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IN THE
Supreme Court of the United States

TERRANCE JAMAR GRAHAM,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

JOE HARRIS SULLIVAN,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

ON WRITS OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF OF AMICUS CURIAE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW IN SUPPORT OF PETITIONERS

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BRIEF OF THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE[1]

Amicus curiae the Center on the Administration of Criminal Law ("the Center") is dedicated to defining and promoting best practices in the administration of criminal justice through academic research, litigation, and participation in the formulation of public policy.

The Center's litigation component aims to use its empirical research and experience with criminal justice and prosecution practices to assist in important criminal justice cases in state and federal courts throughout the United States. The Center's litigation program focuses on cases in which the exercise of prosecutorial discretion raises significant substantive legal issues. Because the misuse of prosecutorial discretion can and has resulted in the imposition of cruel and unusual punishments, the Center participates in cases to encourage the judiciary to check prosecutors by performing its constitutionally mandated task of enforcing the Eighth Amendment. The Center's Faculty Director is a nationally-recognized expert on

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution intended to fund its preparation or submission. The respondent has filed a blanket waiver in both cases. The petitioners have consented to the filing of this brief and such consent is being lodged herewith.

sentencing and criminal law, and the Center's Executive Director is a former federal prosecutor who worked for 12 years in the United States Attorneys' Offices for the Southern District of New York and the District of Columbia and in the United States Department of Justice.

The Center files this amicus brief out of concern that the absence of meaningful substantive review of noncapital sentences, the continued proliferation nationwide of excessively harsh and often mandatory sentences, and the fact that virtually all criminal cases are resolved by plea and not by trial have created significant imbalances in the criminal justice system. These imbalances, combined with the concentration of power in the hands of prosecutors, pose barriers to the fair administration of criminal justice. The Center respectfully submits that this Court should hold that the sentences imposed in these cases are unconstitutionally excessive and invigorate substantive review of noncapital sentences in order to fulfill the mandate of the Eighth Amendment and restore rationality and proportionality to the criminal justice system in the United States.

SUMMARY OF THE ARGUMENT

This Court first held that the Eighth Amendment prohibits disproportionate noncapital sentences nearly a hundred years ago in *Weems v. United States*, 217 U.S. 349 (1910). The Court strongly reaffirmed this principle in the majority opinion of *Solem v. Helm* when it held that "[t]he common-law principle [of proportionality] incorporated into the Eighth Amendment clearly applied to prison terms." 463 U.S. 277, 289 (1983). Since then,

the Court has consistently recognized the Eighth Amendment prohibition on disproportionate sentences.[2]

Although some members of the Court suggested, in *Ewing*, that a prison term can never violate the Eighth Amendment, *Ewing* 538 U.S. 11 at 21-22, 28-30 (2003), the elimination of proportionality review in the noncapital context would be inconsistent with the Eighth Amendment's text and original meaning, the Amendment's text prohibits excessive bail or fines, as well as cruel and unusual punishments. There has been a debate within the Court and among scholars concerning the original meaning of the Eighth Amendment. However, drawing on English and early American legal history, this Court has held that the Amendment was intended to prohibit *all* punishments – including terms of incarceration – that are unwarranted by the nature of the offense committed or the character of the offender. *See Weems v. United States*, 217 U.S. 349, 366-81 (1910); *Solem v. Helm*, 463 U.S. 277, 284-90 (1983); *see also Rummel v. Estelle*, 445 U.S. 263, 287-88 (1980) (Powell, J. dissenting). A close examination of the text and history of the Amendment supports this conclusion.

Now more than ever, citizens need the protection of the Eighth Amendment. In the past few decades, both major political parties have aggressively sought the label of "tough on crime." The result has been a proliferation of new criminal laws, many of which are written so broadly that they cover cases that were not within the

[2] *See Lockyer v. Andrade*, 538 U.S. 63, 72 (2003).

intent of the legislature.[3] In addition to dramatically expanding the scope of behavior covered by criminal law, legislators have adopted increasingly harsher punishments. They have done so through a variety of mechanisms, including mandatory minimums and three-strikes laws that shift control over sentencing away from the judiciary and to prosecutors who determine who gets these sentences through their charging decisions. Judicial control over sentencing is further reduced because these broad and harsh laws give prosecutors the ability to leverage defendants into guilty pleas. In fact, many laws include punishments that no one thinks are appropriate in many of the cases to which they apply. Instead, these laws often contain inflated punishments that are included to create leverage for prosecutors to secure guilty pleas and cooperation. Enforcing the Eighth Amendment prohibition against disproportionate sentences would provide needed protection in those cases where laws are inappropriately applied and yield sentences in excess of what is proportionate to the crime committed or to the particular offender's culpability.

There is already an existing model for this kind of enforcement of the Eighth Amendment. The Court has

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[3] *See* John S. Baker Jr., Federalist Soc'y for Law & Pub. Pol'y, Measuring the Explosive Growth of Federal Crime Legislation 12 (2004); James Strazella et Al., Task Force on the Federalization of Criminal law, Am. Bar Ass'n Criminal Justice Section, The Federalization of Criminal Law, 7 (1998); Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703, 724 (2005); John C. Coffee, *The Metastasis of Mail Fraud: The Continuing Story of the Evolution of a White-Collar Crime*, 21 Am. Crim. L. Rev. 1, 19 (1983).

consistently applied a robust proportionality principle in the context of capital sentencing. There is no good reason to confine a vigorous application of the Eighth Amendment to capital cases. The text of the Eighth Amendment certainly does not distinguish between capital punishments and other forms of punishment. The Court has often emphasized the differences between the death penalty and other forms of punishment, but the only real difference is that death is a more severe punishment. This difference does not justify providing Eighth Amendment protections to defendants in capital cases while denying them to all others.

The Court has also pointed to potential difficulties in administering a proportionality review in noncapital cases as a reason for its unwillingness to apply a proportionality principle to noncapital sentences. However, in many other contexts – including cases involving fines, punitive damages, and capital punishment – the court has often applied proportionality tests that are no easier to administer than a proportionality test that covers terms of incarceration. There is no justification for singling out incarceration as the only type of punishment that escapes judicial review.

Because application of a proportionality principle to noncapital sentences is mandated by the text and original meaning of the Eighth Amendment, the Court, in the present case, should return to the robust proportionality review it adopted in *Solem v. Helm*.

ARGUMENT

I. AN EXAMINATION OF THE TEXT AND HISTORY OF THE EIGHTH AMENDMENT INDICATES THAT THE "CRUEL AND UNUSUAL PUNISHMENTS" CLAUSE WAS ORIGINALLY INTENDED TO PROHIBIT DISPROPORTIONATE CRIMINAL SENTENCES.

The text of the "Cruel and Unusual Punishments" Clause of the Eighth Amendment prohibits all forms of disproportionate punishment, including terms of imprisonment. And the enactment history of the Clause – which comes directly from the English Bill of Rights – strongly supports the view that its ban on cruel and unusual punishment was meant to outlaw punishments that, while permissible in some circumstances, are disproportionate for the offense at hand.

A. The Language and Source of the Eighth Amendment Prohibit All Forms of Disproportionate Punishment.

The Eighth Amendment states that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VII. The prohibitions on "excessive bail" and "excessive fines" mandate a proportionality review.[4] The prohibition on "cruel and unusual punishments" is *in pari materia*[5] with the bail and fines clauses and thus

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[4] *See, e.g.*, *Stack v. Boyle*, 342 U.S. 1, 5 (1951); *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

[5] *Osborn* v. *Haley*, 549 U.S. 225, 263 (2007).

also mandates proportionality review. Indeed, the Court has recognized that the Eighth Amendment imposes "'parallel [proportionality] limitations' on bail, fines, and other punishments." *Solem v. Helm*, 463 U.S. 277, 289 (1983) (quoting *Ingraham v. Wright*, 430 U.S. 651, 664 (1977)).

This interpretation also comports with the commonly understood meanings of "cruel" and "unusual" at the time of the Framing. The word "cruel" was often used as a synonym for severe or excessive.[6] The word "unusual" was used interchangeably with the word "illegal."[7] Illegality in this context meant legal practices contrary to "long usage," or innovations outside of established common or customary law.[8] During the colonial period, common law often operated as a legal minimum, similar to *jus cogens* in international law, preventing legislation from violating longstanding, customary legal principles.[9] Legislation that violated established common law principles was considered

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[6] *See, e.g.*, 4 William Blackstone, Commentaries on the Laws of England 16-17 (1769) (describing punishments of "unreasonable severity" Blackstone uses the word "cruel" as a synonym for severe or excessive); *see also* Oxford English Dictionary Online "cruel" (2d ed. 1989) (hereinafter "OED") (citing a 1710 definition of cruel as "severe, hard"), www.oed.com.

[7] *Harmelin v. Michigan*, 501 U.S. 957, 970-74 (1991).

[8] *See generally* John Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 Nw. L. Rev. 1739 (2008).

[9] *See id.* at 1765.

"unusual" in this sense, and thus void.[10] This concept was at the heart of the American Revolution. Colonists claimed legal justification for independence from Parliament's repeated violation of common law rights to representation and trial by jury, the same rights memorialized in the Constitution.[11] Thus, to the extent that "unusual" is synonymous with "illegal," the illegality referred to was the violation of longstanding common law norms, not the lack of statutory authorization. Thus, interpreting the terms together, the "cruel and unusual punishments" prohibited by the Bill of Rights were severe or excessive punishments that broke from longstanding, inviolable common law tradition.

The common law prohibition "against excessive punishment," in any form, originated with the Magna Carta.[12] Historical evidence suggests that the common law proportionality principle was codified in the English Bill of Rights in response to the disproportionate punishment of Titus Oates.[13] A dissent accompanying the rejection of Oates' appeal stated that "there is no precedent to warrant the punishment of whipping and

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[10] *See id.* at 1795 (citing objections to Parliament's actions as "unusual" and "void" because contrary to "common right or reason").

[11] *Id.* at 1794-96.

[12] Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted":* The Original Meaning, 57 CAL. L. REV. 839, 845 (1969); *see also* MAGNA CARTA ch. 20-22 (1215) (describing regulations on excessive and oppressive punishment through fines).

[13] *See id.* at 852-860.

committing to prison for life *for the crime of perjury*."[14] Thus, in the context of the Oates case, "cruel and unusual" referred to the severity of the punishment in relation to the crime, not to the method of punishment. Therefore, the meaning of the English Bill of Rights provision on which the Eighth Amendment was modeled supports its application to excessive sentences of imprisonment.

B. Evidence from the Ratification of the Bill of Rights Demonstrates the Existence of a Proportionality Requirement.

The history of the Constitution's ratification, including debate notes from both the Virginia Convention and the First Congress, demonstrate that the Eighth Amendment includes a proportionality requirement. Although the historical record contains few specific references to the "Cruel and Unusual Punishments" Clause, disagreements between Federalists and Anti-Federalists concerning the need for a Bill of Rights offer insight into the abuses that the Amendments, including the Eighth Amendment, aimed to prevent. Additionally, the ratification debate in the First Congress illuminates the Members' understanding of the language of the Amendment. Examined in context, both show that the "Cruel and Unusual Punishments" Clause includes a proportionality requirement analogous to English common law.

The best evidence of why state legislatures decided to demand the Amendment comes from

[14] *Harmelin v. Michigan*, 501 U.S. 957, 971 (1991) (Scalia, J.).

transcripts of the Virginia ratification convention.[15] Anti-Federalist resistance to ratification of the Constitution stemmed largely from concerns over the new federal government's potential for abuse of common law civil rights.[16] Patrick Henry and George Mason led the Anti-Federalist attack on ratification, going through the Constitution line-by-line and arguing that it gave the federal government powers unknown at common law that would lead to "new and unusual experiments in government."[17] Henry focused on several instances of federal government power to institute "unusual punishments," including the danger of using the treaty and militia power for law enforcement purposes.[18] Most importantly, Anti-Federalists highlighted the danger of the federal government's criminal prosecutorial power due to a lack of either common law limitations or a bill of rights.[19] Henry's argument for the addition of the Bill of Rights and specifically the Eighth Amendment hinged on protecting citizens from both harsh punishments and disproportionate sentences:

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[15] Stinneford, *supra* note 8, at 1803-10.

[16] *Id.* at 1803.

[17] PATRICK HENRY, SPEECH TO THE VIRGINIA RATIFYING CONVENTION FOR THE UNITED STATES CONSTITUTION (June 9, 1788), *in* 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION IN PHILADELPHIA, 1787, at 172 (Jonathan Elliot ed., 2d ed. 1881) (hereafter "Elliot's Debates").

[18] Stinneford, *supra* note 8, at 1804-1806.

[19] 3 Elliot's Debates, at 447.

> In this business of legislation, your members of Congress will loose [sic] the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors? That they would not admit of tortures, *or* cruel and barbarous punishment. But Congress *may introduce the practice of the civil law*, *in preference to that of the common law*. They may introduce the practice of France, Spain, and Germany of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a *criminal equity*, and extort confession by torture, *in order to punish with still more relentless severity*.[20]

Henry's speech supports proportionality as part of the "Cruel and Unusual Punishments" Clause in two ways. First, the passage supports the view that the Framers meant the Eighth Amendment to preserve common law protections associated with law enforcement. Second, the passage references not only limiting *types* of punishment, but also controlling the *severity* of that punishment.

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[20] *Id.* at 447-48 (emphases added).

Henry and the other Anti-Federalists feared that supplanting common law protections of individual liberties with legislation would lead the government to adopt extreme punishments.[21] Henry saw civil law systems, like France and Germany, and common law systems with parliamentary superiority, like Great Britain, as punishing unreasonably and with "relentless severity."[22] Based on that fear, Henry stressed the need to prevent Congress from disregarding the common law protections that ensured fair trial procedures and the reasonable punishment of criminals.[23]

Henry therefore advocated on behalf of the "Cruel and Unusual Punishments" Clause, and in doing so, he emphasized both the type and severity of punishments. He spoke of the need to disallow "tortures, *or* cruel and barbarous punishment." Speaking of "tortures" *or* "cruel and barbarous punishments" in the disjunctive makes clear they are two separate issues. Tortures were those punishments causing extreme physical or mental pain. "Cruel and barbarous punishments," in contrast, were inflictions of overly severe sentences.[24] Henry argued that failing to codify common law protections through a Bill of Rights would leave citizens susceptible to both.

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[21] Stinneford, *supra* note 8, at 1807.

[22] *Id.* (citing 3 Elliot's Debates, at 448).

[23] *Id.*

[24] *See* OED, *supra* note 6 (defining "torture" as "causing physical or mental suffering" and defining "barbarous" as "uncivilized" or "cruelly harsh").

Henry's support of proportionality is further evidenced by his fear of establishing an American institution of "criminal equity."[25] This statement references the Star Chamber, a court in England that could punish arbitrarily and severely without common law limitations.[26] The Framers knew the abuses of the Star Chamber through both history and reputation: trials were closed, conducted without juries, and no appeals were available.[27] Notably, the problem with Star Chamber punishments was not the *method* of those punishments; the abuses came from the sentences' arbitrary and disproportionate *severity*.[28] The Star Chamber tried only misdemeanors but punishments included heavy fines, mutilation, perpetual imprisonment, or some combination of these.[29] When Henry's speech at the Virginia Convention denounced the possibility of federal courts of "criminal equity," his fear was not only the type of punishments inflicted, but also arbitrary punishment of minor crimes through disproportionate sentences, including perpetual imprisonment.[30] The "criminal equity" of the Star Chamber,

[25] Elliot's Debates, at 448.

[26] *See Faretta v. California*, 422 U.S. 806, 821 n. 18 (1975) (discussing the case of William Prynne, whose Star Chamber libel conviction led to the "monstrous" sentence of legal disbarment, deprivation of his university degrees, pillorying, cutting off ears, perpetual imprisonment without pen or paper, and a fine).

[27] *Id.* at 821.

[28] *Id.*

[29] Thomas G. Barnes, *Star Chamber Mythology*, 5 Am. J. Legal Hist. 1, 4, 7 (1961).

[30] Elliot's Debates, at 448.

with its harsh punishment of misdemeanors, epitomized the "relentless severity" that Henry hoped the Eighth Amendment would curtail.[31]

Henry, Mason, and other Anti-Federalists argued so strongly against ratification that the Federalists compromised, agreeing to recommend a bill of rights along with ratification.[32] Immediately after ratification, a committee was formed, including Henry and Mason, to draft proposed amendments to the Constitution.[33] The Committee proposed amendments that included almost the entire contents of the Virginia Declaration, including the "Cruel and Unusual Punishments" Clause.[34] Other states followed Virginia's lead, each recommending a bill of rights without debate.[35] Congress discussed the Eighth Amendment only briefly before ratification, but the available evidence suggests a broad consensus that the Amendment was designed to codify the prohibition on harsh and disproportionate punishment.

The debate over the Bill of Rights focused only momentarily on the "Cruel and Unusual Punishments" Clause.[36] Only two members of Congress, Representatives Livermore and Smith, made remarks on the Amendment

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[31] *Id.*

[32] Stinneford, *supra* note 8, at 1807-08.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 1808.

[36] *Id.* at 1809.

and only one of these was substantive.[37] Livermore stated that the Clause "seems to have no meaning in it" and questioned whether a ban on "cruel" punishments would prevent the Congress from passing harsh sentences, commenting that "villains often deserve whipping, and perhaps to have their ears cut off."[38] Smith simply made a brief objection, arguing that the Clause was too "indefinite."[39] After Smith's comment, the Amendment passed by an overwhelming margin and without further debate or modification.[40] Although the remarks of Smith and Livermore are the only remarks concerning the Eighth Amendment from the congressional debate that are available, because both were opponents of the Eighth Amendment[41] their statements should be given little interpretive weight.[42]

Far more informative are the views of some of the most influential Founders who were strong advocates of proportionality.[43] Thomas Jefferson authored and

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[37] *Id.*

[38] *Furman v. Georgia*, 408 U.S. 238, 262 (1972) (Brennan, J., concurring) (quoting 1 ANNALS OF CONG. 754 (Joseph Gales ed., 1789)).

[39] *Id.* at 244.

[40] Stinneford, *supra* note 8, at 1810.

[41] *See Weems v. United States*, 217 U.S. 349, 368-69 (1910).

[42] *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 204 n.24 (1976).

[43] *See* Debora Schwartz and Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783, 818-19, 822 (1974).

introduced to the Virginia Legislature, "A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital."[44] This bill limited capital punishment to a few heinous offenses and established a scale of penalties, carefully proportioned to the offense.[45] Like Jefferson, Benjamin Franklin also believed strongly in proportionality.[46] In a letter to Benjamin Vaughan, Franklin objected to what he viewed as disproportionate punishments contained in English law.[47] He said, "[t]o put a man to Death for an Offense which does not deserve Death, is it not Murder?"[48] In light of their strong support of proportionality, Jefferson and Franklin must have believed that the Eighth Amendment protected against disproportionate punishment – as Henry said it would. Otherwise, neither would have refrained from speaking upon the Amendment's passage in the face of Livermore's and Smith's comments.

Further support for this reading comes from the fact that, upon the Amendment's enactment, the Congress crafted penal laws that adhered to and reflected the Clause's commitment to proportionality. The United States' first criminal code included only four capital crimes: murder, treason, forgery of U.S. securities, and

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[44] *Id.* at 818.

[45] *Id.*

[46] *Id.* at 822.

[47] *Id.*

[48] *Id.*

piracy.[49] Although the death sentence for forgery of U.S. securities or piracy may seem extreme today, the proportionality principle is apparent when one examines the code in its entirety. Piracy was punishable by death, but confederacy with a pirate was only punishable by up to three years imprisonment.[50] Similarly, the code prescribed death for treason but a maximum of seven years for failing to inform authorities of the treason of another.[51] Sentences for crimes as serious as maiming someone on federal property, manslaughter on federal property, perjury and altering judicial records ranged from three to seven years in prison.[52] A large scale theft committed in the course of piracy was punishable by death, but simple theft of federal property did not even carry a prison sentence: offenders received a fine and up to thirty-nine lashes.[53] Compared to the "Bloody Code" of England, which sentenced defendants to death for even the smallest offense, the United States code

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[49] Tom Stacey, *Cleaning Up the Eighth Amendment Mess*, 14 Wm. & Mary B. of Rts. J. 475, 517-18 & n.234 (2005) (noting that theft of goods or a ship was only punishable by death if linked to mutiny or piracy, an act that "was the eighteenth century's terrorism.").

[50] *Id*. at 518 n.235 (citing Act of Apr. 30 1790, ch. 9 §§ 8, 12, 1 Stat. 112, 113-15 (1845)).

[51] *Id.* (citing Act of Apr. 30 1790, ch. 9 §§ 1-2, 1 Stat. 112 (1845)).

[52] *Id.* (citing Act of Apr. 30 1790, ch. 9 §§ 3,7,13, 15, 18, 22, 1 Stat. 112, 113,115-117 (1845)).

[53] *Id.* (citing § Act of Apr. 30 1790, ch. 9 § 8, 16, 1 Stat. 112, 113-14, 116 (1845)).

was reasonable and proportional.[54] The First Congress, in limiting the death penalty to four crimes and making the others punishable by reasonable prison terms, thus acted consistently with the prevailing view of the time that punishments should be proportionate. And that same view is reflected in the text of the Eighth Amendment.

II. EIGHTH AMENDMENT PROPORTIONALITY REVIEW IS NECESSARY TO PROTECT THE RIGHTS OF THE ACCUSED AND THE CONVICTED IN THE FACE OF EXPANDING CRIMINAL LAWS AND SENTENCES THAT CONCENTRATE CONTROL OVER SENTENCING IN THE HANDS OF PROSECUTORS.

A. Criminal Law and Sentences Have Expanded Dramatically in Recent Decades.

The past few decades have seen a dramatic expansion in criminal laws and the harshness of the punishment associated with those laws. There are more than 4,000 criminal offenses in the United States Code.[55] State codes are somewhat narrower, but not much.[56]

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[54] *See* Randall McGowan, Law, Crime, and English Society, 1660-1830, 117-21 (2002) (describing the development of the English penal code that by 1819 made 223 crimes punishable by death).

[55] *See* John S. Baker Jr., Federalist Soc'y for Law & Pub. Pol'y, Measuring the Explosive Growth of Federal Crime Legislation 12 (2004).

[56] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 507, 516-517 (2001).

Judge Kozinski has observed that criminal law has expanded to the point that virtually every American could be considered a criminal.[57] As a result of this expansion in criminal law, state and federal codes are filled with overlapping crimes. This allows individuals to be charged with numerous offenses for a single act, thereby increasing the potential prison sentence for any given act.[58]

Prison sentences have also been increased through more direct action. Mandatory minimums and three-strikes laws have been particularly popular. By 1994, every state and the District of Columbia had enacted some version of a mandatory minimum sentencing law.[59] There are now at least 171 mandatory minimum provisions in federal criminal statutes, affecting roughly 10 percent of the federal prison population.[60] The federal government and over half the states have passed three-strikes laws.[61]

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[57] Alex Kozinski & Misha Tseytlin, *You're (Probably) a Federal Criminal*, *in* In the Name of Justice 43, 43-44 (Timothy Lynch ed., 2009).

[58] *See*, *e.g.*, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 517-18 (2001).

[59] Michael Tonry, *Determinants of Penal Policies*, 36 Crime & Just. 1, 27 (2007).

[60] Ricardo H. Hinojosa, Statement Before the House Judiciary Committee Subcommittee on Crime, Terrorism, and Homeland Security 2 (June 26, 2007), *reprinted in* 19 Fed. Sent. Rept. 335.

[61] 18 U.S.C. § 3559(c); Jennifer E. Walsh, Historical Guide to Controversial Issues in America, Three Strikes Laws xvi (2007); Michael Tonry, *Determinants of Penal Policies*, 36 Crime & Just. 1, 27 (2007).

These trends have resulted in significantly longer prison sentences. In the period from 1984 to 1993, actual time spent in prison for narcotics offenses nearly tripled.[62] During the same period, sentences for violent crimes doubled while sentences for firearms offenses nearly tripled.[63] The average prison sentence imposed for all federal crimes more than doubled from 1984 to 2002.[64] In the extreme, mandatory minimums and three-strikes laws have resulted in defendants receiving sentences as severe as 25 years to life for offenses as minor as stealing a piece of pizza or breaking into a church to steal bread.[65]

The increased scope and harshness of criminal laws has contributed to a tripling of the percentage of Americans in prison over the last three decades.[66] The

[62] Paul J. Hofer & Courtney Semisch, Examining Changes in Federal Sentencing Severity: 1980-1998, 2 Fed. Sent. Rep. 12 (1999) at 14-16.

[63] *Id.*

[64] *Excerpts from Principles for the Sentencing Systems: A Background Report*, 18 Fed. Sent. R. 207 (2006) (*citing* U.S. Sentencing Comm'n, 2002 Sourcebook of Federal Sentencing Statistics 30, fig. D; U.S. Sentencing Comm'n, The Federal Sentencing Guidelines: A Report on the Operation of the Guidelines System and Short-Term Impacts on Disparity in Sentencing, Use of Incarceration, and Prosecutorial Discretion and Plea Bargaining 378 (1991)).

[65] *See* Eric Slater, *Pizza Thief Receives Sentence of 25 Years to Life in Prison*, L.A. Times, Mar. 3, 1995, at B3; Martha Bellisle, *Man Gets 25 Years to Life for Alleged Food Heist*, L.A. Times, Jul. 18, 1999, at A1.

[66] See, e.g., James Q. Whitman, Harsh Justice 70-74 (2003); Sarah Lawrence et al., Urban Inst. Just. Policy Center, The Practice and Promise of Prison Programming 2 (2002).

United States incarcerates nearly seven times more people per capita than Europe[67] and has the harshest prison sentences of any Western democracy.[68] In short, as Justice Kennedy has said, "Our resources are misspent, our punishments are too severe, our sentences too long."[69]

B. Only the Judiciary, not the Political Process, Can Provide a Counterweight to Disproportionate Sentences.

Only the Judiciary, via proportionality review, can provide a counterweight to disproportionate sentences. The legislative process plays no such role. Legislators have little incentive to account for the interests of criminal offenders. Offenders yet to be caught are obviously unlikely to identify themselves in order to lobby for narrower criminal definitions or shorter prison sentences. Those already convicted of a crime are an even weaker political group. In many states, felons are disabled from voting.[70] In addition, the stigma of criminal

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[67] *RECENT CASE: Civil Disobedience - The Role of Judges - Ninth Circuit Affirms Mandatory Sentence. - United States v. Hungerford, 465 F.3d 1113 (9th Cir. 2006)*, 120 Harv. L. Rev. 1988, 1993 n.35 (citing Bruce Western & Becky Pettit, *Mass Imprisonment*, *in* PUNISHMENT AND INEQUALITY IN AMERICA 14-15 & fig.1.2. (2006).

[68] *See* JAMES Q. WHITMAN, HARSH JUSTICE 57-58 (2003).

[69] Anthony M. Kennedy, Address at the American Bar Association Annual Meeting (August 9, 2003), *available at http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html*.

[70] Jeremy Travis, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 255-56 (2005).

conviction prevents criminals from forming interest groups or from partnering with other coalitions to influence political outcomes.[71] In contrast, there are various powerful groups in favor of broader and harsher criminal laws, including prosecutors, companies involved in running prisons, prison employee unions, and victims' rights groups.[72]

Significantly, the sentences that emerge from this legislative process are often harsher when applied to individual cases than legislators, the public, and even prosecutors would desire when they support these general laws. Prosecutors lobby for punishments that will give them leverage to induce guilty pleas and cooperation,[73] instead of supporting those tailored to achieve fair results in each individual case. Politicians

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[71] *See* Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 Wm. & Mary Bill of Rts. J. 475, 527 (2005).

[72] Rachel Barkow, *Separation of Powers and Criminal Law*, 58 Stan. L. Rev. 1021, 1029 (2006).

[73] *See, e.g.*, *Federal Cocaine Sentencing Policy: Hearing Before the Subcomm. on Crime and Drugs of the Senate Comm. on the Judiciary*, 107th Cong. 16-33 (2002) (statement of Roscoe C. Howard, U.S. Attorney for the District of Columbia); *Penalties for White Collar Crime: Hearings Before the Subcomm. on Crime and Drugs of the Senate Comm. on the Judiciary*, 107th Cong. 102 (2002) (statement of James B. Comey, Jr., U.S. Attorney, Southern District of New York); *Drug Mandatory Minimums: Are They Working?: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources of the House Comm. on Government Reform*, 106th Cong. 144-53 (2000) (statement of John Roth, Chief, Narcotic and Dangerous Drug Section, Criminal Division, Dep't of Justice).

typically design laws to apply to the worst offenders (often those that have been the subject of media attention), rather than to all cases to which the sentence will apply.[74] As a result, sentences in individual cases are often greater than necessary and far exceed the length of sentence the electorate would actually want under the circumstances. Indeed, empirical studies demonstrate that sentences imposed often exceed the public's expectations and sense of fairness.[75] For example, one study found that, although a majority of Ohio respondents supported a three-strikes law, only a small minority believed that the life sentence required by the law was appropriate when faced with specific factual situations.[76] It is up to judges enforcing the Eighth Amendment to correct these failings.

C. Control Over Sentencing Has Been Concentrated in the Hands of Prosecutors, Allowing Them to Threaten Disproportionate Prison Sentences and To Pressure Defendants into Waiving their Right to a Trial.

The dramatic expansion of criminal law and the increased severity of penalties have shifted control over sentencing away from judges and to prosecutors. This

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[74] *See* Douglas A. Berman, *A Common Law for This Age of Federal Sentencing: The Opportunity and Need for Judicial Lawmaking*, 11 Stan. L. & Pol'y Rev. 93, 107 (1999).

[75] *See* Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 Crime & Just. 99, 101, 122, 150, 152 (1992).

[76] Brandon K. Appelgate et al., *Assessing Public Support for Three-Strikes-and-You're-Out Laws: Global Versus Specific Attitudes*, 42 Crime & Delinq. 517, 528-30 (1996).

Court has held that a prosecutor's decisions regarding charging and plea bargaining are almost entirely discretionary.[77] For example, the Court upheld a prosecutor's decision to offer the defendant a sentence of five years in prison if he pleaded guilty but to seek a sentence of life imprisonment pursuant to a recidivist statute if the defendant chose to go to trial. *Bordenkircher v. Hayes*, 434 U.S. 357, 358-359 (1978). Armed with mandatory minimums, three-strikes laws and overlapping criminal statutes, prosecutors are free to threaten much more severe prison sentences than they were just a few decades ago.[78]

Prosecutors can use these overlapping laws and mandatory minimums to threaten defendants with extreme sentences and pressure them into plea bargains, essentially removing judges from the sentencing process.[79] Indeed, the prospect of a long

[77] *United States v. Armstrong*, 517 U.S. 456, 464 (1996) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."); *Wayte v. United States*, 470 U.S. 598, 608 (1985) (courts are "properly hesitant to examine the decision whether to prosecute").

[78] *See* Ian Weinstein, *Fifteen Years after the Federal Sentencing Revolution: How Mandatory Minimums Have Undermined Effective and Just Narcotics Sentencing*, 40 Am. Crim. L. Rev. 87, 104-05 (2003).

[79] *See, e.g.*, Erik Luna, *Misguided Guidelines: A Critique of Federal Sentencing*, 458 Cato Pol'y Analysis 1, 9-10, 17 (2002); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 531 (2001).

sentence would likely pressure even an innocent defendant into accepting a plea bargain to avoid the risk of much longer sentence after a trial.[80]

Recent statistics indicate that prosecutors are using this increased power. The percentage of defendants pleading guilty has risen substantially over the past few decades as potential prison sentences have increased.[81] The most recent figures from the U.S. Sentencing Commission indicate that over 96% of federal cases end in guilty pleas and that in some districts, the rate exceeds 99%.[82]

The small number of defendants that do risk trial often cannot rely on judicial discretion to avoid grossly

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[80] A recent study by Professor Ronald Wright argues that the data indicate that defendants are likely abandoning meritorious trial defenses because of the steep sentencing discount they receive for pleading guilty. *See generally* Ronald F. Wright, Trial Distortion and the End of Innocence in Federal Criminal Justice, 154 U. Pa. L. Rev. 79 (2005). *See also* C. Ronald Huff, *Wrongful Conviction: Causes and Public Policy Issues*, 18 Crim. Just. 15, 17 (Spring 2003).

[81] In 2007 the percentage of defendants in U.S. district courts pleading guilty or nolo contendere, excluding those cases that were dismissed, was approximately 95.7%. In 1977, only about 81.7% of such defendants plead guilty or nolo contendere. Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics Online tbl. 5.22, *available at http://www.albany.edu/sourcebook/pdf/t5222007.pdf*.

[82] U.S. Sentencing Comm'n, 2008 Sourcebook of Federal Sentencing Statistics, at tbl.10, *available at http://www.ussc.gov/ANNRPT/2008/Table10.pdf*.

disproportionate sentences. Mandatory sentences designed primarily to encourage pleas, but not to apply to individual cases after trial, force judges to impose sentences they believe are "unjust, cruel and irrational."[83] By giving prosecutors the tools to threaten extreme prison sentences and tying the hands of judges in the few cases that do go to trial, legislators have concentrated power in prosecutors and made judges far less relevant in determining sentences. Prosecutors could seek fairer, more proportionate sentences for those defendants that choose to go to trial rather than advocating for the harsher sentences designed to induce guilty pleas. But this possibility is more theoretical than real. If prosecutors threaten long sentences in plea negotiations and then seek shorter sentences at trial, the threat of the longer sentence would lose credibility as a bargaining technique. Thus, if prosecutors threaten defendants with sentences that even they believe are too lengthy in an effort to secure a plea with a sentence they think is appropriate, they will not later be in a position to seek a shorter, more appropriate sentence after trial. They have to live up to their threats if they want to maintain their institutional credibility. As a result, for the small percentage of defendants who do

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[83] *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004) (Cassell, J.); *see also* Anthony M. Kennedy, Hearings before a Subcommittee of the House Committee on Appropriations, 103d Cong., 2d Sess., 29 (Mar. 9, 1994) (mandatory minimums are "imprudent, unwise and often an unjust mechanism for sentencing"); *Harris v. United States*, 536 U.S. 545, 570 (2002) (J. Breyer concurring) ("Mandatory minimum statutes are fundamentally inconsistent with Congress' simultaneous effort to create a fair, honest, and rational sentencing system…").

not agree to the bargains, the sentences actually imposed are often cruel and unusual.

III. THE COURT'S PRACTICE OF APPLYING A ROBUST PROPORTIONALITY REVIEW IN THE CAPITAL CONTEXT WHILE VIRTUALLY ELIMINATING PROPORTIONALITY REVIEW IN THE NONCAPITAL CONTEXT CANNOT BE JUSTIFIED.

The Court has recognized that "[t]he Eighth Amendment is not limited in application to capital punishment, but applies to all penalties." *McCleskey v. Kemp*, 481 U.S. 279, 315 (1987). Nonetheless, the Court has applied the Eighth Amendment very differently in the capital and noncapital contexts. In the capital context, the Court's proportionality review is robust: unlike in the noncapital context, the Court has not dismissed challenges to capital sentences merely because a sentence would promote a penological goal.[84] This robust review of capital sentences has led the Court to exempt certain offenses and certain offenders from the death penalty.[85] Although the same exemptions might

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[84] *See*, *e.g.*, *Coker v. Georgia*, 433 U.S. 584, 592 (1977). Of course, the death penalty always serves the goal of incapacitation, which the Court has pointed to as a penological goal justifying harsh noncapital sentences. *Ewing v. California*, 538 U.S. 11, 25 (2003).

[85] *Coker v. Georgia*, 433 U.S. 584, 592 (1977); *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650-51 (2008); *Enmund v. Florida*, 458 U.S. 782, 797 (1982); *Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002); *Ford v. Wainwright*, 477 U.S. 399 (1986).

not necessarily apply to long prison sentences, applying such a cursory and deferential proportionality review in noncapital cases while applying a robust proportionality review in capital cases cannot be squared with Eighth Amendment.

The Eighth Amendment does not distinguish between capital and noncapital punishments; it prohibits all "cruel and unusual punishments." It is therefore not surprising that the Court has not attempted to justify treating capital cases differently based on the text of the Eighth Amendment. Rather, the Court has relied on a variety of functional arguments to justify its divergent application of the Eighth Amendment. These arguments do not provide an adequate justification for affording capital defendants substantive Eighth Amendment protections while denying those protections to noncapital defendants.

A. Neither the Text of the Eighth Amendment nor the Differences Between Death and Other Forms of Punishment Justify the Court's Divergent Application of the Proportionality Principle in Capital and Noncapital Cases.

In establishing a robust proportionality review for capital cases, the Court has repeatedly distinguished the death penalty from other forms of punishment. The most thorough explanation of the Court's special concern with capital cases is provided by Justice Brennan's concurring opinion in *Furman v. Georgia*, 408 U.S. at 286. However, none of the differences emphasized by Justice Brennan justify the Court's refusal to apply a robust proportionality review in noncapital cases.

Rather, these points demonstrate that Eighth Amendment oversight is necessary for both capital cases and terms of incarceration.

In *Furman*, Justice Brennan highlighted the difference in the pain associated with capital punishment and other punishments. He stated that death is "the only punishment that may involve the conscious infliction of physical pain." *Furman*, 408 U.S. at 287-88. Imposition of the death penalty certainly involves inflicting physical pain. However, imprisonment is typically also accompanied by a form of physical pain.[86] Prisoners regularly face violence while incarcerated.[87] In fact, it has been estimated that 70 percent of all inmates are assaulted by other inmates every year.[88]

In addition to the physical pain associated with capital punishment, Justice Brennan pointed to the "psychological torture" that accompanies the wait between the imposition of a death sentence and the infliction of death. *Furman*, 408 U.S. at 288. Again, there is no denying the extreme psychological pain associated with the death penalty. However, noncapital sentences are also accompanied by severe psychological trauma.[89]

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[86] *See e.g.*, Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. Davis L. Rev. 111, 116-38 (2007).

[87] *Id.* at 123-27; Human Rights Watch, No Escape: Male Rape in U.S. Prisons 29-30, 42-43 (2001).

[88] *Racial Conflict*, *in* Encyclopedia of American Prisons 379 (Marilyn D. McShane & Frank P. Williams III eds., 1996).

[89] *See e.g.*, Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 Mich. L. Rev. 1145, 1168-70 (2009).

A sentence of life without parole is particularly traumatic. John Stuart Mill described those subject to a life sentence as being in "a living tomb, there to linger out what may be a long life . . . without any of its alleviation or rewards—debarred from all pleasant sights and sounds, and cut off from all earthly hope." [90] It is therefore not surprising that some individuals facing death sentences have waived their appeals, preferring death to a life sentence without parole.[91] Physical and mental pain are, therefore, hardly distinguishing characteristics of capital cases. They are emblematic of long terms of incarceration as well.

Justice Brennan also commented on the "awesome" nature of death, which "involves, by its very nature, a denial of the executed person's humanity." *Furman*, 408 U.S. at 290. He suggested that because of the degrading nature and enormity of the death penalty, it was more important to recognize robust Eighth Amendment rights in capital cases. However, the fact that Eighth Amendment protections are essential in the capital context does not mean that they should be nonexistent in the noncapital context. The right to a *Miranda* warning might be "far more important" for those facing capital charges than those suspected of a crime with a one-year punishment, yet everyone taken into police custody has the right to the same warning.

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[90] John Stuart Mill, *Parliamentary Debate on Capital Punishment Within Prisons Bill* (Apr. 21 1868), *reprinted in* Philosophical Perspectives on Punishment 271 (Gertrude Ezorksy ed. 1972).

[91] Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 Wake Forest L. Rev. 681, 712 n.143 (1998).

Finally, Justice Brennan pointed to the "finality" of the death penalty to distinguish it from other penalties. *Furman*, 408 U.S. at 289-90. However, once a prison sentence has been served, it is no more reversible than a death sentence. It is true that with a prison sentence what is irreversibly lost is a portion of one's life rather than one's entire life, but this is a distinction based on severity, not finality.

In sum, the fact that death may be a more severe punishment does not lead to the conclusion that Eighth Amendment protections are unwarranted in noncapital cases. The severity of death may mean that it applies to fewer categories of cases and offenders, but it does not speak to the level of constitutional protection that defendants facing noncapital punishments deserve. The Eighth Amendment does speak to that issue – and it makes no distinction between capital and noncapital cases.

B. The Purported Difficulties in Administering a Proportionality Review for Noncapital Sentences Are Present in Many Other Areas of the Law in which the Court Routinely Applies Some Form of Proportionality Review.

The Court has often alluded to the potential administrative problems associated with extending a robust proportionality review to noncapital cases.[92]

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[92] *See e.g.*, *Ewing v. California*, 538 U.S. 11, 32 (2003) (Scalia, J. concurring); *Harmelin v. Michigan*, 501 U.S. 957, 1001 (Kennedy, J. concurring).

These concerns are highlighted in *Harmelin v. Michigan*, 501 U.S. 957 (1991). A portion of the opinion supported only by Justice Scalia and Chief Justice Rehnquist describes the three-part test for determining proportionality proposed in *Solem* and explains why two of the factors cannot be easily applied.[93] The first of these factors is the inherent gravity of the crime. This factor is purportedly problematic because the gravity of an offense "depends entirely upon how odious and socially threatening one believes [it] to be." *Id.* at 988. The second factor is the comparison of sentences imposed on other offenders in the same jurisdiction. This factor, according to this part of the opinion, raises the same problem. "One cannot compare the sentences . . . if there is no objective standard of gravity." *Id.* The opinion goes on to suggest that even if there were an objective standard of gravity, comparing the sentences for these offenses would do little to shed light on the proportionality of a given sentence. *Id.* at 989. According to the opinion, "[p]roportionality is an inherently retributive concept" addressing the question of whether punishment is commensurate with the harm imposed by the offender." *Id.* However, because the other goals of punishment, such as deterrence and rehabilitation, can affect sentence length, comparing sentences might reveal relatively little about how much retribution is appropriate for a given crime. *Id.*

This line of argument is directly contradicted by the fact that the Court applies proportionality tests in other areas that raise the very issues discussed in *Harmelin*.

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[93] *Harmelin*, 501 U.S. at 985-94 (opinion of Scalia, J., joined by Rehnquist, C.J.).

As already noted, the Court has approved a proportionality test under the Eighth Amendment for punishments imposing death. Of course, "gravity" is no more objective in capital cases than in noncapital cases. Yet, in applying the proportionality principle in the capital context, the Court examines the gravity of the crime.[94] The Court also compares sentences imposed on other criminals in the same jurisdiction.[95] Thus, the Court finds value in such comparisons even where the relevant punishments may be furthering goals other than retribution. It is true that all crimes cannot be precisely ordered in terms of gravity and that penological goals other than retribution may affect prison sentences. However, this does not mean that when a jurisdiction imposes the same sentence for crimes that diverge widely in terms of gravity, such as shoplifting and rape, it sheds no light on the question of proportionality. It is not a purely objective inquiry to determine that death is a disproportionate punishment for rape or that death is a disproportionate punishment for a murder committed by a seventeen-year-old but not by an eighteen-year-old. These decisions necessarily involve some subjective judgment. However, they are based on evidence concerning society's sense of justice and broadly accepted principles concerning gravity, such as the principle that death is graver than other physical harms and the principle that juveniles are less culpable than adults.

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[94] *See e.g.*, *id.* at 598; *Thompson v. Oklahoma*, 487 U. S. 815, 835 (1988); *Enmund v. Florida*, 458 U.S. 782, 797 (1982).

[95] *See e.g.*, *Enmund*, 458 U.S. at 795.

The Court has also applied proportionality review in cases involving fines. According to the Court, "The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). Gravity is no less subjective when the potential penalty is a fine instead of a prison sentence. Nonetheless, in *Bajakajian*, the Court held that gravity can be measured by harm and culpability and that the punishment was disproportionate for a "crime [that] was solely a reporting offense," involving no physical or monetary harm. *Id.* at 339. If the Court can apply these standards in cases involving fines and in cases involving capital punishment, there is no reason why it cannot do so in cases involving prison sentences. In fact, the Court has stated that "[i]t would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not." *Solem v. Helm*, 463 U.S. 277, 289 (1983). However, this is the effect of the Court's current interpretation of the Eighth Amendment, and it is in direct contradiction to the text of the Eighth Amendment.

Moreover, the Eighth Amendment is not the only area in which the Court applies a proportionality principle. For example, the Court has imposed proportionality limits on punitive damages under the Fourteenth Amendment. *See e.g.*, *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). As in the Eighth Amendment context, the Court examines the

gravity of the offense in terms of the harm caused and the blameworthiness of the defendant, and it compares the penalty at issue with penalties authorized or imposed in similar cases. *See id.* at 574-75. "Gravity" is no less subjective when the punishment involves a loss of money in a civil matter instead of a loss of liberty in a criminal case. Furthermore, as the Court has repeatedly recognized, punitive damages serve both retributive and deterrent purposes.[96] Thus, any problems this might cause in comparing penalties in the criminal sentencing context are also present in the punitive damages context. Yet the Court strengthened proportionality review with regard to punitive damages in *Cooper Industries, Inc. v Leatherman Tool Group* by applying de novo review. 532 U.S. 424, 436 (2001).

The Court also applies various forms of proportionality in other areas that, while perhaps less analogous to prison sentences, also do not lend themselves to an objective, straightforward application of proportionality. The Court recognized this fact in *Solem*, when it stated that it may be difficult to decide that a 25-year sentence violates the Eighth Amendment where a 15-year sentence would not but "[t]he courts are constantly called upon to draw similar lines in a variety of contexts." *Solem*, 463 U.S. at 294. As an example, the Court pointed to the task of determining whether or not a defendant's Sixth Amendment right to a speedy trial has been violated, *id.*, a right the Court has characterized as "amorphous" and "slippery."

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[96] *See e.g.*, *Pacific Life Ins. Co. v. Haslip*, 499 U.S. 1, 19, 21 (1991); *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

Barker v. Wingo, 407 U.S. 514, 522 (1972). To determine if this right has been violated, the Court adopted a balancing test, which weighs the conduct of the government and the prejudice to the defendant against the conduct of the defendant. *Id.* at 530-34. Similarly, in the Fourth Amendment context, the Court routinely weighs the strength of the government interest in a search or seizure against the gravity of the intrusion into the person's privacy, liberty and property rights in situations where probable cause is absent. *See e.g.*, *Vernonia School District v. Acton*, 515 U.S. 646, 653-65 (1995); *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 619-33 (1989). It does so despite the recognition that "standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application," *Ker v. State of Cal.*, 374 U.S. 23, 33 (1963), and "[a]rticulating precisely what . . . 'probable cause' mean[s] is not possible." *Ornelas v. United States*, 517 U.S. 690, 695-96 (1996). As these examples illustrate, judges are often required to apply a substantial degree of subjective judgment to a particular set of facts to determine whether an individual's constitutional rights have been violated. The task may not always be easy, but judges are not free to ignore the Constitution's dictates simply because following its commands is difficult.

In any event, these analogous areas demonstrate that conducting proportionality review is a manageable task. There is no reason to believe that judges cannot bring the same skills they apply in these contexts to conducting proportionality review in the case of criminal sentences. In fact, lower courts have had little trouble imposing a proportionality review in the sentencing

context. After *Solem* was decided, courts had "little difficulty applying the [three-part] analysis to a given sentence." *Harmelin v. Michigan*, 501 U.S. 957, 1015 (White, J. dissenting). Many state courts also apply a serious proportionality review in noncapital cases.[97]

If applying a proportionality principle to prison sentences is squarely within a judge's skill set, the only other potential administrability problem is the quantity of cases that could raise these issues. However, as the Court recently held in *Melendez-Diaz v. Massachusetts*, the requirements of the Constitution cannot be relaxed merely to make the prosecution of criminals less burdensome.[98] And application of a proportionality principle in a large number of cases will not overburden the courts. Courts do not appear to be overwhelmed by the task of determining whether sentences that depart from the federal Sentencing Guidelines are "reasonable" under *United States v. Booker*, 543 U.S. 220, 262-63 (2005). Furthermore, the burden of proportionality review can be reduced by instituting certain categorical rules – for example, that a sentence of life without parole is unconstitutionally disproportionate for a juvenile who did not take the life of another.

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[97] *See e.g.*, Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1184 (2009); *State v. Burgess*, 475 So.2d 35, 36-40 (La. Ct. App. 1985); *People v. Miller*, 781 N.E.2d 300, 307-08 (Ill. 2002); *State v. Davis*, 427 S.E.2d 754, 756 (W. Va. 1993); *State v. Bonner*, 577 N.W.2d 575, 581-82 (S.D. 1998); *People v. Lorentzen*, 194 N.W.2d 827, 831-33 (Mich. 1972).

[98] 129 S.Ct. 2527, 2009 LEXIS 4734 at *34 (2009).

CONCLUSION

For the foregoing reasons, the Court should hold the sentence imposed in the present case is unconstitutionally excessive.

Respectfully submitted,

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