

# **Purposeless Restraints: Fourteenth Amendment Rationality Scrutiny and the Constitutional Review of Prison Sentences**

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## **ABSTRACT**

This Article presents an analysis and defense of the Supreme Court's current Eighth Amendment case law on prison sentencing. I argue that in the pivotal cases of *Ewing v. California* and *Harmelin v. Michigan*, a plurality of the Supreme Court has assimilated Eighth Amendment review of individual prison sentences to rationality review of state action under the Fourteenth Amendment's due process clause. When the cases are read rightly, it becomes clear that Eighth Amendment review does *not* really ask whether a sentence is "grossly disproportionate," as the Court has asserted; rather, it seeks to identify *arbitrary and capricious* prison sentences that suggest a procedural defect in the sentencing process. I defend this doctrine on the grounds of original understanding, *stare decisis*, neutral interpretation, and normative federalism values. Finally, I show how an interpretation of Eighth Amendment prison sentencing review as rationality review can be squared with the Supreme Court's decisions involving constitutional proportionality review of other noncapital sanctions such as fines, punitive damages, and conditions of confinement.

## Purposeless Restraints: Fourteenth Amendment Rationality Scrutiny and the Constitutional Review of Prison Sentences

*Michael P. O'Shea*\*

*It is a rational continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . .*<sup>1</sup>

*We have taken special care of you . . . .*<sup>2</sup>

### INTRODUCTION

Even by the standards of a contentious age, the Supreme Court has had a difficult time applying the Cruel and Unusual Punishments Clause of the Eighth Amendment<sup>3</sup> coherently to sentences of imprisonment. Ever since the *Lochner*-era Court first determined that the Eighth Amendment limited not only the forms of punishment that legislatures could employ, but also the magnitude of punishments,<sup>4</sup> a majority of the Court has consistently asserted at least a residual power of judicial review in the area.

The standard of review, however, has fluctuated.<sup>5</sup> At one point the Court adopted a standard so deferential that it seemed to permit virtually any sentence to stand as long

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<sup>1</sup> *Poe v. Ullman*, 367 U.S. 497, 543 (1960) (Harlan, J. dissenting).

<sup>2</sup> Second Trial of Titus Oates, 10 Howell's State Trials 1227, 1314 (K.B. 1685) (remark of Justice Withins of King's Bench in passing sentence on Oates).

<sup>3</sup> U.S. CONST., amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

<sup>4</sup> *Weems v. United States*, 217 U.S. 349 (1910).

<sup>5</sup> *See, e.g.*, *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) ("Our cases exhibit a lack of clarity regarding what factors may indicate gross disproportionality"); *Harmelin v. Michigan*, 501 U.S. 984, 998 (plurality opinion) (acknowledging that "[o]ur . . . recent pronouncement on the subject in *Solem v. Helm* . . . appeared to apply a different analysis than" other noncapital Eighth Amendment cases).

as the triggering crime was “classifiable as a felony.”<sup>6</sup> Less than two years later, the Court boldly proclaimed that prison terms “must be proportionate to the crime for which the defendant has been convicted,” and claimed the power to strike down “significantly disproportionate” sentences.<sup>7</sup> And today, the pendulum has swung back: the Court’s controlling opinions in *Harmelin v. Michigan*<sup>8</sup> and the recent controversial decision in *Ewing v. California*<sup>9</sup> conclude that the Eighth Amendment contains only a “narrow proportionality principle”<sup>10</sup> that requires courts to strike down “extreme” prison terms “grossly disproportionate” to the crime.<sup>11</sup> Justices Kennedy and O’Connor have authored the key plurality opinions setting out this standard.

If the opinions are chaotic, the Court’s holdings have been more coherent. They reflect a deeply deferential approach to noncapital Eighth Amendment review. The Court has repeatedly upheld life sentences (including those without parole) that were triggered by minor or moderate crimes such as petty theft and first-time drug possession. The only discontinuity in the sequence of tough holdings is *Solem v. Helm*, which struck down a life sentence without parole imposed on a felony recidivist who obtained \$100 by false pretenses.<sup>12</sup>

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<sup>6</sup> *Hutto v. Davis*, 454 U.S. 370, 373 (1982) (*per curiam*).

<sup>7</sup> *Solem v. Helm*, 463 U.S. 277, 290, 303 (1983).

<sup>8</sup> 501 U.S. 957 (1991).

<sup>9</sup> 538 U.S. 11 (2003).

<sup>10</sup> *Ewing v. California*, 123 S.Ct. 1179, 1185 (2003) (plurality opinion); *Harmelin v. Michigan*, 501 U.S. at 997 (plurality opinion).

<sup>11</sup> *Andrade*, 538 U.S. at 73; *Harmelin*, 501 U.S. at 997.

<sup>12</sup> 463 U.S. 277 (1983).

Neither the legal left nor the right is satisfied with this state of affairs. The Court's willingness to affirm stringent sentences has produced dissatisfaction among academic commentators,<sup>13</sup> lower court judges,<sup>14</sup> dissenting Justices,<sup>15</sup> and even some Justices who have concurred in the Court's holdings.<sup>16</sup> Moreover, the Court's decisions arguably threaten to conflict with a fundamental norm of constitutional judging. If a general principle forbidding excessive punishment is important enough to be embedded

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<sup>13</sup> See, e.g., James J. Brennan, Note, *The Supreme Court's Excessive Deference to Legislative Bodies Under Eighth Amendment Sentencing Review*, 94 J. CRIM. L. & CRIMINOLOGY 551, 552 (2004) (criticizing *Ewing* and calling on Supreme Court to "assert a more active role" in reviewing prison sentences); Rachel A. Van Cleave, "Death is Different," *Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages – Shifting Constitutional Paradigms for Assessing Proportionality*, 12 S. CAL. INTERDIS. L.J. 217, 219-20 (2003) (Supreme Court "gives teeth" to review of monetary deprivations in punitive damages cases, yet "ironically . . . has not shown the same concern about excessiveness and disproportionality when the punishment is imprisonment"); Erwin Chemerinsky, *Is Any Sentence Cruel and Unusual Punishment?*, 39-MAY TRIAL 78 (2003) (critically analyzing *Ewing* and *Andrade*); Adam M. Gershowitz, Note, *The Supreme Court's Backward Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249, 1279, 1302 (2000) (positing that "virtually no appellate protection against disproportionate criminal punishments exists" under current law, and urging Supreme Court to "reconsider its decisions"); Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107 (1995-1996); Kelly A. Patch, Note, *Harmelin v. Michigan: Is Proportionate Sentencing Merely Legislative Grace?*, 1992 WIS. L. REV. 1697, 1722 (Court's decision in *Harmelin* "eviscerates" Eighth Amendment guarantee and "offends . . . evolving standards of decency"); Nicholas N. Kittrie and Mark H. Allenbaugh, *Jean Valjean Lives*, LEGAL TIMES, May 2, 2003 ("After *Andrade* and *Ewing*, if any legislature . . . in its wisdom chooses to enact harsh and excessive penalties, far be it from the Supreme Court to correct the wrongs."); Charles Lane, *California's "3-Strikes" Law Upheld: Supreme Court Decides Long Prison Terms Legal*, WASH. POST, p. A01, Mar. 6, 2003 ("The fact that these sentences don't violate the [Constitution] makes it harder to imagine any case in which the court is going to find a sentence grossly disproportionate.") (quoting Professor Erwin Chemerinsky).

<sup>14</sup> See, e.g., *Rico v. Terhune*, 63 Fed. Appx. 394, 394, 2003 WL 21186323 (9<sup>th</sup> Cir. 2003) (Reinhardt, J., specially concurring) (rejecting Eighth Amendment habeas challenge to 25-year-to-life recidivist sentence triggered by petty theft) ("I concur only under compulsion of the Supreme Court decision in *Andrade*. I believe the sentence is both unconscionable and unconstitutional."); see also *id.* (Pregerson, J., dissenting in part) ("In good conscience, I can't vote to go along with the sentence imposed in this case.").

<sup>15</sup> See, e.g., *Harmelin*, 501 U.S. at 1029 (Stevens, J., dissenting) ("[T]he notion that this sentence satisfies any meaningful requirement of proportionality is itself both cruel and unusual.").

<sup>16</sup> See *Ewing*, 538 U.S. at 31-32 (Scalia, J., concurring in the judgment) (concluding that the Court's plurality opinion did "not convincingly establish that 25 years-to-life is a 'proportionate' punishment for stealing three golf clubs," but voting to uphold challenged sentence on the ground that Eighth Amendment contains no proportionality guarantee); *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (Powell, J., concurring in the judgment) ("I view the sentence as unjust and disproportionate to the offense. Nevertheless, . . . I reluctantly conclude that the Court's decision in *Rummel* . . . is controlling on the facts before us..").

in the Constitution – and the Court says that it is<sup>17</sup> – then why choose to apply that principle “narrowly” in cases that happen to involve prison sentences? Such a path appears political, not judicial.<sup>18</sup>

On the other hand, conservative jurists like Justices Scalia and Thomas argue that even the Court’s present narrow judicial review of noncapital sentences is improper, and urge the explicit overruling of the contrary holding in *Solem*. Their views can claim a significant pedigree. Ever since its inception, the Supreme Court’s Eighth Amendment sentencing jurisprudence has been criticized by originalist Justices who argue that when the Eighth Amendment was enacted, “cruel and unusual punishment” meant torturous methods of punishment, but not overlong prison sentences, and that this meaning must govern today.<sup>19</sup>

The fight over limits on prison sentencing is one of a family of controversies that have arisen from the Court’s recent decisions in the broad area of *proportionality review* – of identifying constitutional limits on the magnitude of sanctions an official decisionmaker may impose for a given wrongful act. The death penalty is the most prominent example. In the recent cases of *Atkins v. Virginia* and *Roper v. Simmons*, the

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<sup>17</sup> See *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (asserting that “[t]he Eighth Amendment succinctly prohibits ‘excessive’ sanctions”); but see U.S. CONST., amend. VIII (prohibiting “excessive” fines and bail, but “cruel and unusual” punishments).

<sup>18</sup> Cf. Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1062-63 (2004) (“A review of the cases concerning th[e] . . . different types of punishments reveals profound inconsistencies in the Supreme Court’s approach.”); Mary K. Woodburn, Note, *Harmelin v. Michigan and Proportionality Review Under the Eighth Amendment*, 77 IOWA L. REV. 1927, 1942 (1992) (“Objective [Eighth Amendment] inquiry is not only possible, but required. . . . That the inquiry may be difficult and complicated does not excuse the [Supreme] Court from undertaking it.”); Tony Mauro, *Supreme Court OKs Three Strikes Statutes, Megan’s Laws*, AM. LAWYER, March 6, 2003 (“Th[e recent] rulings demonstrate once again that in the area of criminal law, the Court’s instincts are quite conservative and more deferential to state judgments than they are in other areas of the law.”) (quoting ACLU legal director Steven Shapiro).

<sup>19</sup> See *Ewing*, 538 U.S. at 32 (Thomas, J., concurring in the judgment); *Harmelin*, 501 U.S. at 961-985 (opinion of Scalia, J.); *Weems*, 217 U.S. at 389-411 (White, J., dissenting).

same Supreme Court that applies the Eighth Amendment cautiously to noncapital sentences has issued freewheeling opinions that hold the death penalty for first degree murder to be categorically unconstitutional for offenders under age 18<sup>20</sup> or the mildly retarded.<sup>21</sup> The Court has also imposed significant restrictions on the magnitude of punitive damage awards in civil litigation, grounding these limits not in the Eighth Amendment,<sup>22</sup> but in the due process guarantee of the Fifth and Fourteenth Amendments.<sup>23</sup>

These "proportionality" decisions exert friction on one another along multiple axes. It is hard to square the Court's restrained review of prison sentences with its aggressive review of death sentences. Nor is it obvious that the fining of corporations in the form of punitive damages should be reviewed with skepticism while the imprisoning of individuals, a more severe deprivation, is reviewed deferentially. Finally, there is a normative question: If one concludes that these different lines of decisions are incompatible, then which doctrine ought to yield to which?

The principal task of this Article is to present and defend a unified analysis of the Court's prison sentencing jurisprudence culminating in *Harmelin* and *Ewing*. I argue that the prison cases extend the classic New Deal doctrine of Fourteenth Amendment rationality scrutiny to the magnitude of individual terms of imprisonment. In other

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<sup>20</sup> *Roper v. Simmons*, 125 S.Ct. 1183 (Mar. 2, 2005).

<sup>21</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002).

<sup>22</sup> *See Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (holding that the Excessive Fines Clause of the Eighth Amendment does not limit punitive damages awards in private civil litigation).

<sup>23</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (holding that \$145 million punitive damages verdict against insurer for bad-faith failure to settle and other torts violated 14th Amendment due process when compensatory damages were only \$1million and verdict relied upon evidence of out-of-state conduct).

words, *Ewing* and its predecessor cases seek *arbitrary and capricious* sentences that give rise to an inference of irrationality or bias on the part of the decisionmaker — the same kind of procedural defect that implicates the Fourteenth Amendment's due process clause limits on general legislative action.

The Article's secondary task is to use the analysis of the prison sentencing cases to evaluate the other areas of constitutional proportionality review. I conclude that, at least outside of the unique area of capital punishment, constitutional proportionality review should follow the principles deployed in the Eighth Amendment prison sentencing cases.

Accordingly, in Part I of this Article, I briefly discuss the legal framework of Fourteenth Amendment rationality scrutiny. Part II traces the development of the Supreme Court's noncapital Eighth Amendment jurisprudence in a series of sometimes conflicting opinions that culminates in *Harmelin v. Michigan* and *Ewing v. California*. I show that the legal standard adopted by the pluralities in *Harmelin* and *Ewing* is best understood as rationality review of sentencing. Part III presents normative arguments for conceiving noncapital Eighth Amendment review as rationality review, as *Harmelin* and *Ewing* have tacitly done. Finally, Part IV examines the relationships between the use of rationality review in the prison sentencing context and the Supreme Court's holdings in related contexts such as punitive damages and capital punishment.

## **I. THE STRUCTURE OF FOURTEENTH AMENDMENT RATIONALITY REVIEW**

### **A. Four Modes of Due Process Review**

The due process clause of the Fourteenth Amendment<sup>24</sup> has played four roles at different times in its 137-year history. As befits its name, it has been a source of bedrock procedural guarantees such as the reasonable doubt standard of proof<sup>25</sup> and the requirement of notice and an opportunity to be heard before being deprived of liberty or property.<sup>26</sup> Second, it has provided the textual vehicle by which the courts have incorporated most of the guarantees of the federal Bill of Rights against the states.<sup>27</sup> Third, and most controversially, it has served as a source of unenumerated "fundamental" rights that implicate close judicial scrutiny, ranging from a right to keep slaves as property<sup>28</sup> to a right to freedom of contract<sup>29</sup> to a right to elective abortion.<sup>30</sup> It is the

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<sup>24</sup> U.S. CONST. amend. XIV ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

<sup>25</sup> *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *In re Winship*, 397 U.S. 358 (1970) (holding that due process in a criminal trial requires proof beyond a reasonable doubt of all elements of the charged offense).

<sup>26</sup> *Goldberg v. Kelly*, 397 U.S. 254 (1970).

<sup>27</sup> *See, e.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (incorporating Sixth Amendment right to counsel); *Mapp v. Ohio*, 367 U.S. 643 (1961) (incorporating the Fourth Amendment exclusionary rule). There is a well-known debate, which falls outside the scope of this Article, about the propriety of reading the due process clause as incorporating the Bill of Rights, with many scholars suggesting that other constitutional provisions would better serve that role, such as the Ninth Amendment, *see* RANDY A. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980), or the Fourteenth Amendment's Privileges or Immunities Clause, *see* AKHIL REED AMAR, *THE BILL OF RIGHTS* 181-214 (1998). My analysis takes no sides in this debate, but does assume that the Eighth Amendment properly applies against the states on one or another basis. *See* *Robinson v. California*, 370 U.S. 660 (1962).

<sup>28</sup> *See* *Scott v. Sandford*, 60 U.S. 393 (1857).

<sup>29</sup> *See* *Lochner v. New York*, 198 U.S. 45 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897).

<sup>30</sup> *See* *Roe v. Wade*, 410 U.S. 113 (1973).

fourth role that sheds light on the Eighth Amendment prison cases. The clause has also been taken to impose a free-standing general prohibition against government action that is arbitrary and capricious.<sup>31</sup> This is rationality review properly so called, and it is simultaneously universal and limited. As applied to legislative action, such review requires only that the action "rest upon some rational basis within the knowledge and experience of the legislators," not that it overcome the sort of demanding burden imposed on laws that impinge a specifically recognized constitutional right.<sup>32</sup>

Rationality review became formalized as a distinctive level of constitutional scrutiny in the New Deal era, when the Supreme Court retreated from the aggressive enforcement of unenumerated economic liberties that had characterized the preceding era. The rational basis standard received its classic articulation in 1938, in *United States v. Carolene Products Co.*<sup>33</sup> Footnote 4 of the *Carolene Products* opinion famously suggested that laws infringing certain specific guarantees of the Bill of Rights, interfering with the political process, or disadvantaging discrete and insular minorities would receive "more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than . . . most other types of legislation."<sup>34</sup> But as to the large remaining category of "other types of legislation," the courts would merely ensure that statutes were not irrational:

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<sup>31</sup> *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) ("the core of the concept" of due process is "protection against arbitrary action"); *United States R. Retirement Bd. v. Fritz*, 449 U.S. 166, 177 (1980) (legislation is invalid if it "achieves its purpose in a patently arbitrary or irrational way"); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974); *Nebbia v. New York*, 291 U.S. 502, 511 (1934) (due process demands that laws not be "arbitrary or capricious"); *Hurtado v. California*, 110 U.S. 516, 527 (1884).

<sup>32</sup> *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

<sup>33</sup> 304 U.S. 144 (1938).

<sup>34</sup> *Id.* at 152 n.4.

The existence of facts supporting the legislative judgment is to be presumed[.] [L]egislation ... is not to be pronounced unconstitutional unless in the light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon some rational basis within the knowledge and experience of the legislators. . . .

Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry . . . and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist.<sup>35</sup>

Regulatory statutes would be upheld as long as it was "at least debatable" that regulation was appropriate.<sup>36</sup>

The adoption of a modest and deferential form of Fourteenth Amendment review, in the form of the rationality standard, raised the prospect that courts might go further and simply abdicate the review of legislation that did not present a special basis for heightened scrutiny. During the Cold War era, several Supreme Court opinions came close to this purely vestigial conception of rationality review.<sup>37</sup> As discussed in the

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<sup>35</sup> *Id.* at 152-53 (citations and footnote omitted).

<sup>36</sup> *Id.* at 154.

<sup>37</sup> In *Ferguson v. Skrupa*, 372 U.S. 726 (1963), eight Justices dismissively rejected a due process challenge to a Kansas statute limiting the practice of debt adjusting to lawyers. Justice Black approvingly cited Justice Holmes's contention that "a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States." *Id.* at 730. Black added that "relief, if any be needed, lies not with us but with the body constituted to pass laws for the State of Kansas." *Id.* at 732. Interestingly, Justice Harlan chose to concur separately, affirming in a single sentence the more traditional conception of rationality review under which "th[e] state measure [must] bea[r] a rational relation to a constitutionally permissible objective." *Id.* at 733 (Harlan, J., concurring in the judgment).

In *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955), the Court unanimously affirmed, after a speculative search for a possible legitimate interest, an Oklahoma statute forbidding opticians to fit eyeglass lenses into new frames without a written prescription from an ophthalmologist or optometrist, and forbidding advertisements for eyeglass frames. "We cannot say that the regulation has no rational relation to th[e] objective [of public health] and therefore is beyond constitutional bounds." *Id.* at 491; *see also* Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1566 (2004) (arguing that *Carolene Products* imposed a "virtually conclusive" and "ferociously strong" presumption of constitutionality that "effectively . . . abolished" due process review in the area of commercial legislation).

Lund and McGinnis also contend that all such challenges to economic regulations have failed in the modern era. *Id.*; *but cf.* *Eastern Enter. v. Apfel*, 524 US 498 (1998) (invalidating as unconstitutional a

following subsection, however, the Court has more recently returned to the original conception of rationality review first set out in *Carolene Products*. In this Article, "rationality review" denotes a genuine test, one that can be violated in extreme or unusual circumstances, instead of a euphemism decorating a judicial decision to abdicate review of state action in a particular area. The latter sort of review will be distinguished by the term "vestigial review."

### **B. Characteristics of Rationality Review**

As outlined in *Carolene Products* and reinforced by subsequent cases (apart from the Cold War-era dalliance with vestigial review) Fourteenth Amendment rationality scrutiny has four salient characteristics.

1. *Great deference for legislative judgments.* The standard is easy to satisfy. Courts will not hold that a statute or other state action violates due process merely because it appears unwise. Invalidations are rare.

2. *Respect for moral diversity among jurisdictions.* One of the key steps in the demise of *Lochner* was the Court's assimilation of Justice Holmes's aphorism that "the 14th Amendment does not enact Mr. Herbert Spencer's Social Statics," or any other social philosophy.<sup>38</sup> Because the Constitution "is made for people of fundamentally differing views," a court gauging whether a statute bears a reasonable relation to a proper legislative aim must bear in mind that the law may pursue a wide range of moral aims,

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federal coal mining statute that retroactively assigned extensive pension liabilities to a former employer that had left the coal business 35 years prior to the statute's enactment, and that had not participated in the promises that gave rise to pension liability, in a judgment whose necessary fifth vote was supplied by Justice Kennedy on the theory that the statute's application violated due process rationality review).

<sup>38</sup> *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

and that different government actors may place different degrees of weight on these aims.<sup>39</sup>

3. *A challenger must satisfy a significant initial burden before the court will engage in weighing evidence.* A statute is presumed constitutional,<sup>40</sup> and if the reviewing court can consider the statute on its face and conclude, based on "facts [within] the sphere of judicial notice," that it rests on a rational basis, then that settles the matter.<sup>41</sup> The statute may be justified by "rational speculation" on the part of the state.<sup>42</sup> Indeed, the government need not even present evidence.<sup>43</sup> Only if the statute appears irrational at first consideration will the court turn to weighing evidence in the record.<sup>44</sup>

4. *A recurrent emphasis on whether substantive outcomes suggest procedural defects such as bias, caprice, or bad faith.* A court invalidating state action under rationality review will frequently argue that the substantive disposition before the court, by its enormity, gives rise to an inference of *procedural* defect. An "arbitrary" or "irrational" decision is not merely incorrect; rather, it would seem to convict the decisionmaker of at least some measure of dereliction of duty, of gross incompetence,

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<sup>39</sup> *Id.* (arguing that the Constitution "is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of laissez faire.").

<sup>40</sup> *National R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 477 (1985); *Carolene Products*, 304 U.S. at 153.

<sup>41</sup> *Id.*

<sup>42</sup> *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993).

<sup>43</sup> *Heller v. Doe*, 509 U.S. 312, 319 (1993); *Beach Communications*, 508 U.S. at 313; *Carolene Products*, 304 U.S. at 152.

<sup>44</sup> *See Fritz*, 449 U.S. at 176 (finding a federal statute conferring retirement benefits satisfied due process challenge when its "plain language" disclosed possible rational basis).

bias, malice, or bad faith.<sup>45</sup> This idea helps make sense of the famous first appearance of the concept of "substantive" due process in American law: Justice Chase's separate opinion in *Calder v. Bull*, which took it as obvious that a statute that by its terms "takes property from A and gives it to B" would violate due process of law.<sup>46</sup> If the claim is plausible, its plausibility rests not only upon the undesirability of the substantive outcome created by the hypothetical "A to B" statute, but by the suspicion it arouses that the legislature is exercising a grudge against A, or has simply been bought and paid for, and is discharging a crude political favor owed to "B" or his benefactors.<sup>47</sup> Overtones of rationality review, with its characteristic implication of bad faith or procedural taint in the state action invalidated, had also appeared in the early economic due process decisions of the Gilded Age.<sup>48</sup>

### C. Justifying Rationality Review

Rationality review has been one of the less controversial legal doctrines drawn from the due process clause. While particular *applications* of rationality review have

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<sup>45</sup> See *County of Sacramento*, 523 U.S. at 847 n.8 (holding that executive action violates substantive due process if it is "egregious" and "outrageous"); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985) (invalidating denial of a use permit for a group home housing the mentally retarded, pursuant to a municipal ordinance, on the basis that ordinance reflected illegitimate prejudice against the retarded); *North Carolina v. Pearce*, 395 U.S. 711, 723-26 (1969) (holding that due process is violated by "vindictive" judicial resentencing of a previously sentenced defendant after a successful appeal); *Craigsmiles v. Giles*, 312 F.3d 220, 225 (6th Cir. 2002) (holding that legislation that failed rationality scrutiny "c[a]me close to striking us with the force of a five-week-old, unrefrigerated dead fish") (internal quotation marks omitted)

<sup>46</sup> 3 U.S. (3 Dall.) 386, 387 (1798) (emphasis omitted).

<sup>47</sup> Cf. *Craigsmiles*, 312 F.3d at 228-29 (condemning state licensure requirements for casket sales as a "naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers" motivated by an "illegitimate purpose").

<sup>48</sup> The *Lochner* Court, for example, dismissed the New York statute regulating the working hours of bakers as a "mere meddlesome interferenc[e]" and noted that "many laws of this character, while passed under what is claimed to be the police power for protecting the public health or welfare are, in reality, passed from other motives." 198 U.S. at 61, 64.

been fiercely controverted,<sup>49</sup> criticism of the *doctrine* that manifestly arbitrary and capricious official acts violate due process has been limited to the more positivist wing of contemporary conservative jurisprudence.<sup>50</sup>

Rationality review, properly carried out, does not engage in fine-tuned balancing of competing interests. Rather, it invalidates only substantive dispositions that are so egregious that they give rise to inferences of procedural impropriety. It is indeed jarring to suggest that a guarantee of "due process" prohibits a legislature from enacting a law forbidding second-trimester abortions;<sup>51</sup> the powerful, good-faith interests on both sides of the issue make plain that any objection to such a statute must be a matter of substance, not procedure. But consider a hypothetical state statute that requires all motor vehicles in the state to be driven only in reverse gear. Under current law, this statute would violate the rationality requirement of the due process clause, and no other constitutional provision.<sup>52</sup> Is it really so paradoxical to say that this statute, by its very nature, is not only substantively objectionable but *procedurally* suspect? To the contrary. What one

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<sup>49</sup> See, e.g., Robert F. Nagel, *Playing Defense in Colorado*, FIRST THINGS 83:34 (May 1998), which criticizes the holding in *Romer v. Evans*, 517 U.S. 620 (1996), invalidating, under rational basis scrutiny, a popularly adopted amendment to the Colorado constitution prohibiting the recognition of homosexual status as a basis for special status or antidiscrimination claims. Nagel argues that if the Court had paid more attention in *Romer* to the "social context" and the legal backdrop against which the amendment was enacted, it might have found that the amendment was intended to stave off future attempts to disrupt important social institutions through reform litigation exploiting antidiscrimination principles, and that this motivation might well have given the amendment a rational basis. See *id.* (suggesting that voters were "playing defense against a law reform strategy designed to bring on social revolution without popular consent.").

<sup>50</sup> Robert H. Bork argues, against the *Carolene Products* Court, that "a conclusive presumption of constitutionality" should apply to all legislation not within the specific prohibitions of the Constitution. THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 58-59 (1990).

<sup>51</sup> See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

<sup>52</sup> It would be extremely difficult to frame the constitutional objection to this statute as an equal protection challenge, for all drivers and all motor vehicles are equally subject to the statute. The hypothetical is thus a useful illustration of the analytical distinctness of equal protection rationality review and due process rationality review, though they frequently overlap in practice.

wants to say of a legislature capricious enough to enact this statute is, precisely, that *it is not doing its job*: it is instead engaging in private jokes, or (what is more likely) in simple bullying.

This connection to the idea of procedure is why it is more intuitive to argue that the Due Process Clause prohibits official irrationality than it is to argue that the clause protects certain unenumerated substantive rights.<sup>53</sup> It is noteworthy that both of the originalist Justices on the current Supreme Court, as well as Chief Justice Rehnquist, accept the practice of rationality review.<sup>54</sup>

## II. THE EMERGENCE OF THE RATIONALITY STANDARD IN EIGHTH AMENDMENT SENTENCING LAW

Over the course of a century, the Supreme Court has developed an Eighth Amendment jurisprudence of noncapital sentencing under the pressure of a recurring originalist critique which claims that the Clause was intended to prohibit only “cruel and

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<sup>53</sup> Academic criticisms of “substantive due process” focus on the practice of enforcing unenumerated rights, and rarely address the practice of general rationality review. *See, e.g.*, Lund & McGinnis, *supra* note 37, at 1558-60, 1562-67 (discussing *Dred Scott* and *Lochner* as “paradigm[s] for the . . . development of substantive due process” in that they involved judges “illegitimately legislating from the bench” and invalidating statutes that were simply “[o]ffensive to their moral and political sensibilities,” but passing over the rationality requirement of *Carolene Products* as simply a means of “effectively . . . abolish[ing]” due process review of general legislation); ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1998) (arguing that “it may or may not be a good thing to guarantee additional liberties, but the Due Process Clause quite obviously does not bear that interpretation. By its inescapable terms, it guarantees only process.”); John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 500-01 (1997) (considering and criticizing various models of substantive due process such as a “vested rights” approach, a formal requirement of legislative generality, and the free-wheeling “real substantive due process” approach of *Lochner*, but offering only a passing mention of the *Carolene Products* requirement of “minimum rationality”).

<sup>54</sup> Chief Justice Rehnquist and Justice Thomas joined Justice Scalia's dissenting opinion in *Lawrence v. Texas*, 539 U.S. 558, 593 (2003), which argued that proposed rights that are not firmly rooted in Anglo-American tradition and history “may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest.”

unusual” *modes* of punishment, such as torture or drawing and quartering.<sup>55</sup> Though the sequence of opinions has not displayed a smooth and orderly development of doctrine,<sup>56</sup> it has lately converged on a standard that is normatively attractive, fits plausibly with the Eighth Amendment's historical background, and is coherent with several adjacent bodies of law. This standard calls upon courts to ensure that prison sentences rest on some rational basis and are not a product of official arbitrariness.

## A. Early Decisions

### 1. *Weems v. United States*

The Supreme Court first indicated that the Constitution permitted review of terms of imprisonment in the early twentieth century case of *Weems v. United States*.<sup>57</sup> A Coast

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<sup>55</sup> That the Clause reaches at least the latter sort of state action, prohibiting barbarous modes of corporal and capital punishment, has never been seriously disputed. *See, e.g.*, *Hope v. Pelzer*, 536 U.S. 730 (2002) (holding that Alabama prison officials violated clearly established Eighth Amendment law by cuffing refractory prisoners to "hitching posts" without shirts, bathroom breaks, or adequate water for hours at a time); *Harmelin*, 510 U.S. at 976 (opinion of Scalia, J.) (“According to its terms ... the Clause disables the Legislature from authorizing ... cruel methods of punishment that are not regularly or customarily employed.”); Anthony Granucci, “*Nor Cruel and Unusual Punishments Inflicted*”: *The Original Meaning*, 57 CAL. L. REV. 839, 839-842 (1969).

<sup>56</sup> *See Lockyer v. Andrade*, 538 U.S. 63 (2003) (acknowledging that Supreme Court's precedents in noncapital Eighth Amendment context "have not been a model of clarity").

<sup>57</sup> 217 U.S. 349 (1910). Some earlier opinions had suggested a different view. In *In re Kemmler*, 136 U.S. 436 (1890), the Court rejected an Eighth Amendment challenge to New York's use of electrocution on the ground that the amendment did not apply against the states. But it went on to hold that Kemmler's due process rights were not violated either, opining that

[p]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life.

*Id.* at 447.

The Court sidestepped the issue in *O'Neil v. Vermont*, 144 U.S. 323 (1892), which rejected an Eighth Amendment challenge to a state sentence of over 54 years for bootlegging, again on the ground that the Eighth Amendment did not bind the states. *Id.* at 332. However, three Justices urged in dissent that the Eighth Amendment should apply to the case. They asserted that the Cruel and Unusual Punishments Clause prohibited “all punishments which, by their excessive length or severity, are greatly disproportioned to the offenses charged.” *Id.* at 339-340 (Field, J., dissenting).

On the other hand, the vast weight of pre-*Weems* lower court authority interpreting the Eighth Amendment or related state constitutional provisions held that “cruel and unusual” or “cruel or unusual”

Guard clerk in the Philippines, Weems was convicted of falsifying a single entry in a government ledger.<sup>58</sup> The Philippine penal code punished this offense with twelve to twenty years in *cadena temporal*, a regime of penalties that originated in Spanish law.<sup>59</sup> Prisoners were kept constantly shackled at the wrists and ankles and put to “hard and painful labor.”<sup>60</sup> They were also deprived of parental, family, and property rights during the term of imprisonment (“civil interdiction”); barred for life from any position of public trust (“perpetual absolute disqualification”); and subjected for life to “the surveillance of the authorities,” which prohibited them from changing their residence without official permission.<sup>61</sup> Weems received a sentence of fifteen years in *cadena temporal*, which the territorial supreme court affirmed.<sup>62</sup>

The Supreme Court chose to evaluate the sentence under the cruel and unusual punishments clause of the Philippine Bill of Rights, which was identical to the federal Eighth Amendment.<sup>63</sup> The court held that *any* sentence of *cadena temporal* within the statutory range would be cruel and unusual punishment for Weems’s offense, and

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meant only improper modes of punishment. Representative cases include *Hobbs v. State*, 32 N.E. 1019, 1020-21 (Ind. 1893); *State v. White*, 25 P. 33, 34-35 (Kan. 1890); *Comm. v. Hitchings*, 71 Mass. 482, 486 (1855). See also *Harmelin*, 501 U.S. at 983-85 (opinion of Scalia, J.); *Weems*, 217 U.S. at 402-07 (White, J., dissenting) (collecting authorities).

The *Weems* majority declined to make “an extended review of the cases in the state courts.” *Id.* at 377.

<sup>58</sup> *Id.* at 357-58.

<sup>59</sup> *Id.* at 358, 363-64, 368.

<sup>60</sup> *Id.* at 364.

<sup>61</sup> *Id.* at 364-65.

<sup>62</sup> *Id.* at 358.

<sup>63</sup> *Id.* at 365, 367. Weems had not raised below the argument that his sentence was cruel and unusual. *Id.* at 362.

dismissed the indictment against him.<sup>64</sup> The Court’s opinion was elusive, ranging broadly but difficult to pin down to any particular principle of decision.<sup>65</sup> At times it stressed the alien, unusual character of *cadena temporal*, and the harsh regime of physical penalties and legal disabilities that it added to simple imprisonment.<sup>66</sup> But other parts of the majority opinion seemed to focus on the principle of proportionality, emphasizing that “such penalties for such offenses amaze those who ... believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense,” and asking, “[i]s this also a precept of the fundamental law?”<sup>67</sup> The balance of the opinion implied that the answer was yes.<sup>68</sup>

## 2. The Originalist Critique in *Weems*

Two features of *Weems* impress the reader at a century’s distance. The first is the strongly nonoriginalist theory of constitutional interpretation that underpins Justice

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<sup>64</sup> *Id.* at 366, 382. Justice McKenna wrote for a four-Justice majority. Justice Lurton did not participate.

<sup>65</sup> Justice White’s dissent took note of this quality. *See id.* at 385 (White, J., dissenting) (“I find it impossible to fix with precision the meaning which the court gives to [the Cruel and Unusual Punishments Clause].”).

<sup>66</sup> *See id.* at 366 (“He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate. ... No circumstance of degradation is omitted. It may be that even the cruelty of pain is not omitted. He must bear a chain night and day. He is condemned to painful as well as hard labor.”); 377 (“[T]he law under consideration ... has no fellow in American legislation. Let us remember that it has come to us from a government of a different form and genius from ours.”).

Of course, an interpretation of *Weems* that sought to base its holding of unconstitutionality on the potentially “cruel and unusual” penalty of painful labor in perpetual chains, *cf. Harmelin*, 501 U.S. at 990-92 (opinion of Scalia, J.), would have to acknowledge that the use of chained labor gangs was not unfamiliar to common-law jurisdictions of the era. *See Weems*, 217 U.S. at 411-12 (White, J., dissenting) (citing nineteenth-century English criminal statute establishing different degrees of hard labor). Indeed, some contemporary American jurisdictions have employed such punishments. *See, e.g., Rick Bragg, Alabama to Make Prisoners Break Rocks*, N.Y. TIMES, July 29, 1995, at 5 (describing Alabama’s re-institution of chained work gangs for prisoners).

<sup>67</sup> *Id.* at 366-67.

<sup>68</sup> *See id.* at 373 (“We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked [by the Framers].”); 379 (comparing “the mischief and the remedy” in *Weems*’s sentence); Note, *What Is Cruel and Unusual Punishment?*, 24 HARV. L. REV. 54 (1910).

McKenna’s majority opinion. Writing decades before the content of the Eighth Amendment was judicially pegged to “the evolving standards of decency that mark the progress of a maturing society,”<sup>69</sup> McKenna stressed that:

Time works changes, brings into existence new conditions and purposes. Therefore, a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. ... In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be.<sup>70</sup>

Other language similarly reminds one that *Weems* was a contemporary of the famous due process decision in *Lochner v. New York*.<sup>71</sup> Justice McKenna, a member of the *Lochner* majority, based his opinion in *Weems* on a general principle of broad interpretation of constitutional guarantees, and specifically supported his view with the example of the expansive “construction of the 14th Amendment” that the Supreme Court had employed in the decades preceding *Weems*.<sup>72</sup>

The second notable trait of *Weems* is the powerful originalist analysis found in Justice White’s dissenting opinion. White drew on English and founding-era history, as well as nineteenth-century judicial authorities, to argue that the Eighth Amendment did not authorize a general proportionality review of sentences.<sup>73</sup>

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<sup>69</sup> *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion); see *Atkins v. Virginia*, 536 U.S. 304 (2002)

<sup>70</sup> *Weems*, 217 U.S. at 373.

<sup>71</sup> 198 U.S. 45 (1905).

<sup>72</sup> *Weems*, 217 U.S. at 374.

<sup>73</sup> Indeed, Justice Scalia’s separate opinion in *Harmelin*, the *locus classicus* of conservative opposition to proportionality review, restates many of the arguments and authorities found in Justice White’s *Weems* dissent from 81 years before. Compare *Harmelin*, 501 U.S. at 966-985 (opinion of Scalia, J.) with *Weems*, 217 U.S. at 389-411 (White, J., dissenting).

Justice White noted that the Eighth Amendment's prohibition of cruel and unusual punishment duplicated language in the English Bill of Rights of 1689.<sup>74</sup> He concluded that the historical impetus for the clause arose from abusive sentences handed down by judges, particularly those in the trial of the notorious seventeenth-century perjurer Titus Oates. The judges of King's Bench "t[ook] special care" of Oates by fashioning a novel and vindictive sentence: he was to be "whipped from Newgate to Tyburn" by the common hangman, then displayed annually in the pillories in different parts of London, at times that corresponded to specific dates in Oates's perjured accounts of events.<sup>75</sup> As adopted by the colonies, the prohibition of cruel and unusual punishment was, in Justice White's view, principally a prohibition of cruel and barbarous modes of punishment. To the extent it also had to do with the simple magnitude of punishments, the clause placed limits on *courts* but not (as the *Weems* majority held) on legislatures. In other words, it was:

a direct and controlling prohibition upon the legislative branch (as well as all other departments), restraining it from authorizing or directing the infliction of the cruel bodily punishments of the past, which was one of the evils sought to be prevented . . . by the English Bill of Rights, and also restrained the courts from exerting and Congress from empowering them to select and exert by way of discretion modes of punishment which were not usual, or usual modes of punishment to a degree not usual, and which could alone be imposed by express authority of law.<sup>76</sup>

White supplied voluminous supporting citations from nineteenth-century state courts interpreting analogous provisions of their state constitutions.<sup>77</sup> He concluded that

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<sup>74</sup> *Weems*, 217 U.S. at 390 (White, J., dissenting).

<sup>75</sup> *Id.* at 391 n.1, citing 10 Howell's State Trials 1227, 1316-17 (K.B. 1685).

<sup>76</sup> *Id.* at 397 (White, J., dissenting).

<sup>77</sup> *Id.* at 401-07 & n.3.

no courts prior to *Weems* had taken the view that the prohibition on cruel and unusual punishment set limits on the magnitude (rather than the kind) of legislative sanctions.<sup>78</sup>

### 3. Consequences

*Weems* offered uncertain guidance to the development of Eighth Amendment sentencing law. The closest thing to a standard of review that could be gleaned from its analysis was that sentences that “amaze[d]” federal judges were invalid.<sup>79</sup> It was possible to view the holding in *Weems* as turning on the case’s unusual facts – a sentence that originated under a foreign code and encompassed a harsh array of additional penalties beyond simple imprisonment. Perhaps for these reasons, *Weems* did not usher in a period of constitutional review of prison sentencing.<sup>80</sup>

The issue of Eighth Amendment noncapital review did not become salient again until the 1960s and 1970s, when some federal and state courts began to invoke *Weems* to strike down prison sentences as disproportionate.<sup>81</sup> During this period, the Fourth Circuit

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<sup>78</sup> *Id.* at 407-09.

<sup>79</sup> *Id.* at 366. Later courts sometimes cited *Weems* as if it prefigured the “gross disproportionality” standard that a majority of the Court eventually embraced. *E.g.*, *Harmelin*, 501 U.S. at 997 (plurality opinion); *Rummel*, 445 U.S. at 290 (Powell, J., dissenting); *Enmund v. Florida*, 458 U.S. 782, 788, 800 (1982).

Actually, it did not. When *Weems* is read without hindsight bias, it appears that the opaque majority opinion merely noted – rather than adopted – Justice Field’s formulation that the Eighth Amendment prohibited sentences “greatly disproportioned to the offenses charged.” *Weems*, 217 U.S. at 371 (quoting *O’Neil*, 144 U.S. at 340 (Field, J., dissenting)) (punctuation omitted). Indeed, *Weems*’s citation to the *O’Neil* dissent seems to be offered simply to illustrate the point that “[n]o case has occurred in this court which has called for an exhaustive definition” of the Eighth Amendment’s scope. *Id.* (noting that in *O’Neil* “the question was raised but not decided”).

<sup>80</sup> In *Graham v. West Virginia*, 224 U.S. 616 (1912), the Court dismissively rejected an Eighth Amendment proportionality challenge to a life sentence imposed on a three-time horse thief. *See Rummel*, 445 U.S. at 276-77 (describing the *Graham* litigation). Thereafter the Eighth Amendment noncapital proportionality doctrine lay inert in the Supreme Court for several decades. *See* Charles Walter Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMINOLOGY 378, 386-87 (1980). Schwartz’s article gives a detailed discussion of Eighth Amendment sentencing law in the lower courts between *Weems* and *Rummel*.

<sup>81</sup> *See* Schwartz, *supra* note 80, at 396-406. Of course, this was a period of active Supreme Court decisionmaking in *capital* cases under the Eighth Amendment. The Court declared most then-existing

devised an influential four-factor test for proportionality in *Hart v. Coiner*.<sup>82</sup> These decisions formed the backdrop to the Supreme Court’s next major encounter with noncapital proportionality review, which came in 1980.

## **B. Vestigial Scrutiny**

### **1. *Rummel v. Estelle***

*Rummel v. Estelle*<sup>83</sup> was the first Supreme Court case squarely to present the question whether a simple sentence of imprisonment could be unconstitutionally disproportionate. Justice Rehnquist, writing for a five-Justice majority,<sup>84</sup> took a skeptical view. *Rummel*’s narrow holding was important enough: the Court upheld a mandatory life sentence (with potential parole after 12 years) imposed under a Texas recidivist statute on Rummel, who was convicted of obtaining \$120.75 by false pretenses after two convictions for equally minor, but felonious frauds.<sup>85</sup>

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death penalty statutes unconstitutional in *Furman v. Georgia*, 408 U.S. 238 (1972), on the ground that the “freakish” and unpredictable imposition of the death sentence rendered it cruel and unusual. *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) later upheld the constitutionality of a new generation of state death penalty statutes revised in light of *Furman*. In *Coker v. Georgia*, 433 U.S. 584, 592 (1977), the majority explicitly applied a “gross proportionality” analysis to capital sentencing and held that it was *per se* cruel and unusual punishment to impose death for the rape of an adult woman.

The Court decided one notable noncapital proportionality case in the period. In *Robinson v. California*, 370 U.S. 660 (1962), the Court squarely endorsed the incorporation of the Eighth Amendment against the states via the Fourteenth Amendment. *Robinson* held it an Eighth Amendment violation to impose any criminal punishment on a defendant for being addicted to narcotics. However, *Robinson*’s holding shed little light on what penalties were allowable for activities that could be punished as crimes.

<sup>82</sup> 483 F.2d 136 (4th Cir. 1973) (invalidating a life sentence imposed under recidivist statute on defendant whose three felony convictions were for perjury and minor check fraud). The *Hart* test required courts to weigh: (1) the seriousness of the triggering offense; (2) interjurisdictional comparisons (i.e., comparing the defendant’s penalty to that imposed in other jurisdictions for the same offense); (3) intrajurisdictional comparisons (comparing the defendant’s crime with the other crimes assigned a similar penalty in the defendant’s jurisdiction); and (4) the legislative purpose behind the sentence imposed. *Id.* at 140-42.

<sup>83</sup> 445 U.S. 263 (1980).

<sup>84</sup> Justice Stewart concurred in a brief opinion. Justice Powell dissented, joined by Justices Brennan, Marshall, and Stevens.

<sup>85</sup> *Id.* at 264-66, 280. A divided panel of the Fifth Circuit had voted to grant Rummel habeas relief from his sentence under the proportionality analysis of *Hart v. Coiner*, see 568 F.2d 1193 (5<sup>th</sup> Cir. 1978). The court

Of even greater interest was the majority's mode of analysis. In one voice, Justice Rehnquist set aside *Weems* as turning on "the unique nature of the punishments" there, and stressed the Court's "reluctance to review legislatively mandated terms of imprisonment."<sup>86</sup> He explicitly linked this cautious approach to Eighth Amendment review of prison terms with the Court's cautious approach to substantive due process review under the Fourteenth Amendment, invoking Justice Holmes's *Locher* dissent for the proposition that the Constitution "is made for people of fundamentally differing views."<sup>87</sup> The *Rummel* opinion was salted with suggestions that proportionality review of prison terms simply did not exist, except perhaps in cases involving misdemeanors:

[O]ne could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies ... the length of the sentence actually imposed is purely a matter of legislative prerogative.<sup>88</sup>

However, in other portions of its opinion, the *Rummel* Court offered some scraps of proportionality reasoning. It noted that heightened penalties for recidivism were constitutionally permissible and stated that "a proper assessment of Texas's treatment of Rummel" would take the availability of parole into account. The Court endorsed the view that Rummel's punishment could be predicated on a combination of different philosophical grounds, including the utilitarian interests of deterring and incapacitating

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en banc vacated that opinion and affirmed denial of the writ. 587 F.2d 651 (5<sup>th</sup> Cir. 1978). See generally Schwartz, *supra* note 80, at 412-420 (giving an overview of the *Rummel* litigation and the arguments raised; concluding that in rejecting Rummel's claim, "the Supreme Court . . . reached a fair resolution of [a] difficult constitutional problem.").

<sup>86</sup> *Id.* at 274. Justice Rehnquist's opposition in *Rummel* to searching judicial review of prison sentences rested on noninterpretive, pragmatic grounds. His opinion said little about the text or history of the Eighth Amendment. The *Rummel* majority did not revisit the originalist critique of proportionality review that Justice White had offered in *Weems*.

<sup>87</sup> *Id.* at 282, quoting *Lochner*, 198 U.S. at 76 (Holmes, J., dissenting).

<sup>88</sup> *Id.*

recidivists as well as the purely retributive interest in punishing his triggering offense.<sup>89</sup> In an important but equivocal footnote, the majority conceded that “extreme” noncapital sentences such as life imprisonment for overtime parking might be invalid under the Eighth Amendment.<sup>90</sup> In fact, in another passage, the majority declined to express a view on the rather less theoretical question of whether Rummel could have been constitutionally sentenced to life imprisonment for his \$120 fraud if it had been his first offense.<sup>91</sup>

Four Justices dissented, arguing that the Eighth Amendment should be interpreted to prohibit "grossly excessive punishments" in noncapital cases, even when the mode of punishment employed was not barbarous or torturous, and that Rummel's sentence violated this standard.<sup>92</sup> In judging whether a sentence was grossly excessive, the dissenters would have looked to "the nature of the offense" and to inter- and intrajurisdictional comparisons of the punishments for similar offenses.<sup>93</sup> In the end, the dissenters concluded that Rummel's "mandatory life sentence for defrauding persons of about \$230" (in three offenses) "crosse[d] any rationally drawn line" marking the limits

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<sup>89</sup> *Id.* at 276, 284 (“The purpose[s] of a recidivist statute such as that involved here ... are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be classified as felonies, to segregate that person from the rest of society for an extended period of time.”).

<sup>90</sup> *See id.* at 274 n.11.

<sup>91</sup> *Id.* at 276. This hypothetical is not far from the facts of the later case of *Henderson v. Norris*, 258 F.3d 706 (8<sup>th</sup> Cir. 2001) (holding that life sentence without parole was cruel and unusual punishment for selling a quarter of a gram of cocaine, the defendant’s first offense).

<sup>92</sup> *Rummel*, 445 U.S. at 293 (Powell, J., dissenting).

<sup>93</sup> *Id.* at 295.

of proper punishment, and "would be viewed as grossly unjust by virtually every layman or lawyer."<sup>94</sup>

## 2. *Hutto v. Davis*

Scarcely a year later, the *Rummel* majority echoed *Rummel*'s deferential analysis in *Hutto v. Davis*.<sup>95</sup> A Virginia jury gave Davis consecutive twenty-year sentences for each of two criminal counts: one for distributing marijuana, and one for possessing it with intent to distribute. The result was a forty-year sentence for about nine ounces of contraband.<sup>96</sup> Davis had a criminal record,<sup>97</sup> but his sentence was not premised on any finding of recidivism.<sup>98</sup> The en banc Fourth Circuit struck the sentence as cruel and unusual.<sup>99</sup> The Supreme Court vacated and remanded for reconsideration in light of *Rummel*, which had just been decided.<sup>100</sup> On remand the Fourth Circuit stuck by its judgment, affirming without opinion by the vote of an equally divided court.<sup>101</sup>

The Supreme Court then summarily reversed in a tart *per curiam* opinion that suggested the authorship of Justice Rehnquist or Chief Justice Burger. To the five-Justice majority, *Rummel* stood for the near-total rejection of Eighth Amendment scrutiny of terms of imprisonment. The majority did not weigh the facts of Davis's crime and

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<sup>94</sup> *Id.* at 307.

<sup>95</sup> 454 U.S. 370 (1982) (*per curiam*).

<sup>96</sup> *Id.* at 370-71.

<sup>97</sup> *See id.* at 375, 379 (Powell, J., concurring in the judgment).

<sup>98</sup> *See id.* at 383 (Brennan, J., dissenting).

<sup>99</sup> *Davis v. Davis*, 601 F.2d 153, 154 (4<sup>th</sup> Cir. 1979) (en banc).

<sup>100</sup> *Hutto v. Davis*, 445 U.S. 947 (1980).

<sup>101</sup> *Davis v. Davis*, 646 F.2d 123 (4<sup>th</sup> Cir. 1981).

sentence or compare them with the facts of *Rummel*. Rather, it stated that *Rummel* had “distinguished between punishments – such as the death penalty – which by their very nature differ from all other forms of conventionally accepted punishment, and punishments [such as imprisonment] which differ from others only in duration.”<sup>102</sup> It glossed *Rummel* as holding that “the excessiveness of one prison term as compared to another is invariably a subjective determination,” implying that meaningful judicial review was impossible.<sup>103</sup> Indeed, the majority impliedly accused the Fourth Circuit of judicial mutiny for entertaining a contestable disproportionality claim in the wake of *Rummel*.<sup>104</sup>

This reading of *Rummel* threatened to move beyond deferential review to a full repudiation of *Weems*. Yet as in *Rummel*, the majority could not quite bring itself to forswear a minimal form of rationality review. A footnote in *Davis* repeated the concession in *Rummel* that life imprisonment for overtime parking might be unconstitutional.<sup>105</sup>

As in *Rummel*, four Justices took a sharply different view. Justice Powell wrote a reluctant concurrence that rested entirely on *Rummel*'s stare decisis effect.<sup>106</sup> Justice

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<sup>102</sup> *Davis*, 454 U.S. at 373.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 374-75 (“[T]he Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution. . . . [U]nless we wish anarchy to prevail within the judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be.”).

<sup>105</sup> *Id.* at 374 n.3.

<sup>106</sup> *Id.* at 375, 379 (Powell, J., concurring in the judgment). Justice Powell complained that *Rummel* would now “often . . . compe[l]” lower courts “to accept sentences that arguably are cruel and unusual.” *Id.* at 377.

Brennan, in dissent, disputed the majority's interpretation of *Rummel* as precluding significant proportionality review of sentences.<sup>107</sup>

*Rummel* and *Davis* appeared to leave Eighth Amendment noncapital proportionality review in roughly the same place as Cold War-era review of economic legislation under the Fourteenth Amendment. In principle a vestigial power of judicial review was acknowledged for wildly inappropriate state action, but in practice the courts were to have little or nothing to do.<sup>108</sup> Yet it also appeared that this understanding of the Eighth Amendment hung by one vote on the Supreme Court. The reader's views of a lower court's obligations in such a situation will determine her reaction to the fact that less than a year later, the Eighth Circuit struck down as cruel and unusual a life sentence imposed on a seven-time felony recidivist, Jerry Helm.<sup>109</sup> Helm's case reached the Supreme Court, where it produced both a significant holding and a swing away from the minimal-rationality conception of noncapital sentencing review.

#### **D. Substantive Scrutiny: *Solem v. Helm***

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<sup>107</sup> *Id.* at 381-83 (Brennan, J., dissenting). Justices Marshall and Stevens joined this opinion. Justice Brennan condemned what he considered "a serious and improper expansion of *Rummel*" by the majority. *Id.* at 382-83. He characterized the *per curiam* opinion as a "complete abdication of our responsibility to enforce the Eighth Amendment," and asserted that *Davis*'s sentence was "obvious[ly]" cruel and unusual. *Id.* at 383-84.

<sup>108</sup> See Grossman, *supra* note 13, at 122 (*Davis* "appeared to foreclose virtually any proportionality challenge in a non-capital case."); David S. Mackey, *Rationality versus Proportionality: Reconsidering the Constitutional Limits on Criminal Sanctions*, 51 TENN. L. REV. 623, 631 (1984). Compare Gerald Gunther and Kathleen Sullivan, CONSTITUTIONAL LAW 479-81 (13th ed. 1997) (reviewing the Cold War-era substantive due process cases and asking whether they amounted to a "total withdrawal from review").

<sup>109</sup> *Helm v. Solem*, 684 F.2d 582 (8<sup>th</sup> Cir. 1982), *aff'd*, 463 U.S. 277 (1983).

In *Solem v. Helm*,<sup>110</sup> the Court held, five to four, that a judge-imposed sentence of life imprisonment without parole was cruel and unusual punishment for uttering a “no account” check for \$100, Helm’s seventh felony.

Under *Rummel* and *Davis*, Helm’s claim should have failed.<sup>111</sup> His triggering offense was virtually identical to Rummel’s and his recidivist history was considerably worse. Rummel’s only prior felonies were two small-time frauds; in contrast, Helm had six prior felonies, including relatively dangerous crimes such as drunk driving and three separate convictions for nonresidential burglary.<sup>112</sup> The chief point in Helm’s favor was that his judge-imposed life sentence precluded the possibility of parole, whereas Rummel had been eligible for parole in 12 years under the operation of the Texas recidivist statute. However, *Davis* seemed to foreclose relief on this basis with its flat statement that “the excessiveness of one prison term as compared to another is invariably a subjective determination.”<sup>113</sup> Helm’s sentence was also heavier than that available in any other jurisdiction except Nevada.<sup>114</sup> But *Rummel* and *Davis* had squarely rejected the use of interjurisdictional comparisons in noncapital cases to establish an Eighth Amendment violation.<sup>115</sup> Finally, Helm’s triggering fraud, while hardly earth-shattering, was an

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<sup>110</sup> 463 U.S. 277 (1983).

<sup>111</sup> Cf. *id.* at 304, 311 (Burger, C.J., dissenting) (“[T]oday’s holding cannot be rationally reconciled with *Rummel*. ... [*Davis*] makes crystal clear that under *Rummel* it is error for appellate courts to second-guess ... whether a given sentence of imprisonment is excessive in relation to the crime.”); Grossman, *supra* note 13, at 128 (*Solem* Court’s attempt to distinguish *Rummel* and *Davis* was “unpersuasive”); Joshua Dressler, UNDERSTANDING CRIMINAL LAW § 6.05[C] at 47 (1995) (Helm’s claim seemed “weak” in light of *Rummel*).

<sup>112</sup> *Solem*, 463 U.S. at 279-280.

<sup>113</sup> *Davis*, 454 U.S. at 373 (*per curiam*).

<sup>114</sup> *Solem*, 463 U.S. at 298-300.

<sup>115</sup> *Davis*, 454 U.S. at 373; *Rummel*, 445 U.S. at 280-82.

example of genuine criminal conduct, *malum in se*, which distinguished his case from the extreme “no life imprisonment for overtime parking” hypothetical discussed in *Rummel* and *Davis*.<sup>116</sup>

There was another stark difference between *Rummel* and *Solem* that one might have expected to feature more prominently in the *Solem* Court's opinion. While the life sentence in *Rummel* was specifically commanded by the Texas recidivism statute,<sup>117</sup> the South Dakota recidivism statute in *Solem* left Helm's sentence entirely at the discretion of a single trial judge, who could have sentenced Helm to *any number of years* for his triggering offense of passing a \$100 bad check, but chose to impose the maximum possible sentence of life without parole.<sup>118</sup> Helm's harsh sentence thus resulted not from a categorical judgment by the legislature, but from the discretionary (and arguably arbitrary) action of a single decisionmaker.<sup>119</sup>

At the level of Court personnel, *Solem* came out as it did because Justice Blackmun abandoned the coalition of Justices that had decided *Rummel* and *Davis*,

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<sup>116</sup> See *Davis*, 454 U.S. at 374 n.3; *Rummel*, 445 U.S. at 274 n.11.

<sup>117</sup> See *id.* at 264 (citing TEX. PENAL CODE, art. 63 (1973), recodified as TEX. PENAL CODE ANN. § 12.42(d) (1974)) (“Whoever shall have been three times convicted of a felony . . . shall on such third conviction be imprisoned for life in the penitentiary”).

<sup>118</sup> See *Solem*, 463 U.S. at 281 & n.6 (citing S.D. CODIFIED LAWS §§ 22-6-1(2), 22-7-8 (1979)) (providing that punishment for a fourth felony conviction is automatically “enhanced to the sentence for a Class 1 felony,” which is punishable by a discretionary sentence up to life in prison without parole).

<sup>119</sup> The *Solem* Court reproduced the trial judge's colloquy with Helm at sentencing:

I think you certainly earned this sentence and certainly proven that you're an habitual criminal and the record would indicate that you're beyond rehabilitation and that the only prudent thing to do is to lock you up for the rest of your natural life, so you won't have further victims of your crimes, just be coming back before courts. You'll have plenty of time to think this one over.

463 U.S. at 282-83, quoting *State v. Helm*, 287 N.W.2d 497, 500 (S.D. 1980) (Henderson, J., dissenting) (quoting Seventh Judicial Circuit Court, Pennington County, South Dakota).

providing a fifth vote for Justice Powell's opinion for the Court.<sup>120</sup> At the level of doctrine, *Solem* reflected a temporary swing back to the more ambitious passages in *Weems*, that is, an attempt to reconceptualize Eighth Amendment sentencing law as a form of substantive scrutiny closely focused on retributive proportionality.

Justice Powell's *Solem* opinion embraced wholesale the three proportionality criteria rejected in *Rummel* and *Davis*: analysis of "the gravity of the offense and the harshness of the penalty"; of "the sentences imposed on other criminals in the same jurisdiction"; and of "the sentences imposed for commission of the same crime in other jurisdictions."<sup>121</sup> The *Solem* opinion included several dramatic passages, as if to set the stage for future expansion of Eighth Amendment review. In several places Justice Powell abandoned the more restrained "gross disproportionality" standard that he had urged in *Rummel*, and claimed instead a broad power to invalidate "sentences that are disproportionate to the crime committed."<sup>122</sup> Powell also classified all of Helm's six prior felony offenses as "nonviolent,"<sup>123</sup> though this was surely a questionable characterization of Helm's conviction for three-time drunk driving.<sup>124</sup>

Chief Justice Burger and three other Justices joined an indignant dissent, arguing that *Solem's* "holding cannot rationally be reconciled with *Rummel*," and stressing the

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<sup>120</sup> Justices Brennan, Marshall and Stevens also joined Justice Powell's opinion.

<sup>121</sup> *Solem*, 463 U.S. at 292.

<sup>122</sup> *Id.* at 284; *see id.* at 290 ("[W]e hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted"); *cf. id.* at 303 (holding that Helm's "sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment.").

<sup>123</sup> *Id.* at 279.

<sup>124</sup> *See id.* at 280; *cf. id.* at 304 (Burger, C.J., dissenting) ("I reject the fiction that all Helm's crimes were innocuous or nonviolent. Among his felonies were three burglaries and a third conviction for drunken driving. By comparison Rummel was a relatively 'model citizen.'").

perceived affront the Court had administered to the doctrine of *stare decisis*.<sup>125</sup> Burger also challenged the majority's classification of Helm's nonresidential burglary and repeated drunk driving convictions as "nonviolent."<sup>126</sup>

*Solem's* broad statement that "disproportionate" sentences were unconstitutional presented the prospect of a generalized constitutional appellate review of state court prison sentences.<sup>127</sup> Such a view would have given a thoroughly substantive cast to the Cruel and Unusual Punishments Clause. It would interpret it as incorporating a specific, debatable value judgment about penology that would displace contrary legislative approaches, even those adopted and pursued in good faith, much as the First Amendment incorporates a substantive judgment about the costs and benefits of speech regulation that displaces contrary judgments by the states. In Fourteenth Amendment terms, Justice Powell's vision of constitutional sentencing review elevated it either to the tier of heightened scrutiny under the *Carolene Products* framework, or (in light of some of the more conciliatory passages sprinkled in the *Solem* opinion), to the more indefinite but still intrusive brand of scrutiny exemplified by *Lochner*. However, this vision of the Eighth Amendment has not prevailed.

#### **E. Rationality Review: *Harmelin v. Michigan***

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<sup>125</sup> *Id.*; *see id.* at 305-312 (arguing that the holding in *Solem* was inconsistent with *Rummel* and *Davis*); *id.* at 315 ("If we are to have a system of laws, not men, *Rummel* is controlling."); 317 ("It is . . . curious that the Court should brush aside controlling precedents that are barely in the bound volumes of the United States Reports.").

<sup>126</sup> *Id.* at 316 ("It is sheer fortuity that the places respondent burglarized were unoccupied and that he killed no pedestrians while behind the wheel. . . Four of respondent's crimes, I repeat, had harsh potentialities for violence.").

<sup>127</sup> *See id.* at 315 (Burger, C.J., dissenting) (expressing fear that "[t]o require appellate review of all sentences of imprisonment . . . will 'administer the coup de grace to the courts of appeals as we know them.'") (quoting Henry Friendly, *FEDERAL JURISDICTION: A GENERAL VIEW* 36 (1973)).

After three major (and conflicting) opinions in three years, the Supreme Court left the Eighth Amendment issue alone for a time. The lower courts gave *Solem* a cool reception. Despite the potentially broad standard articulated in the case, no federal court of appeals (and only a handful of state courts) set aside a prison sentence on Eighth Amendment grounds in the eight years following *Solem*.<sup>128</sup> This caution was well-founded. When, eight years later, a splintered Court next confronted the problem of noncapital proportionality review in *Harmelin v. Michigan*,<sup>129</sup> it altered *Solem* doctrinally and scaled back its scope of review.

*Harmelin* is the key modern Eighth Amendment sentencing case. Though it yielded only a plurality opinion, it provided the constitutional standard that governs today.<sup>130</sup> Justice Kennedy's plurality opinion went further than any previous opinion had

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<sup>128</sup> See *Harmelin*, 501 U.S. at 1015-16 & n.2 (White, J., dissenting). One must conclude that the lower courts did not take the bolder passages of Justice Powell's *Solem* opinion at face value. Granted, *Solem* declined to overrule the narrow holdings of *Rummel* and *Davis*, and those cases had upheld strict sentences. It nevertheless strains credulity to think that *no* court of appeals, on habeas review or otherwise, confronted a prison sentence that was "disproportionate" to the crime, and distinguishable from *Rummel* and *Davis*, in the eight years between *Solem* and *Harmelin*. Cf. *Solem*, 463 U.S. at 290, 303.

Professors Brannon Denning and Glenn Reynolds identify a pattern in which the lower federal courts sometimes hesitate to give full effect to a new decision that promises a burdensome expansion of judicial review. Full enforcement may not follow until the Supreme Court reiterates its commitment to the new principle in later rulings. See Brannon P. Denning and Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253 (2003). Denning and Reynolds's guiding example is the current reluctance of the lower federal courts to engage in meaningful review of legislation enacted under the Commerce Clause, despite the Supreme Court's embrace of such review in *United States v. Lopez*, 519 U.S. 549 (1995) and *United States v. Morrison*, 529 U.S. 568 (2000). See Denning and Reynolds, *Rulings and Resistance*, *supra*, 55 ARK. L. REV. at 1254-56.

*Solem*'s cool reception in the 1980s may reflect an institutional resistance by the lower courts similar to the one that, in Denning and Reynolds's view, characterizes *Lopez*.

<sup>129</sup> 501 U.S. 957 (1991).

<sup>130</sup> Later pluralities of the Supreme Court, and virtually all lower courts, have held that Justice Kennedy's opinion in *Harmelin*, as the opinion that concurred in the judgment reached but also recognized at least some degree of sentencing review under the Eighth Amendment, contains the *ratio decidendi* of the case. See *Ewing*, 538 U.S. at 23-24 (plurality opinion); *Henderson v. Norris*, 258 F.3d 706, 709 (8th Cir. 2001) ("apply[ing] the principles outlined in Mr. Justice Kennedy's opinion" in *Harmelin*); *Hawkins v. Hargett*, 200 F.3d 1279, 282 (10th Cir. 1999); *United States v. Harris*, 154 F.3d 1082, 1084 (9th Cir. 1998); *Dressler*, *supra* note 111, at 49. See generally *Marks v. United States*, 430 U.S. 188, 193 (1977).

in assimilating the structure of noncapital proportionality review under the Eighth Amendment to that of Fourteenth Amendment rationality review.

Ronald Harmelin had no criminal record. He was found in Detroit with 672 grams of cocaine and a variety of drug paraphernalia, and convicted of simple possession of illegal drugs in an amount greater than 650 grams.<sup>131</sup> Under Michigan law, this offense carried a mandatory penalty of life imprisonment without possibility of parole – the most severe punishment authorized in Michigan.<sup>132</sup> Harmelin unsuccessfully sought relief in the state courts on the ground that his sentence was cruel and unusual. The Supreme Court granted certiorari and affirmed the sentence, five Justices to four.

Under *Solem*, Harmelin’s legal claim should have prevailed. *Solem* had expressly classified Helm’s convictions for drunk driving and nonresidential burglary as “nonviolent” offenses, treating them as relatively less serious than “violent” offenses.<sup>133</sup> By this standard, Harmelin’s passive possession of contraband had at least as attenuated a connection to possible incidents of violence as Helm’s felonies. Moreover, while the Supreme Court in *Davis* had approved stiff sentences (well short of life without parole) for individual counts of drug *trafficking*,<sup>134</sup> Harmelin had not been charged with distribution of drugs, or even with possession with intent to distribute.<sup>135</sup> He was a

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<sup>131</sup> *See id.* at 961 & n.1 (opinion of Scalia, J.) (citing MICH. COMP. LAWS ANN. §§ 333.7403(2)(a)(i), 333.7403(2)(a)(1) (West 1990-91)).

<sup>132</sup> *Id.* at 1021 (White, J., dissenting).

<sup>133</sup> *See Solem*, 463 U.S. at 279.

<sup>134</sup> *Davis*, 454 U.S. at 375 (upholding twenty years for each of two counts of distributing marijuana and possessing with intent to distribute).

<sup>135</sup> Michigan, like most jurisdictions, separately criminalizes the possession of drugs with intent to distribute. Under the state’s drug laws, simple possession above 650 grams then carried the same penalty (life without parole) as possession with intent to distribute. Prosecutors deliberately chose to charge Harmelin with simple possession to ease their burden at trial. *See id.* at 1025 (White, J., dissenting).

simple possessor. Nor could any interest in combating recidivism justify his punishment, as was true in *Rummel*: Harmelin was a first-time offender. Finally, Harmelin also had a powerful case under the two comparative factors announced in *Solem*. The Michigan penal code punished Harmelin’s possessory offense more severely than rape, armed robbery or second degree murder;<sup>136</sup> and Harmelin’s sentence was harsher than any that he could have received for his offense in another state.<sup>137</sup> It is difficult to dispute that Harmelin’s sentence satisfied *Solem*’s standard.<sup>138</sup> And not one Justice claimed otherwise. Instead, the five Justices who voted to affirm Harmelin’s sentence decided the case under different constitutional standards than those announced in *Solem*.

### 1. Justice Scalia’s Restatement of the Originalist Critique

Justice Scalia announced the judgment of the Court in an extensive opinion joined by Chief Justice Rehnquist. Rehnquist’s opinion in *Rummel* had tried to minimize the reach of Eighth Amendment proportionality review using pragmatic and case law-based arguments. Justice Scalia now reached back to fundamentals, arguing from text and history that *Solem* (and behind it, *Weems*) were “simply wrong: the Eighth Amendment

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<sup>136</sup> *Id.* at 1025-26 (White, J., dissenting) (noting that all three of these offenses carried more lenient sentencing ranges than the mandatory life sentence for Harmelin’s crime).

<sup>137</sup> *Id.* at 1026 (noting that the next harshest state, Alabama, imposed a mandatory life sentence without parole only upon conviction for possession of at least 10 kilograms of cocaine).

<sup>138</sup> See Dressler, *supra* note 111, at 48 (Harmelin had a “strong case of unconstitutionality” under *Solem*); but see Woodburn, *supra* note 18, at 1940-42 (arguing that Harmelin’s sentence was constitutional under the *Solem* framework because of “the gravity of drug-related social problems,” especially given that he possessed cocaine in commercial quantities).

Woodburn identifies utilitarian social concerns. These certainly suggest why a rational legislature might decide in good faith to establish fierce mandatory punishments for first-time cocaine possession – which would satisfy the modified constitutional standard that Justice Kennedy announced in *Harmelin*. But Woodburn does not show how this reasoning could be reconciled with *Solem*’s original, broad conception of “nonviolent” crimes. If repeated drunken driving is, as a matter of law, a “relatively minor” offense that is not a “crime against a person,” *Solem*, 463 U.S. at 297, how could one say with any confidence that the simple possession of a bag of contraband is sufficiently “grave” and “violent” to justify a life sentence without parole? *Harmelin*’s result, while correct, was not legally compatible with the *Solem* opinion.

contains no proportionality principle.”<sup>139</sup> Instead, in his view, the Eighth Amendment invalidates only "particular forms or 'modes' of punishment — specifically, cruel methods of punishment that are not regularly or customarily employed."<sup>140</sup>

Justice Scalia's originalist argument rested on three sources of evidence: the English history that gave rise to the cruel and unusual punishments clause of the 1689 Bill of Rights; the history surrounding the Eighth Amendment's adoption in 1791; and nineteenth-century judicial interpretation of the Cruel and Unusual Punishments Clause.

The first of these sources proved to give only equivocal support to Justice Scalia's position. As he recognized, the leading impetus for the 1689 clause was the conduct of the Court of King's Bench in the trial of Titus Oates and other prominent state trials.<sup>141</sup> What prompted outrage, Scalia claimed, was the "arbitrary sentencing power" claimed by Chief Justice Jeffreys, who crafted special sentences to punish perceived enemies of the crown.<sup>142</sup> The defect in Oates's sentence was that it involved punishments "out of the

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<sup>139</sup> *Harmelin*, 501 U.S. at 965 (opinion of Scalia, J.). It is curious that Justice Scalia's *Harmelin* opinion nowhere mentions its most prominent predecessor, Justice White's dissent in *Weems*. The two opinions, eight decades apart, canvass virtually identical historical evidence and offer many of the same arguments. Compare *Weems*, 217 U.S. at 382-413 (White, J., dissenting) with *Harmelin*, 501 U.S. at 966-85 (opinion of Scalia, J.).

Perhaps Justice Scalia was uncomfortable with Justice White's conclusion that, while the Eighth Amendment's Cruel and Unusual Punishments Clause had no application to legislatively enacted penalties such as those before the Court in *Weems*, it might be applicable in some fashion to judge-imposed penalties. See *Weems*, 217 U.S. at 397 (White, J., dissenting) (concluding that Eighth Amendment "restrain[s] the courts from exerting and Congress from empowering them, to select and exert by way of discretion modes of punishment which were not usual, or usual modes of punishment to a degree not usual, and which could alone be imposed by express authority of law.").

<sup>140</sup> *Id.* at 976.

<sup>141</sup> *Id.* at 968-975.

<sup>142</sup> *Id.* at 968. Justice Scalia quoted Justice Withins's remark to Oates that "we have taken special care of you." *Id.* at 970, quoting *Second Trial of Titus Oates*, 10 Howell's State Trials 1227, 1316 (K.B. 1685).

Judges' Power."<sup>143</sup> Some of the elements of Oates's sentence, such as defrocking, could only be administered by an ecclesiastical court. Other punishments, such as prolonged scourging (indeed, the judges may have intended that Oates be scourged to death), were viewed as contrary to common law practice for misdemeanor offenses such as Oates's perjuries.<sup>144</sup> The members of the House of Commons who sought (unsuccessfully) to overturn Oates's sentence were motivated by the judges' "Pretence to a discretionary Power" to "inflict what Punishment they pleased."<sup>145</sup> In Justice Scalia's view, then, the furor over Oates's trial did not principally emphasize the extreme or disproportionate nature of the sanctions imposed, but rather the imposition of punishments not authorized by common law tradition or statute.<sup>146</sup>

At the same time, Justice Scalia obliquely acknowledged that *none* of the individual modes of punishment employed in Oates's sentence – defrocking, whipping, pillorying, fines, imprisonment – were illegal at the time, and they were not prohibited by statute for many years thereafter.<sup>147</sup> Moreover, Justice Scalia's opinion quoted the dissenting minority of the House of Lords, who condemned Oates's sentence not only for

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<sup>143</sup> *Id.* at 973, quoting the dissenting report of the minority of the House of Lords, 1 H.L. JOUR. 367 (May 31, 1689).

<sup>144</sup> *Id.* at 971-72.

<sup>145</sup> *Id.* at 973, quoting 10 H.C. JOUR. 247 (Aug. 2, 1689).

<sup>146</sup> *See* Granucci, *supra* note 55, at 859 (concluding that "[i]n the context of . . . Oates's case, 'cruel and unusual' seems to have meant a severe punishment unauthorized by statute and not within the jurisdiction of the court to impose.").

<sup>147</sup> *Harmelin*, 501 U.S. at 968 (opinion of Scalia, J.); *see* Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119, 143 (2004); Granucci, *supra* note 55, at 855 -56, 859 ("It is clear that no [blanket] prohibition on methods of punishment was intended" by the 1689 Bill of Rights).

being "contrary to Law and ancient practice," but also as "barbarous, inhuman, and unchristian."<sup>148</sup>

Early American history more clearly supported Justice Scalia's view. The few references in the ratification debates to the Cruel and Unusual Punishments Clause viewed it as prohibiting torturous or barbarous punishments.<sup>149</sup> Indeed, a leading scholarly treatment, cited extensively by Justice Scalia, concluded that the Framers were led by an "unjustified reading" of the English Bill of Rights provision to view the words "cruel and unusual" as "proscrib[ing] not excessive but torturous punishments."<sup>150</sup> Justice Scalia also noted that the federal criminal code enacted by the first Congress, immediately contemporary with the adoption of the Eighth Amendment, did not seem to recognize a proportionality principle, as it provided for numerous harsh penalties, including death by hanging for counterfeiting government securities and for stealing fifty dollars worth of goods from a vessel.<sup>151</sup>

Finally, Justice Scalia examined early American case law interpreting the Eighth Amendment. Most nineteenth century courts interpreted it as a limitation on the modes

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<sup>148</sup> *Harmelin*, 501 U.S. at 971 (opinion of Scalia, J.), quoting 1 H.L. JOUR. 367 (May 31, 1689).

<sup>149</sup> *Id.* at 979-80. Delegates to the 1788 Massachusetts convention objected that the new government was "nowhere restrained from inventing the most cruel and unheard-of punishments . . . and there is no constitutional check on [it], but that racks and gibbets may be amongst the most mild instruments of [its] discipline." 2 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 111 (2d ed. 1854). Patrick Henry argued before the Virginia Convention that "your members of Congress will loose the restriction of not . . . inflicting cruel and unusual punishments. What has distinguished our ancestors? That they would not admit of tortures, or cruel and barbarous punishment." 3 Elliot, *id.*, at 447. George Mason reassured the Virginians that the federal Bill of Rights would prohibit torture because, like their own bill of rights, it provided, "that no cruel and unusual punishments shall be inflicted; therefore torture was included in the prohibition." 3 PAPERS OF GEORGE MASON 1085 (R. Rutland ed. 1970); *see generally* Granucci, *supra* note 55, at 839-42; Schwartz, *supra* note 80, at 382.

<sup>150</sup> Granucci, *supra* note 55, at 865; *see Harmelin*, 501 U.S. at 975, 979 (opinion of Scalia, J.).

<sup>151</sup> *Id.* at 980-81, citing 1 Stat. 114-15 (1790).

of bodily punishment the legislature could use, not on the proportionality of punishments.<sup>152</sup>

Justice Scalia's opinion also offered pragmatic criticism of the approach to judicial proportionality review suggested in *Solem*. He contended that courts could not adequately administer a test that required them to gauge the "inherent gravity" of a given offense compared to other offenses,<sup>153</sup> nor could they perform meaningful intrajurisdictional comparisons, because of the parallel difficulty of identifying which offenses are "similar" in gravity to a given offense.<sup>154</sup> He concluded that "the proportionality principle becomes an invitation to imposition of subjective values."<sup>155</sup>

In closing, Justice Scalia acknowledged that the Court's modern death penalty jurisprudence did not conform to the rule that he supported for noncapital cases like *Harmelin's*.<sup>156</sup> The Court has engaged in robust "proportionality" review, squarely so called, in the capital punishment field.<sup>157</sup> Indeed, Justice Byron White's dissent in

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<sup>152</sup> *Id.* at 982-85.

<sup>153</sup> *Id.* at 987-88 (arguing that, with respect to the "gravity" of *Harmelin's* possession of a significant quantity of cocaine, "[t]he members of the Michigan Legislature, and not we, know the situation on the streets of Detroit.").

<sup>154</sup> *Id.* at 988-89. Justice Scalia acknowledged that the third factor endorsed in *Solem*, interjurisdictional comparisons of the punishment for a given offense in different jurisdictions, was properly administrable by courts. However, he viewed this factor as of "no conceivable relevance to the Eighth Amendment." *Id.* at 989 ("That a State is entitled to treat with stern disapproval an act that other States punish with the mildest of sanctions follows *a fortiori* from the undoubted fact that a State may criminalize an act that other States do not criminalize at all. . . . Diversity not only in policy, but in the means of implementing policy, is the very *raison d'etre* of our federal system.").

<sup>155</sup> *Id.* at 986.

<sup>156</sup> *Id.* at 993-94.

<sup>157</sup> *See, e.g.,* *Atkins v. Virginia*, 536 U.S. 304 (2002) (holding death penalty for murder is unconstitutionally disproportionate when imposed on mildly mentally retarded defendant); *Enmund v. Florida*, 458 U.S. 782 (1982) (death penalty is unconstitutionally disproportionate for felony murder without intent to kill); *Coker v. Georgia*, 433 U.S. 584 (1977) (death penalty is unconstitutionally disproportionate for rape of an adult woman).

*Harmelin*, though offering only a desultory response to Justice Scalia's arguments about the historical meaning of the Eighth Amendment,<sup>158</sup> effectively criticized the tension that Scalia's position created between noncapital and capital cases.<sup>159</sup> Justice Scalia stood on the position that proportionality was not "a generalizable aspect of Eighth Amendment law," but was "one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides."<sup>160</sup>

## 2. Justice Kennedy's Plurality Opinion

In the pivotal opinion in *Harmelin*, Justice Kennedy, joined by Justices O'Connor and Souter, concurred in part with Justice Scalia and concurred in the judgment, but parted ways with Justice Scalia's conclusion that the Court should entirely abandon the constitutional review of prison sentences. Declining to take sides in the historical debate between Justices Scalia and White, Kennedy concluded that "stare decisis counsels our adherence to the narrow proportionality principle that has existed in our Eighth

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<sup>158</sup> Justice White pointed out that one nineteenth century commentator had stated that "it would seem that imprisonment for an unreasonable length of time" was contrary to "the spirit of the constitution." *Harmelin*, 501 U.S. at 1010 (White, J., dissenting), quoting B. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 185-86 (1832). Justice White also noted that at one point in his influential historical analysis of the cruel and unusual punishments clause of the English Bill of Rights, Anthony Granucci posited that the prohibition of cruel and unusual punishments included "a reiteration of the English policy against disproportionate penalties." *Id.* at 1011 n.1, quoting Granucci, *supra* note 55, at 860. However, as Justice Scalia pointed out, Granucci's conclusion on this score is difficult to explain in light of the rest of his analysis. See *Harmelin*, 501 U.S. at 975 n.5 (opinion of Scalia, J.).

Granucci notes that the English penal law of the time authorized violent death and harsh bodily punishments for numerous offenses, and that, if anything, this tendency worsened in the eighteenth century after the adoption of the English Bill of Rights. Granucci, *supra* note 55, at 855-56, 859. He catalogs the actual objections to the proceedings in King's Bench which gave rise to the cruel and unusual punishments clause, and while there was an occasional *leitmotif* of objection to the severity of punishments imposed in the trial of Titus Oates and others, the principal objection was clearly to the legally unauthorized nature of the punishments inflicted. *Id.* at 859. Other commentators have also criticized Granucci's *en passant* historical argument for proportionality review. See, e.g., Schwartz, *supra* note 80, at 380-81.

<sup>159</sup> *Id.* at 1012-14, 1018 (White, J., dissenting).

<sup>160</sup> *Id.* at 994 (opinion of Scalia, J.).

Amendment jurisprudence for 80 years."<sup>161</sup> The plurality declined to overrule the holding of *Weems* that some noncapital sentences may violate the Eighth Amendment.<sup>162</sup> However, it substantially reformulated the proportionality analysis of *Solem*, jettisoning *Solem's* standard of "significant disproportionality" and scaling back to a mode of review that would invalidate only rare sentences marked by grave disproportionality.

As defined by the *Harmelin* plurality, Eighth Amendment sentencing review has four salient characteristics.

1. *Review is highly limited.* Only "extreme sentences that are grossly disproportionate to the crime" violate the Eighth Amendment.<sup>163</sup> The courts' review is "narrow," and thus easy for the state to satisfy.<sup>164</sup> Indeed, the *Harmelin* plurality, in upholding *Harmelin's* life sentence for possession of hard drugs in commercial quantity, observed that "a rational basis exist[ed] for Michigan to conclude" that his crime was as serious as felony murder. The plurality seemed to view this as sufficient to justify the sentence.<sup>165</sup>

2. *Respect for moral diversity among jurisdictions.* One of the plurality's most important conclusions was that "the Eighth Amendment does not mandate adoption of any one penological theory."<sup>166</sup> Justice Kennedy identified the four basic goals of

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<sup>161</sup> *Harmelin*, 501 U.S. at 996 (Kennedy, J.) (plurality opinion).

<sup>162</sup> *Id.* at 997-98.

<sup>163</sup> *Id.* at 1001.

<sup>164</sup> *Id.* at 997.

<sup>165</sup> *Id.* at 1004.

<sup>166</sup> *Id.* at 999.

criminal punishment— retribution, deterrence, incapacitation, and rehabilitation <sup>167</sup> — and acknowledged that the weight that different jurisdictions give to these principles has understandably "varied with the times."<sup>168</sup> Eighth Amendment sentencing review, then, is not about ensuring a close conformity of the offense of conviction with the reviewing court's assessment of retributively proper punishment. States may give strong weight to incapacitation and deterrence as well.<sup>169</sup> This holding shed retrospective light on *Rummel*, and prospective light on the Court's later holding in *Ewing*, like *Rummel* a recidivism case.

3. *A challenger must satisfy a significant initial burden before the court will engage in weighing evidence.* *Harmelin's* clearest doctrinal departure from *Solem* was its refusal to apply to *Harmelin's* sentence the intrajurisdictional and interjurisdictional comparisons that *Solem* had applied as a threshold matter. Noting that *Solem* "appeared to apply a different analysis than in *Rummel* and *Davis*,"<sup>170</sup> the plurality held that such comparisons "are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."<sup>171</sup> If the court can inspect the sentence on its face and infer a

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<sup>167</sup> The federal Sentencing Reform Act of 1984, which authorized the promulgation of the U.S. Sentencing Guidelines, identifies these as the four goals that underlie punishment in the federal justice system. *See* 18 U.S.C. § 3553(a)(2); *Mistretta v. United States*, 488 U.S. 361, 367 (1989); *see also* *United States v. Booker*, 125 S.Ct. 738 (2005) (holding that federal courts are not bound by the federal sentencing guidelines, but must consider them in imposing sentence, and that departures from the guidelines must be reasonable).

<sup>168</sup> *Id.*, quoting *Payne v. Tennessee*, 501 U.S. 808, 819 (1991).

<sup>169</sup> *See id.* (observing that "marked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure.").

<sup>170</sup> *Id.* at 998.

<sup>171</sup> *Id.* at 1005.

justification that renders it not grossly disproportionate, then the sentence is constitutional without further inquiry.<sup>172</sup>

4. *Attention to whether substantive outcomes suggest procedural defects.*

*Harmelin* involved a mandatory penalty of life without parole that the Michigan legislature had chosen for the precise conduct in which Harmelin engaged. Unlike *Solem*, where Helm's harsh life sentence resulted from the almost completely unguided discretionary decision of a single trial judge, *Harmelin* thus involved the "collective wisdom of the Michigan Legislature and, as a consequence, the Michigan citizenry."<sup>173</sup> Justice Kennedy's opinion gave weight to this factor as a basis for distinguishing *Solem*, stressing that "[w]e have never invalidated a penalty mandated by a legislature based only on the length of sentence," and "we should do so only in the most extreme circumstance."<sup>174</sup> Yet this difference between *Solem* and *Harmelin* had to do strictly with the *procedure* that yielded the sentences in question. The bottom line, life without parole, was identical in each case.<sup>175</sup>

The reader will, of course, have noticed that the four characteristics just described parallel the ones previously used to define Fourteenth Amendment rationality review.<sup>176</sup>

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<sup>172</sup> See *id.* ("In light of the gravity of petitioner's offense, a comparison of his crime with his sentence does not give rise to an inference of gross disproportionality, and comparative analysis of his sentence with others in Michigan and across the Nation need not be performed.").

<sup>173</sup> *Id.* at 1006.

<sup>174</sup> *Id.* at 1006-07.

<sup>175</sup> Others have noted that the holdings in *Solem* and *Harmelin* suggest that the Court gives weight to the distinction between penalties required by general legislation and those imposed as a result of unguided individual discretion. See Pamela S. Karlan, "Pricking the Lines": *The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 890 (2004) (arguing that "the central appeal of Helm's claim was that he was the victim of a draconian judge.").

<sup>176</sup> See *supra* text accompanying notes 38 to 48.

Despite its use of the language of "proportionality" review (or rather, "gross disproportionality" review), the *Harmelin* plurality is best read as assimilating the structure of Eighth Amendment sentencing review to that of general Fourteenth Amendment due process review. The principle animating judicial review in each context is as much procedural as substantive, hence the differential treatment of mandatory legislative sentences and discretionary judge-imposed ones. As long as the sentencing system in a given state is working properly and evenhandedly, Justice Kennedy's opinion suggests, the federal courts will almost never intervene on the basis of simple disagreement with a state's policy choices. Instead, the federal courts seek to identify individual arbitrary and capricious exercises of state power that suggest official abuse of the authority to punish.

#### **F. *Ewing v. California*: Rationality Review Revisited**

It may seem strange to speak of a splintered 2-3-4 decision as a source of relative stability in a troubled area of the law, but that is how *Ewing v. California*<sup>177</sup> should be viewed. For the first time in over twenty years, the Supreme Court decided two successive Eighth Amendment sentencing cases under the same doctrinal framework.<sup>178</sup> Both in words and in fact, the *Ewing* plurality adhered to and clarified the rational basis standard articulated by Justice Kennedy in *Harmelin*.

#### **1. Background**

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<sup>177</sup> 538 U.S. 11 (2003).

<sup>178</sup> If one limits the field to argued decisions (*Davis* was a summary reversal), and views *Rummel* as a legal departure from *Weems*, then the Court had *never* decided two successive noncapital sentencing cases under the same legal framework until *Ewing* followed *Harmelin*.

*Ewing* arose from the application of California’s “Three Strikes and You’re Out” law, a tough recidivism statute adopted by legislation and popular referendum in 1994.<sup>179</sup> The “Three Strikes” statutory scheme doubles the sentence of any felony offender who is found to have been convicted of one prior serious or violent felony. For felony offenders with at least *two* serious or violent prior felonies, the statute mandates an indeterminate life sentence without the possibility of parole for at least 25 years, for each new felony conviction.<sup>180</sup> When a two-time violent or serious offender is convicted of multiple felonies, each “third strike” produces a separate 25-to-life sentence, which must be served consecutively.<sup>181</sup> The third, triggering strike can be any felony.<sup>182</sup>

The scheme, as interpreted by the state courts, incorporates the exercise of prosecutorial and judicial discretion in several respects. Trial courts may vacate allegations of qualifying prior strikes if they conclude that the circumstances do not justify subjecting the defendant to the Three Strikes scheme.<sup>183</sup> In addition, some possible triggering offenses are “wobblers” – a prosecutor may charge them as either a felony or as a misdemeanor. The latter choice places the defendant outside the Three Strikes scheme. The trial court may also overrule a prosecutor’s decision to charge a

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<sup>179</sup> The original version of the “Three Strikes” statute was defeated in legislative committee in 1993. Supporters then introduced Proposition 184, a ballot initiative with similar content, which was adopted by a 72% majority of voters in the November, 1994 election. Meanwhile, the widely publicized murder of Polly Klaas energized legislative support for the original measure, and it too was enacted, in amended form, in March 1994. Cal. Penal Code Ann. §§ 667(e), 1170.12(c) (2002); see *Ewing*, 538 U.S. at 15-17; Ardaiz, *supra* note 179, at 12.

<sup>180</sup> Cal. Penal Code Ann. §§ 667(e)(2)(A), 1170.12(c)(A) (2002).

<sup>181</sup> *Id.*

<sup>182</sup> Cal. Penal Code §§ 667(e)(2)(A), 1170.12(c)(2)(A).

<sup>183</sup> See *People v. Williams*, 163 P.2d 692, 696 (Cal. 1945); *Ewing*, 538 U.S. at 16-17 (plurality opinion).

wobbler as a felony, which similarly removes a defendant from the statute's reach.<sup>184</sup>

Finally, the trial court may choose to strike a defendant's earlier conviction for a serious or violent felony so as to avoid triggering the Three Strikes scheme.<sup>185</sup>

Gary Ewing received a Three Strikes sentence of 25 years to life when a California jury convicted him of felony grand theft.<sup>186</sup> Ewing had stolen three golf clubs worth approximately \$1200 from the pro shop of a Los Angeles golf course.<sup>187</sup> Ewing's substantial criminal history included four prior felony convictions arising from a residential burglary and robbery spree in 1993, as well as seven misdemeanors, including convictions for burglary, battery, theft, and drug possession.<sup>188</sup>

Ewing's Eighth Amendment challenge to his conviction was rejected in the California appellate courts.<sup>189</sup> The Supreme Court took the case on direct review. Ewing's sentence presented a test of the scope of the holdings in both *Harmelin*, the Court's last prison sentencing case, and *Solem*, its last recidivism case. Ewing's triggering offense (grand theft) was more serious than the minor fraud at issue in *Solem*. His sentence (parole available after 25 years) was lighter than the sentence of life without

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<sup>184</sup> Cal. Penal Code §§ 17(b)(1), 17(b)(5).

<sup>185</sup> *People v. Williams*, 948 P.2d 429, 437 (Cal. 1998).

<sup>186</sup> *Ewing*, 538 U.S. at 19-20 (plurality opinion). More precisely, the mandatory sentence for a "third strike" is an "indeterminate life sentence," for which the offender is eligible for parole in 25 years, or three times the default parole eligibility term for his offense, or the term of the underlying conviction itself, including enhancements — whichever is greater. Cal. Penal Code §§ 667(e)(2)(A)(i) – (iii); 1170.12(c)(2)(A)(i)-(iii). Ewing's offense entailed parole eligibility in 25 years. *Ewing*, 538 U.S. at 20 (plurality opinion).

<sup>187</sup> *Id.* at 17-18.

<sup>188</sup> *Id.* at 18-19. Ewing awakened one of his victims while burglarizing her apartment, then threatened her with a knife, sending her fleeing from the apartment screaming for help. *Id.*

<sup>189</sup> *People v. Ewing*, No. B-143745 (Cal. App. Apr. 25, 2001).

parole struck down in *Solem*. His past criminal record, which included armed robbery and home burglary, was also more severe than Helm's.

The Court rejected Ewing's Eighth Amendment claim. No opinion gathered a majority of Justices. The governing opinion was Justice O'Connor's, which spoke for a three-Justice plurality.<sup>190</sup> This opinion, when read together with Justice Scalia's analytically interesting separate concurrence, furthered the process begun in *Harmelin* of articulating a viable standard for the constitutional review of sentencing. The California Attorney General's brief in *Ewing* asked the Supreme Court to hold in so many words that the Eighth Amendment requires a "rational basis" for sentencing.<sup>191</sup> While not employing that precise phrase, Justice O'Connor's opinion gave California, in substance, what it had requested.

## 2. The Plurality Opinion

Justice O'Connor took the *Harmelin* plurality opinion to govern Ewing's case.<sup>192</sup> She reiterated the key formulations of rationality review that appeared in *Harmelin*: review of prison sentences is "narrow"<sup>193</sup>; courts must respect the "primacy of the

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<sup>190</sup> *Ewing*, 538 U.S. at 14-31 (plurality opinion). Justice Kennedy, author of the *Harmelin* plurality, and Chief Justice Rehnquist joined Justice O'Connor's opinion.

Chief Justice Rehnquist's vote in *Ewing* reflected a shift from his position in *Harmelin*, when he had concurred in Justice Scalia's originalist argument that the Eighth Amendment authorizes no review of the magnitude of prison sentences at all. See *Harmelin*, 501 U.S. at 965 *et seq.* (opinion of Scalia, J., joined by Rehnquist, C.J.). One may speculate that Chief Justice Rehnquist believed that the *Harmelin* plurality opinion was sufficiently justifiable to be entitled to *stare decisis* effect, even though he declined to join it in the first instance. See Van Cleave, *supra* note 13, at 227 (noting this apparent shift in view); *cf. Dickerson v. United States*, 530 U.S. 428 (2000) (Rehnquist, C.J.) (declining to overrule *Miranda v. Arizona*, in a majority opinion whose analysis focused heavily on the value of *stare decisis* rather than on *Miranda's* correctness as an original matter).

<sup>191</sup> Brief for Respondent, No. 01-6978, *Ewing v. California* (U.S. 2003).

<sup>192</sup> *Ewing*, 538 U.S. at 23-24 ("The proportionality principles in our cases distilled in Justice Kennedy's [*Harmelin*] concurrence guide our application of the Eighth Amendment in the new context that we are called upon to consider.").

<sup>193</sup> *Ewing*, 538 U.S. at 20 (plurality opinion).

legislature" and the "federal system"<sup>194</sup>; the Eighth Amendment "does not mandate adoption of any one penological theory"<sup>195</sup>; and *Solem's* intrajurisdictional and interjurisdictional comparison factors do not become relevant except in "the rare case" in which a threshold review of the crime and sentence gives rise to an inference of gross disproportionality.<sup>196</sup>

Justice O'Connor made clear that, under *Harmelin*, a court reviewing a sentence imposed under a recidivism statute is to consider the rationality of the individual sentence in light of the rationality of the sentencing scheme as a whole. She emphasized that not only retribution, but also incapacitation, deterrence, and rehabilitation "may play a role in a State's sentencing scheme."<sup>197</sup> Likewise, when considering the justifiability of the individual sentence, a court must consider how retribution *and* incapacitation *and* deterrence may each contribute to rationalizing the sentence.

In explaining the plurality's review of Ewing's individual sentence, Justice O'Connor introduced some obscurity by stating that she began by weighing "the gravity of Ewing's offense." This phrase, which originated in *Solem*,<sup>198</sup> suggests a focus on the inherent retributive severity of Ewing's grand theft ("standing alone," as Justice O'Connor put it). But the *Ewing* plurality actually held that the "gravity" of Ewing's offense could not be assessed without taking into account "his long history of felony recidivism" and

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<sup>194</sup> *Id.* at 23.

<sup>195</sup> *Id.* at 25.

<sup>196</sup> *Id.* at 30.

<sup>197</sup> *Id.* at 25.

<sup>198</sup> *Solem*, 463 U.S. at 292 (one of three factors considered in proportionality review should be "the gravity of the offense and the harshness of the penalty").

thus "the State's public safety interest in incapacitating and deterring recidivist felons."<sup>199</sup>

It would be error, Justice O'Connor indicated, to fail to give "full effect to the State's choice of th[ese] legitimate penological goal[s]."<sup>200</sup>

It seems more natural to say that the *Ewing* plurality engaged in a threshold review of the overall *rationality* of Ewing's sentence. Comparing Ewing's sentence and statutory scheme with his record and offense of conviction, the Court plurality concluded that the sentence rationally furthered a sentencing scheme that was adopted in a good faith attempt to lower California's crime rate:

To be sure, Ewing's sentence is a long one. But it reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated.<sup>201</sup>

The plurality thus held the sentence constitutional at the threshold stage, and did not go on to consider whether Ewing's sentence was comparable to those imposed for similar offenses in California or in other jurisdictions.<sup>202</sup>

The plurality opinion was not devoid of empirical analysis. Justice O'Connor noted that recidivism is "a serious public safety concern" in California.<sup>203</sup> In an interesting passage, she opined that California's "justification" for the Three Strikes "is no pretext."<sup>204</sup> She also discussed evidence suggesting that the Three Strikes law had led to a decline in the recidivism rate of parolees in California. Other evidence suggested that

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<sup>199</sup> *Ewing*, 538 U.S. at 29 (plurality opinion).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 30.

<sup>202</sup> *Id.* at 30-31.

<sup>203</sup> *Id.* at 26.

<sup>204</sup> *Id.*

parolees were actually emigrating from the state to avoid running afoul of the Three Strikes law.<sup>205</sup>

### 3. Justice Scalia's Criticism of the *Harmelin* Standard

Justice Scalia concurred in the judgment.<sup>206</sup> He did not join the plurality's reasoning, but voted to affirm Ewing's sentence on the basis of the position he had adopted in *Harmelin*: the Eighth Amendment does not authorize constitutional review of prison sentences.<sup>207</sup> Justice Scalia's opinion included a number of interesting observations on the plurality's use of *Harmelin*'s rational basis standard.

Justice Scalia defended his continued refusal to accept Eighth Amendment review of prison sentences on the ground that the proportionality inquiry developed in *Solem* and refined in subsequent cases could not be "intelligibly appl[ied]" by judges.<sup>208</sup> Far from

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<sup>205</sup> *Id.* at 27.

<sup>206</sup> Justice Thomas also concurred separately in the judgment in a brief opinion. He explicitly endorsed Justice Scalia's originalist critique in *Harmelin* and concluded that "the Eighth Amendment contains no proportionality principle." *Id.* at 32 (Thomas, J., concurring in the judgment). It followed that Ewing's sentence was constitutional. In fact, Justice Thomas expressed a stronger commitment to the originalist critique that Justice Scalia did. While Thomas agreed that "the ... test announced in *Solem* ... is incapable of judicial application," he added pointedly that "[e]ven were *Solem*'s test perfectly clear, ... I would not feel compelled by *stare decisis* to apply it," implying that in his view *Solem* (and presumably *Weems*) are plainly mistaken. *Id.*

This subtle disagreement between the two originalist Justices highlights Justice Thomas's signature refusal to give *stare decisis* effect to precedents that he views as unsupported by the Constitution's text and history. *See, e.g.,* *Zelman v. Simmons-Harris*, 536 U.S. 639, 677-680 & n.4 (2002) (Thomas, J., concurring) (questioning whether the Court's Establishment Clause doctrines should continue to be applied against the states); *Saenz v. Roe*, 526 U.S. 489, 521, 528 (1999) (Thomas, J., dissenting) (expressing a willingness to "reevaluat[e] ... in an appropriate case" the meaning of the Privileges and Immunities Clause of the Fourteenth Amendment); *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (arguing that the Court should "temper" its post-New Deal Commerce Clause jurisprudence); *see also* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994) (offering a short, blunt argument that the Supremacy Clause bars federal courts from granting *stare decisis* effect to horizontal precedents in constitutional cases, implying a jurisprudence similar to Justice Thomas's).

<sup>207</sup> *Id.* at 31 (Scalia, J., concurring in the judgment) ("[T]he Eighth Amendment's prohibition of 'cruel and unusual punishments' was aimed at excluding only certain *modes* of punishment, and was not a guarantee against disproportionate sentences.") (punctuation omitted).

<sup>208</sup> *Id.*

embracing (as Chief Justice Rehnquist apparently did) *Harmelin* and *Ewing*'s revision of *Solem*, Scalia contended that the *Ewing* plurality's analysis "demonstrate[d]" the untenability of sentencing review:

Proportionality – the notion that the punishment should fit the crime – is inherently a concept tied to the penological goal of retribution. . . . In the present case, the game is up once the plurality has acknowledged that “the Constitution does not mandate adoption of any one penological theory,” and that a “sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation.” That acknowledgment having been made, it no longer suffices merely to assess the gravity of the offense compared to the harshness of the penalty; that classic description of the proportionality principle (alone and in itself quite resistant to policy-free, legal analysis) now becomes merely the first step of the inquiry.<sup>209</sup>

In effect, Justice Scalia asserted that the move from *Solem* to *Harmelin* rendered Eighth Amendment scrutiny less tractable, not more so.

Perhaps the plurality should revise its terminology, so that what it reads into the Eighth Amendment is not the unstated proposition that all punishment that all punishment should be reasonably proportionate to the gravity of the offense, but rather the unstated proposition that all punishment should reasonably pursue the multiple purposes of the criminal law. That formulation would make it clearer than ever, of course, that the plurality is not applying law but evaluating policy.<sup>210</sup>

Justice Scalia's criticisms appear misguided in two ways. He writes as though *Harmelin* replaced *Solem*'s substantive proportionality review with a kind of generalized intermediate scrutiny (for “reasonab[ility]”) in which federal judges were to scrutinize the

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<sup>209</sup> *Id.* at 31 (punctuation and citations omitted).

<sup>210</sup> *Id.* at 31. Both dissenting Justices and commentators have expressed criticisms of *Ewing* and *Harmelin* similar to Justice Scalia's. *See id.* at 42 (Breyer, J., dissenting) (“A threshold test that blocked every ultimately invalid constitutional claim — even strong ones — would not be a *threshold* test but a *determinative* test. . . . Sentencing comparisons are particularly important because they provide proportionality review with *objective* content. By way of contrast, a threshold test makes the assessment of constitutionality highly subjective.”) (emphasis in original); Van Cleave, *supra* note 13, at 230 (“Justice Kennedy's concurring opinion in *Harmelin* . . . does not meaningfully contribute to th[e] analysis. . . . [T]he *Harmelin* approach is as subjective as one could get.”).

balancing of means and ends in each state's penal code. If that description were right, it would indeed be cause for alarm, but Justice Scalia has not accurately identified the standard described or deployed in *Harmelin*. On balance, *Harmelin* does not require reasonability in sentencing, only rationality.<sup>211</sup> Second, given that a rational connection to a permissible sentencing goal is all that is required, *Harmelin* and *Ewing*'s broadening of the permissible bases for a sentence weighs strictly in the direction of *reducing* the courts' discretion to intervene, not increasing it, just as a switch from intermediate Fourteenth Amendment scrutiny (which requires legislation to rest on an "important" state interest) to rationality scrutiny (which allows any "legitimate" interest to justify the statute) does not broaden a reviewing court's discretion, but narrows it. Certainly Justice Scalia and other critics of similar views have not suggested why judicial sentencing review under the narrow *Ewing-Harmelin* standard is any more intractable or suspect than the general practice of judicial rationality review of statutes under the Fourteenth Amendment, which it so intimately resembles.

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<sup>211</sup> There are sparse references to "reasonableness" in *Ewing* and *Harmelin*, but they are promptly undercut with subsequent language suggesting greater deference, e.g., *Ewing*, 538 U.S. at 28 (plurality opinion) ("It is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons 'advanc[e] the goals of its criminal justice system in any substantial way.'") (quoting *Solem*, 463 U.S. at 297 n.22); *Harmelin*, 501 U.S. at 1004 (plurality opinion) ("Michigan could with good reason conclude that petitioner's crime is more serious than the crime in *Davis*. Similarly, a rational basis exists for Michigan to conclude that petitioner's crime is as serious and violent as the crime of felony murder . . .").

These remarks are heavily outweighed by the repeated references to rationality review in both opinions. See *Ewing*, 538 U.S. at 23 (plurality opinion) (holding that only "extreme" sentences are invalid); *id.* at 24 (noting Court's "tradition of defer[ence]" to States); *id.* at 25 (holding that sentencing rationales are "generally a policy choice to be made by state legislatures, not federal courts"); *id.* at 28 (affirming, in language borrowed from Fourteenth Amendment case law, that the Court "do[es] not sit as a 'superlegislature'" in reviewing sentences); *id.* at 29 (holding California statute serves a "legitimate penological goal"); *id.* at 30 (holding *Ewing*'s sentence valid because it implements "a rational legislative judgment, entitled to deference"); accord *Harmelin*, 501 U.S. at 998 (holding that "substantive penological judgments" are generally "within the province of legislatures, not courts"); *id.* at 1000 (noting that "differing attitudes and local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes"); *id.* (invoking Justice Holmes's *Lochner* dissent); *id.* at 1001 (only "extreme" sentences are invalid); *id.* at 1004 (holding that *Harmelin*'s sentence is supported by "a rational basis").

#### 4. Consequences

*Ewing* yielded a configuration of opinions identical to *Harmelin*: two Justices denying the existence of Eighth Amendment noncapital sentencing review and denying the petitioner's claim, three concurring Justices acknowledging the narrow review of the *Harmelin* concurrence but rejecting the petitioner's claim, and four dissenting Justices urging broad Eighth Amendment review and arguing that the petitioner's claim should have prevailed. The rule of *Marks* entails that the three-Justice *Ewing* plurality binds lower courts as the governing opinion of the Supreme Court.<sup>212</sup>

In the next section, I offer a normative defense of the mode of analysis in *Ewing* and *Harmelin*. Before passing to this task, I suggest that the plurality's result in *Ewing* was clearly correct, even before turning to questions of theoretical jurisprudence. *Ewing* was not a hard case, as long as one grants the premise that Ewing's recidivism – and thus the complete legislative judgment that yielded his sentence – deserves to be given weight in evaluating the propriety of his sentence. Ewing was a much worse recidivist than Rummel or Helm. He had felony convictions for armed robbery (at knifepoint) and three separate residential burglaries, clearly violent crimes, as well as a misdemeanor battery and a brace of various minor convictions for theft, drugs, and illegal firearms possession. In racking up his extensive criminal record, he was a repeated beneficiary of sentences that imposed only short terms of imprisonment followed by probation; California did not impose its harsh sentence upon Ewing until after extending leniency to him, repeatedly,

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<sup>212</sup> *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .") (quotation marks omitted); *but cf. Ewing*, 538 U.S. at 36 (Breyer, J., dissenting) (stating that, "for present purposes," dissenters would analyze Ewing's Eighth Amendment claim under the *Harmelin* plurality opinion); *id.* at 32-33 n.1 (Stevens, J., dissenting) (arguing that "it is not clear that this case is controlled by *Harmelin*," which did not deal with a recidivist offender).

over a period of years, in the hope that he would reform. Nor was the offense that triggered Ewing's 25-to-life sentence, grand theft, a trivial or highly passive one. A number of commentators have described *Ewing* as a case about "shoplifting."<sup>213</sup> However, the golf clubs Ewing tried to steal were worth almost \$1200.<sup>214</sup> This is a more serious property offense than the sort of small theft ordinarily associated with the word "shoplifting." While \$1200 may seem a modest sum to the average appellate lawyer or federal judge, to the median working American it is nearly half a month's pay, before taxes.<sup>215</sup> This sum is by no means minor.<sup>216</sup> Moreover, California could surely have constitutionally punished Ewing with 25 years imprisonment for his earlier armed robbery or his burglary spree alone.<sup>217</sup> Having instead chosen to impose a milder punishment for those serious crimes, the state should not be foreclosed from imposing heightened consequences on Ewing — in effect, revisiting its earlier mercy — when he spurned the chance to reform his conduct.

### III. THE CASE FOR RATIONALITY REVIEW OF PRISON SENTENCES

Under *Ewing* and *Harmelin*, a sentence that reflects a "rational legislative judgment" and furthers a "legitimate penological goal" will be allowed to stand,

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<sup>213</sup> See, e.g., Chemerinsky, *The Constitution and Punishment*, *supra* note 18, at 1059.

<sup>214</sup> *Ewing*, 538 U.S. at 18 (plurality opinion).

<sup>215</sup> See U.S. Department of Commerce, Bureau of the Census, *Current Population Reports*, Series P-60, Money Income in the United States: 1999 (median annual income for all persons 25 or over is roughly \$31,000).

<sup>216</sup> See *Ewing*, 538 U.S. at 28 (plurality opinion) ("Even standing alone, Ewing's theft should not be taken lightly.").

<sup>217</sup> Cf. *Davis*, 454 U.S. at 375 (upholding a sentence of 20 years for each of two counts of marijuana trafficking).

particularly when there is no suggestion that the claimed motive is a "pretext" for an illegitimate motive. This is the language of Fourteenth Amendment due process review under *Carolene Products* and its progeny. The Court's swing Justices have exported the rationality standard from a general context to a specific one: from its original home in the review of statutes to the review of individual dispositions of government power in the form of criminal sentences.

*Ewing* and *Harmelin* got it right. The proper legal meaning of "cruel and unusual" in the context of prison sentencing is arbitrary and capricious, and Eighth Amendment review should be sensitive to whether a supposedly arbitrary sentence is one that is mandated by statute, or was instead imposed by a single judge or jury.<sup>218</sup> This view, *rationality review*, is preferable to *substantive review*, the intrusive level of appellate sentencing review contemplated by the *Solem* opinion and the *Ewing* dissenters. It is also preferable to Justices Scalia and Thomas's view that the Eighth Amendment has no application to the magnitude of sentences of imprisonment — which I will follow Laurence Claus in calling *vicious methods review*.<sup>219</sup>

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<sup>218</sup> For a compelling recent example of the sort of vindictive discretionary sentence barred by the *Ewing-Harmelin* standard, see *State v. David D.W.*, 588 S.E.2d 156, 165-66 (W.Va. 2003), where the court held that a sentence of 1,140 to 2,660 years for 38 incidents of sexual abuse (with the same victim) violated the Eighth Amendment and the corresponding provision of the West Virginia constitution. The statutory scheme gave the trial judge essentially unlimited discretion to fashion the millenia-long sentence, by choosing to sentence the defendant consecutively for each count of conviction.

*David D.W.* displays in a particularly clear fashion the quasi-procedural, due process-like function of Eighth Amendment sentencing review argued for in this Article. The case dealt with an unquestionably grave and reprehensible crime. The West Virginia Supreme Court of Appeals made plain that it considered the defendant's crimes "heinous and repulsive," *id.* at 166, and one concurring judge specifically indicated that he would have considered a traditional life sentence to be appropriate. *Id.* at 166-67 (Maynard, J., concurring). Since no one can serve longer than life in prison, the astronomical sentence struck down in *David D.W.* would have been no worse in *substantive* effect than a sentence that Justice Maynard, and perhaps other justices, would have been perfectly willing to uphold. Thus the result in *David D.W.* can only be explained as resulting from an inference of *procedural* defect arising from the extraordinary quality of the sentence.

<sup>219</sup> Claus, *supra* note 147, at 120.

## A. Stare Decisis

Part II's analysis showed that the conception of Eighth Amendment prison sentencing review as rationality review is currently the law of the land, as supplied by the plurality opinions in *Harmelin* and *Ewing*. It is also the "best fit" interpretation from the standpoint of *stare decisis*, fitting the totality of the Supreme Court's case law more closely than rival interpretations. The rationality-review interpretation preserves the bedrock holding of *Solem* that some sentences violate the constitution. It also preserves the holdings of *Rummel*, *Harmelin* and *Ewing*, which entail that constitutional review of state sentencing is highly limited. As such, the rationality interpretation benefits from the presumption of correctness conferred by *stare decisis*, which is a point in its favor not enjoyed by the "vicious methods" interpretation endorsed by Justices Scalia and Thomas.

Justice Scalia has himself acknowledged that *stare decisis* considerations are relevant to originalist judging.<sup>220</sup> His principal argument against extending *stare decisis* recognition to the principle of Eighth Amendment review of prison sentences has been that the principle cannot be "intelligently appl[ied]."<sup>221</sup> However, as explained in Part II.F.3 above, Justice Scalia's objection appears to rest on a misidentification of the standard imposed by *Ewing* and *Harmelin*. The standard is not a general reasonableness requirement, it only requires the more limited inquiry characteristic of Fourteenth

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<sup>220</sup> Justice Scalia has written:

Originalism, like any other theory of interpretation put into practice in an ongoing system of law, must accommodate the doctrine of stare decisis; it cannot remake the world anew . . . [S]tare decisis is not part of my originalist philosophy; it is a pragmatic exception to it.

SCALIA, *supra* note 53, at 38-40.

<sup>221</sup> *Ewing*, 538 U.S. at 31 (Scalia, J. concurring in the judgment); *Harmelin*, 501 U.S. at 984-85 (opinion of Scalia, J.).

Amendment rationality review.<sup>222</sup> Surely rationality review of sentences is at least as tractable as rationality review of general legislation.<sup>223</sup> If Justice Scalia is not prepared to abandon Fourteenth Amendment rationality review in general as incapable of judicial application, then it is hard to see why he is unwilling to give *stare decisis* effect to the *Harmelin-Ewing* standard.

## **B. Text and History**

The Constitution does not prohibit "excessive punishments," as it prohibits "excessive fines" and "excessive bail."<sup>224</sup> It does not even prohibit "cruel punishments," as some state constitutions did at the time the Bill of Rights was adopted.<sup>225</sup> It only outlaws punishments that are "cruel and unusual."<sup>226</sup>

In recent cases dealing with matters outside the context of prison sentencing, the Supreme Court has veered away from attention to the text of the Eighth Amendment. It must unfortunately be said that some of the Court's most exuberant recent opinions have crossed a line to actual misrepresentation of the text. Justice Stevens has written: "The Eighth Amendment succinctly prohibits 'excessive' sanctions" — complete with

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<sup>222</sup> See *supra* text accompanying notes 206 to 211.

<sup>223</sup> In fact, it is probably *more* tractable. In the context of criminal sentencing, the universe of "legitimate state interests" that can justify a sentence is numerically limited in a way that does not appear to be true of the legitimate state interests that might support a piece of legislation. Penologists traditionally identify four goals of criminal punishment. See, e.g., *Harmelin*, 501 U.S. at 999 (plurality opinion) ("The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation."). The federal sentencing guidelines reflect the same taxonomy of interests. See 18 U.S.C. § 3553(a)(2). While judges, legislators and scholars may and do disagree powerfully on the *weight* to be given to these different interests in different contexts, the existence of a relatively noncontroversial catalog of legitimate interests suggests, again, that rationality review of sentences is at least as tractable as rationality review of legislation — which few seek to discard.

<sup>224</sup> See U.S. CONST. amend. VIII.

<sup>225</sup> See *Harmelin*, 501 U.S. at 977 (opinion of Scalia, J.) (citing N.H. Bill of Rights, art. XVIII (1784) ("cruel or unusual punishments").

<sup>226</sup> U.S. CONST. amend. VIII.

quotation marks — in a criminal case in which the only provision of the Eighth Amendment at issue was the Cruel and Unusual Punishments Clause, which does *not* contain the word "excessive."<sup>227</sup> Fortunately, the Court has so far avoided asserting this fiction in any of its governing opinions in the *Harmelin* line of cases, so that its future decisions in this area, as well as the work of lower courts, litigants and commentators, are less constrained by ill-considered dicta of this nature than in other contexts.

At what might be called the level of naïve textualism, rationality review comports better with the constitutional text than a mode of review that simply searches for "excessive" punishments. "A [merely] disproportionate punishment can perhaps always be considered 'cruel,' but it will not always be (as the text also requires) 'unusual.'"<sup>228</sup> Just so. Yet a harsh sentence that lacks a "rational basis," one that appears to reflect official caprice or vindictiveness, *is* unusual.

At a more sophisticated originalist level, the legislative history of the Eighth Amendment and the corresponding provision of the English Bill of Rights gives virtually no support to the substantive review position,<sup>229</sup> but is more consistent with the rationality review position. The key abuse targeted by the English provision was the exercise of "arbitrary sentencing power" by judges who crafted extreme and vindictive penalties in particular cases. Cruel and unusual punishments were those that were

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<sup>227</sup> *Atkins v. Virginia*, 536 U.S. at 311. It is, again, the use of quotation marks that is remarkable. See Claus, *supra* note 147, at 120 ("If th[e] text were meant simply to condemn *excessive* punishment, why does it not say so? The term 'excessive' was, after all, on the tip of the drafters' tongues, for they used it in respect to bail and fines.").

<sup>228</sup> *Harmelin*, 501 U.S. at 967 (opinion of Scalia, J.).

<sup>229</sup> See generally the discussions of the *Weems* dissent and Justice Scalia's *Harmelin* opinion in Part II, *supra* text accompanying notes 73 to 78, 139 to 160; Claus, *supra* note 147, at 121 ("The [Eighth] Amendment was meant to address a problem distinct from either excessive punishment or vicious punishment. That problem was discriminatory punishment."); Schwartz, *supra* note 80, at 380-82.

"immorally discriminatory in the direction of greater severity."<sup>230</sup> The basic objection to such proceedings is captured in Justice Withins's recorded remark to Titus Oates in handing down Oates's imaginatively ferocious sentence – "we have taken special care of you." It is not much of a stretch to imagine the South Dakota judge in *State v. Helm* making the same remark to Jerry Helm before sentencing him to life without parole for passing a bad check, under a recidivist statute that gave essentially no guidance to the judge's sentencing discretion.<sup>231</sup> One can likewise imagine the Arkansas jury in a key Eighth Circuit case, *Henderson v. Norris*, channeling Justice Withins and Chief Justice Jeffreys as they chose to sentence Grover Henderson to life without parole (at the top of a similarly open-ended sentencing range) for his first criminal offense: delivering *less than one quarter of a gram* of cocaine base.<sup>232</sup> The Michigan legislature, by contrast, did *not* "tak[e] special care" of Ronald Harmelin: it had decided in advance that the possession of commercial quantities of cocaine merited a mandatory penalty of life imprisonment without parole, and that is what Harmelin got.<sup>233</sup>

### C. Political Process Values

In a thoughtful critique of *Harmelin* and other facets of the Supreme Court's "proportionality" jurisprudence, Adam Gershowitz has argued that prison sentencing should receive heightened federal constitutional review because "criminal defendants" are

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<sup>230</sup> Claus, *supra* note 147, at 122.

<sup>231</sup> See *Solem*, 463 U.S. at 281-83; Karlan, *supra* note 175.

<sup>232</sup> 258 F.3d 706 (8th Cir. 2001) (holding that Henderson's sentence violated the Eighth Amendment standard of the *Harmelin* plurality).

<sup>233</sup> *Harmelin*, 501 U.S. at 961 n.1 (opinion of Scalia, J.).

"a discrete and insular minority that will be prejudiced by the political process."<sup>234</sup> While *Harmelin* and *Ewing* effectively liken state prison sentences to the catch all "regulatory legislation" category of the *Carolene Products* Fourteenth Amendment framework, Gershowitz's language suggests the view that they are more analogous to the "special" class of laws disadvantaging discrete and insular minorities, which receive "more searching judicial inquiry."<sup>235</sup>

Gershowitz notes accurately that convicted felons generally cannot vote,<sup>236</sup> and states that "criminal defendants" are politically unpopular.<sup>237</sup> He admits that courts have routinely refused to hold criminal defendants a protected class for equal protection purposes,<sup>238</sup> but relies upon John Hart Ely's widely discussed defense of a "representation-reinforcing" approach to constitutional adjudication in his *Democracy and Discontent*.<sup>239</sup>

In framing his political process argument, however, Gershowitz has subtly misstated the issue. The relevant societal class for purposes of deciding the desirability (as a policy matter) of intrusive judicial review of prison sentences is not *criminal defendants*; rather, it is *convicted criminals*. In fact, from the standpoint of the Eighth Amendment, only the class of criminal defendants who have been *duly convicted after a procedurally proper trial* is ordinarily at issue. For if a constitutional defect had afflicted

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<sup>234</sup> Gershowitz, *supra* note 13, at 1301.

<sup>235</sup> *Cf. Carolene Products*, 304 U.S. at 152 & n.4.

<sup>236</sup> Gershowitz, *supra* note 13, at 1298-99.

<sup>237</sup> *Id.* at 1299-1300.

<sup>238</sup> *Id.* at 1301 n.269, citing *Prisoners' Rights*, 84 GEO. L.J. 1465, 1494 n.2975 (1996) (collecting cases).

<sup>239</sup> Ely, *DEMOCRACY AND DISTRUST*, *supra* note 27, at 88.

the guilt phase of a defendant's trial, then presumably his conviction would have been vacated without regard to the magnitude of his subsequent sentence; a court would not need to consider whether the sentence was excessive.

Once this distinction is cleared up, the notion that Eighth Amendment claimants, duly convicted of crime, should be regarded as a discrete and insular minority entitled to protections not authorized by the text of the Constitution is unpersuasive. Membership in the class does not involve an immutable characteristic of individuals<sup>240</sup>; one can avoid being a member by not committing crimes. And unlike the treatment of criminal *suspects* — who are subject to a presumption of innocence, and who may be unable to exercise any meaningful control over whether the “characteristic” of being suspected applies to them<sup>241</sup> — the very different “characteristic” of being legitimately guilty of criminal conduct is properly viewed as inherently undesirable. It is a *valid* basis for “discrimination.”

#### **D. Neutral Interpretation**

Viewing the Supreme Court's noncapital sentencing cases over the past 25 years through the lens of rationality review is also advantageous from the standpoint of institutional legitimacy. The Court has sometimes spoken of “deferring” to legislatures in the context of Eighth Amendment noncapital review. Such rhetoric, however, is troubling from a standpoint of textualism and of neutral jurisprudence. *Ceteris paribus*, and given identical data, an interpretation according to which the Court is fairly applying

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<sup>240</sup> Cf. *Carolene Products*, 304 U.S. at 152-53 n.4 (protected minorities must be “discrete and insular”).

<sup>241</sup> See William Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 CONTEMP. LEGAL ISSUES 1, 20 (1996) (opining that “the universe of criminal suspects” is a prime example of a “grou[p] that find[s] it hard or impossible to protect [itself] through the political process”).

a principle supplied by the Constitution is surely to be preferred to one in which it is applying a principle only grudgingly or waveringly. One may say that legislatures have a general authority to define crimes (as they do to set penalties for them) but when those definitions impinge on the Constitution's textual guarantee of freedom of speech, for example, one rarely hears talk of courts "deferring" to the legislature in gauging whether a First Amendment violation has occurred.<sup>242</sup> Likewise, in First Amendment analysis it makes no difference whether the challenged state action was brought about by a single government decisionmaker (such as a judge or jury imposing damages in a libel case against a public figure)<sup>243</sup> or is the considered judgment of the whole legislature (such as a statute prohibiting sedition)<sup>244</sup>; yet, as previously discussed, this does seem to matter in the Eighth Amendment prison cases. If the evil at which the cruel and unusual punishments clause is targeted is simply "disproportionate" punishments, it is not obvious why courts should "defer" to the legislature at all in deciding whether that constitutional guarantee has been infringed. Yet the Court's Eighth Amendment opinions *do* suggest that judge-made discretionary sentences deserve tougher scrutiny than sentences mandated by a legislature.<sup>245</sup> Courts that pick and choose in such a fashion make themselves vulnerable to troubling criticism.<sup>246</sup>

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<sup>242</sup> See, e.g., *Konigsberg v. State Bar of California*, 366 U.S. 36, 49-50 (1961) (adopting a balancing approach to First Amendment adjudication, but conceding that the First Amendment's guarantee is "absolute" in at least "the undoubted sense that where the constitutional protection exists it must prevail").

<sup>243</sup> See *New York Times v. Sullivan*, 376 U.S. 254 (1964).

<sup>244</sup> See *Herndon v. Lowry*, 301 U.S. 242 (1937) (overturning conviction for attempting to incite insurrection).

<sup>245</sup> See, e.g., *Harmelin*, 501 U.S. at 1006-07 (plurality opinion).

<sup>246</sup> The best known contemporary example is Judge Alex Kozinski's dissent from the denial of rehearing en banc in the Second Amendment case of *Silveira v. Lockyer*, 328 F.3d 567, 568 (9th Cir. 2003):

The fact that the Court defers in these various ways in noncapital Eighth Amendment cases should lead us to conclude that the cruel and unusual punishments clause is targeting a different evil than mere harshness per se. Instead, as has been argued in this Article, it should be understood as a quasi-procedural guarantee against abuse of the authority to fix punishments. *Usurpatious* or *arbitrary* or *spiteful* prison sentences are cruel and unusual.

### **E. Federalism**

The Supreme Court has described the definition and enforcement of criminal law as a field "where States historically have been sovereign,"<sup>247</sup> and the fixing of punishments for crimes as "peculiarly a question of legislative policy."<sup>248</sup> Modes of judicial review of sentencing that preserve the states' independence in this area are not only consistent with tradition, but are likely to produce normatively beneficial results. It has even been argued that federalism is "likely to be *more* important to the liberty and well being of the American people than any other structural feature of our Constitution, including the separation of powers, the Bill of Rights, and judicial review."<sup>249</sup>

Allowing the states latitude in choosing among different penological theories creates opportunities for each state to learn from the experiences of others. The tough

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It is wrong to use some constitutional provisions as springboards for major social change while treating others like senile relatives to be cooped up in a nursing home until they quit annoying us. Expanding some to gargantuan proportions while discarding others like a crumpled gum wrapper is not faithfully applying the Constitution; it's using our power as federal judges to constitutionalize our personal preferences.

<sup>247</sup> United States v. Lopez, 514 U.S. 549, 564 (1995).

<sup>248</sup> Gore v. United States, 357 U.S. 386, 393 (1958).

<sup>249</sup> Steven G. Calabresi, "A Government of Limited and Enumerated Powers": In Defense of United States v. Lopez, 94 MICH. L. REV. 752, 756 (1995). Calabresi's article contains one of the classic statements of the "normative case for federalism" to be found in the legal academic literature. See *id.* at 756-790.

California "Three Strikes" statute in *Ewing v. California* provided a significant example of such experimentation. As Justice O'Connor's plurality opinion noted, evidence suggested that the California statute had produced a decrease in recidivism and an exodus of felons from the state.<sup>250</sup> The plurality in *Harmelin* similarly viewed Michigan's adoption of a mandatory life sentence for possession of commercial quantities of cocaine as a rational experiment designed to combat serious social maladies caused by drugs.<sup>251</sup>

Standard pro-federalism arguments based on accountability and responsiveness also support the rule of *Ewing* and *Harmelin*. An approach that allows states to display a good deal of moral diversity in fixing crimes and punishments is more likely to yield a penal code that accords with local conditions and local moral beliefs.<sup>252</sup> Justice Scalia put the point concretely in *Harmelin* by contending that "the members of the Michigan Legislature, and not we, know the situation on the streets of Detroit."<sup>253</sup>

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<sup>250</sup> *Ewing*, 538 U.S. at 27 (plurality opinion); see generally Ardaiz, *supra* note 179.

<sup>251</sup> *Harmelin*, 501 U.S. at 1008 ("Reasonable minds may differ about the efficacy of Michigan's sentencing scheme, and it is far from certain that Michigan's bold experiment will succeed."). Justice Kennedy also cited Justice Brandeis's famous dictum on the role of the states as laboratories:

Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

*New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting), cited in *Harmelin*, 501 U.S. at 1008 (plurality opinion).

<sup>252</sup> Elaborating this point, Professor Calabresi argues that federalism "helps ensure a more informed weighing of costs and benefits than often occurs on the national level where taxpayers often may be less cognizant of the social costs of particular legislation," and that "competition among jurisdictions creates incentives for each jurisdiction to provide bundles of goods that will maximize utility for a majority of the voters in that jurisdiction. Calabresi, *supra* note 249, at 777.

<sup>253</sup> *Harmelin*, 501 U.S. at 988 (opinion of Scalia, J.).

A rejection of *Ewing* and *Harmelin* would eliminate many of these potential benefits. The principal dissenting opinion in *Ewing*, by Justice Breyer,<sup>254</sup> contemplates significant intrusion by federal judges on the formulation of state penal codes. Justice Breyer estimated at one point in his opinion that Ewing's sentence was at least "2 to 3 times the length of sentences that other jurisdictions would impose in similar circumstances," and offered this as a basis for viewing the sentence as likely unconstitutional.<sup>255</sup> Yet Justice Breyer then acknowledged in an appendix to his opinion that at least *five states* authorized punishments equal to or greater than Ewing's in similar circumstances.<sup>256</sup> The prospect of the dissenters' Eighth Amendment regime is sobering. Under it, a state, indeed a sizable *group* of different states, apparently would not be permitted to vary more than two to three times from the choices of the rest of the country in fixing a punishment for a given offense. Adopting Justice Breyer's *Ewing* dissent would thus impose real costs to federalism; it would portend a considerable loss of flexibility and independence among the criminal justice systems of the states.<sup>257</sup>

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<sup>254</sup> Justices Stevens, Souter, and Ginsburg joined Justice Breyer's dissent.

<sup>255</sup> *Ewing*, 538 U.S. at 52 (Breyer, J., dissenting).

<sup>256</sup> *Id.* at 59-61 (appendix to dissenting opinion of Breyer, J.) (noting that, at a minimum, the laws of Michigan, Montana, Nevada, Oklahoma, and South Dakota would authorize a life sentence — technically, in Montana's case, a 100-year sentence — with a time before parole eligibility equal to or greater than Ewing's, in circumstances similar to Ewing's crime).

<sup>257</sup> *See Harmelin*, 501 U.S. at 989-90 (opinion of Scalia, J.) (citations omitted):

That a State is entitled to treat with stern disapproval an act that other States punish with the mildest of sanctions follows a fortiori from the undoubted fact that a State may criminalize an act that other States do not criminalize at all. Indeed, a State may criminalize an act that other States choose to reward -- punishing, for example, the killing of endangered wild animals for which other States are offering a bounty. What greater disproportion could there be than that? . . . Diversity not only in policy, but in the means of implementing policy, is the very *raison d'être* of our federal system. Though the different needs and concerns of other States may induce them to treat [Harmelin's crime of simple possession of 672 grams of cocaine as a relatively minor offense, . . . nothing in the Constitution requires Michigan to follow suit.

#### **IV. RECONCILING RATIONALITY REVIEW OF PRISON SENTENCING WITH CONSTITUTIONAL REVIEW OF OTHER TYPES OF SANCTIONS**

The Supreme Court's decisions in the broad area of constitutionality proportionality review have encompassed criminal and civil sanctions ranging from capital punishment to prison terms, prison conditions, fines, and punitive damages. These disparate cases do not allreflect a single overarching standard , and I do not claim that any amount of interpretive adjustment can make them allperfectly consistent. However, there are a number of important points of congruence among the cases. A stable body of doctrine can be articulated in which prison terms, and most other forms of state sanction, are reviewed for rationality, as argued in this Article.

##### **A. Conditions of Confinement**

The Supreme Court's Eighth Amendment law on the legality of prison conditions employs the same rationality standard applicable to terms of imprisonment. Conditions of confinement violate the Eighth Amendment if they "involve the unnecessary and wanton infliction of pain"<sup>258</sup> and are "totally without penological justification,"<sup>259</sup> virtually indistinguishable from the standard of *Harmelin* and *Ewing*.<sup>260</sup> Furthermore, the test used in the prison conditions cases has a subjective component like that found in the sentencing cases. Courts pay attention to the subjective motivations that produced a given condition as well as the sheer harshness of the condition. Prison conditions violate

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<sup>258</sup> *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981).

<sup>259</sup> *Id.*; *Estelle v. Gamble*, 429 U.S. 97, 103 (1976).

<sup>260</sup> *Ewing*, 538 U.S. at 29 (plurality opinion) (upholding *Ewing*'s sentence because it furthered a "legitimate penological goal"); *Harmelin*, 501 U.S. at 999, 1004 (plurality opinion).

the Eighth Amendment only if the decision makers have a "culpable state of mind" suggesting "deliberate indifference."<sup>261</sup>

This is an important source of consistency in the case law. The prison sentencing cases plus the prison conditions cases means that a single, broad constitutional standard of rationality governs all application of state sanctions against those duly convicted of an offense punishable by imprisonment. Neither the length of sentence nor the conditions in which the sentence is served may be the result of an arbitrary, capricious, or vindictive exercise of discretion by a state decisionmaker.

## **B. Punitive Damages**

To many the most objectionable source of inconsistency in the Court's jurisprudence arises from its recent decisions striking down high punitive damages awards as violative of the Due Process Clause, even as Eighth Amendment decisions like *Ewing* and *Harmelin* allow tough prison sentences to stand. In the past decade, in the *State Farm*<sup>262</sup> and *Gore*<sup>263</sup> cases, a majority of the Supreme Court has begun to invalidate large punitive damages awards in state court on the ground that they are "grossly excessive or arbitrary punishments on a tortfeasor" and thereby violate the due process clause.<sup>264</sup>

*Gore* invalidated an Alabama jury's award of \$2 million in punitive damages and \$4,000 in actual damages against BMW for a nationwide practice of selling new cars

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<sup>261</sup> *Wilson v. Seiter*, 501 U.S. 294, 297, 303 (1991).

<sup>262</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

<sup>263</sup> *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

<sup>264</sup> *State Farm*, 538 U.S. at 416; *Gore*, 517 U.S. at 562.

without disclosing that they had been repainted.<sup>265</sup> More recently, *State Farm* invalidated a Utah jury's award of \$145 million in punitive damages and \$1 million in actual damages against State Farm for a variety of torts premised on the insurance company's bad faith failure to settle a wrongful death and tort action against the Campbells within the policy limits.<sup>266</sup> The plaintiffs presented evidence of a variety of actions by State Farm in the Campbells' case, and across the nation, that suggested a strong degree of bad faith by the insurer.<sup>267</sup> However, the Supreme Court held the punitive damages award unconstitutional, and suggested sweeping substantive limits on the magnitude of punitive damage awards. The majority "decline[d] . . . to impose a bright-line ratio," but stated in a remarkable passage that "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."<sup>268</sup>

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<sup>265</sup> *Id.* at 562-64.

<sup>266</sup> *State Farm*, 538 U.S. at 412-16, 419 ("Under the principles outlined in . . . *Gore*, this case is neither close nor difficult.").

<sup>267</sup> The salient facts were disclosed in part in the majority's opinion, and more fully in Justice Ginsburg's dissenting opinion. The plaintiffs presented evidence that State Farm's own investigation concluded that Mr. Campbell was at fault for the lethal car crash that led to the tort claims against him. The company's claims adjuster originally reported that the cost to settle the case would likely be high, but his superiors ordered him to alter that portion of his report. *Id.* at 433 (Ginsburg, J., dissenting). A manager also instructed the claims adjuster to insert false material in his report impugning the character of the accident victim. *Id.* at 432. The company contested liability at trial and refused offers to settle for the policy limits of \$50,000. *Id.* at 413 (majority opinion). However, the jury found against Campbell and entered a verdict for \$185, 849. State Farm refused to fund an appeal and at first refused to cover the excess liability. Its counsel suggested that Campbell "put for sale signs on [his] property to get things moving." *Id.* There was evidence that State Farm had implemented a company-wide plan in Utah, and across the nation, to deny benefits properly owed to customers in order to meet internal profit targets. *Id.* at 431-32 (Ginsburg, J., dissenting). Employees were instructed to target "the weakest of the herd" in choosing which customers to deny benefits. *Id.* at 433. Finally, evidence suggested that the company destroyed incriminating documents that would have demonstrated its policies of denying coverage in bad faith. *Id.* at 434-35.

<sup>268</sup> *Id.* at 425.

Indeed, the Court opined that the Campbells' case "likely would justify a punitive damages award at or near the amount of compensatory damages."<sup>269</sup>

Such sweeping language is hard to reconcile with the Court's careful approach to due process-style review of prison terms in the *Ewing-Harmelin* sequence of cases. Academic condemnation of the Court's twin handling of the cases has been practically universal.<sup>270</sup> Something, the commentators agree, has to give.

The commentators' concerns are reasonable, yet the conflict between the two strands of case law is not as sharp as is generally assumed. A closer appraisal of *State Farm* and *Gore* discloses that their holdings (though not all of their language) can in fact be reconciled with the holdings in the prison sentencing cases, and the general standards of due process review.

In both *State Farm* and *Gore*, the victorious plaintiffs offered evidence of the defendant's alleged wrongdoing in *other* states as a basis for a large award of punitive damages in the forum state.<sup>271</sup> Yet neither set of plaintiffs made any showing that the conduct introduced into evidence was unlawful in the states where it had occurred. The

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<sup>269</sup> *Id.* at 429.

<sup>270</sup> See, e.g., Chemerinsky, *The Constitution and Punishment*, *supra* note 18, at 1062-63; Brennan, Note, *supra* note 13, at 552 (calling on Supreme Court to "assert a more active role" in reviewing prison sentences); Van Cleave, *supra* note 13, at 219-220 ("The Supreme Court . . . continue[s] to give teeth to proportionality review of . . . monetary punishments. . . . Yet, ironically, the Court has not shown the same concern about excessiveness and disproportionality when the punishment is imprisonment, a deprivation of liberty. . . . [T]he Court should give terms of imprisonment at least the same level of scrutiny used to evaluate punitive damages awards and forfeitures for proportionality."); Gershowitz, *supra* note 13, (criticizing the Supreme Court's respective approaches to prison sentencing and punitive damages as not only inconsistent but "backwards").

<sup>271</sup> *State Farm*, 538 U.S. at 414-15 (noting that trial court had denied motion *in limine* to exclude evidence of out of state acts); *id.* at 420 ("This case . . . was used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country."); *Gore*, 517 U.S. at 571-74. "Alabama does not have the power . . . to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents." *Id.* at 572-73.

Supreme Court plausibly viewed this as an infringement of constitutional prohibitions against extraterritorial application of a state's laws.<sup>272</sup> It also suggested that the use of the out-of-state evidence and argument violated principles of fair notice to defendants.<sup>273</sup> (In contrast to the ongoing controversy over "substantive" due process, the procedural requirement of fair *notice* is one of the least controversial aspects of review under the due process clause.)

Two factors tend to justify the judicial interventions in *State Farm* and *Gore*. Punitive damages awards are typically imposed by jurors who must select a number from within a wide, if not unbounded, discretionary range. In this respect, they present a greater danger of arbitrary behavior than do mandatory penalties: they resemble the *Solem* paradigm rather than the *Harmelin* paradigm. In addition, *State Farm* and *Gore* are cases about extraterritoriality as well as excessiveness. than inflexible substantive limits on the magnitude of punitive damages. One may test this proposition by imagining a case involving the same outrageous misconduct by the defendant as *State Farm*, but where, contrary to the actual facts, the plaintiff's argument and evidence were strictly limited to acts of misconduct within the state rendering the punitive damages judgment, thus eliminating or greatly reducing the extraterritoriality and notice concerns that informed the Supreme Court's holding. This reimagined version of *State Farm* would run

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<sup>272</sup> *State Farm* invoked authority stating a general constitutional principle against extraterritoriality, see 538 U.S. at 420-22, citing, *inter alia*, *New York Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) ("It would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State."). *Gore* drew more specifically upon cases decided under the so-called Dormant Commerce Clause. See 517 U.S. at 571-72 ("[O]ne State's power to impose burdens on the interstate market . . . is not only subordinate to the federal power over interstate commerce . . . but is also constrained by the need to respect the interests of other States"), citing, *inter alia*, *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982).

<sup>273</sup> *State Farm*, 538 U.S. at 417 ("[E]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."), quoting *Gore*, 517 U.S. at 574 (Breyer, J., concurring).

roughly parallel to *Harmelin*: i.e., a concededly serious wrongful act that the state punishes with a severe sanction, a life sentence without parole in *Harmelin*, a \$145 million punitive award in *State Farm*. The parallel still would not be perfect, because the penalty in *State Farm* would still be the result of a broad discretionary judgment by the jury and trial judge (similar to *Solem*), which should properly receive more due process scrutiny than a general legislative judgment like the mandatory sentence in *Harmelin*. Nevertheless, in the reimagined *State Farm*, the sanction imposed by the jury would reflect a rational moral judgment, furthering the legitimate interests of deterring and punishing *State Farm*'s conduct in Utah, and it would be difficult to call a \$145 million award arbitrary or capricious in light of the facts. In such a case, the "single digit" guideline suggested by the majority in *State Farm* should not control.<sup>274</sup> It should give way to the more flexible requirement of rationality in *Ewing* and *Harmelin*, and the jury's judgment should stand.

### C. Fines

Fines imposed as criminal punishment present issues similar to punitive damages. However, proportionality analysis of fines involves a different textual provision of the Constitution than either punitive damages (which are reviewed under the due process clause) or other criminal sanctions (which are reviewed under the prohibition of "cruel and unusual punishments," in conformity with Fourteenth Amendment due process

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<sup>274</sup> Judge Posner has taken a related view of *State Farm* in *Matthias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 677-78 (7th Cir. 2003), which upheld, against a due process challenge, a jury's award of \$186,000 punitive damages and \$5,000 compensatory damages against a hotel chain that "outrageous[ly]" tricked guests into renting rooms that it knew were infested with painful bedbugs. *Id.* at 678. Judge Posner reasoned that, in light of the low level of compensable harm, the punitive damages award "serve[d] the . . . purpose of limiting the defendant's ability to profit from its fraud by escaping detection and (private) prosecution." *Id.* *State Farm* and its predecessors, in Judge Posner's view, require judges to police "a range, not a point" in evaluating awards of punitive damages. *Id.* at 678.

requirements). By the terms of the Eighth Amendment, fines need not be "cruel and unusual" to be unconstitutional; they need only be "excessive."<sup>275</sup> It is reasonable, in the face of such language, for courts to review fines for substantive disproportionality, while reviewing other common punishments only for arbitrariness, as in *Ewing*, *Harmelin*, and the prison conditions cases.<sup>276</sup>

The Supreme Court's principal case on the Excessive Fines Clause coheres with such an analysis. *United States v. Bajakajian*<sup>277</sup> invalidated the application of a federal statute that would have required the defendant to forfeit \$357,144 as a penalty for attempting to move it out of the country without obeying federal reporting requirements.<sup>278</sup> A five-Justice majority, in an opinion by Justice Thomas, held that the forfeiture was "grossly disproportionate" to Bajakajian's offense and violated the Eighth Amendment.<sup>279</sup> In gauging the appropriateness of the fine, the *Bajakajian* majority used the full-blooded proportionality analysis originally deployed in the prison sentencing context in *Solem v. Helm*, including *Solem*'s use of mandatory inter- and intrajurisdictional comparisons.<sup>280</sup>

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<sup>275</sup> U.S. CONST. amend. VIII. ("Excessive bail shall not be required, nor excessive fines imposed . . .").

<sup>276</sup> *Cf. Harmelin*, 501 U.S. at 989-90 (opinion of Scalia, J.) (arguing that it was reasonable of the Framers to prohibit excessiveness in bail and fines, which are "sources of revenue" to the State, but not in other modes of punishment); *See Claus*, *supra* note 147, at 120 (noting the apparent significance of the distinction between "excessive" and "cruel and unusual").

<sup>277</sup> 524 U.S. 321 (1998).

<sup>278</sup> *Id.* at 324-26; *see* 18 U.S.C. § 982(a)(1) (1994); 31 U.S.C. § 5316(a)(1)(A) (1994).

<sup>279</sup> *See id.* at 336-37.

<sup>280</sup> *Id.* at 339. The majority gave weight to the fact that under the federal sentencing guidelines, the maximum conventional fine for Bajakajian's offense was a mere \$5,000.

As Pamela Karlan has observed, the analysis in *Bajakajian* also followed *Solem* by focusing its analysis on the factor of retribution: the inherent wrongness of the offense, compared to the magnitude of the fine. The Court did not engage in the looser textured, *Ewing-Harmelin* brand of rationality review, under which many different penal interests may be considered simultaneously, and a combination of deterrence and incapacitation can justify a sanction that would not be justifiable in light of strictly retributive considerations.<sup>281</sup>

*Bajakajian's* use of *Solem's* disproportionality standard admittedly creates a tangle in the case law. Why is the excessive fines inquiry to be governed by a standard that the Court had first formulated in the context of prison sentencing and then *rejected* (in *Harmelin*, seven years before *Bajakajian*) as overbroad? To resolve this tangle, there is no choice but textualism. The test put forth in *Solem* was a plausible version of what the Eighth Amendment *would* require if it prohibited "excessive" prison sentences, which it does not.<sup>282</sup> It was therefore reasonable for the *Bajakajian* Court to export *Solem's* excessiveness inquiry into a context where the constitution really does prohibit "excessiveness" — fines — even though the Court was also correct to scale back *Solem* in its original context of prison sentences, where review is only authorized for arbitrariness.

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<sup>281</sup> See *id.* at 339; Karlan, *supra* note 175, at 900-01 ("Ironically, *Bajakajian* seems to revive, for cases where the criminal punishment is a fine, the very sort of inquiry that the *Harmelin* and *Ewing* Courts rejected with respect to cases where the . . . punishment is a prison sentence. . . . The Court seems to analyze the gravity of *Bajakajian's* offense solely from a retributivist perspective.").

<sup>282</sup> *Pace*, again, recent Court dicta such as *Atkins*, 536 U.S. at 311.

## D. Capital Punishment

The candid interpreter must acknowledge the existence of at least one irreducible division in the proportionality case law: the one separating capital punishment from all other sanctions. Death penalty cases have imposed a host of demanding requirements intended to ensure proportionality between the punishment and the crime.<sup>283</sup> Under current Eighth Amendment law, the death penalty is constitutionally prohibited for non-aggravated murder,<sup>284</sup> felony murder absent an intent to kill,<sup>285</sup> and rape<sup>286</sup>; it cannot be imposed on the mildly retarded<sup>287</sup> or those under age 18 at the time of their offense<sup>288</sup>; it cannot be imposed as a mandatory penalty<sup>289</sup>; and sentencing juries or judges must be empowered to take all relevant mitigating evidence into account.<sup>290</sup> These requirements go far beyond the limited scrutiny employed in the prison sentencing cases, and indeed beyond the punitive damages and fines cases.<sup>291</sup>

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<sup>283</sup> See generally *Atkins*, 536 U.S. at 352-53 (Scalia, J., dissenting) (summarizing previous holdings).

<sup>284</sup> *Godfrey v. Georgia*, 446 U.S. 420, 433 (1980).

<sup>285</sup> *Enmund v. Florida*, 458 U.S. 782, 801 (1982).

<sup>286</sup> *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

<sup>287</sup> *Atkins*, 536 U.S. at 321.

<sup>288</sup> *Roper v. Simmons*, 125 S.Ct. 1183, 1198 (2005).

<sup>289</sup> *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

<sup>290</sup> *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

<sup>291</sup> See *Harmelin*, 501 U.S. at 995 (opinion of Scalia, J.) ("Our cases creating and clarifying the 'individualized capital sentencing doctrine' have repeatedly suggested that there is no comparable requirement outside the capital context, because of the qualitative difference between death and all other penalties."); *id.* at 997 (plurality opinion) (the "most extensive application" of the proportionality principle "has been in death penalty cases"); Dressler, *supra* note 111, at § 6.05[C], p. 49 (contrasting Court's limited "oversight of non-capital sentences" with death penalty cases).

To be sure, the kind of rationality review exemplified by the *Ewing-Harmelin* line of cases (what might be called, following the argument of this Article, the "due process" aspect of the Eighth Amendment) has also sometimes influenced the Justices. It was precisely the impression of overwhelming *arbitrariness* in the imposition of death that appears to have motivated Justice Douglas to concur in the judgment in *Furman v. Georgia*, invalidating existing capital punishment statutes:

There is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature. . . .

[W]e deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned.<sup>292</sup>

Nevertheless, the Court's death penalty jurisprudence goes far beyond arbitrariness review. It imposes squarely substantive judgments of proportionality in cases subject to reasonable moral disagreement.<sup>293</sup>

Explanation of the Court's "death is different"<sup>294</sup> jurisprudence must likewise be normative and substantive. True, the framers of the Cruel and Unusual Punishments

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<sup>292</sup> 408 U.S. 238, 242, 253 (Douglas, J., concurring); see Claus, *supra* note 147, at 121 (examining Justice Douglas's interpretation).

<sup>293</sup> In *Roper*, the Court held that the Eighth Amendment categorically prohibited the sentence of death in all cases involving offenders younger than 18 when their crimes were committed. 125 S.Ct. at 1200; see *id.* at 1191-92 (asserting that "in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.") (quoting *Atkins*, 536 U.S. at 312). The facts of *Roper* itself indicated just how contestable that judgment was. The petitioner, Simmons, was convicted for a brutal and premeditated murder he committed at age 17. He talked before the murder about his desire to kill someone, and formulated a plan with two confederates. He assured his friends that they could "get away with" the crime because they were minors. *Id.* at 1187. Simmons broke into the victim's house, bound her with duct tape, and walked her to a bridge, where they threw her into a river to drown. *Id.* at 1188. Simmons later bragged that he had killed the victim "because the bitch seen my face." *Id.*

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, condemned the *Roper* majority's "usurpation of the role of moral arbiter" and its "pronounce[ment] that the Eighth Amendment is an ever-changing reflection of 'the evolving standards of decency' of our society." *Id.* at 1221-22 (Scalia, J., dissenting).

Clause and its English predecessors put emphasis on abuses of "cruel and barbarous" bodily methods of punishment, from the trial of Titus Oates forward.<sup>295</sup> This gives a certain originalist pedigree to the notion that state-imposed death deserves more scrutiny than more commonplace and less spectacular sanctions such as imprisonment. The qualitative difference between death and other punishments is mirrored in the qualitative difference between Eighth Amendment (and due process) review of death and review of other sanctions. At the same time, the streams of precedent in capital and noncapital proportionality review have been so divergent for so long that they no longer exert much gravitational pull on one another. To bring a coherent and justifiable order to the practice of constitutional review of *noncapital* sanctions may be ambition enough.

## V. CONCLUSION

A durable idea about the Fourteenth Amendment, and particularly its due process clause, holds that it "add[s] greatly to the dignity and glory of . . . citizenship,"<sup>296</sup> by acting as a "bulwar[k] against arbitrary legislation."<sup>297</sup> As interpreted by *Carolene Products* and its progeny, the due process clause confers a The Eighth Amendment, in its application to individual prison sentences, is best understood as extending that same principle to the magnitude of individual terms of imprisonment. This conception is normatively defensible on its own terms, and it sheds light on the constitutional review of

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<sup>294</sup> See Note, *The Rhetoric of Difference and the Legitimacy of Capital Punishment*, 114 HARV. L. REV. 1599, 1599 (2001) (tentatively identifying the origin of this phrase with a remark by Professor Anthony Amsterdam in oral argument in *Gregg v. Georgia*, 428 U.S. 153 (1976)).

<sup>295</sup> See *supra* text accompanying notes 73 to 78, 139 to 160, describing the history of the Eighth Amendment and English Bill of Rights.

<sup>296</sup> *Plessy v. Ferguson*, 163 U.S. 537, 555 (Harlan, J., dissenting).

<sup>297</sup> *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting).

other noncapital sanctions — fines, punitive damages, and conditions of imprisonment. It suggests a general principle, implemented through the Eighth and Fourteenth Amendments, prohibiting the arbitrary and capricious application of state force to the individual.