similar cases pay their fines and go free."). *Id.* ("The imprisonment of a person simply because he does not have the money to pay such a fine is discriminatory.").

[111] *Id.* at 1678. ("The imprisonment of a person simply because he does not have the money to pay such a fine is discriminatory. It is expensive to the community as well as the offender and his family because the wealthy defendant, of course, is able to avoid any imprisonment while the defendant who is jailed because of his poverty reinforces is one more person who may believe that our legal system does not afford equal justice.").

harsh punishments by arguing for the abolition of the death penalty—a prominent issue that became "an emotional focal point" for the Committee.[112]

Several Bill of Rights Committee delegates also felt that considerations of racial justice required a reconsideration of the constitutional protections surrounding sentencing. As Gertz said:

> All of us, no matter how we feel about the penal system, recognize that there is a lot of caprice and whim in sentencing. It sometimes seems that it depends upon race, color, creed, kind of lawyer, all kinds of fortuitous circumstances having nothing to do with the offense; and as I see it, it is possibly of constitutional importance in Illinois—and nationally . . . —that the question of standards for sentence be considered in any bill of rights.[113]

As for Raby, the president of the convention recalled that:

> In the convention's Bill of Rights Committee, in private nightly discussions with independent delegates from Chicago, as well as on the floor of the convention and in the many private and public events in which delegates were involved, Al urged all of us to understand what it meant to be a victim of racial discrimination.[114]

Article 1, Section 14: Imprisonment for Debt. Like Section 11, the first clause is mostly the same as the 1870 Constitution. But the second sentence, "no person shall be imprisoned for failure to pay a fine in a criminal case unless he has been afforded adequate time to make payment, in installments if necessary, and has willfully failed to make payment," is new with the goal of reducing the inequality of criminal fines between rich and poor. *See* Lousin, *The 1970 Illinois Constitution*, *supra* note 108, at 599. This provision preceded the SCOTUS decision of *Tate v. Short*, 401 U.S. 395 (1971), which had largely the same effect.

[112] *See* Lousin, *The 1970 Illinois Constitution*, *supra* note 108, at 598–99; Edith Herman, *Con Con Votes to Retain Death Penalty*, CHI. TRIB., June 3, 1970, at 10 ("A move to abolish capital punishment fell four votes short of approval after three hours of heated debate."); 3 REC. OF PROC., *supra* note 8, at 1414–27. During debate on section 11, several delegates questioned whether Foster's amendment clause was a means of abolishing the death penalty. *See infra* notes 131–134. Ultimately, in August, the Convention "narrowly approved a proposal" permitting voters to decide the fate of the death penalty; this action reversed the vote in June, which had defeated a prohibition on the death penalty. John Elmer, *Death Penalty Put to Voters*, CHI. TRIB, Aug. 6, 1970, at 1. When put to Illinois voters in December, the electorate adopted the new constitution, but, in a separate ballot initiative, rejected a ban on the death penalty by a 2-1 margin. John Elmer, *New Constitution O.K.'d,* CHI. TRIB, Dec. 16, 1970, at 1. The subsequent history of capital punishment in Illinois is complicated. *See generally Illinois*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/illinois. Following the U.S. Supreme Court's 1972 decision striking down the death penalty as applied, Illinois voted to reinstate the death penalty the next year; the law was struck down by the state supreme court in 1975. *Id.* After another Supreme Court decision in 1976 upheld the death penalty, Illinois again voted to reinstate it the next year. *Id.* Despite a moratorium on executions instituted by Gov. George Ryan in 2000, the death penalty was not abolished in Illinois until 2011, over forty years after the Constitutional Convention. *Id.*

[113] 3 REC. OF PROC., *supra* note 8, at 1394.

[114] Witwer, *supra* note 106, at C2.

II. A NEW VISION FOR THE PROPORTIONATE-PENALTIES CLAUSE

As it had previously been interpreted and applied by the Illinois judiciary, the 1870 version of the proportionate-penalties clause was essentially synonymous with the federal Eighth Amendment's Cruel and Unusual Punishment Clause, which states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[115] The Illinois analog then stated: "All penalties shall be proportioned to the nature of the offense; and no conviction shall work corruption of blood or forfeiture of estate; nor shall any person be transported out of the State for any offense committed within the same."[116] Like its Eighth Amendment analog, the original proportionate-penalties clause contained no references to the offender. Yet, even the 1870 version contained proportionality in its text.[117] It was, however, also silent as to the objective of punishment. Despite the linguistic variation between the Eighth Amendment and the 1870 version of the proportionate-penalties clauses, the Illinois courts treated these clauses as similar.[118] Initially, and as we discuss below, any revisions failed to pass out of the Bill of Rights Committee. Only on the convention floor did a change to the original text pass.[119]

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[115] U.S. CONST., amend 8; 3 REC. OF PROC., *supra* note 8, at 1380 (Delegate Dvorak, stating: "[T]he first clause of [Section 11 of the 1870 constitution], 'All penalties shall be proportioned to the nature of the offense,' being the section carrying the substantive profundity of the entire section. Decisional case law has indicated that this language has been interpreted *synonymously* very often with the import of the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution. Approximately half of our states carry this exact language, or language referring to 'proportionate to the nature of the offense,' in their constitutions.") (emphasis added).

[116] Ill. CONST. 1870, art. II, § 11.

[117] *Id.*

[118] *See* People v. Gonzales, 184 N.E.2d 833 (Ill. 1962) (quoting People *ex rel.* Bradley v. Ill. State Reformatory, 36 N.E. 76, 79 (Ill. 1894)); People v. Molz, 113 N.E.2d 314, 317 (Ill. 1953) ("Constitutionally, there is no right to probation. After a plea of guilty a prisoner 'stands convicted he faces punishment, he cannot insist on terms or strike a bargain.'") (quoting Burns v. United States, 287 U.S. 216, 220 (1930)); *see also* Harmelin v. Michigan, 501 U.S. 957, 967–68 (1991) (confronting the question of proportionality in a case where the Court upheld a mandatory sentence of life without the possibility of parole for an offense involving the possession of 652 grams of cocaine and holding that only gross disproportionality violates the federal constitutional prohibition against excessive punishments). The 1870 version of the Illinois constitution does indeed appear to have adopted proportionality in its text, despite being ignored by the courts, suggesting that even the 1870 version of the state constitution goes further than the Eighth Amendment in that any disproportionate sentence violates the state constitution, even before amendment.

[119] GERTZ, *supra* note 6, at 93. Along with the preamble, this was among the closest votes held by the committee members. The other sections had greater margins between majority and

A. COMMITTEE PROCEEDINGS

The Bill of Rights Committee met over a period of about twenty weeks to consider the existing provisions and prepare recommendations in advance of the full constitutional convention. While records of the committee's process are not exhaustive, its majority report shows that it had received numerous proposals on various subjects, heard from hundreds of witnesses, and considered volumes of written material.[120] At the end of this process, the committee unanimously recommended that twelve of the bill of rights' original twenty sections be left unchanged, urged amendment of the preamble and eight sections, and proposed seven entirely new sections.[121]

With respect to the proportionate-penalties clause, however, all proposed revisions failed in committee. For instance, while the committee unanimously voted to maintain the clause's stricture that "no conviction shall work corruption of blood or forfeiture of estate," a minority of members unsuccessfully sought to prohibit convictions resulting in permanent forfeiture of civil rights.[122] Others tried and failed to go further,

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minority votes. *Id.* at 74–110; *compare id. with* 3 REC. OF PROC., *supra* note 8, at 1396 (passage on the floor). For the full discussion during the proceedings, including supporting comments from Delegates Canfield, Gertz, and others (as well as its opponents), see 3 REC. OF PROC., *supra* note 8, at 1392–96.

120 GERTZ, *supra* note 6, at 46–47.

121 *Id*. at 76. Although the amendment concerning bail was not ultimately amended as Raby, Gertz, and Weisberg proposed, *see supra* note 107, the amendment concerning imprisonment for debt was amended. GERTZ, *supra* note 6, at 128 (noting that the minority report on bail was defeated, while Gertz, Raby, and Weisberg prevailed with their minority report on liberalized provisions as to fines in criminal cases, and section 12 concerning imprisonment for debt was approved).

122 *Id.* at 93. The "corruption of blood" refers to a punishment at common law that persists in the modern era; upon attainder, or conviction, the "blood of the attainted person was deemed to be corrupt, so that neither could he transmit his estate to his heirs, nor could they take by descent from the ancestor." United States v. Nesbeth, 188 F. Supp. 3d 179, 181 (E.D.N.Y. 2016) (quoting Avery v. Everett, 18 N.E. 148, 150 (N.Y. 1888)). The decision to induce permanent changes in one's legal status as punishment is referred to as a civil death because it accompanied by a significant loss of substantial rights, including the right to vote, hold office, and even certain jobs. *See, e.g.*, Baldwin v. New York, 399 U.S. 66, 69 n.8 (1970) (noting that those convicted of crimes may be denied the right to vote); *see also* statements of Delegate Dvorak, *infra* Part II.B (explaining the history of penalties after conviction included foreclosure of inheritance, among other penalties).

While the English common law cited in *Nesbeth* imposes a punishment that outlasted the life of the convicted, the 1870 Illinois constitution adopted the same limits as the federal constitution: "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." U.S. CONST., art. III, § 3, cl. 2. While the Framers indicated comfort with a life-long civil death, the 1970 proposal to include the restoration of civil rights was

unsuccessfully advancing a proposal to automatically restore civil rights on completion of a prison sentence or parole term.[123] Other unsuccessful proposals sought to explicitly abolish the death penalty. More conservatively, still others sought to jettison the 1870 language and replace it with the exact words of the federal Eighth Amendment.[124]

And finally, it appears that in committee, a minority of delegates wanted to add an additional clause immediately after the existing language, which would have said: "all penalties shall be proportioned both to the offender and to the nature of the offense." The proposed addition would have specified that penalties should *also* be aimed at "the objective of restoring the offender to useful citizenship."[125] This, too, was unsuccessful; the committee voted 7 to 5 to reject all these proposals and instead retain the original language of Section 11 of the 1870 bill of rights.[126]

At the moment, the winds of change were calm—at least until the convention.

B. CONVENTION FLOOR PROCEEDINGS

Delegates on the convention floor considered the proportionate-penalties clause on May 29, 1970. In keeping with earlier committee proceedings, Delegate John E. Dvorak offered a proposal to maintain the proportionate penalties language of the 1870 constitution.[127] In so proposing, Dvorak noted that courts had interpreted the 1870 language to be synonymous with the Eighth Amendment, that the committee was unprepared to recommend substantive changes, and that they did not want to make purely stylistic changes so as to avoid confusion.[128] Indeed, on May 29, 1970, Delegate Dvorak explained to the voting delegates that:

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undoubtedly an effort to mitigate the collateral consequences of conviction to the term of incarceration; for an excellent discussion of this topic, see generally Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789 (2012).

[123] GERTZ, *supra* note 6, at 93. Gertz favored this proposal. *Id.*

[124] *Id.* at 93.

[125] *Id.*

[126] *Id*. Along with the preamble, this was among the closest votes held by the committee member; the other sections had greater margins between majority and minority votes. *Id.* at 74–110.

[127] 3 REC. OF PROC., *supra* note 8, at 1380–81.

[128] *Id.*; *see also* People v. Caballes, 851 N.E.2d 26, 33 (Ill. 2006) (interpreting, in lockstep, the 1870 clause and the Eighth Amendment—which "would have been known to the drafters of the Bill of Rights of the 1970 constitution, to the constitutional delegates who voted to adopt the present language, and to the voters who approved the new constitution.") (internal citations omitted).

> the general intent of the committee was that while there were other issues to be considered—or while that we did consider these other issues—we felt that we could not include them because they were legislative in nature, and that we would, by changing the language, prefer to make no substantive changes; so we did not want to make stylistic changes. We left the language to exist as it was.[129]

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[129] 3 REC. OF PROC., *supra* note 8, at 1380–81. The transcript proposing to maintain the original language reads as follows:

MR. GERTZ: Thank you, Mr. Weisberg. Section 11, "Limitation of Penalties." John Dvorak, one of the younger reconciling influences of our committee—he will make the presentation.

MR. DVORAK: Thank you, Chairman Gertz. Mr. President and ladies and gentlemen, it's my privilege on behalf of the Bill of Rights Committee to present section 11, "Limitation of Penalties after Conviction." This section has a very sound basis in history and law, as you may have noticed from the language. The language is contained almost intact in the English Bill of Rights of 1689, as well as the 1818 and 1848 Illinois Constitutions. As a practical matter, in contemporary definition the section can be broken down into the three clauses, the first clause, "All penalties shall be proportioned to the nature of the offense," being the section carrying the substantive profundity of the entire section. Decisional case law has indicated that this language has been interpreted synonymously very often with the import of the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution. Approximately half of our states carry this exact language, or language referring to "proportionate to the nature of the offense," in their constitutions. A 1962 federal case, *Robinson v. California*, impliedly, but not specifically, held this section—being the Eighth Amendment to the United States Constitution—to apply to the states through the due process clause of the Fourteenth Amendment of the Federal Constitution. It goes not only to punishment *per se*, but to bail and fines and remedies of this sort. The penalties on appeal that have been contested are usually upheld, if in fact the penalties have been provided for by a constitutionally approved legislative category, as contained in a criminal code.

The second clause, "No conviction shall work corruption of blood or forfeiture of estate," is and has been interpreted to be definitive or explanatory of the first section insofar as contemporary application is concerned. Two-fifths of our states currently utilize this language in their constitutions. The history of the second clause really goes to the idea of convictions of a forefather or forebearer transcending lineal or sanguine lines to foreclose inheritances, estates, things of that nature. A 1950 Illinois Supreme Court case, *Welch v. James*, applied itself to this concept and held that a joint tenant of a fee interest in real estate was not foreclosed of that tenancy by virtue of murdering the joint tenant spouse. There are additional cases dealing with the idea of whether or not a beneficiary of a life insurance policy . . . is foreclosed of reaping the benefits of that policy if, in fact, they murder the insured, or have something to do in conspiracy of the murder; and as matters of public policy, and not based on this section, are the beneficiaries deprived of interest in life insurance policies. Once again, the second clause is more definitive, descriptive, and explanatory of the first clause, rather than having substantive meaning on its own.

The third clause, "nor shall any person be transported out of the state for any offense committed within the same," is akin to the second clause, being explanatory once again. It really has no contemporary significance. The historical basis is evidenced in, for instance, the settling of our original colonies where English prisoners were brought over to do the mundane work necessary for settlement. This has been interpreted in very ancient cases as being so particularly cruel that there is no absolutely decisive case law on this section alone. Approximately one-third of our states now retain this section in their bill of rights.

As indicated in our committee report, this section passed with a seven-to-five vote, and I think this is not indicative of the intent to retain this language. The five votes dissenting on retention were broken down between proponents of some akin matters—for instance, proponents of inclusion of the federal language of "cruel and unusual punishment." We felt, I believe as a committee, that while we could either include or substitute that language for the existing language, we would be making no substantive changes and, therefore, we preferred not to do it. There were proponents, also, of the abolition of the death penalty, insisting that that be placed in this section. There were numerous reasons, and after extended debate, the committee felt that we should not include that in this section or any section of the bill of rights, and that it would be best left to the legislature for determination on this controversial issue.

. . .

MR. WHALEN: Mr. Dvorak, I have a question concerning clause 1 of section 11. Did the Bill of Rights Committee consider inserting a requirement that reasons would be given for penalties imposed? The existing section 11 requires that penalties be proportioned, but it doesn't state that judges or juries need be charged with certain qualifications or standards when they impose a penalty. Did you or your committee consider requiring that the standards be given for imposing penalties?

MR. DVORAK: Well, my recollection is that we did consider that, but not under this section. Offhand, I could not tell you what section it was. Maybe Chairman Gertz can.

MR. GERTZ: While we were deliberating and even now, a landmark case is pending in the United States Supreme Court—*Maxwell v. Bishop*—and the issue there, among others, is whether or not there is a Constitutional requirement that there be standards for imposing the death penalty; and we felt that while that case was pending and while the law was being developed, that it was perhaps inadvisable for us to anticipate what might be done in a fashion that might go contrary to those pending cases.

MR. WHALEN: As I understand it, Chairman Gertz, Maxwell only applies to jury cases, and my question is whether the committee considered requiring judges to state standards or reasons for imposing certain penalties?

MR. GERTZ: I read the argument before the United States Supreme Court in *Maxwell v. Bishop*, and in the argument, Anthony Amsterdam, who is the counsel for the defense — principal counsel for the defense—was asked by various members of the court as to the applicability of that in cases not tried before juries; and as I read the feeling of the court in counsel, it seemed to be recognized that in perhaps all cases we had arrived at the point where sentences had to be imposed upon other than whim—that there had to be reason back of any sentence, whether the extreme sentence of death or any other sentence.

PRESIDENT WITWER: Any other questions?

MR. WHALEN: I have another question, Mr. President.

PRESIDENT WITWER: Yes, Mr. Whalen?

MR. WHALEN: Mr. Dvorak, did your committee consider whether corruption of blood or forfeiture of estate would be prohibited under the due process clause, and whether it requires special treatment in the constitution?

MR. DVORAK: No, I think that we did consider it, and I think we were in agreement that it was, in fact—the due process clause was, in fact, applicable to this phraseology; and as I have indicated before, the idea of—contained in the Eighth Amendment to the United States Constitution—"cruel and unusual punishment" was held to be applicable to the states through the Fourteenth Amendment to the United States Constitution, the due process clause. So in both instances, it does, in fact, apply.

But only a few days later, on June 2, 1970, during floor proceedings, Leonard Foster proposed an amendment to that section: the inclusion of the same restoration language that had been previously rejected by the Bill of Rights Committee.[130] Foster's amendment stated, in relevant part, "All penalties shall be proportioned both to the nature of the offense and to the objective of restoring the offender to useful citizenship."[131]

Foster went on to explain the reasons for his proposal. He told convention delegates that the original text was concerned only with whether the punishment was cruel and unusual in relation to the act. By blinding itself to the convicted person's record, character, and prospects, he argued, the clause no longer tracked modern evidence-based criminological best practices. As he pointed out:

> Traditionally the constitution has stated that a penalty should be proportionate to the nature of the offense. I feel that with all we've learned about penology that somewhere along the line we ought to indicate that in addition to looking to the act that the person committed, we also should look at the person who committed the act and determine to what extent he can be restored to useful citizenship.[132]

When asked about the scope of his amendment—whether it would, for instance, necessarily require the abolition of the death penalty—Foster made an answer that clarified the breadth of his vision, both on the severe and mild ends of the punishment spectrum:

MR. WHALEN: Does that make section 2 and section 11 redundant then? That if corruption of the blood and forfeiture of estate are prohibited by the due process clause, we wouldn't need to state it explicitly in section 11?

MR. DVORAK: I would agree with you. There is a redundancy; but as I said, we did not want to make changes for the sake of—where there was no substantive change, we did not want to change this language and create any anxieties as to why we did it.

3 REC. OF PROC., *supra* note 8, at 1380–81.

[130] *Id.* at 1391.

[131] *Id.*

[132] *Id.* The debate turned to whether the amendment would prohibit the death penalty. Among the very first questions:

MR. YOUNG: I would like to ask Delegate Foster a question. The phrase, "and to the objective of restoring the offender to a useful citizenship"—do you feel that that would have any effect on the death penalty?

MR. FOSTER: I think it probably might, but I would just as soon not open that can of worms. I don't think this would necessarily preclude the death penalty, although I wish it could. I think that if the offense were considered so overwhelmingly outrageous that the General Assembly wanted to impose the death penalty, I think they could do so; but if they wanted to impose something less than the death penalty, then I think the judge would be required to consider the use of parole, probation, and would even go to what we did in our prisons, in terms of having people learn how to do something more useful than make license plates.

Id. at 1394.

> I don't think this would necessarily preclude the death penalty, although I wish it could. I think that if the offense were considered so overwhelmingly outrageous that the General Assembly wanted to impose the death penalty, I think they could do so; but if they wanted to impose something less than the death penalty, then I think the judge would be required also to consider the use of parole, probation, and it would even go to what we did in our prisons, in terms of having people learn how to do something more useful than make license plates.[133]

At this point, on the floor, Elmer Gertz added:

> I certainly look with great sympathy and approval with the proposed amendment . . . I think the spirit of the proposed amendment is in accordance with modern penology. I think if we're going to lower the crime rate and make this a more livable world, we have to think in such terms as those set forth by Mr. Foster.[134]

Delegates then asked about the meaning of the amendment's focus on rehabilitation. One Delegate Hendren asked: "Leonard, specifically, what does the word proportion mean in your amendment, and does this mean major emphasis would be placed on rehabilitation?" Foster's response:

> In terms of proportion, the more serious the crime, the more serious the punishment; and also, in deciding what punishment to impose, the court would do that which with regard to this particular convicted person is most likely to get him back into useful citizenship. It means that they can't just take rules of thumb and apply them willy nilly but they have to look at each situation rather carefully, applying whatever standards are developed.[135]

Hendren continued: "Would major emphasis be placed on rehabilitation?" Foster responded:

> I would hope so. At least some emphasis would have to be placed on rehabilitation under this provision. Now, of course, probably there would be worked out by the legislature and by rules of court just where the emphasis would lie. This is a pretty wide open statement here. It's just a statement of sentiment, almost, on the part of the Convention. I would hope, though, that it would lead to the major thrust being towards rehabilitation rather than just punishment.[136]

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[133] *Id.*

[134] 3 REC. OF PROC., *supra* note 8, at 1392.

[135] *Id.*

[136] *Id.* at 1392. The Convention debate continued and is included here in relevant part. Vice President Smith said, "Delegate Foster, I can concur certainly that the objective of rehabilitation is a laudable one. My question is, when we require that the court explain the penalty, are we not constitutionalizing something that has not heretofore been constitutionalized . . . ?" *Id.* at 1392.

Mr. Friedrich stated:

I have many times opposed the abolition of the death penalty . . . . But, I think all penologists and certainly the people on the parole board recognize that there are some people who are just not suitable for rehabilitation. . . . [T]here are such crimes that are committed—and I have had

As the debate continued, delegates pressed Foster on whether the legislature, in addition to courts, would have to abide by the constitutional mandate that punishments restore the offender to useful citizenship. In particular, Delegate Kamin asked:

> I am curious. Is it contemplated that the requirement is directed to the legislature as well as to the court and is the legislation which provides a penalty subject to challenge under this provision? That's my first question. My second question is, if a judge is within the range of penalties prescribed by the legislature and if the legislation passes the test, hasn't the judge passed the test with regard to the proportion?[137]

Leonard Foster replied:

> As to the first question, as I remember it, yes, this would be binding on the legislature. As to the second question, I would presume that in order for this provision to be effectuated there would have to be rules adopted by the courts, but where the legislature provides a range—say, five to twenty for a given offense—even if the judge is within that range under this provision, I would expect him to somehow justify picking either the five or the twenty.[138]

Further questions ensued, but one by one delegates fell in line. Eventually, Leonard Foster's proposed amendment passed the convention floor with a vote of 41 to 34.[139] In full, the amendment, codified in 1970 as Article 1, Section 11 of the Illinois constitution, proclaims that "all penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship. No conviction

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a chance to talk to, I think, some of those who have committed some of the most horrible crimes in this state and read their records—and if this is even by inference or suggestion that those people should be released under any system, I would not be for it . . . .

Id.

Mr. Lennon renewed his objection to Foster's amendment, noting that he voted against it in committee. He was concerned about the "automatic restoration" of civil rights, because, according to him, "in modern parlance it's been extended far beyond" the right to vote, serve on a jury, or hold office. *Id.* at 1394.

[137] *Id.* at 1393.

[138] *Id.* When Kamin continued to press on this point, Leonard stood firm:

I would anticipate that, somewhere along the line, rules and standards would be established both by the legislature and by the courts and a judge . . . for example, if the rules were specific that a man with such kind of a record and such kind of employment and permanent residence and family background should get one type of sentence as opposed to a different classification of individual getting another kind of sentence, presumably the judge could completely divorce himself from reason and just follow the rules and stay within bounds, but somewhere along the line I would expect the reviewing courts to determine what the judges should do. I don't pretend to stand here and tell judges for all time what they are going to have to do.

Id.

[139] 3 REC. OF PROC., *supra* note 8, at 1396. For the full discussion during the proceedings, including supporting comments from Delegates Canfield, Gertz, and others (as well as its opponents), *see id.* at 1392–96.

shall work corruption of blood or forfeiture of estate. No person shall be transported out of the State for an offense committed within the State."[140] And the people of Illinois adopted the proposed constitution on December 15, 1970.[141] The Bill of Rights' proportionate-penalties clause was now oriented squarely towards the goal of rehabilitating the offender.

III. THE MEANING OF ILLINOIS'S NEW PROPORTIONATE-PENALTIES CLAUSE

In enacting the expanded, modern-day proportionate-penalties clause, Illinois became a national leader in providing constitutional limits against excessive punishments. Illinois has clear language prioritizing rehabilitation as a constitutionally mandated purpose of criminal sanctions.[142] The courts must consider rehabilitation in assigning punishment. Today, eleven state constitutions have language identical to the Eighth Amendment, proscribing "cruel and unusual" punishments without additional gloss.[143] Another thirteen states use the "cruel and unusual" language as their constitutional centerpieces while supplementing with additional requirements.[144] Another sixteen state constitutions contain federal-adjacent constitutional provisions that disjunctively proscribe cruel *or* unusual punishments.[145] And six additional states proscribe cruel, but not unusual, punishments in their constitutions.[146]

A minority of states, including Illinois, have taken substantively different approaches.[147] Oregon's constitution, for instance, both prohibits cruel and unusual punishment and adds a requirement that all penalties be

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[140] ILL. CONST. art. I, § 11.

[141] Lousin, *The Illinois Constitution After Forty-Five Years*, *supra* note 16, at 1.

[142] Ill. CONST. art. II, § 11.

[143] William Berry, *Cruel State Punishments*, 98. N.C. L. REV. 1201, 1252 (2020) [hereinafter Berry, *State Punishments*].

[144] *Id.* at 1252–53.

[145] *Id.* at 1253.

[146] William W. Berry, *Cruel and Unusual Non-Capital Punishments*, 58 AMER. CRIM. L. REV. 1627, 1636–37 (2021) [hereinafter Berry, *Non-Capital Punishments*] (collecting and summarizing Eighth Amendment state constitutional analogs); *see generally* Berry, *State Punishments*, *supra* note 143143 (analyzing state constitutional analogs and their textual and interpretive distinctions).

[147] Berry, *State Punishments*, *supra* note 143, at 1236–38. Connecticut implicitly prohibits cruel and unusual punishment, and the Connecticut supreme court found the death penalty to be unconstitutional in 2015 in *State v. Santiago*, 122 A.3d 1, 17 (Conn. 2015). Washington does not explicitly prescribe unusual punishments. WASH. CONST. art. I, § 14 ("Excessive bail shall not be required, excessive fines imposed, nor cruel punishment inflicted.").

proportionate to the offense.[148] The Alaska Constitution, most similar to the Illinois constitution, contains a sentence related to the purposes of punishment:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. Criminal administration shall be based upon the following: the need for protecting the public, community condemnation of the offender, the rights of victims of crimes, restitution from the offender, and the principle of reformation[149]

Unlike Illinois, however, the Alaska constitution offers up a variety of punishment purposes without singling any one out as most significant.[150]

The Illinois proportionate-penalties clause most clearly acknowledges that courts must consider the offender and not only the offense; additionally, it contains an affirmative statement of the primary purpose of punishment: to "restore the offender to useful citizenship."[151] Its plain language constitutionally requires, in other words, a penal focus not on punishment only, but also on restoration.[152] In this way, Illinois delegates passed the most progressive sentencing constitutional amendment that existed at the time and it remains so today.[153]

The plain language of the Illinois proportionate-penalties clause establishes protections that go beyond its predecessor—and beyond the federal Constitution's Eighth Amendment. Many delegates, including those on the Bill of Rights Committee, seriously considered maintaining the existing 1870 language, including interpretations conforming to the Eighth Amendment. The committee delegates, in particular, expressly recognized that the Supreme Court of the United States had recently held—in its 1962 decision, *Robinson v. California*—that the Fourteenth Amendment

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[148] OR. CONST. art. I, § 16 ("Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense."); *see also* W. VA. CONST. art. III, § 5 ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Penalties shall be *proportioned to the character and degree of the offence*." (emphasis added)); Berry, *State Punishments*, *supra* note 143, at 1219–24 (discussing linguistic differences among state constitutional analogs, including those with proportionality requirements). Indiana, Maine, and New Hampshire also contain constitutional provisions requiring punishments be proportional to the offense. *See* Berry, *State Punishments*, *supra* note 143, at 1219.

[149] ALASKA CONST. art I, § 12.

[150] *Id.*

[151] ILL. CONST., art. II, § 11.

[152] *Id.*

[153] *Cf.* Berry, *State Punishments*, *supra* note 143, at 1226 (arguing that state constitutions that contain any changes from the Eighth Amendment, i.e., "cruel *or* unusual," rather than the Eighth Amendment's "cruel *and* unusual," should be distinguished in interpretation).

incorporates the Cruel and Unusual Clause against the several states.[154] But the convention as a whole decided to change the proportionate-penalties clause—with full knowledge that they were moving away from a scheme that had been interpreted in lockstep with the Eighth Amendment.[155] This

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[154] 3 REC. OF PROC., *supra* note 8, at 1380–81 (discussing Robinson v. California, 370 U.S. 660 (1962)). Pre-*Robinson*, Illinois's punishment jurisprudence was cited by several cases as summed up in *People v. Gonzales*:

> This court has traditionally been reluctant to override the judgment of the General Assembly with respect to criminal penalties. It indicated at an early date that the constitutional command that 'penalties shall be proportioned to the nature of the offense' would justify interference with the legislative judgment only if the punishment was 'cruel,' 'degrading' or 'so wholly disproportionate to the offense committed as to shock the moral sense of the community.'

184 N.E.2d 833, 836 (Ill. 1962). In *People ex rel. Bradley v. Ill. State Reformatory*, 36 N.E. 76, 79 (Ill. 1894), Illinois first articulated the "shock moral conscience" test for the proportionality of a punishment. Lyon & Brooks, *supra* note 12, at 52–53.

Later, the court emphasized the social norms and effects on evolving "moral conscience." In *People v. Elliott*, 112 N.E. 300, 302 (Ill. 1916), the court upheld a severe sentence for illegal alcohol sales just after town became anti-saloon territory largely because it had been voted upon by majority of townspeople. *See* Lyon & Brooks, *supra* note 12, at 53; *see also* People v. Morris, 554 N.E.2d 235, 239 (Ill. 1990) (striking down a law-making alteration of a vehicle drive-away sticker a Class 2 felony). *Morris* references a pre-*Robinson* case, People v. Gonzales, 184 N.E.2d 833 (Ill. 1962), and its test for analyzing penalties as being deferential to the legislature unless a penalty is so disproportionate as to shock the "moral sense of the community." *Morris*, 554 N.E.2d at 239.

Finally, before incorporation, the courts exhibited great deference to the legislature in considering whether the penalty was unjust. *See* People v. Landers, 160 N.E. 836, 838 (Ill. 1927) ("The nature, character, and extent of penalties are matters almost wholly legislative, and the courts have jurisdiction to interfere with legislation upon the subject only where the penalty is manifestly in excess of the very broad and general constitutional limitation invoked. . . . However absurd or unwise the court may regard this legislation, it cannot declare it void unless it can say that it is so disproportionate to the offense that it shocks the conscience of reasonable men.").

After incorporation, Illinois courts continued to emphasize social evils when affirming severe penalties. In *People v. Jackson*, for instance, the court emphasized "evils" of narcotic drugs when upholding severe sentence in a narcotics recidivism case. 253 N.E.2d 527, 536 (Ill. Ct. App. 1969). It included both Eighth and Fourteenth Amendment analysis as well as the Illinois constitution—post-*Robinson*, but before the 1970 amendment.

[155] Berry, *Non-Capital Punishments*, *supra* note 143, at 1653.

> Basic principles of interpretation might suggest that the state provision would be superfluous and pointless if it offered no additional protection to that provided by the Federal Constitution, particularly if the state constitution was adopted after the Federal Constitution in 1787. The Supreme Court, however, did not provide for the incorporation of the cruel and unusual punishment clause of the Eighth Amendment until its 1962 decision in *Robinson v. California*. This could explain why states might want their own version of the Eighth Amendment if the Eighth Amendment previously did not apply to the states.

Id.

becomes even more apparent given the 1970 Illinois delegates' express desire to only make changes with substantive effect.[156]

The long duration of time between changes also supports the conclusion that the drafters intended the new clause to depart substantively from its long-held predecessor. Several scholars have noted that there is a correlation between the magnitude of constitutional change and the passage of time.[157] In their study comparing constitutional changes, Professors Law and Whalen observed the following:

> [The frequency and] magnitude of change are inversely correlated: the more time that elapses between changes, the bigger the changes tend to be. Conversely, the more frequently a constitution changes, the smaller the changes tend to be. In other words, constitutional change exhibits a temporal pattern of either incremental tinkering or periodic bursts."[158]

As noted above, Illinois's proportionality clause had remained static since its first constitution in 1818.[159] Indeed, as one of the delegates noted, the 1870 version of the proportionality clause is taken nearly word for word from the English Bill of Rights of 1689.[160] The amount of time—more than 150 years—between the original text and the 1970 amendment, further removes doubt that the change was one of meaning and substance, and not merely of wording.

In addition to the plain text, the convention debates show that the delegates intended the new clause to require criminal punishments to be aimed directly at restoration to useful citizenship. For example, Leonard Foster made the intent behind his proposed amendment clear: "Since Article 11 sets forth as a sole criterion the offense, I offer this amendment so that the courts in addition to the offense can consider the offender."[161] On the convention floor, Foster and his colleagues repeatedly explained that the "major thrust" of the amendment was directed at "rehabilitation rather than just punishment" and cited the lessons of modern penology in support of that

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[156] *See supra* note 129 and accompanying text.

[157] David S. Law & Ryan Whalen, *Constitutional Amendment Versus Constitutional Replacement: An Empirical Comparison*, *in* ROUTLEDGE HANDBOOK OF COMPARATIVE CONSTITUTIONAL CHANGE 74, 84 (Xenophon Contiades & Alkmene Fotiadou eds. 2021) ("We also find evidence of an empirical relationship between the *frequency* and the *magnitude* of constitutional change.").

[158] *Id.*

[159] *See supra* note 100 and accompanying text.

[160] 3 REC. OF PROC., *supra* note 8, at 1380.

[161] 7 REC. OF PROC., Sixth Illinois Constitutional Convention 1391, 1396 (1970). An Explanatory Note advising voters on this proposed provision amendment stated that the language "adds the requirement that penalties be determined with the objective of rehabilitating the offender and in accordance with the seriousness of the offense." *Id.* at 2675.

idea.[162] He explicitly encouraged the consideration of parole and probation in place of more restrictive modes of confinement, understanding that less restrictive punishments facilitated quicker paths to rehabilitation.[163]

In addition to differences in text and intention, the clause's insistence on rehabilitation places particular requirements on state judges at sentencing and on legislatures during lawmaking. As the Supreme Court of the United States has repeatedly made clear, the Eighth Amendment categorically limits the imposition of death on juvenile offenders and the imposition of juvenile life without the possibility of parole for certain offenses.[164] The Eighth Amendment also limits mandatory life sentences without the possibility of parole when imposed against juvenile offenders.[165] Likewise, Illinois's "useful citizenship" clause requires more than proportionality. It requires courts to develop a framework for assessing restoration to citizenship before any prison sentence may be imposed. It would not simply proscribe all mandatory sentences, and require individualized consideration for every

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[162] 3 REC. OF PROC., *supra* note 8, at 1392; *see also* Joshua Kleinfeld, *Two Cultures of Punishment*, 68 STAN. L. REV. 933, 937 (2016) ("When parts of Europe became fascist, criminal punishment in those countries became harsh, and in the democratic era that followed, criminal law became milder along with the form of government. By the middle of the twentieth century, a mild, rehabilitative, and individualizing penal philosophy prevailed in both Europe and America. From the late 1920s through the early 1970s, the incarceration rate in the United States was low, roughly stable, and roughly equal to what it is in Germany, France, Italy, and Spain today. Capital punishment in the United States was under a national moratorium and very nearly abolished between 1972 and 1976. By comparison, Spain abolished it in 1978 and France did so in 1981. America and Europe throughout most of the democratic era were pulling criminal justice in Western civilization along a certain track, and it was the same track.") (citations omitted); *see generally* John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 NW. J.L. & SOC. POL'Y 195 (2009) (exhaustively summarizing the history of punishment and the death penalty in the United States).

[163] 3 REC. OF PROC., *supra* note 8, at 1391. On the floor, the debate turned to whether the amendment would prohibit the death penalty:

MR. YOUNG: I would like to ask Delegate Foster a question. The phrase, "and to the objective of restoring the offender to a useful citizenship"—do you feel that that would have any effect on the death penalty?

MR. FOSTER: I think it probably might, but I would just as soon not open that can of worms. I don't think this would necessarily preclude the death penalty, although I wish it could. I think that if the offense were considered so overwhelmingly outrageous that the General Assembly wanted to impose the death penalty, I think they could do so; but if they wanted to impose something less than the death penalty, then I think the judge would be required to consider the use of parole, probation, and would even go to what we did in our prisons, in terms of having people learn how to do something more useful than make license plates.

Id.

[164] William W. Berry III, *Individualized Sentencing*, 76 WASH. & LEE L. REV. 13, 16 (2019) [hereinafter Berry, *Individualized Sentencing*].

[165] *Id.*

offender, but also require that such individualized consideration extend to restoration to useful citizenship.[166]

Importantly, moreover, Foster's specific insistence on restoration to "useful citizenship" is crucial in light of his upbringing. Foster grew up in the proud tradition of a Black civic leader to whom a tightly woven social fabric, based on earned and deserved equality, was the best and most vital locus of civic life. Foster's rehabilitative goal was not to break the will, nor was it to create a mindset of chastened misery or dependent submission on the part of the convicted person. Rather, all evidence suggests that he intended to create a penal system that would allow a person to leave prison and once again look their fellow citizens in the eye. In this sense, the amendment, Foster explained, "would even go to what we did in our prisons, in terms of having people learn how to do something more useful than make license plates."[167] Punishment policy was to be directed towards something more fundamental, and something broader than simply withholding freedom for a set term of years; under Foster's vision, the state must ensure that those years are spent preparing convicted people to reacquire all the rights and responsibilities that citizenship entails. It is a bold vision—a vision that heralds much for ending the era of mass incarceration that was, unfortunately, soon to develop.

IV. THE PROPORTIONATE-PENALTIES CLAUSE'S INTENT & ORIGINAL MEANING HAS GONE UNFULFILLED

A. THE EXPANSION OF THE CARCERAL STATE AND DISPROPORTIONATE SENTENCES

As Illinois delegates debated and passed a constitutional provision to restore more of its convicted people to useful citizenship, the United States began ascending to its place as the world's largest jailer.[168] Beginning in the

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[166] As Professor Berry explains in his article on individualized sentencing, the U.S. Supreme Court first proscribed the use of mandatory death sentences in *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976) (plurality opinion of J. Stewart), and later held that defendants in capital cases were entitled to "individualized sentencing" in *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion of C.J. Burger). *Id.* at 18 (internal citations omitted.) Similarly, the Illinois courts must consider how proportionality and restoration intersect at sentencing. In so considering, the courts cannot simply disregard one, in favor of the other. Instead, the courts must not impose any sentence that fails to restore the offender to useful citizenship and is not proportionate to the nature of the offense.

[167] 3 REC. OF PROC., *supra* note 8, at 1391.

[168] *See* ASHLEY NELLIS, SENT'G PROJECT , MASS INCARCERATION TRENDS 1 (2023), https://www.sentencingproject.org/app/uploads/2023/01/Mass-Incarceration-Trends.pdf

1970s and continuing through today, the United States' jail and prison population exploded. While the rise of the carceral state—often called mass incarceration—has many causes, dramatically higher crime rates was not one of them; incarceration and crime rates have not moved in lockstep.[169] Instead, changes in sentencing laws and longer sentences contributed to a near quintupling of the carceral state.[170] Close to two million U.S. citizens are under some form of carceral supervision.[171] Professor John Pfaff notes that "the single most striking statistic in the American criminal justice system is its thirty-year expansion in prison population. From 300,000 prisoners in 1977, the prison population has risen steadily to over 1.5 million as of June 30, 2005."[172]

This proliferation of prisoners comes in large part from the changes in the types and lengths of sentences. Beginning in 1973, mandatory minimum sentencing schemes proliferated and new "truth in sentencing" laws required people to serve 75% or 85% of their sentences. Both innovations caused sentence lengths to increase.[173] Life terms—both with and without parole—

[https://perma.cc/99GD-7XMN] (describing incarceration trends beginning in the early 1970s).

In 1972, the imprisonment rate was 93 per 100,000 people. The prison expansion that commenced in 1973 reached its peak in 2009, achieving a seven-fold increase over the intervening years. Between 1985 and 1995 alone, the total prison population grew an average of eight percent annually. And between 1990 and 1995, all states, with the exception of Maine, substantially increased their prison populations, from 13% in South Carolina to as high as 130% in Texas. The federal system grew 53% larger during this five-year period alone.

Id.

[169] John F. Pfaff, *The Empirics of Prison Growth: A Critical Review and Path Forward*, 98 J. CRIM. L. & CRIMINOLOGY 547, 553–55 (2008) (arguing that crime does in fact influence incarceration rates, but crime rates and incarceration rates are not necessarily co-extensive).

[170] NELLIS, *supra* note 168, at 1.

[171] *Id.*; *see also* Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie*, PRISON POL'Y INITIATIVE (Mar. 14, 2023), https://www.prisonpolicy.org/reports/pie2023.html. [https://perma.cc/6K24-K2H9]

[172] *See* Pfaff, *supra* note 169, at 547.

[173] NELLIS, *supra* note 168, at 9 (describing legislative decisions that increased the length of already long prison terms). From mandatory minimums of 15 years for possession of drugs, to truth-in-sentencing laws, to the abolition of parole, people are serving longer sentences: "Nearly one in five people in U.S. prisons—over 260,000 people—had already served at least 10 years as of 2019. This is an increase from 133,000 people in 2000—which represented 10% of the prison population in that year." *Id.*; *see also* Rachel E. Barkow, *Supreme Injustice: How the Court Has Enabled Mass Incarceration*, CATO POL'Y REP., Nov.–Dec. 2021, at 13, 13, https://www.cato.org/sites/cato.org/files/2021-12/cpr-v43n6-7.pdf [https://perma.cc/5FEG-XDLP] ("We now live in a country where one out of every three adults has a criminal record. For every seventeen people born in 2001, one of them will go to prison or jail. It's almost unfathomable, the sheer scale of it, and it's not falling proportionately across the population.

have also become far more common. Today, nearly one in seven people in prison is serving a life sentence, and the number of people serving life without the possibility of parole is nearly six times higher today than it was in the early 1990s.[174] But, despite both state and federal constitutional prohibitions on excessive punishments, courts have been largely sidelined—or, worse, complicit—in this problem.[175] When it comes to lengthy prison terms, it has been nearly impossible to challenge sentences as unconstitutionally excessive.[176]

The dramatic and unchecked expansion of the prison state has disproportionately impacted marginalized communities and people who are Black and Latino.[177] For example, Black people represent 55% of those serving life sentences without the possibility of parole, but only 14% of the total United States population.[178] Scholars have posited that contemporary mass incarceration trends fit within a much longer and larger antiblack punitive tradition.[179]

Black people bear a disproportionate share of it. African Americans make up a third of the people incarcerated, even though they're only 13.4% of the U.S. population. One-third of Black men have a felony conviction, and Black adults are six times more likely to be incarcerated than white adults.").

[174] NELLIS, *supra* note 168, at 8. The report describes that historically, even when people were sentenced to life imprisonment, many were released for good time after ten or fifteen years. This began to change after the 1980s. Significantly, the report shows that "in 1992, 9,404 people were reportedly serving [life without parole]," (LWOP) and another 57,888 had life sentences eligible for parole." *Id.* But eleven years later "the number of people serving LWOP had more than tripled and parole eligible lifers had increased 62%. By 2020, six times as many people were serving LWOP, reaching an all-time high of 55,945; the total population of people serving LWP rose 82% over these years." *Id.*

[175] *See* Barkow, *supra* note 173, at 16. ("The Supreme Court has effectively taken the judiciary out of the business of checking the state when it comes to long punishments. The court knows how to give greater scrutiny for proportionality because it's done so in other contexts, including its death penalty cases. Its failure to do it in a noncapital context, even though the Constitution is no less relevant in such cases, is really one of the worst examples of a judiciary not enforcing an explicit, constitutional guarantee."); *see generally* Smith et al., *supra* note 4, at 541–47 (arguing that state courts—like their federal counterparts—have mostly failed to intervene when it comes to excessive punishments, despite prohibitions on cruel and unusual punishments in the federal constitution and state constitutional analogs).

[176] Barkow, *supra* note 173, at 15.

[177] NELLIS, *supra* note 168, at 4 ("Black men are six times as likely to be incarcerated as white men and Latinx men are 2.5 times as likely. Nationally, one in 81 Black adults in the United States is serving time in state prison.").

[178] *Id.* at 9 (noting that Black Americans represent 33% of the total prison population, and 46% of the prison population who had already served at least 10 years).

[179] Understanding incarceration as part of an antiblack punitive tradition is critical for grasping the insidious manifestations of criminal justice discrimination in modern-day

Further still, severe effects persist even after people are freed from prison, which appears as a feature (and not a bug) of American sentencing practices. Instead of restoring offenders to useful citizenship, states and the federal government have done the opposite by passing tens of thousands of laws that ensure "civil death."[180] Nearly 50,000 state and federal regulations impose restrictions on people with a felony conviction.[181] From voting disenfranchisement to exclusion from housing, education, and employment, people who have served time in prison are never really free, never "restored."[182] As one federal judge concluded, the sheer breadth of various post-incarceration penalties is astounding:

> The range of subject matter that collateral consequences cover can be particularly disruptive to an ex-convict's efforts at rehabilitation and reintegration into society. As examples, under federal law alone, a felony conviction may render an individual ineligible for public housing, section 8 vouchers, Social Security Act benefits, supplemental nutritional benefits, student loans, the Hope Scholarship tax credit, and Legal Services Corporation representation in public-housing eviction proceedings. Moreover, in addition to the general reluctance of private employers to hire ex-convicts, felony convictions disqualify individuals from holding various positions. Oftentimes, the inability to obtain housing and procure employment results in further disastrous consequences, such as losing child custody or going homeless. In this way, the statutory and regulatory scheme contributes heavily to many ex-convicts becoming recidivists and restarting the criminal cycle. Denials of social benefits and the difficulty of

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America. The defining feature of this tradition, we argue, is the habitual surveillance and incapacitation of racialized individuals and communities. Under the banner of order maintenance and anticrime warfare, public officials and law enforcement practitioners have routinely mobilized financial resources, new technologies, and political support for tactical police operations in the midst of recurrent crime panics and urban uprisings. *See* Hinton & Cook, *supra* note 40, at 263.

[180] United States v. Nesbeth, 188 F. Supp. 3d 179, 181 (E.D.N.Y. 2016) (citing *Civil Death*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[181] *Id*.

[182] *Id.* at 184, 184 n.32 (citing *Collateral Consequences Inventory*, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, https://niccc.nationalreentryresourcecenter.org/consequences [https://perma.cc/WB52-BTLB]). In *Nesbeth*, Judge Block summarized the history and uses of civil disabilities resulting from conviction. *Id.* at 180–86. The notion of "civil death" or loss of rights after conviction of a serious crime comes to us from English common law. *Id.* at 181, 181 n.4. Judge Block further characterizes the sheer number of people subject to federal and statutory restrictions after convictions as staggering:

> Some 70 million to 100 million people in the United States—more than a quarter of all adults—have a criminal record, and as a result they are subject to tens of thousands of federal and state laws and rules that restrict or prohibit their access to the most basic rights and privileges—from voting, employment and housing to business licensing and parental rights.

Id. at 184, 184 n.32 (quoting *How to Get Around a Criminal Record*, N.Y. TIMES, Oct. 19, 2015, at A22). This phenomenon is nothing new. *See, e.g.*, Thomas R. McCoy, *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 942–49 (1970) (describing collateral consequences of conviction).

> obtaining employment are only two aspects of post-conviction life. States impose other restrictions that exclude convicted felons from fully rejoining society.[183]

The epidemic of mass incarceration did not leave Illinois unscathed. In Illinois, beginning in 1978, incarceration rates skyrocketed from approximately 100 out of every 100,000 people to now about 497 to every 100,000 people—a rate far greater than "almost any democracy on earth."[184] Each year, approximately 173,000 people in Illinois are booked into jails.[185] And, like the federal system and other state counterparts, Black and Latino people from Illinois are disproportionately impacted.[186]

In short, despite the proportionate-penalties clause's rehabilitative mandate, Illinois courts and legislatures—like their federal counterparts—have adopted policies that achieved quite the opposite.[187] Indeed, despite explicit text requiring it, the courts in Illinois have generally ignored the rehabilitative mandate. Mass incarceration—practically by definition a set of policies fundamentally discordant with notions of rehabilitation and restoration—thrives in Illinois and around the country.[188]

B. THE EIGHTH AMENDMENT STANDARD

Neither the Eighth Amendment nor Illinois's proportionate-penalties clause has served to limit extreme sentences. At least under modern case law, the Eighth Amendment of the federal Constitution does not have a purpose to rehabilitate or restore offenders to useful citizenship. Indeed, its plain text

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[183] *Nesbeth*, 188 F. Supp. 3d at 185–86.

[184] *Illinois Profile*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/profiles/IL.html ("Illinois has an incarceration rate of 497 per 100,000 people (including prisons, jails, immigration detention, and juvenile justice facilities), meaning that it locks up a higher percentage of its people than almost any democracy on earth.") (citing Emily Widra & Tiana Herring, *States of Incarceration: The Global Context 2021*, PRISON POL'Y INITIATIVE (Sept. 2021), https://www.prisonpolicy.org/global/2021.html [https://perma.cc/TQ4N-HCSE].

[185] *Id.* (citing Wanda Bertram & Alexi Jones, *How Many People in Your State Go to Local Jails Every Year?*, PRISON POL'Y INITIATIVE (Sept. 18, 2021), https://www.prisonpolicy.org/blog/2019/09/18/state-jail-bookings/ [https://perma.cc/9FEC-34T2]).

[186] *Id.*

[187] *See generally Illinois Snapshot of Employment-Related Consequences*, CSG JUST. CTR. (Jan. 2021), https://csgjusticecenter.org/wp-content/uploads/2021/02/collateral-consequences-illinois.pdf [https://perma.cc/2FDN-C2R8] (noting that as of 2020, the NICCC identified "1,289 provisions of Illinois law that impose these 'collateral consequences,' a large majority of which act as barriers to employment for people with criminal convictions").

[188] Ben Ruddell, *It's Time for Real Sentencing Reform in Illinois*, ACLU OF ILL. (Oct., 21 2020) https://www.aclu-il.org/en/news/its-time-real-sentencing-reform-illinois [https://perma.cc/3956-M7K6] (noting the similarities between national incarceration trends and ones in Illinois). Ruddell states that "[i]n 1980, Illinois'[s] prison population was 11,768. Today, it stands at more than 30,000, after reaching a historic peak of nearly 50,000 in 2013." *Id.*

does not suggest any particular purpose or goal of punishment, but simply proscribes cruel and unusual punishments. In the absence of federal help, the Supreme Court of the United States has consistently said that state legislatures have broad leeway to set the purposes of adult criminal sentences—including sheer, retributive punishment—and to pass sentencing laws in accordance with those purposes.[189] And state constitutions go further than the federal constitution.

Yet, the Supreme Court has held that the Eighth Amendment contains a narrow "gross proportionality" principle, ascertainable in the history and intent of the Amendment, that discourages extremely severe sentences disproportionate to the nature of the crime.[190] In *Trop v. Dulles*, decided in 1958, the Court explained that proportionality can be considered in light of the "evolving standards of decency that mark the progress of a maturing society."[191] The Supreme Court's most conservative members have argued

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[189] In *Harmelin v. Michigan*, the United States Supreme Court confronted the question of proportionality in a case where the Court upheld a mandatory sentence of life without the possibility of parole for an offense involving the possession of 652 grams of cocaine. 501 U.S. 957, 967–68 (1991). In his concurrence, Justice Kennedy said "[t]he efficacy of any sentencing system cannot be assessed absent agreement on the purposes and objectives of the penal system. And the responsibility for making these fundamental choices and implementing them lies with the legislature." *Id.* at 598–99 (Kennedy, J., concurring). And, also, "the Eighth Amendment does not mandate adoption of any one penological theory. . . . The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation." *Id*. at 599.

[190] In *Solem v. Helm*, the United States Supreme Court traced the Eighth Amendment's origins and its principle of proportionality through the Magna Carta to the English Bill of Rights:

> The English Bill of Rights repeated the principle of proportionality in language that was later adopted in the Eighth Amendment: 'excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.' Although the precise scope of this provision is uncertain, it at least incorporated 'the longstanding principle of English law that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged.

463 U.S. 277, 285–86 (1983). The Court also marshalled evidence from the Magna Carta, noting that three of its chapters were "devoted to the rule that 'amercements' may not be excessive." *Id.* at 284, 284 n.8 (defining "amercement" as similar to a modern-day fine). For additional historical overview, see Kevin Bendesky, *"The Key-Stone to the Arch": Unlocking Section 13's Original Meaning*, 26 U. PA. J. CONST. L. 201 (2023) (interpreting Pennsylvania's cruel and unusual punishment clause). Under the United States Supreme Court's Eighth Amendment test, a person convicted of a crime has to show the sentence is "grossly disproportionate" in order to challenge his sentence under the Eighth Amendment. *See Harmelin*, 501 U.S., at 997–98.

[191] *Trop v. Dulles*, 356 U.S. 86, 1010 (1958); *see also* John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 905,

that the Eighth Amendment does even less. That minority argues that the Eighth Amendment limits only *methods* of punishment that are themselves "cruel and unusual,"[192] and that there is no protection against disproportionate sentences at all. Under either view, though, the human being before the court is irrelevant. When it comes to adult prison terms, the Eighth Amendment looks only at the nature of the offense and the severity of the punishment.[193] Whether the person who received that punishment has been battling addiction or poverty, or is intellectually disabled, or has been the victim of violence, is all beside the point.[194] And what that person needs to rehabilitate—to return to useful citizenship—is absent from the analysis.[195]

C. ILLINOIS COURTS RENDER THE PROPORTIONATE-PENALTIES CLAUSE WHOLLY INEFFECTIVE

In Illinois, the 1970 constitution's proportionate-penalties clause has too often been interpreted in a way that renders it wholly ineffective as a check on policies driving mass incarceration.[196] In fact, the judiciary has largely ignored the plain text and history of the proportionate-penalties clause.[197] Occasionally, the courts distinguish between the Eighth Amendment and the

905 n.26 (2011) (noting proportionality is theoretically considered under an "evolving standards of decency" approach).

[192] Writing for the four-justice plurality in *Harmelin*, Justice Antonin Scalia argued that the English Bill of Rights did not in fact contain any proportionality principle. 501 U.S. at 967–68. Moreover, Justice Scalia noted that at the time of ratification, the Framers were aware of state court constitutions containing words referring to proportionality, and, in contrast, the Framers of the Eighth Amendment did not use such words. *Id.* at 975.

[193] *See generally Solem*, 463 U.S. at 290–95. The *Solem* Court adopted the following framework by which proportionality should be judged: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. *Id.* In these non-juvenile Eighth Amendment cases, the test does not require courts to consider the offender's capacity to be rehabilitated, nor are courts required to take into account the offender's life up to that point.

[194] *Id.*

[195] *Id.*

[196] *See* Lyon & Brooks, *supra* note 12, at 49 (noting that Illinois courts have generally interpreted the proportionality clause in lockstep with the Eighth Amendment of the U.S. Constitution); *see also* Lousin, *The Illinois Constitution After Forty-Five Years*, *supra* note 16, at 25 (noting that while the amendment may have had some impact, and, though, "[t]he early cases, interpreting the combination of seriousness of the offense and potential for rehabilitation, sometimes held invalid either a statutory penalty or a specific sentence. In recent years, courts have shown more deference to the legislature's judgment as to statutory penalties. Because the statutes limit the range of penalties, judges now have relatively little discretion in imposing sentences upon specific defendants.").

[197] Lousin, *The Illinois Constitution After Forty-Five Years*, *supra* note 16, at 25.

proportionate-penalties clause.[198] More often, they do not.[199] To be sure, the courts in Illinois do not appear to be against the ideal of rehabilitation, and, from time to time, announce as much.[200] Rather, the courts have not yet integrated and adopted the history of the text and its analysis on the floor and in debates.

Before its passage, Illinois courts were largely deferential to the legislature when it came to reviewing sentences, unless the sentences in question were "'cruel,' 'degrading' or 'so wholly disproportionate to the offense committed as to shock the moral sense of the community.'"[201]

Since 1970, little change has occurred, despite the drafters' clear intent to incorporate "useful citizenship" considerations into the constitutional analysis. Instead, and unfortunately, the "useful citizenship" clause's plain text and intent has been largely sidelined by the Illinois courts. Of the more than one hundred cases raising issues under the new proportionate-penalties clause in the first decade or so after the provision went into effect, few resulted in reductions of sentences. In those few cases, the defendant usually was a very young first-time offender.[202]

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[198] People v. Harris, 2018 IL 121932, ¶ 46, 120 N.E.3d 900, 911 (recognizing that the Eighth Amendment does not protect emerging adults (those between 18–20 years of age) against excessively long sentences but leaving open the possibility that Illinois's proportionality clause may do so).

[199] *See e.g.*, People *ex rel.* Birkett v. Konetski, 909 N.E.2d 783, 799 (Ill. 2009). In considering whether sex offense registration violated a juvenile's constitutional rights under the proportionate-penalties clause, the Illinois Supreme Court stated "Our proportionate-penalties clause is coextensive with the federal constitution's prohibition against cruel and unusual punishment." *Id.* at 799. It then went on to cite *In re* Rodney H., 861 N.E.2d 623, 628 (Ill. 2006), and concluded that "Both provisions apply only to the criminal process where the government takes direct action to inflict punishment . . . Thus, the critical determination is whether imposition of the Act's registration requirement is a direct action to inflict punishment." *Id.*

[200] *People v. Taylor* notes, for instance, that where rehabilitation is possible, a sentence must be calculated to achieve both proportionality with the offense and the purpose of rehabilitation in order to satisfy the proportionate-penalties clause. 464 N.E.2d 1059, 1062 (Ill. 1984).

[201] People v. Gonzales, 184 N.E.2d 833, 835 (Ill. 1962) (quoting People *ex rel.* Bradley v. Ill. State Reformatory, 36 N.E. 76 (Ill. 1894)); People v. Molz, 113 N.E.2d 314, 317 (Ill. 1953) ("Constitutionally, there is no right to probation. After a plea of guilty a prisoner 'stands convicted,' he faces punishment, he cannot insist on terms or strike a bargain.") (quoting Burns v. United States, 287 U.S. 216, 220 (1932)).

[202] *See* Lousin, *The 1970 Illinois Constitution*, *supra* note 108, at 598*;* Lyon & Brooks, *supra* note 12, at 50 (showing that the proportionate-penalties clause supports broader goals for youthful offenders in Illinois courts); *see also* People v. Williams, 379 N.E.2d 1268 (Ill. Ct. App. 1978) (involving young defendants with no adult convictions); People v. Horton, 356 N.E.2d 1044 (Ill. Ct. App. 1976) (same); People v. Wilkins, 344 N.E.2d 724 (Ill. Ct. App. 1976) (same); People v. Brown, 327 N.E.2d 75 (Ill. Ct. App. 1975) (same).

On many occasions, Illinois courts essentially ignored the new clause. In *People ex rel. Ward v. Moran*—only a few years after Leonard Foster's "restoring the offender to useful citizenship" language was adopted—the court considered the case of a defendant convicted of theft and forgery who sought to reduce his concurrent terms of incarceration (1–5 years and 1–3 years) to probation.[203] Rejecting his argument that probation was more conducive to rehabilitation, the court concluded that reducing the defendant's sentence would impermissibly elevate the proportionate penalty clause's rehabilitative purpose above considerations related to the gravity of the offense:

> It is urged that under the facts of this case probation was the only method by which Broverman[, the defendant,] could be restored to useful citizenship. We do not find this reasoning persuasive. There is no indication that the [useful citizenship clause] is to be given greater consideration than that which establishes that the seriousness of the offense shall determine the penalty.[204]

In *People v. Brownell*, the Supreme Court of Illinois upheld a death sentence without mentioning the proportionate-penalties clause; rather, it simply concluded that "the Supreme Court's statements in its recent decisions on the constitutionality of other States' death penalty statutes [was] dispositive."[205] And in yet another case, the court acknowledged that the 1970 clause required sentences to be proportional to the crime and calibrated toward rehabilitation, but nonetheless determined that the clause did not preclude the legislature from requiring mandatory minimum sentences of life imprisonment:

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[203] People *ex rel* Ward v. Moran, 301 N.E.2d 300, 301–02 (Ill. 1973).

[204] *Id* at 302. The facts to which the court refers when addressing useful citizenship show the Illinois court's selective invocation of the state constitution. Broverman had successfully petitioned the appellate court to serve his time on parole instead of incarceration. *Id.* at 301. The appeal court directed the lower court to enter orders to that effect; however, state attorneys filed an original mandamus in the Illinois Supreme Court seeking to compel the appellate court to vacate Broverman's probation. *Id.*

The primary issue was whether Illinois Supreme Court Rule 615 allowed the appellate court to change Broverman's sentence. *Id.* The Supreme Court considered the relevant criminal statute, which allowed probation in circumstances Broverman satisfied. *Id.* Although it acknowledged the proportionate penalty clause, the court ultimately decided that the criminal statute appropriately placed punishment within the purview of the trial court—seemingly without concern as to proportionality of the punishment—and that Rule 615 "was not intended to grant a court of review the authority to reduce a penitentiary sentence to probation." *Id.* at 302. Curiously, the court noted that while mandamus was an improper equitable remedy concerning matters of law, the state constitution gave it supervisory authority over the administration of justice. *Id.*

[205] People v. Brownell, 404 N.E.2d 181, 198 (Ill. 1980).

> The rehabilitative objective of article I, section 11, should not and does not prevent the legislature from fixing mandatory minimum penalties where it has been determined that no set of mitigating circumstances could allow a proper penalty of less than natural life for the crimes of two or more murders. It is within the legislative province to define offenses and determine the penalties required to protect the interests of our society.[206]

Beyond proportionality, Illinois courts have "not spoken consistently on the relationship between our proportionate-penalties clause and the Eighth Amendment."[207] Some rulings interpret the Illinois proportionate-penalties clause in conformance with its federal analog—effectively nullifying any "useful citizenship" considerations. [208] In the 2014 decision *People v. Patterson*, for instance, the Illinois Supreme Court reviewed a juvenile defendant's transfer to an adult facility and found that "the Illinois proportionate-penalties clause is co-extensive with the Eighth Amendment's cruel and unusual punishment clause."[209] The court rejected the defendant's argument that the transfer statute, coupled with harsher penalties and truth-in-sentencing laws, violated the state or federal constitution.[210]

Similarly, in *People v. McDonald*, decided in 1995, the court found that because the proportionate-penalties clause does nothing more than what is provided by the Eighth Amendment, there is no state constitutional right to have the jury consider lingering doubt about guilt during the sentencing phase of a capital trial.[211] Notably, the *McDonald* court acknowledged that "when

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[206] People v. Taylor, 464 N.E.2d 1059, 1062 (Ill. 1984). In dicta, the court appeared to imply that the constitutional mandate requiring restoration to useful citizenship applied only if such restoration were possible. *Id.* (observing "no indication that the possibility of rehabilitating an offender was to be given greater weight and consideration than the seriousness of the offense in determining a proper penalty"). Illinois courts have not so held, yet there has been much misapplication of this clause. Indeed, the court suggests it is the province of the legislature—not the court—to consider the constitutional goals of restoring an offender to useful citizenship and of providing a penalty according to the seriousness of the offense." *Id.* The court then simply concludes that because legislative classifications are presumed valid, the criminal statute at issue in *Taylor* is constitutional. *Id*.

[207] People v. Coty, 178 N.E.3d 1071, 1086 (Ill. 2020).

[208] *Id*. ("[I]f a sentence passes muster under the proportionate-penalties clause, *i.e.*, it is found not to be 'cruel, degrading, or so wholly disproportionate to the offense committed as to *shock the moral sense of the community*,' after considering 'the seriousness of the offense with the objective of restoring the offender to useful citizenship' then it would seem to comport with the contemporary standards of the eighth amendment . . . .") (internal citations omitted).

[209] People v. Patterson, 2014 IL 115102, ¶ 106, 25 N.E.3d 526, 551. The court focused on the procedural nature of the transfer statute, emphasizing that the "mere possibility" of a harsher sentence resulting from a conviction in criminal court "logically cannot change the underlying nature of a statute delineating the legislature's determination that criminal court is the most appropriate trial setting" for this case. *Id.* ¶ 105, 25 N.E.3d at 551.

[210] *Id.*

[211] People v. McDonald, 168 Ill.2d 420, 455–56 (Ill. 1995).

interpreting State constitutional provisions, [it] is not bound by the Supreme Court's interpretation of similar Federal constitutional provisions."[212] Instead, the court considered the intent of the framers and reviewed the proceedings of the 1970 constitutional convention, but incorrectly decided that it "clearly indicates the framers' understanding that article I, section 11 was synonymous" with the Cruel and Unusual Punishment Clause of the Eighth Amendment.[213] As demonstrated above, the records indicate the opposite.

Indeed, in the 2012 case *People v. Clemons*, the Illinois Supreme Court repudiated its conclusion in *McDonald*, calling it an "overstatement."[214] "What is clear," the court stated, "is that the limitation on penalties set forth in the second clause of article I, section 11, which focuses on the objective of rehabilitation, went beyond the framers' understanding of the Eighth Amendment and is not synonymous with that provision."[215] From time to time, the Illinois judiciary has issued contrary holdings that indicate a recurring, if occasional, willingness to consider and apply a more robust version of the proportionate-penalties clause—one that adheres to the 1970 Illinois constitution's framers' original intent to go beyond the federal Eighth Amendment. Soon after the 1970 clause took effect, Illinois courts did reduce a few sentences after considering rehabilitation.[216] In 1977, for example, in *People v. Gibbs*, the Illinois appellate court noted that "[n]ot only must the judge consider the rehabilitative or restorative factor, he must also act on it as an objective of his sentence."[217] It went on to emphasize that while "[s]ome degree of discretion is permitted within the legislative parameters establishing our indeterminate system of sentencing[,] the judge may not resign to total retribution one who has a chance of future restoration to useful citizenship in the free society."[218]

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[212] *Id.* at 455.

[213] *Id.* at 455–56.

[214] People v. Clemons, 2012 IL 107821, ¶ 39, 968 N.E.2d 1046, 1057.

[215] *Id.* Note, however, that just two years later in *People v. Patterson*, the same court made an apparently contradictory statement: "[T]he Illinois proportionate-penalties clause is co-extensive with the Eighth Amendment's cruel and unusual punishment clause." 2014 IL 115102, ¶ 35, 25 N.E.3d 526, 551.

[216] *See* People v. O'Dell, 289 N.E.2d 686, 687–88 (Ill. Ct. App. 1972); People v. Gill, 286 N.E.2d 516, 520 (Ill. Ct. App. 1972).

[217] People v. Gibbs, 364 N.E.2d 491, 494 (Ill. Ct. App. 1977).

[218] *Id.* A few years later, *People v. Taylor* held that where rehabilitation is possible, a sentence must be calculated both in proportion to the offense and to achieve rehabilitation in order to satisfy the proportionate-penalties clause. 464 N.E.2d 1059, 1062 (Ill. 1984).

In 2015, the Illinois appellate court struck down a juvenile's 52-year sentence in *People v. Gipson*.[219] The court said that instead of restoring him to useful citizenship, such a sentence "seems more consistent with eliminating his utility as a citizen."[220] In addition to noting that the Illinois and federal provisions were not synonymous, the court added: "the proportionate-penalties clause demands consideration of the defendant's character by sentencing a defendant with the objective of restoring the offender to useful citizenship, an objective that is much broader than defendant's past conduct in committing the offense."[221]

And, in a recent line of cases involving young adults, ages eighteen to twenty ("emerging adults"), the courts in Illinois have acknowledged the more expansive text—and, thus, additional available remedies—under the proportionate-penalties clause.[222] To begin, the Illinois supreme court held that the Eighth Amendment does not protect emerging adults against excessive sentences.[223] However, Illinois courts have left open the possibility that its own state constitution's proportionate-penalties clause may indeed provide such protection.[224]

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[219] People v. Gipson, 2015 IL App (1st) 122451, ¶ 74, 34 N.E.3d 560, 582.

[220] *Id.* Note also that defendant in *Gipson* had been determined unfit to stand trial before the offense at issue occurred. *Id.* ¶ 75. The appellate court returned to *Gipson* in *People v. Wilson*, 2016 IL App (1st) 141500, 62 N.E.3d 329. Wilson was a seventeen-year-old sentenced to thirty-one years' imprisonment for attempted first degree murder and aggravated battery with a firearm. *Id.* ¶ 1. The court distinguished *Gipson* because there was no evidence that Wilson acted as a lookout nor was mentally unfit. *Id.* ¶ 43. Instead, Wilson "pursued the victim down an alley, raised his firearm, and shot at the victim four times before fleeing." *Id.* The mandatory aspects of Wilson's sentence (mandatory minimum and truth-in-sentencing) were within the trial court's discretion. *Id.* As such the "sentence in this case did not violate the proportionate-penalties clause." *Id*., *aff'd on other grounds sub nom.* People v. Hunter, 2017 IL 121306, ¶ 43, 104 N.E.3d 358, 369.

[221] *Gipson*, 2015 IL App (1st) 122451, ¶ 72, 34 N.E.3d at 582.

[222] *See* Janes, *supra* note 3, at 1932–36 (noting the success of as-applied constitutional challenges under the proportionate-penalties clause, despite the Illinois Supreme Court holding that the Eighth Amendment does not protect against excessive sentences involving emerging adults).

[223] People v. Harris, 2018 IL 121932, ¶ 60, 120 N.E.3d 900, 914 (denying Eighth Amendment challenge to sentence of seventy-six years imposed on eighteen-year-old). The Illinois Supreme Court did not reach the merits of the proportionality challenge to the sentence, leaving open the possibility of such challenges. *See id.*

[224] For example, the Illinois supreme court vacated a lower appellate court's opinion and required it to consider its opinion in *Harris*, on the issue of whether the imposed sentence violated the proportionate-penalties clause. People v. House, 111 N.E.3d 940, 940 (Ill. 2018) (vacating People v. House (*House I*), 2015 IL App (1st) 110580, N.E.3d 357, (Ill. Ct. App. 2015)). The appellate court then reconsidered *People v. House* (*House II*) and held the defendant's mandatory sentence of natural life "shocks the moral sense of the community . . . .

More recently, in *People v. Carrasquillo*, the Illinois appellate court remanded an indeterminate sentence of 200–600 years imposed on Mr. Carrasquillo, who was eighteen-years old at the time of the offense.[225] In that case, Mr. Carrasquillo was convicted of murdering a police officer. Despite a record of rehabilitation, he had been denied parole nearly 30 times. Mr. Carrasquillo filed post-conviction petitions alleging that the sentencing court failed to consider his youth and attendant circumstances when it affirmed the sentence.[226] The appellate court vacated the sentence and remanded the case for the trial court to consider Mr. Carrasquillo's youth and attendant circumstances.[227] Though the court did not specifically make its findings under the proportionate-penalties clause, it favorably quoted a dissenting opinion highlighting the broader purpose and text of the proportionate-penalties clause.[228] In particular, the majority in *Carrasquillo* quoted a previous dissent, highlighting that the objective of restoring the defendant to useful citizenship "is much broader than the defendant's past conduct in committing the offense."[229]

As more recent case law demonstrates, the Illinois Supreme Court and appellate courts have not categorically rejected the applicability of a broader state proportionality clause, and its impact on sentencing. In *Carrasquillo*, for instance, the appellate court emphasized the distinction between the Eighth Amendment and the proportionate-penalties clause and noted that the proportionate-penalties clause has a broader objective.[230]

However, these holdings have been infrequent and seldom if ever producing a binding effect on the courts' decisions in subsequent cases (and, in the case of emerging adults, are rather recent.). As a result, the Illinois courts continue to be everywhere and nowhere on the proportionate-penalties clause. Occasionally, they distinguish between the federal and state

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and violates the proportionate-penalties clause as applied to him." 2019 IL App (1st) 110580-B, ¶¶ 66, 142 N.E.3d 756, 774 (Ill. Ct. App. 2019). *House II* went up on appeal to the Illinois Supreme Court, which reversed and remanded the case with respect to the as-applied proportionate-penalties clause challenge because the appellate court improperly found that petitioner's sentence violated the proportionate-penalties clause of the Illinois Constitution without a developed evidentiary record on the as-applied constitutional challenge. People v. House, 2021 IL 125124, ¶ 43, 185 N.E.3d 1234, 1243.

[225] People v. Carrasquillo, 2023 IL App (1st) 211241, ¶ 61.

[226] *Id.* ¶ 1.

[227] *Id.* ¶ 56.

[228] *Id.* ¶ 48.

[229] *Id.*

[230] *Id.* ¶ 32. (Mr. Carrasquillo "maintain[ed] that his sentence violate[d] the proportionate-penalties clause irrespective of *Miller* considerations because the unduly harsh sentence entered by a corrupt trial court judge shocks the moral sense of our community.") (footnote omitted).

constitutions on the question of punishment; other times, they do not. Rarely do they engage with the state constitution's clear requirement that criminal sanctions restore citizens to usefulness. Mostly, however, the judiciary has ignored the proportionate-penalties clause outside of the juvenile and emerging adult context.

V. TOWARDS A FORWARD-LOOKING CONSTITUTIONAL INTERPRETATION OF THE PROPORTIONATE-PENALTIES CLAUSE

The Illinois supreme court must give effect to the text and intent of the penological amendment under Article I, Section 11, as it has begun to in the context of juveniles and emerging adults. As the court has made clear, "when interpreting a constitution, a court must 'ascertain and give effect to the intent of the framers of it and the citizens who have adopted it.'"[231] If given such effect, no longer could the Illinois courts ignore what the framers explicitly intended: a forward-looking amendment, as concerned with the offender's successful return to the community in the future as it is with the offense that occurred in the past. Indeed, courts in Illinois should re-consider sentencing practices that have not been subjected to judicial review—the kinds of practices that ban any consideration of rehabilitation and possibility. Courts have in fact done just this when they have abolished life without parole for juveniles and beyond that to excessive sentences imposed on emerging adults.[232]

Anything short of that does not fulfill the text of the clause and intent of the framers, the convicted individuals in question, and to the people of Illinois, whose constitutional commitment has been largely ignored.

If courts and legislatures were to take seriously the text and history of Illinois's proportionate-penalties clause, they must consider the following steps:

First, expressly holding that the state's proportionate-penalties clause is different and broader than the federal constitutional clause. As some courts have already done, Illinois courts and legislatures must acknowledge that the distinction between the Eighth Amendment and the proportionate-penalties clause is a significant one.[233] As the court in *People v. Clemons* made clear, the proportionate-penalties clause provides additional limitations on penalties "beyond those afforded by the [E]ighth [A]mendment."[234] The proportionate-penalties clause "focuses on the objective of rehabilitation,"

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[231] *See* People v. Caballes, 851 N.E.2d 26, 33, 36 (Ill. 2006).

[232] Janes, *supra* note 3, at 1932–36.

[233] People v. Clemons, 2012 IL 107821, ¶ 39, 968 N.E.2d 1046, 1047.

[234] *Id.*

goes "beyond the framers' understanding of the eighth amendment[,] and is not synonymous with that provision."[235]

Moreover, as the Illinois supreme court expressly held that a young adult's excessive sentencing claims are foreclosed under the Eighth Amendment, but the court left open the door for a young adult offender to make such claims under the proportionate-penalties clause.[236]

The Illinois supreme court must make clear—and lower courts should follow—the significant distinction between the two clauses. In so doing, it can help provide much needed clarity in this area of the law, for both courts and legislatures to follow.

Second, providing adequate recourse for rehabilitation. Understood as the framers did, the proportionate-penalties clause is and must be far-reaching. Sentencing law is surely encompassed by it; under the delegates' own articulated vision,[237] for instance, the clause compels legislatures and courts to consider probation and parole as viable alternatives to more severe punishments like incarceration.[238] And when incarceration occurs, moreover, this clause would seem to require that confinement be substantially limited in duration. At the least, the original meaning and intent of Section 11 requires both sentencing and appellate courts to scrutinize the fit between a particular sentence, the person who receives it, and the goal of rehabilitation. Leonard Foster could not have been clearer in his explanations to the full convention before it, and later the people of Illinois adopted the clause which Foster had been so clear about.

Thus, a forward-looking clause would require courts to hold individualized sentencing hearings for each and every felony case. Mandatory sentences and those that require recidivist premiums, or minimum sentences, are not merely unfair; rather, they are unconstitutional, pursuant to a clause that obligates courts and legislatures to restore people to useful citizenship.[239]

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[235] *Id.* ¶ 40.

[236] *Harris*, 2018 IL 121932, ¶¶ 48, 61.; *see also* People v Carasquillo, 2023 IL App (1st) 211241 ¶ 47 (citing *Harris* and *Clemons* favorably for the proposition that the state's proportionate-penalties clause is broader than the eighth amendment and should be interpreted as such).

[237] *See supra* notes 161–62.

[238] *Id.*

[239] For a more in-depth analysis of individualized sentencing in the context of Eighth Amendment claims and doctrinal justification for such, see generally Berry, *Individualized Sentencing*, *supra* note 164, at 13. Berry argues the U.S. Supreme Court should extend Eighth Amendment individualized sentencing claims to include all felony convictions. He notes such an extension would require the Court to overturn *Harmelin v. Michigan*. *Id.* Unlike the federal jurisprudence, the Illinois Supreme Court need not overturn binding precedent on this issue.

In addition to requiring individualized sentencing hearings, the proportionate-penalties clause goes beyond that, in that it would prohibit excessive sentences, even those that are discretionary, where the court's opportunity to review and undo such sentences cannot honestly be provided. It requires courts to re-sentence to a non-prison term in those cases where rehabilitation has been shown.

But the proportionate-penalties clause goes even further. In addition to individualized sentencing hearings, the rehabilitative mandate requires judicial review of sentences on the back-end, after they are imposed, to ensure their continued constitutionality. It is not enough for courts to consider reformation at the time of sentencing. In most cases, at least, a sentence is only constitutionally valid so long as it furthers the goal of rehabilitation, and once that goal is obtained, or when further incarceration undermines rather than promotes that goal, a prison sentence becomes constitutionally suspect. The proportionate-penalties clause, then, demands the opportunity and authority for courts to review sentences, and requires them to resentence to a non-prison term when rehabilitation has been either achieved or is no longer further by incarceration.

But the proportionate-penalties clause also addresses policies far beyond the type and duration of sentencing; it strikes at the very purpose of the criminal system itself. What of, for example, Leonard Foster's intention that incarcerated people "learn how to do something more useful than make license plates"?[240] Under his view, the proportionate-penalties clause could be fairly and accurately construed to require that prison conditions are aimed at facilitating prisoners' return to useful citizenship. Might the clause require prison education? Job training? Counseling? Family visitation and regular contact? What about the re-entry system—might the clause require more and better structures to be put in place not only to monitor returning citizens, but also to meaningfully support their restoration into citizenship? The policies that potentially flow from an authentic application of the proportionate-penalties clause pose quite a contrast from the old policies of mass incarceration. It is not too late, even fifty-three years after the constitutional convention, to breathe life into the framers' vision.

And even beyond the policies it may require, Illinois's proportionate-penalties clause does something still greater. Recall that it was adopted in 1970, directly in the wake of years of urban unrest sparked by racism, segregation, and unequal treatment. Recall too that the clause's main champion, Leonard Foster, was closely linked in adulthood to the very Chicago neighborhoods that were burned to the ground after the assassination

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[240] 3 REC. OF PROC., *supra* note 8, at 1391.

of Rev. Dr. Martin Luther King. His response to that unrest—smoldering virtually in his backyard—was not to punish or exclude. Rather, his response was to remind his state that full citizenship should and must be the goal for everyone, even for those whose past actions have rent the social fabric. It was to insist that the state's work to hold individuals accountable must be channeled towards reweaving that fabric even tighter than before.

CONCLUSION

The historical record seems clear that even in the wake of violence, the 1970 Illinois constitutional convention delegates insisted on seeing people as fellow citizens—as democratic equals whose participation in the body politic was best done on equal footing—and criminal penalties as mere deviations from the daily expectation of full, functioning citizenship. Properly understood, the framers' vision is breathtakingly optimistic. It is a vision worth studying, we believe, and one that we hope will inspire a careful revisiting of the purposes of punishment in Illinois and beyond.