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

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PURPOSELESS RESTRAINTS: FOURTEENTH AMENDMENT RATIONALITY SCRUTINY AND THE CONSTITUTIONAL REVIEW OF PRISON SENTENCES

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"It is a rational continuum which . . . includes a freedom from all substantial arbitrary impositions and purposeless restraints"¹

"[W]e have taken special care of you"²

INTRODUCTION

Even by the standards of a contentious age, the Supreme Court has had a difficult time coherently applying the Cruel and Unusual Punishments Clause of the Eighth Amendment³ to sentences of imprisonment. Ever since the *Lochner*-era Court first determined that the Eighth Amendment limited the form and magnitude of non-capital punishments,⁴ a majority of the Court has consistently asserted at least a residual power of judicial review in this area.

The standard of judicial review, however, has fluctuated.⁵ By 1982, the Court had adopted a standard so deferential to state legislatures that it seemed to permit virtually any sentence to stand if the triggering crime was "classifiable as [a] felon[y]."⁶ Less than two years later, the Court boldly

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1. *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

2. Second Trial of Titus Oates, 10 How. St. Tr. 1227, 1316 (K.B. 1685) [hereinafter *Titus Oates*] (remark of Justice Withins of King's Bench in passing sentence on Oates).

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

4. *See Weems v. United States*, 217 U.S. 349, 349 (1910).

5. *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. 957, 998 (1991) (Kennedy, concurring in part and concurring in the judgment) (acknowledging that the Court's "recent pronouncement on the subject in *Solem v. Helm*, 463 U.S. 277 (1983)] . . . appeared to apply a different analysis than" other noncapital Eighth Amendment cases).

6. *Hutto v. Davis*, 454 U.S. 370, 373 (1982) (per curiam) (quoting *Rummel v. Estelle*, 445 U.S. 263, 274 (1980)).

proclaimed that prison sentences “must be proportionate to the crime for which the defendant has been convicted” and claimed the power to strike down “significantly disproportionate” sentences.⁷ Today, however, the pendulum has swung back to a degree: the controlling plurality opinions in *Harmelin v. Michigan*⁸ and *Ewing v. California*⁹ conclude that “[t]he Eighth Amendment . . . contains a ‘narrow proportionality principle’”¹⁰ that only requires courts to strike down “extreme” prison sentences that are “‘grossly disproportionate’ to the crime.”¹¹

If the opinions in this area are chaotic, the Court’s holdings have been more coherent. They reflect a restrained approach to noncapital Eighth Amendment review. The Court has repeatedly upheld mandatory life sentences – including those without parole – that were triggered by crimes such as theft by a recidivist and the first-time possession of commercial quantities of cocaine.¹² The exception to the sequence of tough holdings is *Solem v. Helm*,¹³ in which the Court struck down a discretionary sentence of life without parole imposed on a felony recidivist for obtaining \$100 by false pretenses.¹⁴

Neither the legal left nor the legal right is satisfied with the current state of Eighth Amendment judicial review. The Court’s willingness to affirm stringent prison sentences has produced dissatisfaction among academic commentators,¹⁵ lower court judges,¹⁶ dissenting Supreme Court Justices,¹⁷ and

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

8. 501 U.S. 957 (1991) (plurality opinion).

9. 538 U.S. 11 (2003) (plurality opinion).

10. *Id.* at 20 (quoting *Harmelin*, 501 U.S. at 996 (Kennedy, J., concurring in part and concurring in the judgment)).

11. *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment) (citing *Solem v. Helm*, 463 U.S. 277, 288, 303 (1983)).

12. *See infra* Part II B, D.

13. 463 U.S. 277 (1983).

14. *Id.* at 281, 303.

15. *See, e.g.,* Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court’s Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107, 168 (1995) (“[T]he Court should adopt an approach of ‘limiting retribution’ . . . [so] that no sentence can be grossly disproportional to the crime which it seeks to punish.”); Rachel A. Van Cleave, “Death is Different,” *Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages – Shifting Constitutional Paradigms for Assessing Proportionality*, 12 S. CAL. INTERDISC. L.J. 217, 219-20 (2003) (noting that Supreme Court “give[s] teeth” to “proportionality review” of monetary deprivations in punitive damages cases but “ironically . . . has not shown the same concern about excessiveness and disproportionality when the punishment is imprisonment”); 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 the Supreme Court to “assert a more active role” in reviewing prison sentences); Adam M. Gershowitz, Note, *The Supreme Court’s Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV.

even some Justices concurring in the Court's holdings.¹⁸ Moreover, the Court's decisions arguably threaten to conflict with a norm of constitutional judging: if a general principle forbidding *disproportionate* punishment is important enough to be embedded in the Constitution – and the Court has said that it is¹⁹ – then why apply that principle “narrowly” in cases involving prison sentences? Such a path appears political, not judicial.²⁰

1249, 1279, 1302 (2000) (positing that “virtually no appellate protection against disproportionate criminal punishments exists” under current law, and urging the Supreme Court to “reconsider its decisions”); Kelly A. Patch, Note, *Harmelin v. Michigan: Is Proportionate Sentencing Merely Legislative Grace?*, 1992 WIS. L. REV. 1697, 1722 (“The Court’s decision in *Harmelin* offends the evolving standards of decency . . . and essentially abrogates the proportionality principle.”); Erwin Chemerinsky, *Is Any Sentence Cruel and Unusual Punishment?*, TRIAL, May 2003 at 78, 78 (critically analyzing *Ewing* and *Andrade*); 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, Mar. 6, 2003, at A1 (“The fact that these sentences don’t violate the [Constitution] makes it harder to imagine any case in which the court [sic] is going to find a sentence grossly disproportionate.” (alteration in original) (quoting Professor Erwin Chemerinsky)).

16. See, e.g., *Rico v. Terhune*, 63 F. App’x 394, 394 (9th Cir. 2003) (Reinhardt, J., specially concurring) (rejecting Eighth Amendment habeas challenge to 25 year-to-life recidivist sentence triggered by petty theft “under compulsion of the Supreme Court decision in *Andrade*” but acknowledging that “the sentence is both unconscionable and unconstitutional”); *id.* (Pregerson, J., dissenting in part) (“In good conscience, I can’t vote to go along with the sentence imposed in this case.”).

17. 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.”).

18. See *Ewing v. California*, 538 U.S. 11, 31-32 (2003) (Scalia, J., concurring) (concluding that the Court’s plurality opinion in favor of a “narrow proportionality principle” did “not convincingly establish that 25 years-to-life is a ‘proportionate’ punishment for stealing three golf clubs” but voting to uphold the challenged sentence anyway on the ground that Eighth Amendment contains no proportionality guarantee); *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (Powell, J., concurring) (“I view the sentence as unjust and disproportionate to the offense. Nevertheless, . . . I reluctantly conclude that the Court’s decision in *Rummel v. Estelle*, 445 U.S. 263 (1980), is controlling on the facts before us.”).

19. See *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (“The Eighth Amendment succinctly prohibits ‘[e]xcessive’ sanctions.” (alteration in original) (quoting U.S. CONST. amend. VIII)). But see U.S. CONST. amend. VIII (prohibiting “excessive” fines and bail but only prohibiting “cruel and unusual” punishments).

20. Cf. Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1062 (2004) (“A review of the cases concerning th[e] differ[ent] types of punishments reveals profound inconsistencies in the Supreme Court’s approach.”); Mary K. Woodburn, Comment, *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]

On the other hand, conservative jurists such as Justices Scalia and Thomas argue that even a narrow judicial review of noncapital sentences is improper, and they urge the explicit overruling of the contrary holding in *Solem*. In their view, the original meaning of “cruel and unusual punishment” in the Eighth Amendment encompasses only torturous *methods* of punishment, not arguably overlong prison sentences.²¹

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*, i.e., the process of identifying constitutional limits on the magnitude of sanctions that may be imposed for a given wrongful act. The death penalty is the most prominent example. In the recent cases of *Atkins v. Virginia*²² and *Roper v. Simmons*,²³ the same Supreme Court that has applied the Eighth Amendment cautiously to noncapital prison sentences, has issued freewheeling opinions holding that the death penalty is categorically unconstitutional for first-degree murders committed by mildly retarded offenders²⁴ or offenders under age 18.²⁵ Furthermore, the Court has imposed significant restrictions on the magnitude of punitive damage awards in civil litigation, grounding these limits not in the Eighth Amendment,²⁶ but in the Due Process Clause of the Fourteenth Amendment.²⁷

The Court’s “proportionality” decisions exert friction upon one another along multiple axes. The Court’s limited review of prison sentences clearly differs from its aggressive and broad review of death sentences. Moreover, the apparent discrepancies in the Court’s treatment of the various forms of noncapital sanctions are unsettling. It is not obvious that the fining of corporations in the form of punitive damages should be reviewed with

Court from undertaking it.”); Tony Mauro, *Supreme Court OKs Three Strikes Statutes, Megan’s Laws*, AM. LAW., 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)).

21. See *Ewing*, 538 U.S. at 32 (Thomas, J., concurring) (“In my view, the Cruel and Unusual Punishments Clause of the Eighth Amendment contains no proportionality principle.”); *Harmelin*, 501 U.S. at 961-985 (Scalia, J., delivering the judgment) (discussing the historical meaning of the Cruel and Unusual Punishments Clause).

22. 536 U.S. 304 (2002).

23. 125 S.Ct. 1183 (2005).

24. *Atkins*, 536 U.S. at 321.

25. *Simmons*, 125 S. Ct. at 1200.

26. See *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989) (holding that the “Excessive Fines Clause [of the Eighth Amendment] does not apply to awards of punitive damages in cases between private parties”).

27. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 412, 416, 427, 429 (2003) (holding that \$145 million in punitive damages verdict against insurer violated Fourteenth Amendment Due Process Clause because compensatory damages totaled only \$1 million and verdict relied upon evidence of out-of-state conduct).

skepticism while the imprisoning of individuals, a more severe deprivation of liberty, is reviewed deferentially. A normative question follows: if one concludes that the Court's different proportionality decisions are incompatible, which doctrine ought to yield?

The principal task of this Article is to present a unified analysis and defense of the Court's prison sentencing jurisprudence culminating in *Harmelin v. Michigan*²⁸ and *Ewing v. California*.²⁹ I argue that the Court's holdings are best understood as requiring courts to evaluate the magnitude of individual terms of imprisonment under a form of review similar to Fourteenth Amendment rationality scrutiny "with bite." The Court is really targeting *arbitrary and capricious* prison sentences, those that give rise to an inference of an irrational or biased decisionmaker, analogous to the kind of procedural defect that implicates the Fourteenth Amendment's limits on state action.

This Article's secondary task is to determine whether the prison sentencing cases are compatible with other areas of constitutional proportionality review. I conclude that the recent constitutional proportionality cases, except in the unique area of capital punishment, can largely coexist in peace. The apparent differences in the Court's treatment of various noncapital sanctions generally reflect real differences either in constitutional text or in the legal and factual circumstances presented.

In Part I of this Article, I briefly discuss the doctrinal framework of Fourteenth Amendment rationality scrutiny. Part II traces the development of the Supreme Court's noncapital Eighth Amendment jurisprudence in a series of superficially conflicting opinions that culminates in *Harmelin v. Michigan*³⁰ and *Ewing v. California*.³¹ I demonstrate that the standard adopted by the pluralities in *Harmelin* and *Ewing* parallels the Fourteenth Amendment framework discussed in Part I, and thus amounts to rationality review of sentencing (though a form of rationality review with bite). Part III presents normative arguments for conceiving noncapital Eighth Amendment review as rationality review with bite. Part IV discusses three notable contemporary cases that shed light on different aspects of the theory developed in Parts I through III. Finally, Part V examines the relationship between Eighth Amendment rationality review in the prison sentencing context and the Supreme Court's holdings in related contexts such as punitive damages, fines, and conditions of imprisonment.

I. THE STRUCTURE OF FOURTEENTH AMENDMENT RATIONALITY REVIEW

In applying the guarantees of the Fourteenth Amendment, the Supreme Court has developed the doctrine of rational basis scrutiny or rationality

28. 501 U.S. 957 (1991) (plurality opinion).

29. 538 U.S. 11 (2003) (plurality opinion).

30. 501 U.S. 957 (1991) (plurality opinion).

31. 538 U.S. 11 (2003) (plurality opinion).

review, the lowest and most general level of scrutiny applied to state action. Sometimes this test has been applied so deferentially that it has become merely verbal, a vacuous test satisfied by all state action. At other times it has been applied in a more bona fide fashion. Despite this divergence, I will argue, the Court's formulations of Fourteenth Amendment rationality review have a certain coherence; they express a recognizable judicial attitude. They mark out an area where substantive review of state action shades into procedural review.

An important part of my overall thesis is the claim that the Supreme Court's Eighth Amendment review of noncapital sentences takes place on the same terrain as Fourteenth Amendment rationality review, incorporating the same concepts. Therefore, in this Part, I briefly examine the structure of Fourteenth Amendment rationality review, in order to use it in later parts as a helpful model for understanding noncapital sentencing review under the Eighth Amendment.³²

A. Four Modes of Due Process Review

The Due Process Clause of the Fourteenth Amendment³³ has played at least four different roles throughout its 137-year history. First, it has been a source of bedrock procedural guarantees such as the reasonable doubt standard of proof³⁴ and the requirements of notice and an opportunity to be heard before depriving an individual of liberty or property.³⁵ 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.³⁶ Third, and most

32. Readers should be able to draw benefit from the comparison, and indeed to accept the views that I will present about noncapital review under the Eighth Amendment, regardless of their beliefs about whether the Fourteenth Amendment authorizes the sort of generalized rationality review that the Supreme Court has adopted.

33. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .").

34. See *Apprendi v. New Jersey*, 530 U.S. 466, 476-77(2000) (holding that the Fourteenth Amendment "proscription of any deprivation of liberty without 'due process of law' . . . entitle[s] a criminal defendant to a 'jury determination that [he] is guilty . . . beyond a reasonable doubt.'" (second alteration in original) (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995))); *In re Winship*, 397 U.S. 358, 364 (1970) (holding that due process in a criminal trial requires "proof beyond a reasonable doubt" of all elements of the charged offense).

35. See *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970) (stating that the Due Process Clause requires "timely and adequate notice" and "an effective opportunity to defend").

36. See, e.g., *Gideon v. Wainwright*, 372 U.S. 335, 342 (1963) (incorporating Sixth Amendment right to counsel); *Mapp v. Ohio*, 367 U.S. 643, 655 (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 against the states. Many scholars suggest that other constitutional provisions such

controversially, it has been viewed as a source of unenumerated “fundamental” rights that implicate close judicial scrutiny ranging from a right to freedom of contract³⁷ to a right to elective abortion.³⁸ It is the fourth role that sheds light on the Eighth Amendment prison sentencing cases: the Due Process Clause has also been taken to impose a general prohibition against government action that is arbitrary and capricious.³⁹ This prohibition is enforced through the use of judicial rationality review, which is simultaneously universal and limited. It requires only that legislative action “rest[] upon some rational basis within the knowledge and experience of the legislators” – not that it overcome the demanding burden imposed on laws that impinge a specifically recognized constitutional right.⁴⁰

The rational basis standard received its classic articulation in *United States v. Carolene Products Co.*⁴¹ Footnote four of the *Carolene Products* opinion famously suggested that laws infringing certain specific guarantees in the Bill of Rights, or interfering with political processes, 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.”⁴² But with the large remaining category of “other types of legislation,” the courts would merely ensure that statutes were not irrational:

[T]he existence of facts supporting the legislative judgment is to be presumed, for regulatory legislation . . . 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

as the Ninth Amendment, see RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 224-52 (2004), or the Fourteenth Amendment’s Privileges or Immunities Clause, see AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 181-214 (1998), would better serve in an incorporating role. My analysis in this Article takes no sides in this debate, but does assume that the Eighth Amendment is properly incorporated against the states. See *Robinson v. California*, 370 U.S. 660, 666-67 (1962).

37. See, e.g., *Lochner v. New York*, 198 U.S. 45, 53 (1905); *Allgeyer v. Louisiana*, 165 U.S. 578, 591 (1897).

38. See, e.g., *Roe v. Wade*, 410 U.S. 113, 164 (1973).

39. *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998) (stating that “the core . . . concept” of due process is “protection against arbitrary action”); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) (“The touchstone of due process is protection . . . against arbitrary action of government.”); *Nebbia v. New York*, 291 U.S. 502, 525 (1934) (due process “demands only that the law shall not be . . . arbitrary or capricious”); *Hurtado v. California*, 110 U.S. 516, 527 (1884) (stating that due process protects against “the arbitrary exercise” of government power); see also *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 177 (1980) (stating that legislation is invalid under Fourteenth Amendment equal protection if it “achieve[s] its purpose in a patently arbitrary or irrational way”).

40. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

41. 304 U.S. 144 (1938).

42. *Id.* at 152 n.4.

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.⁴³

Such, regulatory statutes would be upheld if the legislature's reasoning was "at least debatable."⁴⁴

The New Deal Court's adoption of a modest form of Fourteenth Amendment review under the rational basis standard raised the prospect that courts might simply abdicate the review of legislation that did not present a special basis for heightened scrutiny. During the Cold War era, some Supreme Court opinions came close to this purely vestigial conception of rationality review.⁴⁵ The Court, however, has more recently returned to and even

43. *Id.* at 152-53 (citations omitted).

44. *Id.* at 154.

45. *See, e.g.,* *Ferguson v. Skrupa*, 372 U.S. 726, 731-32 (1963); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955). In *Skrupa*, the Court dismissively rejected a due process challenge to a Kansas statute that limited the practice of debt adjusting to licensed attorneys. *Skrupa*, 372 U.S. at 726-27. 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 729 (quoting *Tyson & Brother v. Banton*, 273 U.S. 418, 445-46 (1927)). Black further 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. But Justice Harlan, concurring separately, expressed allegiance to the traditional conception of rationality review, which requires that the "state measure bears a rational relation to a constitutionally permissible objective." *Id.* at 733 (Harlan, J., concurring).

In *Lee Optical*, the Court, after a speculative search for a possible legitimate interest, unanimously affirmed an Oklahoma statute that forbade opticians from fitting eyeglass lenses into new frames without a written prescription, and forbade advertisements for eyeglass frames. *Lee Optical*, 348 U.S. at 485-90. "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.

Noting *Lee Optical*, authors Nelson Lund and John McGinnis argued 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; all such challenges to economic regulations have failed in the modern era. Nelson Lund & John O. McGinnis, *Lawrence v. Texas and Judicial Hubris*, 102 MICH. L. REV. 1555, 1566 (2004). But in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), the Court invalidated as unconstitutional under the Takings Clause of the Fifth Amendment a federal coal mining statute that retroactively assigned extensive pension liabilities to Eastern Enterprises. *Id.* at 503-04. The company had left the coal business 35 years prior to the statute's enactment and had not participated in the promises that gave rise to pension liability. *See id.* at 504-19. Interestingly, Justice Kennedy, who supplied the necessary fifth vote in favor of the judgement, concluded that the statute's application violated due process rationality review. *See id.* at 539 (Kennedy,

exceeded the original conception of rationality review first set out in *Carolene Products*. Commentators speak of contemporary courts exercising so-called “rational basis review with bite,”⁴⁶ a genuine test that can be violated in extreme or unusual circumstances. In this Article, I distinguish that genuine test from “vestigial review,” a concept of rationality review that renders it a mere euphemism decorating a judicial decision to abdicate review of state action in a particular area. It is the concept of rationality review with bite that, I claim, sheds light on the Supreme Court’s application of the Eighth Amendment to prison sentences.

B. Characteristics of Rationality Review

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

1. *Review is highly limited.* The standard is easy to satisfy. Courts will not hold that a regulatory 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 eventual demise of *Lochner v. New York*⁴⁷ was the Court’s assimilation of Justice Holmes’s aphorism that “[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics” or any other social philosophy.⁴⁸ Because the Constitution “is made for people of fundamentally differing views,” a court gauging whether a statute is rationally related to a proper legislative aim must bear in mind that the law may pursue a wide range of moral aims; different government actors may place different degrees of weight on these aims.⁴⁹

3. *A challenger must satisfy a significant initial burden before the court will engage in weighing evidence.* A statute is presumed constitutional.⁵⁰ 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 review ends.⁵¹ The statute may be justified by “rational speculation” on

J., concurring in the judgment and dissenting in part).

46. See, e.g., GERALD GUNTHER, CONSTITUTIONAL LAW 605 n.5 (11th ed. 1985); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-3, at 1445-46 (2d ed. 1988) (stating that a “minimum rationality test” should uphold “all but the most brazenly and blatantly irrational government measures”).

47. 198 U.S. 45 (1905).

48. *Id.* at 75 (Holmes, J., dissenting).

49. *Id.* at 75-76 (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*”).

50. See *Nat’l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 477 (1985); *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 (1938).

51. *Carolene Products*, 304 U.S. at 153.

the part of the state.⁵² Indeed, the government need not even “articulate its reasons for enacting a statute.”⁵³ The court will only turn to weighing evidence in the record if the statute appears irrational upon first consideration.⁵⁴

4. *Attention to whether substantive outcomes suggest procedural defects.* A court that invalidates 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. The invalid, “arbitrary” or “irrational” decision is not merely incorrect; the decisionmaker, by implication, engaged in at least some measure of dereliction of duty, gross incompetence, bias, malice, or bad faith.⁵⁵ This idea clarifies the famous first appearance of the concept of “substantive” due process in American law, Justice Chase’s separate opinion in *Calder v. Bull*.⁵⁶ Justice Chase contended that any statute that simply “takes property from A and gives it to B” would be an “apparent and flagrant abu[s]e of legi[s]lative power.”⁵⁷ To the extent 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 also upon the suspicion it arouses that the legislature is simply exercising a grudge against A or discharging a crude political favor owed to B or his benefactors.⁵⁸

52. *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993).

53. *Id.*; accord *Heller v. Doe*, 509 U.S. 312, 319 (1993); *Carolene Products*, 304 U.S. at 152.

54. See *United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 176 (1980) (finding that a federal statute satisfied due process challenge because its “plain language” disclosed a possible rational basis).

55. See, e.g., *County of Sacramento v. Lewis*, 523 U.S. 833, 847 n.8 (1998) (stating that executive action violates substantive due process if it is so “egregious” and “outrageous” that it “shock[s] the contemporary conscience”); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985) (invalidating denial of a use permit for a group home housing the mentally retarded in accordance with a municipal ordinance on the basis that the ordinance reflected “irrational prejudice against the mentally retarded”); *North Carolina v. Pearce*, 395 U.S. 711, 723-26 (1969) (holding that due process is violated by “vindictive” judicial resentencing of a defendant after a successful appeal); *Craigmiles v. Giles*, 312 F.3d 220, 222, 229 (6th Cir. 2002) (holding that a Tennessee statute prohibiting the sale of caskets by anyone not licensed as a funeral director was a “naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers”).

56. 3 U.S. (3 Dall.) 386, 388 (1798).

57. *Calder*, 3 U.S. (3 Dall.) at 388 (emphasis omitted).

58. See, e.g., *Craigmiles*, 312 F.3d at 228-29 (condemning state licensure requirements for casket sales). Overtones of rationality review, with its characteristic implication of bad faith or procedural taint in the invalidated state action, also appeared in the early economic due process decisions of the Gilded Age. See, e.g., *Lochner v. New York*, 198 U.S. 45, 61, 64 (1905) (dismissing New York statute regulating the working hours of bakers as a “mere meddlesome interference[]” and noting that “many . . . laws of this character, while passed under what is claimed to be the police power for the purpose of protecting the public health or welfare, are, in reality, passed from other motives”).

C. Equal Protection Rationality Review

The Fourteenth Amendment's Equal Protection Clause also imposes a requirement of rationality.⁵⁹ While the typical equal protection claim alleges discrimination between groups, the Supreme Court has also given its imprimatur to "equal protection claims brought by a 'class of one,' where the [individual] plaintiff alleges that she has been intentionally treated differently from others similarly situated" without a rational basis for the distinction.⁶⁰ In this sense, due process rationality review and equal protection rationality review tend to converge at the limit.⁶¹ If a branch of government imposes irrational burdens on one group or individual and not on others, this tends to suggest a defect in the procedure that yielded the disposition. The converse also holds: if a given exercise of state power against a particular individual appears to lack any rational basis, this tends to suggest that the measure may really be motivated by an improper or discriminatory motive.⁶²

59. *Heller*, 509 U.S. at 320; *FCC v. Beach Commc'n*, 508 U.S. 307, 313 (1993).

60. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (holding that plaintiff property owner had stated a cognizable Fourteenth Amendment claim against a municipality by alleging that the zoning authority arbitrarily and irrationally required her to give the municipality a larger easement than other landowners). The *Olech* Court unanimously declared that "[t]he purpose of the equal protection clause [sic] of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Id.* (first alteration in original) (quoting *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441, 445 (1923)).

61. See *Chapman v. United States*, 500 U.S. 453, 465 (1991).

[A] person who *has* been . . . convicted "after a fair trial" is eligible for . . . whatever punishment is authorized by statute, . . . so long as that penalty is not cruel and unusual, and . . . is not based on an arbitrary distinction that would violate the Due Process Clause of the Fifth Amendment. In this context . . . an argument based on equal protection essentially duplicates an argument based on due process.

Id. (citations omitted).

62. Some courts have tentatively considered direct equal protection challenges to the rationality of an individual prison sentence. In a careful opinion in *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004), Judge Paul Cassell addressed and rejected an "as applied" equal protection challenge to a 55-year increase in a first-time offender's sentence pursuant to 18 U.S.C. § 924(c), which, as amended, imposes mandatory consecutive penalties for the "use" of firearms in connection with a drug crime. *Angelos*, 345 F. Supp. 2d at 1230, 1256. Judge Cassell noted that "[i]t is not clear whether as-applied challenges are permitted in the context of rationality review," since "statutes subject to rational[ity] review can be based on 'assumptions' and 'generalizations' which 'inevitably produce seemingly arbitrary consequences in some individual cases.'" *Id.* at 1236 n.45 (quoting *Califano v. Jobst*, 434 U.S. 47, 53 (1977)).

Even if acts of legislation directed at an individual may be challenged on equal protection grounds, as in the "class of one" scenario in *Village of Willowbrook v. Olech*, allowing Equal

D. Justifications for Rationality Review

The framework of Fourteenth Amendment rationality review relates to Eighth Amendment sentencing review as an illustrative analogy. One may reject the practice of Fourteenth Amendment rationality review, as a normative matter, and still accept the theory of Eighth Amendment sentencing review defended in this Article. Nevertheless, it is fair to observe that rationality review, viewed generally, has been one of the less controversial legal doctrines drawn from the Due Process Clause. Today, criticism of the doctrine is rare outside of the positivist wing of contemporary conservative jurisprudence.⁶³

Rationality review, properly carried out, does not engage in a fine-tuned balancing of competing interests. Rather, it only invalidates substantive legislative dispositions if they are so egregious that they give rise to inferences of *procedural* impropriety. For example, it is jarring to suggest that a guarantee of “due process” would prohibit a legislature from enacting a law forbidding second-trimester abortions;⁶⁴ the powerful, good-faith interests on both sides of the issue make plain that any objection to such a statute is a matter of substance, not legislative procedure. But consider a hypothetical state statute that requires all persons to walk backwards at all times. I submit that under current law, this statute would violate the rationality requirement of the Due Process Clause and no other constitutional provision.⁶⁵ Is it really a

Protection Clause challenges to individual *implementations* of general legislative commands seems to produce a confusing distortion of concepts. Instead, I submit that such a challenge belongs under the Due Process Clauses of the Fifth or Fourteenth Amendments, if the challenge calls into question whether the application of state sanctions *at all* is appropriate in an individual case; or under the Cruel and Unusual Punishments Clause, if it calls into question whether conduct that is properly sanctionable has been sanctioned to an irrationally extreme and unusual *degree*.

63. Cf. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 58-59 (1990) (arguing, against the *Carolene Products* Court, that “a conclusive presumption of constitutionality” should apply to all legislation not within the specific prohibitions of the Constitution). This was also the position of Justice Hugo Black. Black’s opinions in the 1960s sought to push the Court away from even minimal forms of substantive due process or unenumerated rights review, sometimes in the majority, see *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963), and sometimes in the dissent, see *Griswold v. Connecticut*, 381 U.S. 479, 520-21 (1965) (Black, J., dissenting). “[T]here is no provision of the Constitution which either expressly or impliedly vests power in this Court to . . . set aside . . . laws because of the Court’s belief that the legislative policies adopted are unreasonable, unwise, arbitrary, capricious or irrational.” *Id.* See also *supra* note 45 and accompanying text.

64. See John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920-21, 924, 947 (1972-1973) (criticizing the Court’s conclusion in *Roe* that state prevention of abortion “prior to viability” of the fetus is without an “important and legitimate interest” under Fourteenth Amendment due process and concluding that *Roe* is not “constitutional law and gives almost no sense of an obligation to try to be”).

65. It would be difficult to frame the constitutional objection to this hypothetical statute

paradox to suggest that this statute, by its very nature, is not only *substantively* objectionable but also *procedurally* suspect? On the contrary – a legislature capricious enough to enact this statute is failing to do its job; it is engaging in private jokes or, more likely, in simple bullying.

This connection to *procedure* reenforces the argument that the Due Process Clause prohibits official irrationality, an argument more intuitive than the claim that the clause protects certain unenumerated substantive rights.⁶⁶ Both of the originalist Justices on the current Supreme Court accept the practice of rationality review, as did the late Chief Justice Rehnquist.⁶⁷ Although the modern Supreme Court's prison-sentencing jurisprudence development has sometimes been tumultuous, the Court has, in effect, interpreted the Eighth Amendment as incorporating a similar requirement of rationality for the magnitude of individual prison sentences.

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

Over the course of a century, the Supreme Court has developed its Eighth Amendment jurisprudence regarding noncapital sentencing under the pressure

as an equal protection challenge because all persons are equally subject to it. The hypothetical thus illustrates the analytical distinctness of equal protection rationality review and due process rationality review, even though they often overlap in practice. Note that a state statute requiring all *vehicles* within the state to be *driven* backwards would likely violate the Dormant Commerce Clause as an improper burden on interstate commerce; but a mere prohibition against *walking* forward within the state would place a less direct burden on interstate commerce.

66. Academic criticisms of “substantive due process” primarily focus on the practice of enforcing unenumerated rights and rarely address general rationality review. *See, e.g.*, John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 498-501, 509 (1997) (considering and criticizing various models of substantive due process such as the “vested rights” approach — a formal requirement of legislative generality — and the free-wheeling approach of *Lochner* but offering only a passing mention of the *Lee Optical* and *Carolene Products* requirement of “minimum rationality”); Lund & McGinnis, *supra* note 45, at 1558-67 (arguing that *Dred Scott* and *Lochner* were “paradigm[s] for the future development of . . . substantive due process” because they involved judges “illegitimately legislating from the bench” by invalidating statutes that were “[o]ffensive to their moral and political sensibilities” but glossing over the rationality requirement upheld in *Carolene Products* as simply a means of “effectively . . . abolish[ing]” due process review of regulatory commercial transaction legislation); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 24 (Amy Gutmann ed., 1997) (“[I]t 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.”).

67. Chief Justice Rehnquist and Justice Thomas joined Justice Scalia's dissenting opinion in *Lawrence v. Texas*, 539 U.S. 558 (2003), in which he 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.” *Id.* at 593 (Scalia, J., dissenting).

of a recurring critique claiming that the Amendment was only intended to prohibit “cruel and unusual” *modes* of punishment such as drawing and quartering.⁶⁸ Although the Court’s prior opinions do not reveal a smooth and orderly development of doctrine,⁶⁹ the Court has lately converged on a standard that is normatively attractive, plausibly fits the Eighth Amendment’s historical background, and is coherent with several adjacent bodies of law. This standard calls upon all courts to ensure that individual prison sentences rest on a rational basis and are not a product of official arbitrariness. It counsels heightened skepticism of harsh sentences that are the product of broad discretion exercised by a sentencing judge or jury, while allowing legislatures extensive authority to define mandatory sentences for crimes.

A. Early Decisions

1. *Weems v. United States*

The Supreme Court first indicated that the Constitution permitted review of prison sentences in the early twentieth century case of *Weems v. United States*.⁷⁰ *Weems*, a Coast Guard clerk in the Philippines, was convicted of

68. The Court has never seriously disputed that the Cruel and Unusual Punishments Clause prohibits barbarous modes of corporal punishment. *See, e.g.*, *Hope v. Pelzer*, 536 U.S. 730, 733-34, 738 (2002) (holding that Alabama prison officials clearly violated established Eighth Amendment law by cuffing prisoners to “hitching posts” without shirts, bathroom breaks, or adequate water for hours at a time); *Harmelin v. Michigan*, 501 U.S. 957, 976 (1991) (Scalia, J., delivering the judgment) (“According to its terms . . . the [Cruel and Unusual Punishments] Clause disables the Legislature from authorizing particular forms or ‘modes’ of punishment — specifically cruel methods of punishment that are not regularly or customarily employed.” (citations omitted)); Anthony F. Granucci, “*Nor Cruel and Unusual Punishments Inflicted: The Original Meaning*,” 57 CAL. L. REV. 839, 839-42 (1969).

69. *See Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003) (acknowledging that the Supreme Court’s precedents in noncapital Eighth Amendment context “have not been a model of clarity”).

70. 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. *Id.* at 446. Furthermore, the Court held that *Kemmler*’s due process rights were not violated, 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 447-49.

The Court sidestepped the issue in *O’Neil v. Vermont*, 144 U.S. 323 (1892). In *O’Neil*, the Court rejected an Eighth Amendment challenge to a state sentence of 54 years for bootlegging, again on the ground that the Eighth Amendment did not apply against the states. *Id.* at 331-32. Justice Field, however, urged in dissent that the Eighth Amendment should apply to the case, asserting that the Cruel and Unusual Punishments Clause prohibited “all punishments which by

falsifying a single entry in a government ledger.⁷¹ The Philippine penal code punished this offense with twelve to twenty years in *cadena temporal*, a regime of penalties that originated in Spanish law.⁷² Prisoners were constantly kept shackled at the wrists and ankles and forced to endure “hard and painful labor.”⁷³ 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 also prohibited them from changing their residence without official permission.⁷⁴ Weems received a sentence of fifteen years in *cadena temporal*, which the territorial supreme court affirmed.⁷⁵

The Supreme Court chose to evaluate Weems’s sentence under the cruel and unusual punishments clause of the Philippine Bill of Rights, which was identical to the Eighth Amendment.⁷⁶ The court held that *any* sentence of *cadena temporal* within the statutory range would be cruel and unusual punishment for Weems’s offense and dismissed the indictment against him.⁷⁷ The Court’s opinion was elusive, ranging widely but difficult to pin down to any particular principle of decision.⁷⁸ At times, the opinion stressed the alien character of *cadena temporal* and the harsh regime of physical penalties and legal disabilities that it added to simple imprisonment.⁷⁹ But other parts of the

their excessive length or severity are greatly disproportioned to the offenses charged.” *Id.* at 339-40 (Field, J., dissenting). Justices Harlan and Brewer, in a separate dissenting opinion, agreed with Justice Field on this point. *Id.* at 370 (Harlan, J. dissenting).

The vast majority of pre-*Weems* lower court authority interpreting the Eighth Amendment or related state constitutional provisions also held that “cruel and unusual” or “cruel or unusual” only meant improper *modes* of punishment. *See, e.g.,* *Hobbs v. State*, 32 N.E. 1019, 1020-21 (Ind. 1893); *State v. White*, 25 P. 33, 35 (Kan. 1890); *Commonwealth v. Hitchings*, 71 Mass. 482, 486 (1855); *see also Harmelin*, 501 U.S. at 983-85 (Scalia, J., delivering the judgment); *Weems*, 217 U.S. at 402-07 (White, J., dissenting) (collecting authorities). The *Weems* majority, however, declined to engage in “[a]n extended review of the cases in the state courts.” 217 U.S. at 377.

71. *Weems*, 217 U.S. at 357-58.

72. *Id.* at 358, 363-64, 368.

73. *Id.* at 364.

74. *Id.* at 364-65.

75. *Id.* at 358.

76. *Id.* at 365, 367. Weems had not raised the argument that his sentence was cruel and unusual in the lower courts, but the Court considered the argument under the “plain error” doctrine. *Id.* at 362.

77. *Id.* at 366, 382. Justice McKenna wrote for a four-Justice majority, and Justices Lurton and Moody did not participate. *Id.* at 357 n.1.

78. 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].”).

79. *See id.* at 366 (majority opinion).

He is forever kept under the shadow of his crime, forever kept within voice and view of

opinion seemed to focus on the principle of proportionality, emphasizing that “[s]uch 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?”⁸⁰ The balance of the opinion implied that the answer was yes.⁸¹

Two features of *Weems* strike the reader at a century’s distance. The first is the strongly nonoriginalist theory of constitutional interpretation that underpins Justice McKenna’s majority opinion. Writing decades before the Eighth Amendment was judicially pegged to “the evolving standards of decency that mark the progress of a maturing society,”⁸² McKenna stressed the following:

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.⁸³

This and other broad language in the opinion reminds one that *Weems* was a contemporary of *Lochner v. New York*.⁸⁴ Justice McKenna, a member of the *Lochner* majority, based his opinion in *Weems* on a general principle of broad interpretation of constitutional guarantees; he specifically supported his view with the example of the expansive “construction of the Fourteenth Amendment” that the Court had employed in the decades preceding *Weems*.⁸⁵

The second notable feature of *Weems* is the powerful originalist analysis found in Justice Edward White’s dissenting opinion, joined by Justice Holmes. I will discuss this unjustly neglected opinion at some length because it contains ideas that are highly pertinent to untangling the problem of Eighth

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.

Id.; *id.* at 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.”).

80. *Id.* at 366-67.

81. *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].”); *id.* at 379 (comparing “the mischief and the remedy”); *see also* Note, *What Is Cruel and Unusual Punishment*, 24 HARV. L. REV. 54, 55 (1911).

82. *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion); *see also* *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002) (citing *Trop* and discussing the evolution of decency over the last century).

83. *Weems*, 217 U.S. at 373.

84. 198 U.S. 45 (1905).

85. *Weems*, 217 U.S. at 374.

Amendment sentencing review today.⁸⁶

2. Justice White's Originalist Critique in *Weems*

Justice 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 legislative sentences.⁸⁷ Justice White began his dissenting opinion by noting that the Eighth Amendment's prohibition of cruel and unusual punishment duplicated language in the 1689 English Bill of Rights.⁸⁸ He concluded that the historical impetus for the Cruel and Unusual Punishments Clause arose from abusive sentences handed down by judges in the trial of the notorious seventeenth-century perjurer Titus Oates.⁸⁹ The judges of King's Bench took "special care" of Oates by fashioning a novel and vindictive sentence: he was to be "whipped from Newgate to Tyburn[] by the . . . common hangman" and then displayed annually in the pillories in different parts of London at times that corresponded to specific dates in his perjured account of events.⁹⁰

The prohibition of cruel and unusual punishment adopted by the American colonies was, in Justice White's view, principally a prohibition of cruel and barbarous modes of punishment.⁹¹ To the extent the Cruel and Unusual Punishments Clause addressed the magnitude of punishments, Justice White concluded that the Clause placed limits on *courts* but not, as the *Weems* majority held, on *legislatures*.⁹² Supplying voluminous supporting citations from nineteenth-century state courts interpreting analogous state constitution provisions,⁹³ Justice White concluded that no courts prior to *Weems* had taken the view that the prohibition on cruel and unusual punishment set limits on the *magnitude* as well as the *kind* of legislative punishments.⁹⁴

Justice White, however, concluded his analysis by drawing a distinction that the contemporary reader may overlook.⁹⁵ Summing up, he stated that the

86. We can profit from the *Weems* dissent even if we must reject Justice White's specific conclusion that *Weems*'s 15-year sentence in *cadena temporal* did not violate the Eighth Amendment. As I discuss further below, *Weems* should be viewed as a correct decision reached under the Eighth Amendment's prohibition of barbarous methods of punishment.

87. See *id.* at 389-411 (White, J., dissenting).

88. *Id.* at 389, 395.

89. *Id.* at 390-92.

90. *Id.* at 391 n.1 (citing Titus Oates, *supra* note 2, at 1316-17).

91. *Id.* at 393, 395.

92. *Id.* at 397.

93. *Id.* at 401-07, 407 n.1.

94. *Id.* at 407-09.

95. The similarity between the historical discussion in Justice White's dissent in *Weems* and in Justice Scalia's opinion in *Harmelin* creates a temptation to assume that Scalia's categorical rejection of Eighth Amendment review of prison sentences also parallels the *Weems* dissent. Compare *Harmelin v. Michigan*, 501 U.S. 957, 966-85 (1991) (Scalia, J., delivering

Cruel and Unusual Punishments Clause 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*.⁹⁶

This very interesting passage demonstrates that Justice White did *not* conclude that a prison sentence can never violate the Eighth Amendment. Rather, he accepted that the Amendment prohibited judges from imposing “usual modes of punishment” – such as imprisonment – to an unusually extreme degree in cases in which the court chose the degree of punishment “by way of discretion.”⁹⁷ Furthermore, Justice White accepted that it was irrelevant whether Congress had “empower[ed]” the courts to impose a given extreme discretionary sentence;⁹⁸ for example, by passing an open-ended statute that authorized a sentencing judge to punish minor offenses with anything from three months imprisonment to life without parole.

In the end, Justice White parted company with the *Weems* majority in his proposed treatment of severe prison sentences that are *not* imposed pursuant to broad sentencing discretion, but rather are mandatory, i.e., “imposed by express authority of law.”⁹⁹ In those cases, if the legislature had clearly intended a severe sentence for all instances of the specific conduct at issue, Justice White believed that the legislature’s moral judgment, not the Supreme Court’s, was entitled to prevail.¹⁰⁰

Why distinguish between severe discretionary penalties and severe penalties mandated by the legislature? The question gains importance when one notes that White’s position is very similar to the contemporary Supreme Court’s position.¹⁰¹ The underlying principle must be one of *procedural*

the judgment), with *Weems*, 217 U.S. at 389-411 (White, J., dissenting). The temptation should be resisted.

96. *Weems*, 217 U.S. at 397 (White, J., dissenting) (emphasis added).

97. *Id.*

98. *Id.*

99. *Id.*

100. *See id.* at 398-99.

101. The pivotal plurality opinion in *Harmelin v. Michigan* demonstrates that the Court is especially reluctant to overturn mandatory legislative penalties. 501 U.S. 957, 1006-07 (1991) (Kennedy, J., concurring in part and concurring in the judgment). The *Harmelin* plurality, giving weight to the mandatory-discretionary distinction, upheld a *mandatory* life sentence without parole imposed on a first-time felony offender; nine years earlier the Court struck down a *discretionary* life sentence without parole imposed on a seven-time felon in *Solem v. Helm*, 463 U.S. 277 (1983). *See infra* Part I C-D.

justice. In *Weems*, White took the trial of Titus Oates to exemplify the type of judicial acts prohibited by the Eighth Amendment. The critical feature of that exemplar is a vindictively harsh sentence, unguided by positive law, and imposed within a legal setting that gave the sentencers free rein to exploit a personal hostility towards the defendant.¹⁰² Furthermore, White accepted that even if the modes of punishment chosen are “usual,” judicial discretion leading to an extreme sentence may cast doubt on the integrity of the sentencing process and thus require reversal.¹⁰³

Weems, however, involved a deliberately severe penalty *mandated* by the legislature; the penalty required a minimum of twelve years in *cadena temporal* for each violation.¹⁰⁴ The territorial court in *Weems* simply applied the legislative scheme and sentenced Weems to a sentence in the middle of the relatively limited range prescribed by statute.¹⁰⁵ This result, however, while substantively objectionable, did not give rise to an inference of vindictiveness or bias in the sentencing procedure, and therefore, did not violate the Eighth Amendment as White conceived it.¹⁰⁶

3. Consequences of *Weems*

Weems offered uncertain guidance to the development of Eighth Amendment sentencing law. The closest thing to a standard of review that

102. See *Weems*, 217 U.S. at 391 n.1 (White, J., dissenting).

103. See *id.* at 397.

104. *Id.* at 364 (majority opinion).

105. *Id.* at 358.

106. *Id.* at 385 (White, J., dissenting). Justice White acknowledged that “cruel bodily punishments” could violate the Eighth Amendment, regardless of their proportionality or disproportionality to the offense. *Id.* at 397. However, he concluded that the regime of *cadena temporal* was not sufficiently cruel and/or unusual to violate the constitution. Justice White observed that the use of chained labor, as such, was not unfamiliar to common-law jurisdictions of the era. See *id.* at 411-12 (citing a nineteenth-century English criminal statute establishing different degrees of hard labor). Indeed, some contemporary American jurisdictions have even employed such punishments. See *Alabama to Make Prisoners Break Rocks*, N.Y. Times, July 29, 1995, at 5 (describing Alabama’s re-institution of chained work gangs).

Nevertheless, the *Weems* majority appears to have the better of the argument on this concrete point, despite the intellectual deficiencies of its opinion as a whole. The Spanish *cadena temporal* regime of perpetual shackling, “painful” labor, coupled with a wide array of civil and political disqualifications, was a sufficiently harsh and unusual mode of punishment to violate the U.S. Constitution. See *Weems*, 217 U.S. at 377 (observing that the punishment “has no fellow in American legislation” and “come[s] . . . from a government of a different form and genius from ours”). We are free to endorse the holding in *Weems* on this basis, understanding it as a case involving the “no barbarous methods” prong of the Eighth Amendment rather than a simple proportionality principle. Doing this does not foreclose us from acknowledging the superiority of Justice White’s general account of the Eighth Amendment in its application to ordinary methods of punishment.

could be gleaned from the majority's analysis was that prison sentences that "amaze[d]" federal judges were invalid.¹⁰⁷ Moreover, one could conclude that the holding in *Weems* merely turned 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 Eighth Amendment review of prison sentencing.¹⁰⁸

The issue of Eighth Amendment noncapital proportionality 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.¹⁰⁹ During this period, the Fourth Circuit also devised an

107. *Weems*, 217 U.S. at 366. Later courts sometimes cited *Weems* as though it prefigured the "gross disproportionality" standard that a majority of the Court eventually embraced. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring in part and concurring in the judgment); *Enmund v. Florida*, 458 U.S. 782, 788, 800 (1982); *Rummel v. Estelle*, 445 U.S. 263, 290 (1980) (Powell, J., dissenting).

Actually, *Weems* did not. If *Weems* is read without hindsight bias, it appears that the opaque majority opinion merely noted, rather than adopted, Justice Field's formulation in *O'Neil v. Vermont* that the Eighth Amendment prohibited prison sentences "'greatly disproportioned to the offenses charged.'" *Weems*, 217 U.S. at 371 (quoting *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting)). Indeed, the citation to the *O'Neil* dissent in *Weems* 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.* at 369, 371 (noting that in *O'Neil* "the question was raised but not decided").

108. Following *Weems*, in *Graham v. West Virginia*, 224 U.S. 616 (1912), the Court rejected an Eighth Amendment proportionality challenge to a mandatory life sentence, imposed on a three-time horse thief, under a state recidivist statute. See *id.* at 622, 631; see also *Rummel v. Estelle*, 445 U.S. 263, 276-77 (1980) (describing the *Graham* litigation). Thereafter, the Eighth Amendment noncapital- proportionality doctrine lay inert for several decades. See generally Charles Walter Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMINOLOGY 378 (1980) (providing a detailed discussion of Eighth Amendment sentencing law in the lower courts between *Weems* and *Rummel*). Schwartz also speculates that the high quality of the dissent in *Weems* may have dampened the case's reception. *Id.* at 385.

109. See Schwartz, *supra* note 108, at 396-406. This was a period of active Supreme Court decisionmaking in capital cases under the Eighth Amendment. The Court declared most then-existing death penalty statutes unconstitutional in *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), on the ground that the "freakish[]" and unpredictable imposition of the death sentence rendered it cruel and unusual. *Id.* at 310 (Stewart, J., concurring). In *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion), the Court later upheld the constitutionality of a new generation of state death penalty statutes revised in light of *Furman*. *Id.* at 173, 186-87. In *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion), Justice White explicitly applied a "gross proportionality" analysis to capital sentencing and held that imposition of death for the rape of an adult woman was *per se* cruel and unusual punishment. *Id.* at 592.

The Court decided one notable noncapital proportionality case during this 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. *Id.* at 666-67 (holding

influential four-factor test for proportionality review in *Hart v. Coiner*.¹¹⁰ These combined decisions formed the backdrop for the Supreme Court's next major encounter with noncapital proportionality review, which occurred in 1980.

B. Vestigial Scrutiny

1. *Rummel v. Estelle*

*Rummel v. Estelle*¹¹¹ was the first Supreme Court case to squarely question whether a simple sentence of imprisonment could be unconstitutionally disproportionate. Justice Rehnquist, writing for a five-Justice majority, took a skeptical view. The Court upheld a mandatory life sentence, with potential for parole after 12 years, imposed under a Texas recidivist statute on Rummel,¹¹² who was convicted of obtaining \$120.75 by false pretenses after two previous convictions for equally minor felony frauds.¹¹³ Even more interesting than the holding was the majority's analysis. In upholding the sentence, Justice Rehnquist set aside *Weems* as a case turning on "the unique nature of the punishments" imposed and stressed the Court's "reluctance to review legislatively mandated terms of imprisonment."¹¹⁴ He explicitly linked

that the imposition of any state criminal punishment on a defendant solely for being addicted to narcotics is a violation of the Eighth Amendment). *Robinson's* holding, however, shed little light on what state penalties were allowed under the Eighth Amendment for activities that could be punished as crimes.

110. 483 F.2d 136, 138, 143 (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 the following: (1) the seriousness of the triggering offense; (2) the legislative purpose behind the sentence imposed; (3) interjurisdictional comparisons, i.e., comparing the defendant's penalty to that imposed in other jurisdictions for the same offense; and (4) intrajurisdictional comparisons, i.e., comparing the defendant's penalty to that imposed in the same jurisdictions for other offenses. *Id.* at 140-42.

111. 445 U.S. 263 (1980).

112. *Id.* at 280-81, 285. A divided panel of the Fifth Circuit had voted to grant Rummel habeas corpus relief from his sentence under the proportionality analysis of *Hart v. Coiner*, 483 F.2d 136, 140-43 (4th Cir. 1973). *Rummel v. Estelle*, 568 F.2d 1193, 1200 (5th Cir. 1978); see also *supra* text accompanying note 110. The court en banc vacated that opinion and affirmed denial of the writ. *Rummel v. Estelle*, 587 F.2d 651, 662 (5th Cir. 1978), *aff'd*, 445 U.S. 263 (1980). See generally Schwartz, *supra* note 108, at 412-20 (giving an overview of the *Rummel* litigation and the arguments raised and concluding that by rejecting Rummel's claim, "the Supreme Court . . . reached a fair resolution of this difficult constitutional problem").

113. *Id.* at 264-66.

114. *Rummel*, 445 U.S. at 274. Justice Rehnquist's opposition in *Rummel* to proportionality judicial review of prison sentences rested on noninterpretive, pragmatic grounds. His opinion said little about the text or history of the Eighth Amendment, and it did not revisit the originalist critique of proportionality review that Justice White offered in *Weems*. See

this cautious approach to Eighth Amendment review of prison sentences with the Court's cautious approach to substantive due process review under the Fourteenth Amendment; he cited Justice Holmes's *Lochner* dissent for the proposition that the Constitution "is made for people of fundamentally differing views" ¹¹⁵ Indeed, the *Rummel* Court suggested that proportionality review of prison sentences did not exist, except perhaps in cases involving misdemeanors: "one 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." ¹¹⁶

In other portions of the *Rummel* opinion, however, the Court offered some scraps of proportionality reasoning. The Court, noting that heightened penalties for recidivism were constitutionally permissible, stated that "a proper assessment of Texas'[sic] treatment of Rummel" would take the availability of parole into account. ¹¹⁷ In an important footnote, the majority conceded that "extreme" noncapital sentences such as life imprisonment for overtime parking might be invalid under the Eighth Amendment. ¹¹⁸ Furthermore, the majority declined to express a view on the somewhat more realistic question of whether Rummel could have been constitutionally sentenced to life imprisonment for a *first-offense* \$120 felony fraud. ¹¹⁹

In contrast to the majority, four dissenting Justices argued for an interpretation of the Eighth Amendment that would squarely prohibit "grossly excessive punishments" in noncapital cases, even when the mode of punishment employed was not barbarous or torturous. ¹²⁰ Under this interpretation, the dissent concluded that Rummel's sentence violated the Eighth Amendment. ¹²¹

2. *Hutto v. Davis*

Less than two years later, the *Rummel* majority echoed *Rummel*'s deferential analysis in *Hutto v. Davis*. ¹²² A Virginia jury gave Davis

generally id. at 271-77.

115. *Id.* at 282 (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting)).

116. *Id.* at 274 (emphasis added).

117. *Id.* at 280-81.

118. *Id.* at 274 n.11.

119. *Id.* at 276. This hypothetical is similar to the facts of *Henderson v. Norris*, 258 F.3d 706 (8th Cir. 2001), a later case in which the Eighth Circuit held that a life sentence without parole for selling a quarter of a gram of cocaine, the defendant's first criminal offense, was cruel and unusual punishment. *Id.* at 713-14; *see also infra* Part IV A.

120. *Rummel*, 445 U.S. at 293 (Powell, J., dissenting). Justice Powell was joined in his dissent by Justice Brennan, Justice Marshall and Justice Stevens. *Id.* at 285.

121. *Id.* at 293, 307.

122. 454 U.S. 370 (1982) (per curiam).

consecutive twenty-year sentences for two criminal counts: one for distributing marijuana and one for possessing marijuana with intent to distribute (Virginia law authorized a sentence of from five to forty years for each count).¹²³ The overall result was a combined forty-year sentence for possessing and distributing nine ounces of contraband.¹²⁴ Davis had a criminal record,¹²⁵ but his sentence was not premised on any finding of recidivism.¹²⁶ The Fourth Circuit struck the sentence down as a violation of the Cruel and Unusual Punishments Clause,¹²⁷ but the Supreme Court vacated and remanded for reconsideration in light of *Rummel*, which had just been decided.¹²⁸ On remand, the Fourth Circuit stuck by its previous judgment; an equally divided court affirmed without opinion.¹²⁹

The Supreme Court summarily reversed the Fourth Circuit in a *per curiam* opinion.¹³⁰ The five-Justice majority concluded that *Rummel* stood for the near-total rejection of Eighth Amendment proportionality review for terms of imprisonment.¹³¹ The majority neither weighed the facts surrounding Davis's crime and sentence nor compared them with the facts in *Rummel*.¹³² 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."¹³³ The majority glossed *Rummel* as holding that "the excessiveness of one prison term as compared to another is invariably a subjective determination,"¹³⁴ implying that meaningful judicial review of such sentences was impossible. Indeed, the majority even implied that the Fourth Circuit had engaged in judicial mutiny by entertaining a contestable disproportionality claim in the wake of *Rummel*.¹³⁵

123. *Id.* at 371.

124. *Id.* at 370-71.

125. *Id.* at 375, 379 (Powell, J., concurring).

126. *Id.* at 383 (Brennan, J., dissenting).

127. *Davis v. Davis*, 601 F.2d 153, 154 (4th Cir. 1979) (*per curiam*) (*en banc*).

128. *Hutto v. Davis*, 445 U.S. 947, 947 (1980).

129. *Davis v. Davis*, 646 F.2d 123, 123 (4th Cir. 1981) (*per curiam*) (*en banc*).

130. *Hutto v. Davis*, 454 U.S. 370, 372 (1982) (*per curiam*).

131. *See id.* at 374.

132. *See id.* at 372-74.

133. *Id.* at 373.

134. *Id.*

135. *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 and Congress. . . . [U]nless we wish anarchy to prevail within the federal 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.

Id.

This reading of *Rummel* threatened to move beyond deferential review to a full repudiation of the proportionality portions of *Weems*. But 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.¹³⁶

As in *Rummel*, four Justices in *Davis* took a sharply different view. Justice Powell wrote a reluctant concurrence that rested entirely on *Rummel*'s stare decisis effect.¹³⁷ Justice Brennan's dissent, joined by Justices Marshall and Stevens, disputed the majority's interpretation of *Rummel* as precluding significant proportionality review of sentences.¹³⁸

The Court in *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. Theoretically, a vestigial power of judicial review was acknowledged for wildly inappropriate state action, but in practice, the courts were to have nothing to do.¹³⁹ But it also appeared that this understanding of the Eighth Amendment hung on by one vote on the Supreme Court. Less than a year later, the Eighth Circuit struck down as cruel and unusual a discretionary, judge-determined life sentence imposed on a seven-time felony recidivist, Jerry Helm.¹⁴⁰ Helm's case reached the Supreme Court, where it produced both a significant holding and a swing away from the vestigial conception of noncapital sentencing review.

C. Substantive Scrutiny: *Solem v. Helm*

In *Solem v. Helm*,¹⁴¹ the Court held in a five to four decision that the imposition of a discretionary sentence of life imprisonment without parole upon Jerry Helm for his seventh felony – “uttering a ‘no account’ check for

136. *Id.* at 374 n.3.

137. *Id.* at 375, 379 (Powell, J., concurring). Justice Powell complained that *Rummel* would now “often . . . compel[] [lower courts] to accept sentences that arguably are cruel and unusual.” *Id.* at 377.

138. *Id.* at 381-83 (Brennan, J., dissenting). 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.

139. See Grossman, *supra* note 15, at 122 (concluding that *Davis* “appeared to foreclose virtually any proportionality challenge in a non-capital [sic] case.”); David S. Mackey, *Rationality versus Proportionality: Reconsidering the Constitutional Limits on Criminal Sanctions*, 51 TENN. L. REV. 623, 631 (1984); cf. Gerald Gunther and Kathleen M. Sullivan, CONSTITUTIONAL LAW 478-81 (13th ed. 1997) (reviewing the Cold War-era substantive due process cases and asking whether they amounted to a “[t]otal withdrawal from review”).

140. *Helm v. Solem*, 684 F.2d 582, 582, 587 (8th Cir. 1982), *aff'd*, 463 U.S. 277 (1983).

141. 463 U.S. 277 (1983).

\$100"—was cruel and unusual punishment.¹⁴²

Under *Rummel* and *Davis*, Helm's sentence should have been upheld.¹⁴³ His triggering offense was virtually identical to Rummel's and his history of recidivism was considerably worse. Rummel's only prior felonies were two small-time frauds; Helm had six prior felonies, including convictions for relatively dangerous crimes such as drunk driving and nonresidential burglary.¹⁴⁴ The chief factor in Helm's favor was that his judge-imposed life sentence precluded the possibility of parole.¹⁴⁵ Rummel was eligible for parole in 12 years under operation of the Texas recidivist statute.¹⁴⁶ 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."¹⁴⁷ A second factor was the relative severity of Helm's sentence: his sentence was heavier than that available in any other jurisdiction except Nevada (where the life sentence was "merely authorized," not mandatory).¹⁴⁸ But, again, *Rummel* and *Davis* had squarely rejected the use of interjurisdictional comparisons in noncapital cases to establish an Eighth Amendment violation.¹⁴⁹ Finally, Helm's triggering offense, while far from hardly earth-shattering, was an example of genuine *malum in se* criminal conduct, which distinguished his case from the extreme "no life imprisonment for overtime parking" hypothetical discussed in *Rummel* and *Davis*.¹⁵⁰

However, there was another important difference between *Rummel* and *Solem* that one might have expected to feature more prominently in the *Solem* opinion. While the life sentence in *Rummel* was specifically commanded by the Texas recidivism statute,¹⁵¹ the South Dakota recidivism statute in *Solem*

142. *Id.* at 281, 284.

143. *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 . . ."); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 6.05[C] at 47 (2d ed. 1995) (stating that Helm's claim seemed "weak" in light of *Rummel*); Grossman, *supra* note 15, at 128 (stating that Court's attempt in *Solem* to distinguish *Rummel* and *Davis* was "unpersuasive[]").

144. *See Solem*, 463 U.S. at 279-280. *Compare Solem*, 463 U.S. at 279-82 (discussing Helm's seven "nonviolent" felonies and his resulting life sentence *without* parole), *with Rummel v. Estelle*, 445 U.S. 263, 265-66 (1980) (discussing Rummel's three nonviolent felonies and his resulting life sentence *with possibility* of parole).

145. *See Solem*, 463 U.S. at 279.

146. *Rummel*, 445 U.S. at 268.

147. *Hutto v. Davis*, 454 U.S. 370, 373 (1982) (per curiam).

148. *See Solem*, 463 U.S. at 298-300.

149. *Davis*, 454 U.S. at 373 n.2; *Rummel*, 445 U.S. at 280-82.

150. *See Davis*, 454 U.S. at 374 n.3; *Rummel*, 445 U.S. at 274 n.11.

151. *Rummel*, 445 U.S. at 264 ("Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary." (quoting TEX. PENAL CODE ART. 63 (1973) (recodified with minor revisions as TEX. PENAL CODE ANN. § 12.42(d) (Vernon Supp. 1974)))

left Helm's sentence entirely to the discretion of a single trial judge, who could have sentenced Helm to *any number of years* for his triggering offense, but chose instead to impose the maximum possible sentence – life without parole.¹⁵² Helm's harsh sentence, therefore, was not the result of a categorical judgment by the legislature, but rather the discretionary and arguably arbitrary action of a single decisionmaker.¹⁵³ Even the dissenters in *Weems* might well have viewed Helm's sentence as unconstitutional.¹⁵⁴

At the level of Court personnel, *Solem* came out as it did because Justice Blackmun, invalidating Helm's sentence, abandoned the judicial coalition that had decided *Rummel* and *Davis* and provided a fifth vote for Justice Powell's opinion.¹⁵⁵ *Solem* reflected a temporary swing back to the more ambitious passages in *Weems*: the majority opinion sought to reconceptualize Eighth Amendment sentencing review as a form of substantive scrutiny that focused closely on retributive proportionality.

Justice Powell's opinion in *Solem* embraced wholesale the three proportionality criteria rejected in *Rummel* and *Davis*: (1) comparison of "the gravity of the offense and the harshness of the penalty"; (2) analysis of "the sentences imposed on other criminals in the same jurisdiction"; and (3) analysis of "the sentences imposed for commission of the same crime in other jurisdictions."¹⁵⁶ Furthermore, the opinion included several dramatic passages that seemed to set the stage for the future expansion of Eighth Amendment review. Justice Powell abandoned the more restrained "gross disproportionality" standard that he had urged in dissent in *Rummel*,¹⁵⁷ and instead claimed a power to invalidate "sentences that are disproportionate to the crime committed."¹⁵⁸ He also classified all of Helm's six prior felony

152. See *Solem*, 463 U.S. at 281 & n.6 (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 including life in prison without parole (quoting S.D. CODIFIED LAWS §§ 22-6-1(2) (1967 & Supp. 1978), 22-7-8 (1979)(amended 1981))).

153. The *Solem* Court reproduced the trial judge's colloquy at Helm's sentencing: "I think you certainly earned this sentence and certainly [sic] proven that you're an [sic] habitual criminal [sic] 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, [sic] just be coming back before Courts [sic]. You'll have plenty of time to think this one over."
Id. at 282-83 (quoting *State v. Helm*, 287 N.W.2d 497 and 500 (S.D. 1980) (Henderson, J., dissenting) (quoting trial judge, Parker, J.)).

154. See *supra* Part II A 2 (analyzing Justice White's dissenting opinion in *Weems*).

155. *Solem*, 463 U.S. at 279. Justices Brennan, Marshall and Stevens also joined Justice Powell's opinion. *Id.*

156. *Id.* at 292; see *Hutto v. Davis*, 454 U.S. 370, 373 & n.2 (1982) (per curiam) (discussing *Rummel*'s rejection of the three proportionality criteria derived from *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973), and again rejecting the criteria).

157. *Rummel v. Estelle*, 445 U.S. 263, 288 (1980) (Powell, J., dissenting).

158. *Solem*, 463 U.S. at 284; see *id.* at 290 ("[W]e hold as a matter of principle that a

offenses as “nonviolent,”¹⁵⁹ though this was a questionable characterization of Helm’s three convictions for drunk driving.¹⁶⁰

Chief Justice Burger, joined by three other Justices, wrote an indignant dissent, arguing that *Solem*’s “holding cannot rationally be reconciled with *Rummel*” or *Davis* and stressing the disregard that the majority had shown to the doctrine of stare decisis.¹⁶¹

Solem’s broad statement that “disproportionate” prison sentences were unconstitutional presented the prospect of a generalized constitutional appellate review of state prison sentences.¹⁶² Such an approach would have given a thoroughly substantive cast to the Cruel and Unusual Punishments Clause. It would incorporate a specific, debatable value judgment about penology that would displace differing legislative judgments, even those adopted and pursued in good faith. In Fourteenth Amendment terms, Justice Powell’s vision of proportionality review in *Solem* elevated constitutional sentencing review either to the tier of heightened scrutiny under the *United States v. Carolene Products Co.* framework,¹⁶³ 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*.¹⁶⁴ This vision of the Eighth Amendment, however, is not necessary to *Solem*’s holding, and it has not prevailed.

D. Rationality Review: *Harmelin v. Michigan*

After three major conflicting opinions in three years, the Supreme Court left the issue of Eighth Amendment review alone for some time. The lower courts gave *Solem* a cool reception. Despite the potentially broad standard

criminal sentence must be proportionate to the crime for which the defendant has been convicted.”); *id.* at 303 (holding that Helm’s “sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment.”).

159. *Id.* at 279.

160. *See 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.’”); *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 . . . had harsh potentialities for violence.”).

161. *Id.* at 304, 305-12 (arguing that the holding in *Solem* is inconsistent with *Rummel* and *Davis*); *id.* at 315 (“[I]f we are to have a system of laws, not men, *Rummel* is controlling.”); *id.* at 317 (“It is . . . curious that the Court should brush aside controlling precedents that are barely in the bound volumes of the United States Reports.”).

162. *See id.* at 315 (expressing fear that “appellate review of all sentences of imprisonment . . . will ‘administer the *coup de grace* to the courts of appeals as we know them.’” (quoting HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 36 (1973))).

163. *See supra* Part I A.

164. *See Lochner v. New York*, 198 U.S. 45, 64-65 (1905).

articulated in the case, no federal court of appeals, and only a handful of state courts, set aside prison sentences on Eighth Amendment grounds in the eight years following *Solem*.¹⁶⁵ In 1991, when a splintered Court again confronted noncapital proportionality review in *Harmelin v. Michigan*,¹⁶⁶ it retained *Solem*'s holding, but altered *Solem* doctrinally and scaled back its scope of review.

Harmelin is the key modern Eighth Amendment proportionality review case. Although it yielded only a plurality opinion, it provides the constitutional standard that governs today.¹⁶⁷ Justice Kennedy's plurality opinion went further than any previous opinion in assimilating noncapital

165. See *Harmelin v. Michigan*, 501 U.S. 957, 1015 & n.2 (1991) (White, J., dissenting). The lower courts evidently did not take the bolder passages of Justice Powell's *Solem* opinion at face value. Granted, the *Solem* majority declined to overrule the specific holdings of *Rummel* and *Davis*, and those cases had upheld strict prison sentences. Nevertheless, it strains credulity to think that in the eight years between *Solem* and *Harmelin* no court of appeals confronted any prison sentence that was (in *Solem*'s words) "disproportionate" to the crime and distinguishable from *Rummel* and *Davis*. Cf. *Solem*, 463 U.S. at 290, 303 (expressing a requirement of "proportiona[lity]").

Professors Brannon Denning and Glenn Reynolds identified a pattern revealing that the lower federal courts sometimes hesitate to give full effect to a new Supreme Court decision that promises a burdensome expansion of judicial review. See Brannon P. Denning & Glenn H. Reynolds, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1256, 1299 (2003). Full enforcement of the decision may not occur until the Supreme Court reiterates its commitment to the new principle in later rulings. See *id.* Denning and Reynolds's guiding example is the 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*, 514 U.S. 549, 561, 567-68 (1995) and *United States v. Morrison*, 529 U.S. 598, 607-618 (2000). See Denning & Reynolds, *supra* at 1254-56. A legal realist could argue that the lower courts' caution about *Lopez* and *Morrison* was vindicated by *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), which upheld federal regulation, under the Commerce Clause, of small quantities of medical marijuana grown intrastate for personal use. *Raich* appears to eliminate the prospect that the Commerce Clause will significantly limit federal power in the foreseeable future. See *id.* at 2214-15.

Solem's cool reception in the 1980s, after which the Supreme Court revisited the issue and made a retreat in *Hamermelin v. Michigan*, may reflect an institutional reluctance similar to the one that, in Denning and Reynolds's view, characterized *Lopez*.

166. 501 U.S. 957 (1991) (plurality opinion).

167. Later pluralities of the Supreme Court and virtually all lower courts have held that Justice Kennedy's opinion in *Harmelin* contains the *ratio decidendi* of the case. See, e.g., *Ewing v. California*, 538 U.S. 11, 23-24 (2003) (plurality opinion); *Henderson v. Norris*, 258 F.3d 706, 709 (8th Cir. 2001); *Hawkins v. Hargett*, 200 F.3d 1279, 1282 (10th Cir. 1999); *United States v. Harris*, 154 F.3d 1082, 1084 (9th Cir. 1998); DRESSLER, *supra* note 143, at 49. Cf. *Marks v. United States*, 430 U.S. 188, 193 (1977) (plurality opinion) ("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 the Members who concurred in the judgments on the narrowest grounds . . .'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (plurality opinion))).

sentencing review under the Eighth Amendment to Fourteenth Amendment rationality review.

Ronald Harmelin had no criminal record. He was arrested in Detroit with 672 grams of cocaine and a variety of drug paraphernalia and convicted of possession of illegal drugs “in an amount of 650 grams or more.”¹⁶⁸ Under Michigan law, this offense carried a mandatory penalty of life imprisonment without possibility of parole.¹⁶⁹ Harmelin unsuccessfully sought relief in the state courts on the ground that his sentence was cruel and unusual. The Supreme Court, by a vote of five to four, affirmed his sentence.¹⁷⁰

Under the language of the *Solem* opinion, Harmelin’s Eighth Amendment claim should have prevailed. First, *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.¹⁷¹ By this standard, Harmelin’s possession of contraband had a similarly attenuated connection to possible incidents of violence. Second, although the Supreme Court in *Davis* had affirmed stiff sentences short of life without parole for individual counts of drug *distribution*,¹⁷² Harmelin had not been charged with distribution or even possession with intent to distribute – just possession.¹⁷³ Third, unlike *Rummel*, Harmelin’s sentence could not be justified by an interest in combating recidivism: Harmelin was a first-time offender.¹⁷⁴ And fourth, Harmelin had a powerful case under the two comparative factors announced in *Solem*.¹⁷⁵ The Michigan penal code punished Harmelin’s possessory offense more severely than rape, armed robbery, or second degree murder,¹⁷⁶ and Harmelin’s sentence was harsher than any he could have received for his offense in any other state.¹⁷⁷

168. See *Harmelin*, 501 U.S. at 1021 (White, J., dissenting) (quoting MICH. COMP. LAWS ANN. § 333.7403(2)(a)(i) (West Supp. 1990-91)).

169. *Id.*

170. *Id.* at 961, 996 (Scalia, J., delivering the judgment).

171. See *Solem v. Helm*, 463 U.S. 277, 279-80 (1983).

172. See, e.g., *Hutto v. Davis*, 454 U.S. 370, 375-76 (1982) (per curiam) (upholding a forty year sentence for two counts of distributing marijuana and possession with intent to distribute).

173. *Harmelin*, 501 U.S. at 961 (Scalia, J., delivering the judgment). Michigan separately criminalizes the possession of drugs with intent to distribute. See *id.* at 1024-25. Under the state’s drug laws, simple possession above 650 grams carried the same penalty — life without parole — as possession with intent to distribute. See *id.* (White J., dissenting). It is true, of course, that 650 grams of cocaine is a substantial quantity — roughly a pound and a half — that, by its very magnitude, tends to suggest the presence of commercial drug activity.

174. *Id.* at 1021.

175. See *Solem*, 463 U.S. at 291-92.

176. *Harmelin*, 501 U.S. at 1025-26 (White, J., dissenting) (applying the intrajurisdictional comparative factor and noting that all three of these offenses carry more lenient sentencing ranges than Harmelin’s crime).

177. *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

It is difficult to dispute that Harmelin's sentence satisfied the *Solem* standard for unconstitutionality,¹⁷⁸ and not one Justice stated otherwise. Instead, the five Justices who affirmed Harmelin's sentence did so under different constitutional standards than those announced in *Solem*.

1. Justice Scalia's Restatement of the Originalist Critique

Justice Scalia, joined by Chief Justice Rehnquist, announced the judgment of the Court in an extensive opinion.¹⁷⁹ Reaching back to fundamentals, Justice Scalia argued from text and history that *Solem* was "simply wrong; the Eighth Amendment contains no proportionality guarantee."¹⁸⁰ Instead, Justice Scalia contended, the Eighth Amendment invalidates only "particular forms or 'modes' of punishment – specifically, cruel methods of punishment that are not regularly or customarily employed."¹⁸¹

Justice Scalia's originalist argument rested on three sources of evidence: (1) the English history that gave rise to the cruel and unusual punishments clause of the 1689 English Bill of Rights; (2) the history surrounding the

cocaine).

178. See DRESSLER, *supra* note 143, at 48 (concluding that Harmelin had "a strong case of unconstitutionality" under *Solem*). But see Woodburn, *supra* note 20, at 1940-42 (arguing that Harmelin's sentence was constitutional under the *Solem* framework because of "the gravity of drug-related societal problems," especially because he possessed cocaine in commercial quantities).

Woodburn identifies utilitarian social concerns that certainly exemplify why a rational legislature might decide, in good faith, to establish fierce mandatory punishments for first-time cocaine possession. See Woodburn, *supra* note 20, at 1940-41. These concerns satisfy the modified constitutional standard that Justice Kennedy announced in *Harmelin*. *Harmelin*, 501 U.S. at 998-1001 (Kennedy, J., concurring in part and concurring in the judgment). But Woodburn does not demonstrate how these concerns can be reconciled with *Solem*'s original, broad conception of "nonviolent" crimes. See *Solem*, 463 U.S. at 296-97. If repeated drunk driving is, as a matter of law, a "relatively minor" offense that is not a "crime against a person," how could one say with any confidence that the simple possession of drugs is sufficiently "grave" and "violent" to justify a life sentence without parole? *Id.* *Harmelin*'s result, while correct, is indeed compatible with *Solem*'s holding but is not legally compatible with the language of the *Solem* opinion.

179. *Harmelin*, 501 U.S. at 961 (Scalia, J., delivering the judgment).

180. *Id.*, 501 U.S. at 965. Interestingly, Justice Scalia's *Harmelin* opinion nowhere mentions its most prominent predecessor: Justice White's dissent in *Weems*. The two opinions, although eight decades apart, canvass virtually identical historical evidence and offer many of the same arguments. Compare *Weems v. United States*, 217 U.S. 349, 382-413 (1910) (White, J., dissenting), with *Harmelin*, 501 U.S. at 966-85 (Scalia, J., delivering the judgment). Perhaps Justice Scalia was uncomfortable with Justice White's conclusion that the Eighth Amendment's Cruel and Unusual Punishments Clause, while inapplicable to mandatory legislative penalties, *did* authorize review of judicially imposed discretionary sentences. See *Weems*, 217 U.S. at 397 (White, J., dissenting); see also *supra* note 95.

181. *Harmelin*, 501 U.S. at 976 (Scalia, J., delivering the judgment).

Eighth Amendment's adoption in 1791; and (3) the nineteenth-century judicial interpretation of the Cruel and Unusual Punishments Clause.¹⁸²

The first of these evidentiary sources gave only equivocal support to Justice Scalia's position. Justice Scalia recognized that the leading impetus for the 1689 English Bill of Rights cruel and unusual punishments clause was the conduct of the Court of King's Bench in prominent state trials, particularly in the trial of Titus Oates.¹⁸³ Scalia claimed that outrage was prompted by the "arbitrary sentencing power" of Chief Justice Jeffreys, who crafted special sentences to punish perceived enemies of the crown.¹⁸⁴ Therefore, the overall defect in Oates's sentence was that the punishment was "'out of [the Judges'] Power.'"¹⁸⁵

Some of the elements of Oates's sentence, such as defrocking, could only be administered by an Ecclesiastical Court.¹⁸⁶ Other punishments, such as prolonged (and possibly fatal) scourging, were viewed as contrary to common law practice for punishing misdemeanor offenses such as Oates's perjuries.¹⁸⁷ Members of the House of Commons, motivated by the judges' "[p]retence to a discretionary [p]ower" to "inflict what [p]unishment they pleased," unsuccessfully sought to overturn Oates's sentence.¹⁸⁸ Therefore, in Justice Scalia's view, the furor over Oates's trial did not principally revolve around the extreme or disproportionate nature of the sanctions imposed, but rather imposition of punishments not authorized by common law tradition or statute.¹⁸⁹

However, Justice Scalia did obliquely acknowledge that the individual modes of punishment – defrocking, whipping, pillorying, fines, imprisonment – employed in Oates's sentence were not illegal at the time and were not prohibited by statute for many years thereafter.¹⁹⁰ Moreover, Justice Scalia quoted the dissenting minority of the House of Lords, who condemned Oates's sentence not only for being "contrary to [l]aw and ancient [p]ractice," but also

182. *Id.* at 966-85.

183. *Id.* at 969-75.

184. *Id.* at 967-68. Justice Scalia quoted Justice Withins's remark to Oates that "'we have taken special care of you.'" *Id.* at 970 (quoting Titus Oates, *supra* note 2, at 1316).

185. *Id.* at 971, 973 (alteration in original) (quoting 1 Journals of the House of Lords 367 (May 31, 1689) quoted in Titus Oates, *supra* note 2, at 1325).

186. *Id.* at 971.

187. *Id.* at 970-71.

188. *Id.* at 971, 973 (quoting 10 Journal of the House of Commons 247 (Aug. 2, 1689)).

189. See Granucci, *supra* note 68, at 859 ("In the context of the Oates' [sic] case, 'cruel and unusual' seems to have meant a severe punishment unauthorized by statute and not within the jurisdiction of the court to impose." (footnote omitted)).

190. *Harmelin*, 501 U.S. at 968 (Scalia, J., delivering the judgment); see Laurence Claus, *The Antidiscrimination Eighth Amendment*, 28 HARV. J.L. & PUB. POL'Y 119, 143 (2004) (stating that "whipping and pillorying" were not outlawed in America until 1839); Granucci, *supra* note 68, at 855-56, 859 (concluding "that no [blanket] prohibition on methods of punishment was intended" by the 1689 English Bill of Rights).

for being “barbarous, inhuman, and unchristian.”¹⁹¹

Early American history served as Justice Scalia’s second evidentiary source and more clearly supported his view. The few references to the Cruel and Unusual Punishments Clause in the ratification debates reveal that the ratifiers clearly did view the Clause as prohibiting “tortur[ous]” or “barbarous” punishments, whatever else it might do.¹⁹² In fact, 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 to interpret the words “cruel and unusual” as “proscrib[ing] not excessive but torturous punishments.”¹⁹³ Justice Scalia also noted that the federal criminal code enacted by the first Congress did not seem to recognize a proportionality principle.¹⁹⁴ The code enacted numerous harsh penalties, such as death by hanging, for counterfeiting government securities or for stealing fifty dollars worth of goods from a vessel.¹⁹⁵

Justice Scalia examined early American case law interpreting the Eighth Amendment as his third and final evidentiary source. He concluded that most nineteenth century courts interpreted the Clause as a limitation on the *modes* of bodily punishment that the legislature could use rather than limits on the proportionality of the punishment itself.¹⁹⁶

In addition to historical evidence, Justice Scalia’s opinion also offered pragmatic criticism of the judicial approach to Eighth Amendment

191. *Harmelin*, 501 U.S. at 971 (Scalia, J., delivering the judgment) (quoting 1 Journals of the House of Lords 367 (May 31, 1689), *quoted in* Titus Oates, *supra* note 2, at 1325).

192. *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.’” *Id.* at 979 (plurality opinion) (alteration and emphasis in original) (quoting Debates in the Convention of the Commonwealth of Massachusetts, on the Adoption of the Federal Constitution (Jan. 30, 1788), *in* 2 JONATHAN 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.” *Id.* at 980 (Scalia, J., delivering the judgment) (quoting 3 JONATHAN ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 452 (2d ed. 1854)). 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 [sic] torture was included in the prohibition.” A Bill of Rights is More Than a “Paper Check” (Jun. 16, 1788), *in* 3 THE PAPERS OF GEORGE MASON, 1725-1792, at 1085 (Robert A. Rutland ed., 1970); *see* Granucci, *supra* note 68, at 839-42; Schwartz, *supra* note 108, at 382.

193. Granucci, *supra* note 68, at 865; *see Harmelin*, 501 U.S. at 975, 979 (Scalia, J., delivering the judgment).

194. *Harmelin*, 501 U.S. at 980-81.

195. *Id.*

196. *Id.* at 982-85 (“In the 19th century, judicial agreement that a ‘cruel and unusual’ . . . provision did not constitute a proportionality requirement appears to have been universal.”).

proportionality review that was articulated in *Solem*.¹⁹⁷ He contended that courts could not adequately administer a proportionality test that required them to gauge the “inherent gravity” of a given offense.¹⁹⁸ Nor could they adequately identify which offenses are “similar” in gravity to a given offense within the same jurisdiction and which offenses are not.¹⁹⁹ Justice Scalia concluded that “the proportionality principle becomes an invitation to imposition of subjective values.”²⁰⁰

Justice Scalia, in closing, acknowledged that the Court’s modern death penalty jurisprudence did not conform to the standard of review that he had urged for noncapital cases like *Harmelin*’s.²⁰¹ The Court has engaged in robust Eighth Amendment proportionality review in the capital punishment field.²⁰² Justice Byron White’s dissent in *Harmelin*, although offering only a limited response to Justice Scalia’s historical arguments about the Eighth Amendment,²⁰³ more effectively criticized the tension that Scalia’s position

197. *Id.* at 985-90.

198. *Id.* at 986-89 (arguing that “there is no objective standard of gravity” and that the “gravity” of *Harmelin*’s possession of a significant quantity of cocaine is best determined by “[t]he members of the Michigan Legislature, [who] know the situation on the streets of Detroit”).

199. *Id.* at 988-89. Justice Scalia acknowledged that the third factor endorsed in *Solem* — interjurisdictional comparisons of punishment for a given offense — was properly administrable by courts. *Id.* at 989. He viewed this factor, however, as having “no conceivable relevance to the Eighth Amendment.” *Id.* at 989-90.

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.

Id.

200. *Id.* at 986.

201. *Id.* at 993-94.

202. *See, e.g.,* *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (holding that the death penalty for murder is unconstitutionally disproportionate when imposed on a mentally retarded defendant); *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (holding that the death penalty is unconstitutionally disproportionate for felony murder *without* intent to kill); *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (holding that the death penalty is unconstitutionally disproportionate for rape of an adult woman).

203. *See Harmelin*, 501 U.S. at 1009-13 (White, J., dissenting). Justice White pointed out that one nineteenth century commentator had stated that “it would seem, that imprisonment for an unreasonable length of time, is . . . contrary to the spirit of the constitution [sic].” *Id.* at 1010 (quoting BENJAMIN L. OLIVER, *THE RIGHTS OF AN AMERICAN CITIZEN* 185 (Books for Libraries Press 1970) (1832)). Justice White also noted that Anthony Granucci, in his influential historical analysis of the cruel and unusual punishments clause of the English Bill of Rights, 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 68, at 860). As Justice Scalia noted, however, Granucci’s conclusion is not obviously entailed by the rest

created between noncapital and capital cases.²⁰⁴ Justice Scalia took the position that proportionality was not “a generalizable aspect of Eighth Amendment law” but rather, was “one of several respects in which we have held that ‘death is different,’ and have imposed protections that the Constitution nowhere else provides.”²⁰⁵

2. Justice Kennedy’s Plurality Opinion

In the pivotal *Harmelin* plurality opinion, Justice Kennedy concurred in part with Justice Scalia and concurred in the judgment, but he parted ways with Justice Scalia’s conclusion that the Court should entirely abandon Eighth Amendment review of prison sentences.²⁰⁶ Declining to take sides in the historical debate, Kennedy concluded that “*stare decisis* counsels [the Court’s] adherence to the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years.”²⁰⁷ The plurality declined to overrule the holdings in *Weems* and *Solem* that some noncapital sentences violate the Eighth Amendment.²⁰⁸ However, the plurality substantially reformulated the proportionality analysis of *Solem*, jettisoning *Solem*’s standard of “significant disproportionality”²⁰⁹ and scaling back the scope of review to one that would invalidate only rare sentences marked by grave disproportionality.²¹⁰

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

1. *Review is highly limited.* “[O]nly extreme sentences that are ‘grossly disproportionate’ to the crime” violate the Eighth Amendment.²¹¹ Judicial

of his analysis. *Id.* at 975 n.5 (Scalia, J., delivering the judgment).

Granucci notes that the English penal law of the time authorized violent death and harsh bodily punishments for numerous offenses and that this continued, into the eighteenth century, after the adoption of the English Bill of Rights in 1689. Granucci, *supra* note 68, at 855-56, 859. He catalogs the actual objections in the House of Commons to the proceedings at King’s Bench; these objections gave rise to the English version of the Cruel and Unusual Punishments Clause. *Id.* at 858-59. Although there was an occasional *leitmotif* of objection to the *severity* of punishments imposed on Titus Oates and others, the principal objection was clearly to the unusual or unauthorized nature of the punishments inflicted. *Id.* at 859. Other commentators have also criticized Granucci’s historical argument for proportionality review. See, e.g., Schwartz, *supra* note 108, at 380-81.

204. *Harmelin*, 501 U.S. at 1012-14, 1018 (White, J., dissenting).

205. *Id.* at 994 (Scalia, J., delivering the judgment).

206. Justices O’Connor and Souter joined Justice Kennedy’s opinion. *Id.* at 996 (Kennedy, J., concurring in part and concurring in the judgment).

207. *Id.*

208. See *id.* at 997.

209. See *Solem v. Helm*, 463 U.S. 277, 303 (1983).

210. See *Harmelin*, 501 U.S. at 1001, 1004-05 (Kennedy, J., concurring in part and concurring in the judgment).

211. *Id.* at 1001.

review is “narrow” and easy for the state to satisfy.²¹² The *Harmelin* plurality, in upholding Harmelin’s mandatory life sentence for possession of drugs in commercial quantity, observed that “a rational basis exist[ed] for Michigan to conclude that [Harmelin’s] crime [was] as serious and violent as the crime of felony murder”²¹³ The plurality seemed to believe that the legislature’s conclusion was sufficient to justify the sentence.²¹⁴

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.”²¹⁵ Identifying the four basic goals of criminal punishment — “retribution, deterrence, incapacitation, and rehabilitation”²¹⁶ — Justice Kennedy acknowledged that the weight given to these principles in different jurisdictions has understandably “varied with the times.”²¹⁷ Therefore, Eighth Amendment sentencing review is not about ensuring the close conformity of the offense to the reviewing court’s assessment of retributively proper punishment.²¹⁸ Instead, states may give strong weight to incapacitation as well as deterrence.²¹⁹

3. *A challenger must satisfy a significant initial burden before the court will engage in weighing evidence.* The *Harmelin* plurality’s clearest doctrinal departure from *Solem* was its refusal to make the intrajurisdictional and interjurisdictional comparisons that the *Solem* Court applied as a threshold matter.²²⁰ Noting that *Solem* “appeared to apply a different analysis than in

212. *Id.* at 996, 999.

213. *Id.* at 1004 .

214. *See id.*

215. *Id.* at 999.

216. *Id.* 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. Sentencing Reform Act, 18 U.S.C. § 3553(a)(2) (2000); *Mistretta v. United States*, 488 U.S. 361, 367 (1989); *see United States v. Booker*, 125 S. Ct. 738, 764-68 (2005) (holding that federal courts are not mandated to follow the federal sentencing guidelines, but must consider them in imposing sentences and can only make reasonable departures from them).

217. *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Payne v. Tennessee*, 501 U.S. 808, 819 (1991)).

218. *Id.* at 998-99.

219. *See id.* (“[M]arked 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.”). The *Harmelin* plurality opinion shed retrospective light on *Rummel v. Estelle*, 445 U.S. 263 (1980), and prospective light on *Ewing v. California*, 538 U.S. 11 (2003) (plurality opinion), which is a recidivism case similar to *Rummel*. Compare *Rummel*, 445 U.S. at 266 (discussing *Rummel*’s two prior felonies and his sentencing under a recidivism statute), with *Ewing*, 538 U.S. at 17-20 (discussing *Ewing*’s prior criminal history and his sentencing under a recidivism statute).

220. *See Harmelin*, 501 U.S. at 1004-05 (Kennedy, J., concurring in part and concurring in the judgment).

Rummel and *Davis*,”²²¹ 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.”²²² If the Court can inspect the sentence on its face and infer a justification that renders it not grossly disproportionate, then review is at an end.²²³

4. *Attention to whether substantive outcomes suggest procedural defects.* In *Harmelin*, the Michigan legislature had imposed a mandatory penalty of life without parole for Harmelin’s precise conduct.²²⁴ The defendant’s sentence in *Harmelin* thus involved “the collective wisdom of the Michigan Legislature and, as a consequence, the Michigan citizenry”²²⁵ rather than the almost completely unguided, discretionary decision of a single trial judge, as in *Solem*.²²⁶ Justice Kennedy’s plurality opinion gives weight to this difference 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.”²²⁷ Yet this difference between *Solem* and *Harmelin* had to do strictly with the *procedure* that yielded the sentences in question; the sentences at issue, life without parole, were identical.²²⁸

The four characteristics of Eighth Amendment sentencing review described above parallel those used to define Fourteenth Amendment

221. *Id.* at 998.

222. *Id.* at 1005.

223. *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.”).

224. *Id.* at 1006.

225. *Id.*

226. *See Solem v. Helm*, 463 U.S. 277, 281-83 (1983).

227. *Harmelin*, 501 U.S. at 1006-07 (Kennedy, J., concurring in part and concurring in the judgment). Justice Kennedy’s opinion echoed the Eighth Amendment distinction between mandatory and discretionary prison sentences first drawn in Justice White’s dissent in *Weems*, despite the fact that Justice Kennedy did not cite to the *Weems* dissent. *See supra* Part II A 2 (discussing the *Weems* dissent). *See generally Harmelin*, 501 U.S. at 996-1009 (Kennedy, J., concurring in part and concurring in the judgment) (discussing the history of Eighth Amendment proportionality review but failing to cite Justice White’s dissent in *Weems*).

228. *Compare Harmelin*, 501 U.S. at 961 (Scalia, J., delivering the judgment) (“Petitioner was . . . sentenced to a mandatory term of life in prison without possibility of parole.”), with *Solem*, 463 U.S. at 281-82 (noting that defendant was sentenced to the “maximum” sentence of life imprisonment without parole). Others have also noted that the holdings in *Solem* and *Harmelin* suggest that the Court gives weight to the distinction between penalties imposed by general legislation and penalties imposed by unguided, individual discretion. *Cf., e.g.,* Pamela S. Karlan, “Pricking the Lines”: *The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 890 (2004) (“The central appeal of Helm’s claim [in *Solem*] was that he was the victim of a draconian judge.”).

rationality review in Part I of this Article.²²⁹ Despite the use of the terms “proportionality” or “gross disproportionality” rather than “rationality,” Justice Kennedy’s plurality opinion in *Harmelin* is best read as assimilating the structure of Eighth Amendment sentencing review into that of general Fourteenth Amendment due process review. The principle that animates judicial review in each context is as much procedural as substantive, hence the differing treatment of mandatory legislative sentences and discretionary judicial sentences. If the sentencing system in a given state is working evenhandedly, Justice Kennedy’s plurality opinion in *Harmelin* suggests that the courts will rarely intervene on the basis of simple disagreement with the state’s policy choices.²³⁰ Instead, the courts seek to identify individual, arbitrary and capricious exercises of state and judicial power that suggest abuse of the authority to punish.

E. Rationality Review Revisited: Ewing v. California

Though a splintered decision, *Ewing v. California*²³¹ should be viewed as a source of relative stability in a troubled area of law. *Ewing* marked the first time in over twenty years that the Supreme Court has decided two successive Eighth Amendment sentencing cases under the same doctrinal framework.²³² Both in words and in fact, the *Ewing* plurality adhered to and clarified the rationality standard articulated by Justice Kennedy in *Harmelin*.

1. Background

Ewing arose from the application of California’s “three strikes” law, a tough recidivism statute adopted by legislation and popular referendum in 1994.²³³ The “three strikes” statutory scheme is as follows: if any felony

229. See *supra* Part I A-B.

230. See *Harmelin*, 501 U.S. at 1004, 1006-07 (Kennedy, J., concurring in part and concurring in the judgment).

231. 538 U.S. 11 (2003).

232. If one limits the field to argued decisions (*Hutto v. Davis*, 454 U.S. 370, 375 (1982) (per curiam), was a summary reversal), and views *Rummel v. Estelle*, 445 U.S. 263 (1980), as a legal departure from *Weems v. United States*, 217 U.S. 349 (1910), then the Court had *never* decided two successive noncapital sentencing cases under the same legal framework until *Ewing* followed *Harmelin*.

233. *Ewing*, 538 U.S. at 15. The original version of the “three strikes” statute was defeated in legislative committee in 1993. *Id.* at 14. Supporters then introduced Proposition 184, a ballot initiative with similar content, which was adopted by a 72% majority of California voters in a November 1994 election. *Id.* at 15. Meanwhile, the widely publicized murder of Polly Klaas energized legislative support for the original “three strikes” measure. An amended form of the “three strikes” measure “that conformed to Proposition 184” was enacted in March 1994. *Id.*; CAL. PENAL CODE § 667(e) (West 1999); CAL. PENAL CODE § 1170.12(c) (West 2002); see also *Ewing*, 538 U.S. at 15-17; James A. Ardaiz, *California’s Three Strikes Law: History*,

offender has been convicted of one prior serious or violent felony, the sentence for the current felony is doubled; if any felony offender has at least *two* prior serious or violent felony convictions, the statute mandates the imposition of an indeterminate life sentence without parole for at least 25 years for each subsequent felony conviction.²³⁴ Therefore, if a two-time previous felony offender is convicted of multiple felonies, each “third strike” produces a separate 25-to-life sentence that must be served consecutively.²³⁵

The “three strikes” law, as interpreted by the state courts, incorporates the exercise of judicial discretion in two respects. First, trial courts may vacate qualifying prior strikes if they conclude that the circumstances surrounding the current offense and defendant’s background do not justify subjecting the defendant to the “three strikes” scheme.²³⁶ Second, some possible triggering offenses are “wobblers” — “offenses [that] may be classified as either felonies or misdemeanors.”²³⁷ If a prosecutor chooses to charge such an offense as a misdemeanor rather than a felony, the defendant falls outside the “three strikes” scheme.²³⁸ Furthermore, the trial court may overrule a prosecutor’s decision to charge a wobbler as a felony, which also removes a defendant from the statute’s reach.²³⁹

Gary Ewing received a sentence of 25 years to life under the “three strikes” statute when a California jury convicted him of felony grand theft.²⁴⁰ Ewing had stolen three golf clubs, worth around \$1200, from the pro shop of a Los Angeles golf course.²⁴¹ His substantial criminal history included four prior felony convictions, arising from three residential burglaries and one armed robbery; Ewing also had seven misdemeanor convictions for burglary, battery, theft, and drug possession.²⁴² Because grand theft is not a “wobbler” offense, Ewing’s sentence only implicated the sentencing court’s discretion in one respect: the court declined to vacate Ewing’s multiple qualifying prior “strikes.”

Expectations, Consequences, 32 MCGEORGE L. REV. 1, 12 (2000).

234. §§ 667(e)(1)-(2)(A); 1170.12(c)(1)-(2)(A).

235. §§ 667(e)(2)(A)-(B); 1170.12(c)(2)(A)-(B).

236. *See Ewing*, 538 U.S. at 17 (citing *People v. Williams*, 948 P.2d 429, 437 (Cal. 1998)).

237. *Id.* at 16.

238. *Id.* at 17.

239. CAL. PENAL CODE §§ 17(b)(1), (5) (West 1999); *Ewing*, 538 U.S. at 17.

240. *Ewing*, 538 U.S. at 19-20. More precisely, the mandatory sentence for a “third strike” is an “indeterminate term of life imprisonment” with an option for parole. §§ 667(e)(2)(A); 1170.12(c)(2)(A). Parole eligibility is “calculated as the greater of the following:” 25 years; three times the default parole term for the current offense; or the parole term of the underlying conviction itself, including enhancements. *Id.* Ewing’s offense entailed parole eligibility in 25 years. *Ewing*, 538 U.S. at 20.

241. *Ewing*, 538 U.S. at 17-18.

242. *Id.* at 18-19. Ewing accosted one of his victims in the mailroom of an apartment complex, then threatened her with a knife, forced her back to the apartment, and burglarized the apartment while she fled screaming for help. *Id.*

The California Court of Appeal rejected Ewing's Eighth Amendment challenge to his conviction, the California Supreme Court denied hearing, and the United States Supreme Court took the case on direct review.²⁴³ Ewing's sentence presented a test for the scope of the holdings in both *Harmelin v. Michigan*,²⁴⁴ the Court's last prison sentencing case, and *Solem v. Helm*,²⁴⁵ its last recidivism case. Ewing's triggering offense (grand theft) was more serious than the minor fraud at issue in *Solem*.²⁴⁶ His sentence (life with parole available after 25 years) was lighter than the discretionary sentence of life without parole that the Court struck down in *Solem*.²⁴⁷ Ewing's past criminal record, which included armed robbery and residential burglary, was also more severe than Helm's in *Solem*.²⁴⁸

The Court rejected Ewing's Eighth Amendment claim. No opinion gathered a majority of Justices. Justice O'Connor wrote the governing opinion, which spoke for a three-Justice plurality.²⁴⁹ This opinion, when read against the backdrop of Justice Scalia's analytically interesting separate concurrence, furthered the process begun in *Harmelin* of articulating a viable standard for the Eighth Amendment review of sentencing. The California Attorney General's brief in *Ewing* asked the Supreme Court to hold, in effect, that the Eighth Amendment requires a rational basis for sentencing.²⁵⁰

243. See *People v. Ewing*, No. B143745, 2001 WL 1840666, at *1 (Cal. Ct. App. Apr. 25, 2001), *aff'd*, 538 U.S. 11 (2003).

244. 501 U.S. 957 (1991).

245. 463 U.S. 277 (1983).

246. Compare *Ewing*, 538 U.S. at 19 (noting that defendant was convicted "of felony grand theft of personal property"), with *Solem v. Helm*, 463 U.S. 277, 281 (1983) (noting that defendant was charged with "uttering a 'no account' check for \$100").

247. Compare *Ewing*, 538 U.S. at 20, with *Solem*, 463 U.S. at 282.

248. Compare *Ewing*, 538 U.S. at 18-19 (noting four felony and seven misdemeanor convictions), with *Solem*, 463 U.S. at 279-80 (noting six felony convictions "that . . . were all nonviolent, none was a crime against a person, and alcohol was a contributing factor in each case").

249. *Ewing*, 538 U.S. at 14. Justice Kennedy, author of the *Harmelin* plurality, and Chief Justice Rehnquist joined Justice O'Connor's opinion. *Id.*

Chief Justice Rehnquist's vote in *Ewing* reflected a shift from his position in *Harmelin*, in which he had concurred in Justice Scalia's originalist argument that the Eighth Amendment authorizes no proportionality review of prison sentences at all. Compare *Ewing*, 538 U.S. at 30 (applying a gross proportionality standard of review under the Eighth Amendment), with *Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (Scalia, J., delivering the judgment) (arguing that there is no Eighth Amendment proportionality review). 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. See Van Cleave, *supra* note 15, at 227 (noting this apparent shift in view); cf. *Dickerson v. United States*, 530 U.S. 428, 443-44 (2000) (declining to overrule *Miranda v. Arizona*, 384 U.S. 436 (1966), in a majority opinion, which focused heavily on the value of stare decisis rather than on *Miranda*'s correctness as an original matter).

250. Respondent's Brief at 8, *Ewing v. California*, 538 U.S. 11 (2003) (No. 01-6978),

Although not employing that precise phrase, Justice O'Connor's opinion gave California, in substance, what it requested.

2. The Plurality Opinion

Justice O'Connor concluded that the *Harmelin* plurality opinion governed Ewing's case.²⁵¹ She reiterated the key characteristics of Eighth Amendment rationality review that appeared in *Harmelin*: review of prison sentences is "narrow";²⁵² courts must respect the "primacy of the legislature" and the "federal system";²⁵³ the Eighth Amendment "does not mandate adoption of any one penological theory";²⁵⁴ and *Solem*'s intrajurisdictional and interjurisdictional comparison factors are irrelevant except in "the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."²⁵⁵

Justice O'Connor clarified that under *Harmelin*, a court reviewing a sentence imposed under a recidivism statute must consider the rationality of the individual sentence in light of the rationality of the sentencing scheme as a whole.²⁵⁶ She emphasized that not only retribution, but also "incapacitation, deterrence, . . . and rehabilitation . . . may play a role in a State's sentencing scheme."²⁵⁷ Therefore, when considering the justifiability of the individual sentence, a court must consider how "incapacitation, deterrence, retribution, or rehabilitation" may each contribute to rationalizing the sentence.²⁵⁸

Justice O'Connor began the analysis of Ewing's individual sentence with a bit of avoidable obscurity, stating that the Court would begin by weighing "the gravity of Ewing's offense."²⁵⁹ This phrase, which originated in *Solem*,²⁶⁰ suggests a focus on the inherent retributive severity of Ewing's grand theft offense and conviction. But the *Ewing* plurality actually held that the

available at 2002 WL 1808710 (arguing that Ewing's sentence "reflects a rational, graduated, and penologically sound legislative response to" a recidivist felon).

251. *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.").

252. *Id.* at 20.

253. *Id.* at 23.

254. *Id.* at 25 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in the judgment)).

255. *Id.* at 30 (quoting *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment)).

256. *Id.* at 29-30.

257. *Id.* at 25.

258. *Id.*; see *id.* at 29.

259. *Id.* at 28.

260. *Solem v. Helm*, 463 U.S. 277, 292 (1983) (concluding that one of three factors considered in Eighth Amendment proportionality review should be "the gravity of the offense and the harshness of the penalty").

“gravity” of Ewing’s offense could not be assessed without taking into account “his long history of felony recidivism” and “the State’s public-safety interest in incapacitating and deterring recidivist felons.”²⁶¹ It would be error, Justice O’Connor indicated, to fail to give “full effect to the State’s choice of . . . legitimate penological goal[s].”²⁶²

In other words, the *Ewing* plurality really engaged in a threshold review of the overall *rationality* of Ewing’s sentence. Comparing the individual sentence and statutory scheme with Ewing’s prior criminal record and offense of conviction, the plurality concluded that Ewing’s sentence rationally furthered a sentencing scheme that the California legislature adopted in a good faith effort to lower California’s crime rate. Justice O’Connor stated: “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.”²⁶³ The plurality held that Ewing’s sentence was constitutional at the threshold stage, and therefore did not consider whether Ewing’s sentence was comparable to those imposed for similar offenses in California or the same offense in other jurisdictions.²⁶⁴

The plurality opinion, however, was not devoid of empirical analysis. Justice O’Connor noted that “[r]ecidivism is a serious public safety concern in California.”²⁶⁵ In an interesting passage, she opined that California’s “justification” for the “three strikes” law “is no pretext,”²⁶⁶ suggesting a sensitivity to possible bad motives by state actors that is reminiscent of rationality review “with bite.” She also discussed evidence suggesting that the “three strikes” law had led to a decline in the recidivism rate of parolees in California.²⁶⁷ Other evidence suggested that parolees were actually emigrating from the state to avoid running afoul of the “three strikes” law.²⁶⁸

261. *Ewing*, 538 U.S. at 29.

262. *Id.*

263. *Id.* at 30.

264. *See id.* at 30-31.

265. *Id.* at 26.

266. *Id.*

267. *Id.* at 27.

268. *Id.*

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

Justice Scalia concurred in the judgment,²⁶⁹ but he did not join the plurality's reasoning. He voted instead 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.²⁷⁰

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 "intelligently appl[ie]d" by judges.²⁷¹ Far from embracing *Harmelin*'s and *Ewing*'s revision of *Solem*, as Chief Justice Rehnquist apparently did, Scalia contended that the *Ewing* plurality's analysis demonstrated 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

269. *Id.* at 31 (Scalia, J., concurring in the judgment). Justice Thomas, in a separate but brief opinion, also concurred in the judgment. *Id.* at 32 (Thomas, J., concurring in the judgment). He explicitly endorsed Justice Scalia's originalist critique in *Harmelin* and concluded that "the Eighth Amendment contains no proportionality principle." *Id.* at 32. In fact, Justice Thomas expressed a stronger commitment to the originalist critique than Justice Scalia did. Although 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, however, I would not feel compelled by stare decisis to apply it." *Id.* (citation omitted).

The subtle disagreement between the two originalist Justices in *Ewing* highlights Justice Thomas's signature refusal to give stare decisis effect to precedents that he believes are unsupported by the Constitution's text and history. See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 677-79 & n.4, 680 (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); cf. Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23, 26-28 (1994) (offering a short, blunt argument that the Supremacy Clause of the Constitution bars federal courts from granting stare decisis effect to horizontal precedents in constitutional cases).

270. *Ewing*, 538 U.S. 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.'" (quoting *Harmelin v. Michigan*, 501 U.S. 957, 985 (1991) (Scalia, J., delivering the judgment))).

271. *Id.*

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.²⁷²

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 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.²⁷³

Justice Scalia’s criticisms appear misguided in two ways. First, he wrote as though the *Harmelin* plurality replaced *Solem*’s substantive proportionality review with a form of generalized intermediate scrutiny (for “reasonability”) that would require federal judges to scrutinize the balancing of means and ends in each state’s penal code. If correct, that description of *Harmelin* would indeed be cause for alarm. But Justice Scalia has not accurately identified the standard of review described or deployed by the plurality in *Harmelin*. On balance, *Harmelin* does not require reasonableness in sentencing, only rationality.²⁷⁴

272. *Id.*(citations omitted).

273. *Id.* at 32. Both dissenting opinions in *Ewing* and some commentators expressed related criticisms of the plurality opinions in *Ewing* and *Harmelin*. See, e.g., *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.

Id. (Breyer, J., dissenting); see also Van Cleave, *supra* note 15, 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.”).

274. See *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment). While there are sparse references to “reasonableness” in *Ewing* and *Harmelin*, these remarks are heavily outweighed by the repeated references to rationality review in both opinions. Compare *Ewing*, 538 U.S. at 28 (“It is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons ‘advance[s] the goals of [its] criminal justice system in any substantial way.’” (alterations in original) (quoting *Solem v. Helm*, 463 U.S. 277, 297 n.22 (1983))); *Harmelin*, 501 U.S. at 1004 (Kennedy, J., concurring in part and concurring in the judgment) (“Michigan could with good reason conclude that petitioner’s crime is more serious than the crime in [*Hutto v. Davis*], with *Ewing*, 538 U.S. at 23 (holding that only “extreme” sentences are invalid

Second, since Eighth Amendment scrutiny is satisfied by a rational connection to a permissible sentencing goal, the Court's broadening of the permissible bases for a noncapital sentence in *Harmelin* and *Ewing* reduces rather than increases the courts' discretion to intervene. Analogously, under the Fourteenth Amendment, a move from intermediate scrutiny (which requires legislation to rest on an *important* state interest) to rationality scrutiny (which allows any *legitimate* state interest to justify a statute), reduces, rather than increases, a reviewing court's discretion.²⁷⁵ Justice Scalia and other critics with similar views have not explained why Eighth Amendment sentencing review under the *Ewing-Harmelin* standard should be viewed as more intractable or suspect than the judicial rationality review of statutes under the Fourteenth Amendment.

4. Consequences

Ewing yielded a configuration of opinions identical to *Harmelin*: two Justices denied the existence of Eighth Amendment noncapital sentencing review and denied the petitioner's claim; three Justices acknowledged the narrow review of the *Harmelin* plurality but rejected the petitioner's claim; and four Justices urged broad Eighth Amendment review and argued that the petitioner's claim should have prevailed.²⁷⁶ Therefore, as in *Harmelin*, the three-Justice *Ewing* plurality binds lower courts as the governing opinion of the Supreme Court.²⁷⁷

under the Eighth Amendment); *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 that the Court "do[es] not sit as a 'superlegislature'" in reviewing sentences); *id.* at 29 (holding that 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"); *Harmelin*, 501 U.S. at 998 (Kennedy, J., concurring in part and concurring in the judgment) (holding that "substantive penological judgment[s]" are generally "'within the province of legislatures, not courts'" (quoting *Rummel v. Estelle*, 445 U.S. 263, 275-76 (1980))); *id.* at 1000 ("[D]iffering attitudes and . . . local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes."); *id.* (noting that the Constitution "'is made for people of fundamentally differing views'" (quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting))); *id.* at 1001 (only "extreme" sentences are invalid); *id.* at 1004 (holding that *Harmelin*'s sentence is supported by "a rational basis").

275. See *supra* Part I A-B, D.

276. Compare *Ewing*, 538 U.S. at 30-31, 32, 35, with *Harmelin*, 501 U.S. at 965, 1001, 1027.

277. See *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 . . .'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976))). But see *Ewing*, 538 U.S. at 36 (Breyer, J., dissenting) (stating that "for present purposes," dissenters would analyze *Ewing*'s Eighth Amendment claim under the

In the next section, I will offer a general defense of the mode of analysis in *Ewing* and *Harmelin* as explicated in the foregoing sections. First, however, I suggest that the plurality's result in *Ewing* is recognizably sound, even before one turns to more technical questions of doctrine and jurisprudence. *Ewing* makes sense, as long as one accepts the premises that (1) states are entitled to a significant amount of flexibility in shaping their penal codes; and (2) *Ewing*'s recidivism — and thus the complete legislative judgment that yielded his sentence — impacts the propriety of his sentence. *Ewing* was a much worse recidivist than the defendants in *Rummel* or *Solem*. He had felony convictions for armed robbery (at knifepoint) and residential burglaries — both clearly violent crimes — as well as a misdemeanor conviction for battery and minor convictions for theft, drugs, and illegal firearms possession.²⁷⁸ Furthermore, California did not impose its harsh sentence upon *Ewing* until after repeatedly extending leniency to him over a period of years, in the hope that he would reform.²⁷⁹

Nor was the offense that triggered *Ewing*'s 25-to-life sentence (grand theft) a trivial or highly passive one.²⁸⁰ A number of commentators have described *Ewing* as a case about “shoplifting.”²⁸¹ The golf clubs *Ewing* attempted to steal, however, were worth almost \$1200²⁸² — a more serious property offense than the sort of small theft ordinarily associated with the word “shoplifting.”²⁸³ This sum is not immense, but nor is it minor.²⁸⁴ Having imposed milder punishments for *Ewing*'s previous armed robbery and his burglary spree, the state should not be foreclosed from imposing heightened consequences on *Ewing* when he spurned the chance to reform his conduct.²⁸⁵

Harmelin plurality opinion of Justice Kennedy); *id.* at 32 n.1 (Stevens, J., dissenting) (arguing that “it is not clear that this case is controlled by *Harmelin*” because *Harmelin* did not deal with a recidivist offender).

278. *Ewing*, 438 U.S. at 18-19.

279. *See id.* at 18-21.

280. *Id.* at 19.

281. *See, e.g.,* Chemerinsky, *supra* note 20, at 1059.

282. *Ewing*, 538 U.S. at 18.

283. Although \$1200 may seem a modest sum to the average appellate lawyer or federal judge, to the median working American in 2000, when *Ewing* committed his theft, it was a good deal more than half a month's pre-tax pay. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS, TABLE B-2, *available at* <ftp://ftp.bls.gov/pub/suppl/empsit.ceseeb2.txt> (last visited Jan. 5, 2006).

284. *See Ewing*, 538 U.S. at 28 (“Even standing alone, *Ewing*'s theft should not be taken lightly.”).

285. The Court recognized the validity of such an interest in *Rummel v. Estelle*, 445 U.S. 263 (1980), observing that one of the justifications supporting *Rummel*'s life sentence was that “[o]ne in *Rummel*'s position has been both graphically informed of the consequences of lawlessness and given an opportunity to reform, all to no avail.” *Id.* at 278.

III. THE CASE FOR RATIONALITY REVIEW OF PRISON SENTENCES

Under *Ewing v. California*²⁸⁶ and *Harmelin v. Michigan*,²⁸⁷ a prison sentence that reflects a “rational legislative judgment” and furthers a “legitimate penological goal” will be allowed to stand, particularly when there is no suggestion that the claimed motive for the sentence is a “pretext” for an illegitimate motive.²⁸⁸ This standard incorporates the language of Fourteenth Amendment due process review articulated in *United States v. Carolene Products Co.*²⁸⁹ and its progeny.²⁹⁰ The swing Justices on the Court have translated the rationality standard from its original home in the review of statutes to its new home in the review of individual dispositions of government power in the form of criminal sentences.

Ewing and *Harmelin* got it right – right enough to be entitled to the benefit of stare decisis. The proper legal meaning of “cruel and unusual” in the context of prison sentencing is “arbitrary and capricious.” Eighth Amendment review should thus be sensitive to whether a supposedly arbitrary sentence was mandated by statute or imposed by the discretion of a single judge or jury.²⁹¹ This view — *rationality review* — is preferable to *substantive review*, the intrusive level of appellate sentencing review contemplated in the bolder passages of the *Solem v. Helm*²⁹² opinion and by the *Ewing* dissenters.²⁹³ Rationality review is also preferable to Justices Scalia’s 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.²⁹⁴

A. Stare Decisis

The conception of Eighth Amendment prison sentencing review as rationality review, under the terms supplied by the plurality opinions in *Harmelin* and *Ewing*, is currently the law of the land.²⁹⁵ Rationality review 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 of the Eighth

286. 538 U.S. 11 (2003).

287. 501 U.S. 957 (1991).

288. See *Ewing*, 538 U.S. at 20, 23; *Harmelin*, 501 U.S. 998-1001 (Kennedy, J., concurring in part and concurring in the judgment).

289. 304 U.S. 144 (1938).

290. See *id.* at 152 & n.4, 153-54; see also *supra* Part I A-B.

291. See, e.g., *Ewing*, 538 U.S. at 28-29.

292. 463 U.S. 277 (1983).

293. See *Ewing*, 538 U.S. at 33, 35 (Stevens, J., dissenting); *Solem*, 463 U.S. at 290, 292.

294. Claus, *supra* note 190, at 120 (emphasis added); see *Ewing*, 538 U.S. at 31 (Scalia, J., concurring in the judgment); *id.* at 32 (Thomas, J., concurring in the judgment).

295. See *supra* Part II.

Amendment preserves the bedrock holding of *Solem* that some sentences violate the constitution.²⁹⁶ It also preserves the holdings of *Rummel v. Estelle*,²⁹⁷ *Harmelin*, and *Ewing*, which entail that constitutional review of state sentencing is limited.²⁹⁸ The rationality interpretation of the Eighth Amendment therefore benefits from the presumption of correctness conferred by *stare decisis*, a presumption not enjoyed by the “vicious methods” interpretation endorsed by Justices Scalia and Thomas.

Justice Scalia has acknowledged that *stare decisis* considerations are relevant to originalist judging.²⁹⁹ His principal argument against extending *stare decisis* recognition to Eighth Amendment review of prison sentences has been that proportionality review cannot be “intelligently appl[ied].”³⁰⁰ Justice Scalia’s objection, however, appears to rest on a misidentification of the standard imposed by *Ewing* and *Harmelin*.³⁰¹ The standard is not a general reasonableness requirement; it only requires the more limited inquiry characteristic of Fourteenth Amendment rationality review.³⁰² Surely Eighth Amendment rationality review of prison sentences is as tractable as Fourteenth Amendment rationality review of general legislation.³⁰³ If Justice Scalia is not prepared to abandon Fourteenth Amendment rationality review on the basis that it is incapable of judicial application, then it is hard to see why he is

296. See *Solem*, 463 U.S. at 290.

297. 445 U.S. 263 (1980).

298. See *Ewing*, 538 U.S. at 20; *Harmelin v. Michigan*, 501 U.S. 957, 996-97 (1991) (Kennedy, J., concurring in part and concurring in the judgment); *Rummel*, 445 U.S. at 274.

299. 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 66, at 138-40.

300. *Ewing*, 538 U.S. at 31 (Scalia, J., concurring in the judgment); accord *Harmelin*, 501 U.S. at 985-86 (Scalia, J., delivering the judgment).

301. See generally *supra* Part II D 2, E 2 (discussing the review standard imposed by the plurality opinions in *Harmelin* and *Ewing*).

302. See *supra* Part I A-B.

303. In fact, Eighth Amendment rationality review is probably *more* tractable. In the context of criminal sentencing, the universe of legitimate state interests that can justify a sentence is numerically limited compared to the number of legitimate state interests that can support a piece of legislation. Penologists traditionally identify four goals of criminal punishment: retribution, deterrence, incapacitation, and rehabilitation. See, e.g., *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in the judgment) (“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 Sentencing Reform Act, 18 U.S.C. § 3553(a)(2) (2000); see also *supra* note 216. Although judges, legislators, and scholars disagree vehemently about the *weight* given to these four interests in different contexts, the existence of a relatively noncontroversial catalog of legitimate interests suggests, again, that Eighth Amendment rationality review of prison sentences is at least as tractable as Fourteenth Amendment rationality review of legislation, which few seek to discard.

unwilling to give stare decisis effect to the *Ewing-Harmelin* standard of Eighth Amendment rationality review.

B. Text and History

The Eighth Amendment does not prohibit “excessive punishments,” even though it does prohibit “excessive fines” and “excessive bail.”³⁰⁴ The Eighth Amendment also does not prohibit “cruel punishments,” as some state constitutions did at the time the Bill of Rights was adopted;³⁰⁵ it only outlaws punishments that are both “cruel and unusual.”³⁰⁶

In recent Eighth Amendment cases 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 recent and exuberant opinions have crossed a line to actual misrepresentation of the text. Justice Stevens has written in *Atkins v. Virginia*³⁰⁷ that “[t]he Eighth Amendment succinctly prohibits ‘[e]xcessive’ sanctions”³⁰⁸ — complete with quotation marks — in a criminal case in which the only Eighth Amendment provision at issue was the Cruel and Unusual Punishments Clause, which does *not* contain the word “excessive.”³⁰⁹ The Court fortunately has avoided asserting this fiction in any of the governing opinions in the *Harmelin* line of cases; as a result, future Supreme Court 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.

At what might be called the level of naïve textualism, rationality review comports better with the actual text of the Eighth Amendment 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 [constitutional] text also requires) ‘unusual.’”³¹⁰ Yet, a harsh sentence that lacks a “rational basis,” i.e., one that appears to reflect official caprice or vindictiveness, *is* unusual, particularly when it is not a mandatory sentence fixed as “usual” for a given offense, but instead reflects an exercise of individual discretion.

Furthermore, at a more sophisticated originalist level, the legislative

304. See U.S. CONST. amend. VIII.

305. See *Harmelin*, 501 U.S. at 977 (Scalia, J., delivering the judgment) (citing N.H. Bill of Rights arts. XVIII, XXXIII (1784), reprinted in 1 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (Bernard Schwartz ed., 1971) (stating “cruel or unusual punishments”)).

306. See U.S. CONST. amend. VIII.

307. 536 U.S. 304 (2002).

308. *Id.* at 311 (alteration in original).

309. See U.S. CONST. amend. VIII; *Atkins*, 536 U.S. at 311. The use of quotation marks is remarkable. See Claus, *supra* note 190, 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 tips of the drafters’ tongues, for they used it in respect to bail and fines.”).

310. *Harmelin*, 501 U.S. at 967 (Scalia, J., delivering the judgment).

history of the Eighth Amendment and its corresponding provision in the 1689 English Bill of Rights gives little support to the substantive review position.³¹¹ 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, not merely excessive punishments.³¹² Cruel and unusual punishments under the English provision were those that were “immorally discriminatory in the direction of greater severity.”³¹³

The basic objection to arbitrary, vindictive sentencing is captured in Justice Withins’s recorded remark to Titus Oates after handing down Oates’s imaginatively ferocious sentence: “we have taken special care of you.”³¹⁴ One could easily imagine the state judge in *State v. Helm*³¹⁵ making the same remark before sentencing Jerry Helm — under a recidivist statute that gave essentially no guidance to the judge’s sentencing discretion — to life without parole for the triggering offense of passing a bad check.³¹⁶ One can likewise imagine the jury in *Henderson v. Norris*³¹⁷ channeling Justice Withins and Chief Justice Jeffreys of King’s Bench as they chose to sentence first-time offender Grover Henderson to life without parole for selling less than one quarter of a gram of cocaine.³¹⁸ The Michigan legislature, by contrast, did *not* “tak[e] special care”³¹⁹ of Ronald Harmelin; the statutory sentencing scheme approved by the legislature decided in advance that the possession of commercial quantities of cocaine merited a *mandatory* penalty of life imprisonment without parole — the sentence Harmelin got.³²⁰

C. Political Process Values

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

311. See Claus, *supra* note 190, at 121 (“[T]he [Eighth] Amendment was meant to address a problem distinct from either excessive punishment or vicious punishment. That problem was *discriminatory* punishment.”); Schwartz, *supra* note 108, at 380-82. See generally *supra* Part II A 2, D 1 (discussing the dissent in *Weems v. United States*, 217 U.S. 349 (1910), and Justice Scalia’s *Harmelin* opinion).

312. See Claus, *supra* note 190, at 121-22.

313. *Id.* at 122.

314. Titus Oates, *supra* note 2, at 1316.

315. 287 N.W.2d 497 (S.D. 1980), *rev’d sub nom* *Solem v. Helm*, 463 U.S. 277 (1983).

316. See *Solem*, 463 U.S. at 281-83; Karlan, *supra* note 228, at 890.

317. 258 F.3d 706 (8th Cir. 2001); see Part IV A (discussing the *Henderson* case).

318. See *id.* at 707.

319. Titus Oates, *supra* note 2, at 1316.

320. *Harmelin v. Michigan*, 501 U.S. 957, 961 & n.1 (1991) (Scalia, J., delivering the judgment).

insular minority that will be prejudiced by the political process.”³²¹ Although *Harmelin* and *Ewing* appear to have effectively likened state prison sentences to the catch-all “regulatory legislation” category of Fourteenth Amendment review, Gershowitz’s language suggests that prison sentences are more analogous to the “special” class of laws disadvantaging discrete and insular minorities, which receive “more searching judicial inquiry.”³²²

Gershowitz accurately notes that convicted felons generally cannot vote,³²³ and that “criminal defendants” are politically unpopular.³²⁴ He admits that courts have routinely refused to recognize criminal defendants as a protected class for equal protection purposes,³²⁵ but relies upon John Hart Ely’s widely discussed defense of a “representation-reinforcing” approach to constitutional adjudication.³²⁶

In framing his political process argument, however, Gershowitz has subtly misidentified the issue. The relevant social class for purposes of deciding the desirability of a policy of intrusive federal constitutional sentencing review is not criminal *defendants* but *convicted* criminals. In fact, from the standpoint of Eighth Amendment sentencing review, the only relevant class is the class of criminal defendants who have been *duly convicted* of conduct that may be *constitutionally punished as a crime*. If a constitutional defect had afflicted the guilt phase of trial, then the defendant’s conviction presumably would have been vacated without regard to the magnitude or irrationality of his subsequent sentence, i.e., a court would not need to consider whether the sentence was improper.

Once this distinction is clear, the notion that Eighth Amendment claimants should be regarded as a discrete and insular minority entitled to special protections not authorized by the Constitution is less persuasive. Membership in the “convicted criminal” class is not the result of an immutable characteristic;³²⁷ one can avoid being a member by not committing crimes.

321. Gershowitz, *supra* note 15, at 1301; *see also, e.g.*, Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571, 647-48 (2005) (arguing from similar premises that “sentencing is an area in which it is particularly important for federal courts to play a limiting role, checking the excesses of elected and politically appointed officials.”).

322. *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 & n.4 (1938) (holding that regulatory legislation is presumed to have a rational basis unless it “appears on its face to be within a specific prohibition of the Constitution” such as legislation against “discrete and insular minorities,” which would require a “more searching judicial inquiry.”).

323. Gershowitz, *supra* note 15, at 1298-99.

324. *See id.* at 1299-1300.

325. *Id.* at 1301 n.269 (citing Sarah Botz & Robert C. Scherer, *Prisoners’ Rights*, 84 GEO. L.J. 1465, 1494 n.2975 (1996) (collecting cases holding that prisoners are not a suspect class)).

326. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 86-88 (1980).

327. *Cf. Carolene Products*, 304 U.S. at 152 n.4 (protected minorities must be “discrete and insular”).

This class thus differs in important ways from the class of criminal *suspects*, who are subject to a presumption of innocence and may well be unable to control the “characteristic” of being suspected.³²⁸

D. Neutral Interpretation

Viewing the Supreme Court’s noncapital sentencing cases over the past 25 years through the lens of rationality review is also beneficial to the Court’s institutional legitimacy. The Court has sometimes spoken of “deferring” to legislatures in the context of Eighth Amendment noncapital review.³²⁹ Such rhetoric, however, is troubling from a standpoint of constitutional textualism and neutral jurisprudence.

Ceteris paribus, we should prefer an interpretation of the Court’s activities under which it is fairly applying a principle supplied by the Constitution over one in which it is only applying a principle grudgingly or waveringly. This is usually how the Court proceeds in the First Amendment field, for example. One might argue that legislatures have a general authority to define crimes (as they do to set penalties for them), but if those definitions impinge on one of the Constitution’s textual guarantees such as freedom of speech, one rarely hears suggestions that the courts should “defer” to the legislature in gauging whether a First Amendment violation has occurred. Furthermore, First Amendment analysis does not ordinarily differentiate between whether the challenged state action was brought about by a single government decisionmaker, e.g., a judge or jury imposing damages in a libel case,³³⁰ or by the entire legislature, e.g., in a statute prohibiting sedition.³³¹ Yet, as previously discussed, the distinction matters in the Eighth Amendment prison cases.

If the evil targeted by the Cruel and Unusual Punishments Clause is really simply “disproportionate” punishments rather than arbitrary or discriminatory punishments,³³² why should courts “defer” to the legislature in deciding whether that constitutional guarantee has been infringed? Yet the Court’s

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

329. See, e.g., *Rummel v. Estelle*, 445 U.S. 263, 274 (1980) (“[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 . . . is purely a matter of legislative prerogative.”).

330. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283-84 (1964).

331. See *Herndon v. Lowry*, 301 U.S. 242, 246 & n.2, 264 (1937) (overturning conviction for attempting to incite insurrection).

332. Cf., e.g., *Ewing v. California*, 538 U.S. 11, 20 (2003) (concluding that the Eighth Amendment contains a “narrow proportionality principle” (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996-97 (1991) (Kennedy, J., concurring in part and concurring in the judgment))).

Eighth Amendment opinions *do* suggest that judge-made discretionary sentences deserve tougher scrutiny than sentences mandated by a legislature.³³³ Courts that pick and choose in such a fashion, however, make themselves vulnerable to troubling criticism.³³⁴

The Court's reasoning and decisions in noncapital Eighth Amendment cases should lead us to impute to it an interpretation of the Cruel and Unusual Punishments Clause that targets a different evil than mere harshness of a sentence *per se*. Instead, if *Ewing* and *Harmelin* are to be defended, then the Clause should be understood as a quasi-procedural guarantee against abuse of authority in imposing punishments. Therefore, *arbitrary*, *discriminatory*, or *spiteful* prison sentences are cruel and unusual under the Eighth Amendment.

E. Federalism

The Supreme Court has described the enactment and enforcement of criminal law as a field in which "States historically have been sovereign."³³⁵ The Court has also described the fixing of punishments for crimes as peculiarly "a question of legislative policy."³³⁶ Modes of judicial sentencing review that preserve the states' independence regarding the severity of a punishment are not only consistent with this tradition, but are also 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."³³⁷

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

333. See, e.g., *Harmelin* 501 U.S. at 1006-07 (Kennedy, J., concurring in part and concurring in the judgment).

334. A well-known contemporary example of such criticism is Judge Alex Kozinski's dissent in the Second Amendment case of *Silveira v. Lockyer*, 328 F.3d 567, 568-70 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc):

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.

Id. at 568-69.

335. *United States v. Lopez*, 514 U.S. 549, 564 (1995).

336. *Gore v. United States*, 357 U.S. 386, 393 (1958).

337. 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 is one of the classic presentations of the "normative case for federalism" in legal academic literature. *Id.*; see generally *id.* at 756-90 (discussing the history of federalism and its impact on the modern world).

California “three strikes” statute in *Ewing v. California*³³⁸ provides a significant example of such experimentation. As Justice O’Connor noted in her plurality opinion, there was evidence that the California statute had caused a decrease in recidivism and an exodus of felons from the state.³³⁹ 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 the serious social maladies caused by drugs.³⁴⁰

Standard pro-federalism arguments based on accountability and responsiveness also support the *Ewing* and *Harmelin* rationality review standard for sentencing. Rationality review allows states to display a good deal of moral diversity in fixing criminal punishments, which is more likely to yield a penal code that accords with local conditions and moral beliefs.³⁴¹ Justice Scalia made this point concretely in *Harmelin*, contending that “[t]he members of the Michigan Legislature, and not we, know the situation on the streets of Detroit.”³⁴²

A rejection of the *Ewing-Harmelin* standard would eliminate many of the potential benefits discussed above. Justice Breyer, in the principal dissenting opinion in *Ewing*, contemplated significant intrusion by federal judges into the formulation of state penal codes.³⁴³ Justice Breyer estimated 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 estimation as a basis for holding the sentence unconstitutional.³⁴⁴ Yet, Justice Breyer’s appendix to his opinion revealed that at least *five other states* authorized punishments equal to or greater than *Ewing*’s in similar

338. 538 U.S. 11 (2003).

339. *Ewing*, 538 U.S. at 27; see generally Ardaiz, *supra* note 233 (discussing the impact of California’s “three strikes” law).

340. See *Harmelin v. Michigan*, 501 U.S. 957, 1007-08 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (“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 in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), 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.

Id. at 311 (1932) (Brandeis, J., dissenting), cited in *Harmelin*, 501 U.S. at 1009 (Kennedy, J., concurring in part and concurring in the judgment).

341. See Calabresi, *supra* note 337, at 777 (arguing that federalism “helps ensure a more informed weighing of costs and benefits than often occurs at 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”).

342. *Harmelin*, 501 U.S. at 988 (Scalia, J., delivering the judgment).

343. See *Ewing*, 538 U.S. at 35-53 (Breyer, J., dissenting).

344. *Id.* at 52.

circumstances.³⁴⁵ Therefore, under Justice Breyer's proposed Eighth Amendment regime, a state — indeed a sizable *group* of six different states — would not be permitted to vary more than two or three times from the choices of other states in fixing a punishment for a given offense. Adopting the *Ewing* dissent would impose real costs to federalism; it would result in a meaningful loss of flexibility and independence among the criminal justice systems of the States.³⁴⁶

IV. ILLUSTRATIONS

The conception of Eighth Amendment prison sentencing review, developed in the preceding Parts, has three defining features: (1) review is for rationality (though it is “with bite,” not merely vestigial); (2) the courts are more willing to disturb sentences that reflect the exercise of a substantial degree of judicial or jury discretion; and (3) the values vindicated by review are as much procedural as they are substantive.³⁴⁷ The following cases illustrate different aspect of the theory. After examining two significant lower court cases, I discuss at some length the Supreme Court's decision in the habeas case of *Lockyer v. Andrade*.³⁴⁸ *Andrade* not only sheds light on the intersection of the *Ewing-Harmelin* standard and federal habeas review, but when considered on the merits, it also provides a useful illustration of a close case in which a sentence should be deemed invalid under *Ewing-Harmelin*.

345. *Id.* app. at 59-61 (disclosing that the laws of Michigan, Montana, Nevada, Oklahoma, and South Dakota would authorize a life sentence — technically, in Montana, a 100-year sentence — with a time to parole eligibility equal to or greater than *Ewing*'s, in circumstances similar to *Ewing*'s crime).

346. *See Harmelin*, 501 U.S. at 989-90 (Scalia, J., delivering the judgment). Justice Scalia concluded:

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.

Id. (Scalia, J., delivering the judgment) (citations omitted).

347. *See supra* Part II.

348. 538 U.S. 63 (2003).

A. Substantive Irrationality: *Henderson v. Norris*

The contention that current law leaves the Eighth Amendment with no role to play in noncapital cases³⁴⁹ finds a counterexample in the Eighth Circuit's decision in *Henderson v. Norris*.³⁵⁰ An Arkansas jury convicted Grover Henderson of selling a police informant three small rocks of cocaine weighing less than a quarter of a gram.³⁵¹ This was Henderson's first criminal offense.³⁵² The relevant Arkansas criminal statute authorized the jury to choose a sentence of "not less than ten (10) years nor more than forty (40) years, or life."³⁵³ The jury was instructed that, under Arkansas law, a sentence of life imprisonment for Henderson's offense would be without parole.³⁵⁴ The jury nevertheless chose to sentence Henderson to life imprisonment.³⁵⁵ The Arkansas Supreme Court subsequently affirmed the sentence, four to three, rejecting an Eighth Amendment challenge.³⁵⁶ The entire discussion of federal law in the majority opinion was a single unadorned "see also" cite to *Harmelin v. Michigan*.³⁵⁷

Henderson sought federal habeas relief, and the Eighth Circuit, applying the standard of the *Harmelin* plurality, granted relief.³⁵⁸ Judge Morris Arnold's analysis was straightforward: he concluded that the small magnitude of Henderson's drug sale, the lack of any prior offenses, and the exceptionally harsh nature of the sentence gave rise to an inference of "gross disproportionality" — an inference confirmed by intrajurisdictional and interjurisdictional comparisons.³⁵⁹

Henderson exemplifies the irrational discretionary sentence. Because Henderson was a first-time offender, no interest in incapacitation or deterring recidivism could justify the life sentence without parole that the jury imposed. The amount of drugs involved was extremely small — just 0.238 grams³⁶⁰ — sharply differentiating the case from *Harmelin*. *Harmelin*'s possession of 672.5 grams of cocaine (as well as various other trappings of the drug trade)

349. See, e.g., *id.* at 83 (Souter, J., dissenting) ("If Andrade's sentence is not grossly disproportionate, the principle has no meaning."); Chemerinsky, *supra* note 20, at 1058; Gershowitz, *supra* note 15, at 1279.

350. 258 F.3d 706 (8th Cir. 2001). See generally Ray S. Pierce, Note, *Henderson v. Norris*, 258 F.3d 706 (8th Cir. 2001), 24 U. ARK. LITTLE ROCK L. REV. 775, 776-79 (2002).

351. *Henderson v. State*, 910 S.W.2d 656, 657-58 (Ark. 1995); *rev'd sub nom. Henderson v. Norris*, 258 F.3d 706 (8th Cir. 2001); Pierce, *supra* note 350, at 776.

352. *Henderson*, 910 S.W.2d at 661 (Brown, J., dissenting).

353. *Id.* (quoting ARK. CODE ANN. § 5-64-401(a)(1)(A) (1993)).

354. *Henderson*, 258 F.3d at 711.

355. *Id.* at 707.

356. *Henderson*, 910 S.W.2d at 660-61.

357. 501 U.S. 957 (1991) (plurality opinion); see *Henderson*, 910 S.W.2d at 660.

358. *Henderson*, 258 F.3d at 709, 714.

359. *Id.* at 709-14.

360. Pierce, *supra* note 350, at 776.

provided clear evidence of a sizable commercial drug operation.³⁶¹ And finally, the sentence was the result of a broad, discretionary judgment made by a single jury that was authorized by statute to sentence Henderson to as little as ten years imprisonment *with* possibility of parole or as much as life imprisonment *without* possibility of parole.³⁶² Something went wrong with Henderson's trial. Using Justice White's terminology in *Weems v. United States*,³⁶³ we can understand *Henderson* to be a case in which the Eighth Amendment "restrained the [jury] from exerting and [the Arkansas legislature] from empowering them to select and exert by way of discretion . . . usual modes of punishment to a degree not usual and which could alone be imposed by express authority of law."³⁶⁴

361. See *Henderson*, 258 F.3d at 709 ("[T]he plurality in *Harmelin* repeatedly emphasized the amount of cocaine involved in the crime . . ." (citation omitted)); *Harmelin*, 501 U.S. at 1008 (Kennedy, J., concurring in part and concurring in the judgment).

362. Ark. Code Ann. § 5-64-401(a)(1)(A) (1993); see *Henderson*, 910 S.W.2d at 661 (Brown, J., dissenting) ("The range for the jury to consider is very broad While I am extremely reluctant to reverse the jury in this case on grounds that it did not represent the moral sense of the community, I must conclude that it did not.").

363. 217 U.S. 349 (1910).

364. *Id.* at 397 (White, J., dissenting). The Eighth Circuit reviewed the Eighth Amendment claim de novo because Henderson's habeas petition was filed before the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA") — the current federal habeas corpus statute. *Henderson*, 258 F.3d at 707; see 28 U.S.C. § 2254(d)(1) (Supp. 2005) (requiring federal courts to affirm a state court's denial of a petitioner's habeas claim unless the state court's resolution is "contrary to, or involve[s] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States").

Would the result in *Henderson* have been the same if Henderson's habeas corpus petition was subject to the AEDPA? I believe so. Henderson's case is very close to the facts of *Solem v. Helm*, 463 U.S. 277 (1983), which also invalidated a discretionary life sentence without parole imposed on a minor offender. *Id.* at 282, 303. If Henderson's triggering offense is somewhat more serious than Helm's (a minor drug sale versus a minor financial crime), the gravity of the offense is outweighed by the fact that Henderson was not a recidivist felony offender like Helm. Compare *Henderson*, 258 F.3d at 707 (noting that Henderson is a first-time offender), with *Solem*, 463 U.S. at 279-81 (listing and discussing Helm's previous felonies).

Therefore, the Arkansas courts' failure to grant Henderson relief constituted an "unreasonable application" of *Solem* and would have been invalid under AEDPA. This conclusion is reinforced by the Court's recognition in its prior opinions that *some* prison sentences violate the Eighth Amendment. See *Ewing v. California*, 538 U.S. 11, 23-24 (2003); *Harmelin*, 501 U.S. at 997-98 (Kennedy, J., concurring in part and concurring in the judgment); *Solem*, 463 U.S. at 290. Denial of relief in Henderson's case would have scraped close against this bedrock principle, closer than *Harmelin* and *Andrade*. I say more about the relationship between AEDPA and noncapital Eighth Amendment review in the following sections of this Article. See *infra* Part IV C-D (discussing *Andrade*).

B. Procedural Irrationality: State v. David D. W.

Shortly after *Ewing v. California*³⁶⁵ was decided, the West Virginia Supreme Court of Appeals decided the case of *State v. David D. W.*³⁶⁶ Though primarily a state law decision, this case provides a compelling example of the type of vindictive discretionary sentence barred by the *Ewing-Harmelin* Eighth Amendment review standard.

David D. W. differs from most significant Eighth Amendment cases because it involved an unquestionably grave and reprehensible crime. The defendant was convicted of 38 incidents of sexual abuse of the same victims — his children — over a period of years.³⁶⁷ The trial judge had wide-ranging statutory discretion to fashion a sentence of years; the judge could have decided to sentence each count of the conviction concurrently or consecutively.³⁶⁸ The trial judge chose to fashion an astronomical sentence by imposing consecutive terms for every count of the conviction, which yielded a final punishment of 1,140 to 2,660 years of imprisonment.³⁶⁹ Citing both the federal Eighth Amendment and the corresponding provision of the West Virginia Constitution, the West Virginia Supreme Court of Appeals held that the sentence was unconstitutional.³⁷⁰

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 West Virginia Supreme Court of Appeals made clear that it considered the defendant's crimes "heinous and repulsive."³⁷¹ One concurring judge even specifically stated that he would have considered a more traditional life sentence appropriate.³⁷² Why then, invalidate the sentence? No one can serve longer than life in prison; thus, the millennia-long sentence struck down in *David D. W.* would have been no worse in *substantive* effect than a life sentence that at least part of the court would have been willing to uphold.

The result suggests that the West Virginia Supreme Court of Appeals acted on an inference of *procedural* defect arising from the extraordinary quality of the sentence. *David D. W.* is an analytical match for that paradigmatic Eighth Amendment violation — the King's Bench sentencing of Titus Oates.³⁷³ Like David D. W., Oates was a serious offender; Oates's

365. 538 U.S. 11 (2003) (plurality opinion).

366. 588 S.E.2d 156 (W.Va. 2003).

367. *Id.* at 160.

368. *Id.* at 166.

369. *Id.*

370. *Id.* at 165-66.

371. *Id.* at 166.

372. *Id.* at 167 (Maynard, J., concurring).

373. See generally Titus Oates, *supra* note 2, at 1227-1330 (discussing and recording Titus Oates's trial before the King's Bench).

perjuries caused numerous deaths.³⁷⁴ Consistent with the analysis presented in this Article, however, the West Virginia Supreme Court of Appeals declined to enforce a sentence that so dramatically revealed that the trial judge had “taken special care” of David D. W.³⁷⁵

C. Lockyer v. Andrade: The Effect of the AEDPA on Federal Noncapital Sentencing Review

Lockyer v. Andrade,³⁷⁶ the companion case to *Ewing v. California*,³⁷⁷ demonstrates how Eighth Amendment rationality review is refracted through the lens of the federal habeas corpus statute. The Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter “AEDPA”)³⁷⁸ limits the ability of federal courts to review the merits of state criminal courts’ decisions on issues of federal law. Under AEDPA, a federal habeas court may not grant habeas relief unless the state court’s adjudication of a petitioner’s claim is “contrary to, or involve[s] an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.”³⁷⁹ The Supreme Court has stressed that even state court judgments perceived as erroneous must be upheld on habeas review unless the state court’s decision contradicts a Supreme Court case with “materially indistinguishable” facts³⁸⁰ or applies the Supreme Court’s holdings in an “objectively unreasonable” manner.³⁸¹

As in *Ewing*, Leandro Andrade’s Eighth Amendment claim arose from application of the California “three strikes” recidivism statute.³⁸² Andrade stole videotapes from two K-Mart stores within a two-week time period, resulting in \$153.54 of stolen property.³⁸³ Andrade had previously been convicted of various misdemeanors and three groups of felony offenses: transportation of marijuana, escape from federal prison, and residential burglary.³⁸⁴ Although Andrade’s thefts ordinarily would have been classified as “petty theft,” a misdemeanor under California law, Andrade’s criminal

374. *Id.* at 1314.

375. *Id.* at 1316.

376. 538 U.S. 63 (2003).

377. 538 U.S. 11 (2003) (plurality opinion).

378. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 8, 15, 18, 19, 21, 22, 28, 40, 42, 49, 50 U.S.C.).

379. 28 U.S.C. § 2254(d)(1) (2000).

380. *Andrade*, 538 U.S. at 73 (quoting *Williams v. Taylor*, 529 U.S. 362, 406 (2000)); accord *Bell v. Cone*, 535 U.S. 685, 694 (2002).

381. *Andrade*, 538 U.S. at 75 (citing *Williams*, 529 U.S. at 409).

382. *Id.* at 67-68; see *Ewing v. California*, 538 U.S. 11, 19 (2003); see also *supra* text accompanying notes 233-39 (discussing the California “three strikes” statute).

383. *Andrade*, 538 U.S. at 66.

384. *Id.* at 66-67.

record enabled the prosecutor to charge each videotape theft as the cognate “wobbler” offense of “petty theft with a prior” — a felony and thus a triggering offense for the “three strikes” law.³⁸⁵ The prosecution also charged Andrade’s earlier residential burglary convictions as prior felony “strikes.”³⁸⁶ When the jury convicted him, Andrade incurred a sentence of “two consecutive terms of 25 years to life in prison”³⁸⁷ — a total punishment of 50 years to life triggered by the theft of roughly \$150 in property.

As previously discussed in connection with *Ewing*, California law authorized the trial judge to exercise discretion over Andrade’s sentence in two ways. First, the judge could have chosen to reduce the two charges of “petty theft with a prior” to misdemeanor petty theft, thereby preventing application of the “three strikes” statute.³⁸⁸ Second, the judge could have dismissed from the indictment some or all of Andrade’s prior “strikes,” thereby reducing his eventual sentence upon conviction.³⁸⁹ The trial judge, however, denied Andrade’s motions for relief, and the California Court of Appeal rejected Andrade’s claim that the 50-to-life sentence violated the Eighth Amendment.³⁹⁰

The Supreme Court heard Andrade’s case after a divided panel of the Ninth Circuit held that the California Court of Appeal “unreasonably applied” *Solem v. Helm*³⁹¹ when it affirmed Andrade’s sentence.³⁹² In an opinion by Justice O’Connor, the author of the *Ewing* plurality, a five-Justice majority of the Court reversed; the Court held that the California Court of Appeal’s rejection of Andrade’s Eighth Amendment claim did not violate AEDPA.³⁹³ The Court, however, expressly declined to decide whether Andrade’s

385. *Id.* at 67-68.

386. *Id.* at 68.

387. *Id.*

388. *Id.* at 67-68 (citing *People v. Super. Ct. of L.A. ex rel. Alvarez*, 928 P.2d 1171, 1177-78 (Cal. 1997)).

389. *Id.* at 67-68; *People v. Garcia*, 976 P.2d 831, 839-40 (Cal. 1999).

390. *Andrade*, 538 U.S. at 68-69.

391. 463 U.S. 277 (1983).

392. *Andrade v. Att’y Gen. of Cal.*, 270 F.3d 743, 767 (9th Cir. 2001), *rev’d sub nom. Lockyer v. Andrade*, 538 U.S. 63 (2003). In 2001, Ninth Circuit precedent allowed a federal court, under the guise of the AEDPA standard of “objective unreasonableness,” to reverse a state court’s denial of a claim if the federal court was left with a “firm conviction” of state court “error.” *See Andrade*, 270 F.3d at 753 (quoting *Van Tran v. Lindsey*, 212 F.3d 1143, 1153-54 (9th Cir. 2000)). The Ninth Circuit followed its idiosyncratic precedent in deciding *Andrade*. *Id.* The Supreme Court abrogated this precedent, holding that the Ninth Circuit’s “gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness.” *Andrade*, 538 U.S. at 75-76. The Court further stated that “the state court’s application . . . must be objectively unreasonable.” *Id.* at 75. *Cf. Ramirez v. Castro*, 365 F.3d 755, 777 (9th Cir. 2004) (Kleinfeld, J., dissenting) (“That is quite a standard.”).

393. *See Andrade*, 538 U.S. at 73-77. Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas joined Justice O’Connor’s opinion. *Id.* at 65.

constitutional claim would have prevailed under de novo review.³⁹⁴

AEDPA shifts the emphasis of federal habeas corpus review away from detailed consideration of the facts and equities of the defendant's case and toward the doctrinal analysis of prior Supreme Court decisions: what had the Court held and not held at the time the state court decided the petitioner's claims? The Court's majority opinion in *Andrade* strongly reflects this shift in focus. The majority spent much of the opinion discussing the state of the law as of 1997, when the California state courts acted on Andrade's Eighth Amendment claim.³⁹⁵ This was a particularly unpromising area of law for relief under AEDPA. The problem, Justice O'Connor emphasized, was that the Court's opinions from *Rummel v. Estelle*³⁹⁶ to *Harmelin v. Michigan*³⁹⁷ "ha[d] not been a model of clarity" and had failed to "establish[] a clear or consistent path for [lower] courts to follow."³⁹⁸ The *Andrade* majority concluded that "the only relevant clearly established law amenable to [AEDPA] . . . framework is the gross disproportionality principle, the precise contours of which are unclear, applicable only in the 'exceedingly rare' and 'extreme' case."³⁹⁹

Viewed from this standpoint, the decision in *Andrade* appears sound. No prior decision of the Court controlled Andrade's case — *Solem* in particular did not.⁴⁰⁰ Andrade was a more dangerous recidivist offender than Helm (Andrade had committed three residential burglaries and had escaped from prison), and yet, he received a slightly lighter sentence: 50 years to life instead of life without parole.⁴⁰¹ The state court could have deemed Andrade's case to fall closer to the tough prior holdings in *Rummel*, *Davis*, and *Harmelin* than to *Solem*'s holding without thereby engaging in an "objectively unreasonable" analysis under AEDPA.

D. Andrade On the Merits

We are still entitled to ask whether Andrade's sentence would have been affirmed on direct review, i.e., whether the California Court of Appeal's

394. *Id.* at 71 ("[W]e do not reach the question whether the state court erred and instead focus solely on whether § 2254(d) forecloses habeas relief on Andrade's Eighth Amendment claim.").

395. *See id.* at 71-77.

396. 445 U.S. 263 (1980).

397. 501 U.S. 957 (1991).

398. *Andrade*, 538 U.S. at 72.

399. *Id.* at 73 (quoting *Harmelin*, 501 U.S. at 1001 (plurality opinion) (Kennedy, J., concurring in part and concurring in the judgment)).

400. *Cf. id.* at 74 ("[W]hile this case resembles to some degree both *Rummel* and *Solem*, it is not materially indistinguishable from either.").

401. Compare *Andrade*, 538 U.S. at 66-68 (discussing Andrade's criminal record and prison sentence), with *Solem v. Helm*, 463 U.S. 277, 279-82 (1983) (discussing Helm's criminal record and prison sentence).

handling of his claim was not merely reasonable but *correct*. There is reason to doubt this. Justice Souter's thoughtful dissenting opinion in *Andrade* identifies two problems with Andrade's sentence, reasoning in terms that mesh well with this Article's conception of Eighth Amendment sentencing review as rationality review with bite.⁴⁰²

First, unlike the *Harmelin* sentence, which was the result of a flat, mandatory legislative penalty for drug possession,⁴⁰³ Andrade's sentence was the result of multiple discretionary decisions by the trial judge that permitted the case to proceed under the fullest rigor of the "three strikes" statute.⁴⁰⁴ This fact, along with the minor, nonviolent nature of the triggering crimes in *Andrade* and *Solem*, brings Andrade's case closer to the *Solem* side of the *Solem/Harmelin* divide.⁴⁰⁵

The second problem was that Andrade's 50-to-life sentence was obtained by treating his two related minor thefts as two distinct "strikes." This choice, Justice Souter argued, placed an internal strain on the penological theory underpinning the "three strikes" statute.⁴⁰⁶ Justice Souter reasoned that the "only serious justification for the 25-year minimum" for a defendant with three qualifying "strikes," or felonies, is "to incapacitate [the] defendant from further crime."⁴⁰⁷ In other words, the third-strike crime identifies a *tendency* to commit crimes, thereby justifying, under an incapacitative rationale, a heavy 25-to-life sentence for what may be a modest crime. But in *Andrade*, the defendant not only received the 25-to-life sentence, but also a consecutive 25-to-life sentence for a second minor offense that was similar to, and occurred within two weeks of, the triggering offense.⁴⁰⁸ Justice Souter argued that this consecutive 25-to-life sentence for an offense that was so similar in kind and so close in time did nothing to further the incapacitative rationale:

Andrade did not somehow become twice as dangerous to society when he stole the second handful of videotapes. . . . Since the defendant's condition has not changed between the two closely related thefts, the incapacitation penalty is not open to the simple arithmetic of multiplying the punishment by two [T]he California Court of Appeal offered no comment at all as to the particular penal theory supporting such a punishment.⁴⁰⁹

In summary, Andrade's case involved a very severe sentence triggered by

402. See *Andrade*, 538 U.S. at 78-83. Justice Souter even characterized Andrade's sentence as "irrational." See *id.* at 82 (Souter, J., dissenting).

403. *Harmelin*, 501 U.S. at 961 n.1 (Scalia, J., delivering the judgment).

404. *Andrade*, 538 U.S. at 67-68.

405. See *id.* at 78-79 (Souter, J., dissenting) ("The facts [in *Andrade*] are on all fours with those of *Solem* and point to the same result.").

406. *Id.* at 80-82.

407. *Id.* at 80.

408. See *id.* at 81-82.

409. *Id.* at 82.

two misdemeanor thefts elevated to felonies, in which the trial court refused two different discretionary legal avenues to mitigate the sentence. Furthermore, the penological rationale underpinning the state's recidivist statute could not be extended to justify the harsh sentence without considerable logical strain, even in the statute's own terms. Therefore, a court could justifiably conclude on direct review that the sentence was arbitrary and capricious and thus in violation of the Eighth Amendment. Ninth Circuit Judge Andrew Kleinfeld accurately summed up the issues in a dissent from a later Ninth Circuit decision, writing that *Andrade* "operates more as a federalism decision than as an Eighth Amendment decision."⁴¹⁰ It is AEDPA, not the *Ewing-Harmelin* standard, that determined the outcome in the case.

V. RECONCILING RATIONALITY REVIEW OF PRISON SENTENCES WITH CONSTITUTIONAL REVIEW OF OTHER TYPES OF SANCTIONS

The Supreme Court's Eighth Amendment proportionality decisions are by no means limited to prison sentencing. They have encompassed criminal and civil sanctions ranging from capital punishment to terms and conditions of imprisonment, fines, and punitive damages.⁴¹¹ I do not believe that any amount of interpretive adjustment can make these disparate cases perfectly consistent. But I do reject the notion that the Court's handling of *noncapital* proportionality review is so riddled with contradiction as to be intractable. To the contrary, there are important points of congruence between the different areas of the Court's Eighth Amendment noncapital proportionality review jurisprudence, resulting in a stable body of doctrine in which prison terms and most other forms of sanction are reviewed for rationality.

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"⁴¹² and are "totally without penological justification"⁴¹³ — a standard virtually indistinguishable from the rationality review standard of *Harmelin v. Michigan*⁴¹⁴ and *Ewing v.*

410. *Ramirez v. Castro*, 365 F.3d 755, 778 (9th Cir. 2004) (Kleinfeld, J., dissenting).

411. *See infra* Part V A-D.

412. *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion)).

413. *Id.* (quoting *Gregg v. Georgia*, 428 U.S. at 183); *see also* *Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) (holding that the denial of medical care to an inmate serves no penological purpose and is a violation of the Eighth Amendment).

414. *See Harmelin v. Michigan*, 501 U.S. 957, 999, 1004 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (noting four penological goals and concluding that the

California.⁴¹⁵ Furthermore, the standard used in prison condition cases has a subjective component similar to the one found in sentencing review cases: courts pay attention to the subjective motivations for imposing a given condition as well as the severity of the condition.⁴¹⁶ Prison conditions violate the Eighth Amendment only if the decision makers have a “culpable state of mind” suggesting at least “‘deliberate indifference.’”⁴¹⁷

This is an important source of consistency in Eighth Amendment case law. The prison sentencing and prison condition cases reveal that a single, broad constitutional standard of rationality governs all measures imposed against those duly convicted of an offense punishable by imprisonment. Neither the length of the 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

In the view of many, the most objectionable source of inconsistency in the Court’s jurisprudence arises from its recent decisions striking down high punitive damage awards as violative of the Fourteenth Amendment’s Due Process Clause, even as Eighth Amendment decisions like *Ewing* and *Harmelin* allow tough prison sentences to stand.⁴¹⁸ In the past decade, a majority of the Supreme Court in the cases of *State Farm Mutual Automobile Insurance Co. v. Campbell*⁴¹⁹ and *BMW of North America, Inc. v. Gore*⁴²⁰ has invalidated some large punitive damage awards in state courts on the ground that they are “grossly excessive or arbitrary punishments on a tortfeasor” in violation of the Due Process Clause.⁴²¹

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 without disclosing that they had been repainted.⁴²² In the recent and important *State Farm* case, the Court invalidated a Utah jury’s award of \$145 million in punitive damages and \$1 million in actual damages against State Farm for the company’s bad-faith failure to settle a tort action for

statutory scheme at issue had a rational basis that satisfied those goals).

415. See *Ewing v. California*, 538 U.S. 11, 29-31 (2003) (upholding *Ewing*’s sentence because it furthered a “legitimate penological goal”).

416. See, e.g., *Gamble*, 429 U.S. at 104-06.

417. *Wilson v. Seiter*, 501 U.S. 294, 297 (1991) (citing and quoting *Gamble*, 429 U.S. at 106).

418. See *Ewing*, 538 U.S. at 20, 31; *Harmelin*, 501 U.S. at 961, 996 (Scalia, J., delivering the judgment).

419. 538 U.S. 408 (2003).

420. 517 U.S. 559 (1996).

421. *State Farm*, 538 U.S. at 416; accord *Gore*, 517 U.S. at 562.

422. *Gore*, 517 U.S. at 563-65, 586.

wrongful death within the clients' policy limits.⁴²³

The plaintiffs, who were clients of State Farm, presented evidence of various actions by the insurer that suggested a strong degree of bad faith.⁴²⁴ The Supreme Court, however, held the punitive damage award unconstitutional; the Court even suggested sweeping substantive limits on the magnitude of punitive damage awards.⁴²⁵ 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."⁴²⁶ The Court further opined that the plaintiffs' case "likely would justify a punitive damages award at or near the amount of compensatory damages."⁴²⁷

The Court's sweeping language in *State Farm* is hard to reconcile with its careful approach to due process-style review of prison terms in *Ewing* and *Harmelin*. Academic condemnation of the Court's handling of the twin lines of cases has been practically universal.⁴²⁸

423. *State Farm*, 538 U.S. at 413, 415, 418, 429 ("Under the principles outlined in . . . *Gore*, this case is neither close nor difficult.").

424. *See id.* at 414-15. 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 the plaintiffs were at fault for the lethal car crash that led to the tort claims. *See id.* at 433 (Ginsburg, J., dissenting). 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.* A manager also instructed the claims adjuster to insert false material in his report impugning the character of the accident victim. *See id.* at 432. The company contested liability and refused offers to settle within the policy limit of \$50,000. *Id.* at 413 (majority opinion). At trial the jury found against Campbell and entered a verdict for \$185,849. *Id.*

State Farm refused to fund an appeal, and at first, refused to cover the excess liability. *Id.* State Farm's counsel even suggested that the plaintiffs "'put for sale signs on [their] property to get things moving.'" *Id.* (quoting *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1142 (Utah 2001)). There was also evidence that State Farm had implemented a company-wide, national plan 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. Furthermore, evidence suggested that the company destroyed incriminating documents that would have demonstrated its policy to deny coverage in bad faith. *Id.* at 434-35 (majority opinion).

425. *See id.* at 425, 429.

426. *Id.* at 425.

427. *Id.* at 429.

428. *See, e.g.*, Brennan, *supra* note 15, at 552 (calling on the Supreme Court to "assert a more active role" in reviewing prison sentences); Chemerinsky, *supra* note 20, at 1062-63; Gershowitz, *supra* note 15, 1252-55 (criticizing the Supreme Court's respective approaches to prison sentencing and punitive damages as not only inconsistent but "backwards"); Kaimipono David Wenger & David A. Hoffman, *Nullifactory Juries*, 2003 WIS. L. REV. 1115, 1134-36. Van Cleave succinctly states the issue as follows:

The Supreme Court . . . continue[s] to give teeth to proportionality review of . . . monetary

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 the holdings in *State Farm* and *Gore* discloses that they (though not all of their language) can in fact be reconciled with *Harmelin* and *Ewing* and the general standards of due process review.

In both *State Farm* and *Gore*, the large punitive damages awards in the forum states were based upon the plaintiffs' evidence of the defendants' alleged wrongdoing in *other* states.⁴²⁹ But neither set of plaintiffs demonstrated that the alleged wrongful conduct was unlawful in the states where it had occurred — a fact plausibly viewed by the Court as an infringement of constitutional prohibitions against extraterritorial application of a state's laws.⁴³⁰ The Court also suggested that the use of out-of-state evidence to enhance an argument violated principles of fair notice to defendants.⁴³¹

Two factors, then, tend to justify the judicial interventions in *State Farm* and *Gore*. First, punitive damage awards are typically imposed by jurors who select a number within a wide *discretionary* range, resembling the

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.

Van Cleave, *supra* note 15, at 219-220.

429. *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."); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571-74 (1996) ("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.").

430. *State Farm*, 538 U.S. at 420-22. The Court invoked authority stating a general constitutional principle against extraterritoriality. *See id.* at 420-22 (quoting, *inter alia*, *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914) ("[I]t would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State" (alteration in original))). *Gore* drew more specifically upon cases decided under the so-called Dormant Commerce Clause, stating that "one 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." *Gore*, 517 U.S. at 571 (citation omitted) (citing, *inter alia*, *Edgar v. MITE Corp.*, 457 U.S. 624, 643 (1982)). *See generally* Donald H. Regan, *Siamese Essays: (I) CTS Corp. v. Dynamics Corp. of America and Dormant Commerce Clause Doctrine; (II) Extraterritorial State Legislation*, 85 MICH. L. REV. 1865 (1987) (discussing the history and application of the "extraterritoriality principle").

431. *See 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)). 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.

discretionary sentence disposed of in *Solem v. Helm*⁴³² rather than the mandatory sentence approved of in *Harmelin*.⁴³³ Second, *State Farm* and *Gore* can fruitfully be conceived (and if necessary reconceived) as cases that were about perceived excessiveness in punitive damages *combined with* a constitutional extraterritoriality violation.

C. Fines

Fines imposed as criminal punishment present issues similar to those surrounding punitive damages. Proportionality analysis of fines, however, involves a different textual provision of the Constitution than either punitive damages (reviewed under the Due Process Clause)⁴³⁴ or other criminal sanctions (reviewed under the Cruel and Unusual Punishments Clause).⁴³⁵ By the terms of the Eighth Amendment, fines need not be “cruel and unusual” to be unconstitutional; they need only be “excessive.”⁴³⁶ Therefore, in the face of such language, courts can reasonably review fines for *substantive* disproportionality while reviewing other common punishments for only arbitrariness, which is the standard in prison sentencing and prison conditions cases.⁴³⁷

The Supreme Court’s principal case on the Excessive Fines Clause coheres with such an analysis. *United States v. Bajakajian*⁴³⁸ invalidated the application of a federal statute that required the defendant to forfeit his undeclared currency — \$357,144 — as a penalty for attempting to transport it out of the country without reporting that he was transporting more than \$10,000.⁴³⁹ In an opinion by Justice Thomas, a five-Justice majority held that the forfeiture was “grossly disproportionate” to Bajakajian’s offense and violated the Eighth Amendment.⁴⁴⁰ The *Bajakajian* majority, however, used the full-blooded proportionality analysis originally deployed in the prison sentencing context in *Solem*, including *Solem*’s use of mandatory interjurisdictional and intrajurisdictional comparisons, to gauge the

432. *Solem v. Helm*, 463 U.S. 277 (1983).

433. *See supra* Part II C-D.

434. *See supra* Part V B.

435. *See supra* Part V A; *infra* Part V D.

436. U.S. CONST. amend. VIII. (“Excessive bail shall not be required, nor *excessive fines* imposed” (emphasis added)).

437. *Cf. Harmelin*, 501 U.S. at 978 n.9 (Scalia, J., delivering the judgment) (arguing that it was reasonable for 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 190, at 120 (noting the apparent significance of the Eighth Amendment distinction between “excessive” and “cruel and unusual”); *see also supra* Part II D-E.; *supra* Part III A.

438. 524 U.S. 321 (1998).

439. *Id.* at 324-25; *see* 18 U.S.C. § 982(a)(1) (1994); 31 U.S.C. § 5316(a)(1)(A) (1994).

440. *Bajakajian*, 524 U.S. at 339-40, 344.

appropriateness of the fine.⁴⁴¹ The analysis in *Bajakajian* also followed *Solem* by focusing on the sole factor of retribution. In other words, the inherent wrongness of the offense was compared to the magnitude of the fine⁴⁴² — in contrast to the looser textured *Ewing-Harmelin* brand of rationality review, under which different penal interests may be considered simultaneously.⁴⁴³

At first glance, *Bajakajian*'s use of *Solem*'s proportionality standard creates a tangle in the case law. Why is the excessive fines inquiry governed by a standard that the Court first formulated in the context of prison sentencing and then *rejected* (in *Harmelin*) as overbroad?⁴⁴⁴ To resolve this tangle, there is no choice but textualism: the proportionality test put forth in *Solem* is a plausible version of what the Eighth Amendment *would* require if it prohibited "excessive" rather than "cruel and unusual" prison sentences.⁴⁴⁵ Therefore, the *Bajakajian* Court reasonably exported *Solem*'s excessiveness/proportionality inquiry into a context — fines — where the Constitution really does prohibit "excessiveness,"⁴⁴⁶ as opposed to the context of prison sentences, in which it only prohibits arbitrariness.⁴⁴⁷

D. Capital Punishment

The candid interpreter must acknowledge the sharp division between capital punishment and all other criminal sanctions in Eighth Amendment proportionality case law. Death penalty cases have imposed a host of demanding requirements intended to ensure proportionality between the punishment and the crime.⁴⁴⁸ Under current Eighth Amendment law, the death penalty is constitutionally prohibited for non-aggravated murder,⁴⁴⁹ felony

441. *Id.* at 337-39; *see also* *Solem v. Helm*, 463 U.S. 277, 292 (1983). 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. *Bajakajian*, 524 U.S. at 338.

442. *Bajakajian*, 524 U.S. at 337-39; *Solem*, 463 U.S. at 290-91.

443. *See* *Ewing v. California*, 538 U.S. 11, 23 (2003) (citing *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment)).

444. *See* Karlan, *supra* note 228, 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. . . . [T]he Court seems to analyze the gravity of *Bajakajian*'s offense solely from a retributivist perspective. . . .

Id.

445. *Cf.* *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (concluding incorrectly that the Eighth Amendment prohibits "[e]xcessive" sanctions" (alteration in original)); *see also* U.S. CONST. amend. VIII.

446. *See* U.S. CONST. amend. VIII.

447. *See supra* Part II D-E.

448. *See generally* *Atkins*, 536 U.S. at 352-53 (Scalia, J., dissenting) (summarizing requirements imposed by previous holdings).

449. *Godfrey v. Georgia*, 446 U.S. 420, 432-33 (1980) (plurality opinion).

murder absent an intent to kill,⁴⁵⁰ and rape.⁴⁵¹ The death penalty cannot be imposed on the mildly retarded⁴⁵² or those under age 18 at the time of their offense.⁴⁵³ Furthermore, the death penalty cannot be imposed as a mandatory penalty,⁴⁵⁴ and sentencing juries or judges must be empowered to take all relevant mitigating evidence into account.⁴⁵⁵ These requirements go far beyond the limited scrutiny employed in the prison sentencing cases, in the form of rationality review, and indeed beyond the punitive damages and fines cases.⁴⁵⁶

To be sure, the kind of rationality review exemplified by the *Ewing-Harmelin* line of cases — the “due process” aspect of the Eighth Amendment — has also influenced the Justices’ capital punishment review. The impression of overwhelming *arbitrariness* in the imposition of the death penalty in *Furman v. Georgia*⁴⁵⁷ appears to have motivated Justice Douglas to concur in the *Furman* judgment invalidating previous 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 [in Georgia and Texas] that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned.⁴⁵⁸

The Court’s death penalty jurisprudence, however, goes far beyond arbitrariness review; it imposes squarely substantive judgments of

450. *Enmund v. Florida*, 458 U.S. 782, 801 (1982).

451. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

452. *Atkins*, 536 U.S. at 321.

453. *Roper v. Simmons*, 125 S. Ct. 1183, 1198 (2005).

454. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion).

455. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion).

456. *See Harmelin v. Michigan*, 501 U.S. 957, 995 (1991) (Scalia, J., delivering the judgment) (“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 (Kennedy, J., concurring in part and concurring in the judgment) (noting that the “most extensive application” of the Eighth Amendment proportionality principle “has been in death penalty cases”); DRESSLER, *supra* note 143, at 49 (contrasting the Court’s limited “oversight of non-capital sentences” with death penalty cases); *see also supra* Part II D-E; *supra* Part IV B-C.

457. 408 U.S. 238 (1972) (per curiam).

458. *Id.* at 242, 25 (Douglas, J., concurring); *see Claus, supra* note 190, at 121 (examining Justice Douglas’s interpretation of the Eighth Amendment in *Furman*).

proportionality in cases subject to reasonable moral disagreement.⁴⁵⁹

An explanation of the Court's "death is different"⁴⁶⁰ jurisprudence must also be squarely substantive. The qualitative difference between death and other punishments is mirrored in the qualitative difference between Eighth Amendment or "due process" review of death and other sanctions. Furthermore, the streams of precedent in capital and noncapital Eighth Amendment proportionality review have been so divergent for so long that they no longer exert much gravitational pull on one another. At present, to bring a coherent and justifiable order to the practice of constitutional review of *noncapital* sanctions is ambition enough.

VI. CONCLUSION

A durable idea about the Fourteenth Amendment, particularly its Due Process Clause, is that it "add[s] greatly to the dignity and glory of American citizenship"⁴⁶¹ by acting as a "bulwark[.] . . . against arbitrary legislation."⁴⁶² As interpreted by *United States v. Carolene Products Co.*⁴⁶³ and its progeny, the Due Process Clause confers protection against irrational state action at the wholesale level.⁴⁶⁴ The Eighth Amendment, in its application to individual

459. In *Roper v. Simmons*, 125 S. Ct. 1183 (2005), the Court held that the Eighth Amendment categorically prohibited the sentence of death in all cases involving offenders younger than 18 at the time of their offense. *Id.* at 1200; *see id.* at 1191-92 (asserting that "'the Constitution contemplates that in the end [the Court's] judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment.'" (quoting *Atkins v. Virginia*, 536 U.S. 304, 312 (2002))). The facts of *Roper*, however, demonstrate the often contestable nature of the Court's judgments in this area.

In *Roper*, the defendant was convicted for a brutal and premeditated murder that he committed at age 17. *Id.* at 1187-88. Prior to the murder, he talked about his desire to kill someone, and formulated a plan with two companions. *Id.* at 187. He assured his friends that they could "get away with" the crime because they were minors. *Id.* The defendant actually broke into the victim's house, bound her with duct tape, walked her to a bridge, and threw her into a river to drown. *Id.* at 1188. Subsequent to the murder, the defendant 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).

460. *See Note, The Rhetoric of Difference and the Legitimacy of Capital Punishment*, 114 HARV. L. REV. 1599, 1599 n.1 (2001) (noting that this phrase originated in the remarks of Professor Anthony Amsterdam in oral argument before the Court in *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion)).

461. *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (Harlan, J., dissenting).

462. *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (Harlan, J., dissenting) (quoting *Hurtado v. California*, 110 U.S. 516, 532 (1884)).

463. 304 U.S. 144 (1938).

464. *See supra* Part I A-B.

prison sentences, is best understood as extending that same principle of protection and review to the magnitude of individual terms of imprisonment. This conception of the Eighth Amendment is normatively defensible on its own terms, and it sheds light on the constitutional review of other noncapital sanctions — fines, punitive damages, and conditions of imprisonment.⁴⁶⁵ Furthermore, this conception suggests a principle of general constitutional scope, implemented through the Eighth and Fourteenth Amendments, that prohibits the application of state force to individuals in a manner that is arbitrary and capricious, either in itself or in its degree.

465. *See supra* Part V.