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NOTE

THE SUPREME COURT'S BACKWARDS PROPORTIONALITY JURISPRUDENCE: COMPARING JUDICIAL REVIEW OF EXCESSIVE CRIMINAL PUNISHMENTS AND EXCESSIVE PUNITIVE DAMAGES AWARDS

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INTRODUCTION

IT is a bedrock principle of American law that reprehensible conduct should be punished and that the punishment should be proportionate to the crime.[1] This, however, does not always come to pass. On occasion, both our civil and criminal justice systems mete out disproportionately severe punishments.[2]

In the civil justice system, disproportionate punishments can take the form of excessive punitive damages. Punitive damages are awarded not to compensate the plaintiff, but to punish the defendant for wrongful conduct and to deter the defendant and others from perpetrating such conduct again.[3] In recent years, punitive

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[1] See Solem v. Helm, 463 U.S. 277, 284 (1983) ("The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence [as far back as the Magna Carta in 1215]."). Notable discussions of the idea that punishment should be proportionate to the crime can be found in Cesare Beccaria, Of Crimes and Punishments 73–76 (Jane Grigson trans., Marsilio Publishers 1964) (1764); Jeremy Bentham, An Introduction to the Principles of Morals and Legislation *in* A Bentham Reader 121–33 (Mary Peter Mack ed., 1969) (1789); H.L.A. Hart, Punishment and Responsibility 25 (1968); Andrew Von Hirsch, Doing Justice: The Choice of Punishments 66–76 (1976).

[2] See BMW of N. Am. v. Gore, 517 U.S. 559 (1996) (finding a $2 million punitive damages verdict for selling a repainted car as new to be disproportionate); *Helm*, 463 U.S. at 303 (finding a sentence of life imprisonment without the possibility of parole for the commission of a seventh nonviolent property felony to be disproportionate).

[3] See Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) ("[Punitive damages] are not compensation for injury .... [T]hey are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."). For an economic perspective on deterrence and punishment in the context of punitive damages, see A. Mitchell Polinsky & Steven Shavell, Punitive Damages: An Economic Analysis, 111 Harv. L. Rev. 869 (1998). For a broader overview of the numerous legal questions that punitive damages raise, see Dan B. Dobbs, Law of Remedies § 3.11 (2d ed. 1993).

damages verdicts have skyrocketed in both frequency and amount.[4] As a result, courts increasingly have been inundated with appeals that punitive damages verdicts are disproportionate and hence should be struck down.[5] Perhaps more obviously, criminal defendants also claim that they have been punished disproportionately. Putting aside the distinct (and perhaps more contentious) issue of proportionality in death-penalty cases,[6] criminal proportionality

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[4] See Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) ("Awards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000 .... Since then, awards more than 30 times as high have been sustained on appeal." (citation omitted)); John Calvin Jeffries, Jr., A Comment on the Constitutionality of Punitive Damages, 72 Va. L. Rev. 139, 139 (1986) ("In my view, punitive damages are out of control. Certainly recent awards are unprecedented in both incidence and amount."). But see Theodore Eisenberg & Martin T. Wells, Punitive Awards After *BMW*, a New Capping System, and the Reported Opinion Bias, 1998 Wis. L. Rev. 387, 417 ("No credible evidence supports the claim that punitive damages are awarded frequently, that when they are awarded they are unrelated to compensatory damages, or that punitive damages are systematically awarded in inappropriate cases.").

[5] There are two different kinds of appeals defendants can make to challenge excessive punitive damages verdicts. First, defendants can request that the trial court order remittitur (that is, reduction) of the jury's verdict. The trial court has the power to conclude that the evidence does not support the size of the punitive damages verdict assessed by the jury or that the verdict is simply excessive. Having found the amount of damages to be too high, the trial court can reduce the damages to a permissible level. The plaintiff then has the option to accept the court's assessment of the damages or to have a new trial. In the federal system and in many states, if a trial court declines to grant remittitur the defendant can appeal the verdict to an appellate court, contending that the trial court abused its discretion in failing to grant remittitur. See Gasperini v. Center for Humanities, 518 U.S. 415, 436 (1996). See generally James C. Lopez, Comment, Appellate Control of Excessive Jury Verdicts Since *Gasperini v. Center for Humanities:* From *Nisi Prius* Courts to "*Gasperini* Hearings," 66 U. Cin. L. Rev. 1323 (1998). The second way in which a defendant can challenge a punitive damages verdict is to claim that the verdict is so grossly excessive that it violates the Constitution's guarantee of due process. See *BMW*, 517 U.S. at 562–63. It is this second method that will be the focus of this Note.

[6] This Note deals only with the Supreme Court's proportionality review of excessive prison sentences and does not broach the even more complicated topic of proportionality review in capital punishment cases. The Supreme Court has recognized that "death is ... different" and in doing so has required greater procedural safeguards in capital cases. Woodson v. North Carolina, 428 U.S. 280, 305 (1976). The Court has repeatedly affirmed that in capital cases the punishment must be proportionate to the crime. See Enmund v. Florida, 458 U.S. 782, 801 (1982) (finding a death sentence for felony-murder to be disproportionate when the defendant neither killed, attempted to kill, nor intended to kill); Coker v. Georgia, 433 U.S. 584, 592 (1977) (finding the death penalty to be a disproportionate punishment for the crime of rape of an adult

claims usually involve the question of whether a prison sentence is too long for a given crime.[7]

Although the Supreme Court has on occasion discussed the law of excessive criminal punishments when deciding punitive damages cases,[8] the Court has nevertheless developed two distinct sets of jurisprudence.[9] In the excessive criminal punishment area, after a long and tumultuous history,[10] the Court has pronounced that successful proportionality challenges to criminal punishments will be exceedingly rare.[11] Moreover, the Court's current test to determine if a criminal punishment is excessive allows lower courts to dispose of such claims without conducting rigorous review.[12] Conversely, the Court recently struck down a punitive damages award as excessive[13] and delineated a multi-factored test for lower courts to utilize in assessing the proportionality of other punitive damages verdicts.[14] This multi-factored proportionality test is vague and gives lower courts leeway to strike down punitive damages awards as they see fit.[15] It thus appears that the Supreme Court has not only analyzed excessive criminal punishment claims separately from excessive punitive damages verdicts, but it has also promulgated different levels of proportionality review for the two areas. Strin-

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woman); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (upholding the constitutionality of the death penalty but noting that the punishment must not be grossly out of proportion to the crime). However, in light of recent decisions upholding the death penalty for felony-murder (Tison v. Arizona, 481 U.S. 137 (1987)), minors over the age of sixteen (Stanford v. Kentucky, 492 U.S. 361 (1989)), and the mentally retarded (Penry v. Lynaugh, 492 U.S. 302 (1989)), at least one scholar contends that the Supreme Court has neglected its duty to conduct rigorous proportionality review in capital cases. See Michael Mello, Executing Rapists: A Reluctant Essay on the Ethics of Legal Scholarship, 4 Wm. & Mary J. Women & L. 129, 154 (1997).

[7] For a discussion of other proportionality challenges to criminal and civil punishments, such as objections to multiple punishments for the same offense, see Nancy J. King, Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties, 144 U. Pa. L. Rev. 101 (1995).

[8] See infra note 100 and accompanying text, discussing Justice O'Connor's use of a criminal proportionality test in the punitive damages context.

[9] See Part I, infra.

[10] See infra Part I.A, discussing the Court's key decisions in the area of excessive criminal punishments.

[11] See Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

[12] See infra notes 143–57 and accompanying text.

[13] See BMW of N. Am. v. Gore, 517 U.S. 559, 574–75 (1996).

[14] See id. at 574–85.

[15] See infra notes 174–201 and accompanying text.

gent proportionality review is afforded to punitive damages verdicts while curt proportionality analysis is conducted for criminal punishment cases.

Affording greater proportionality review to punitive damages verdicts than to criminal punishments initially appears to make sense: Criminal punishments are determined by legislatures and hence should be struck down reluctantly, while punitive damages verdicts are awarded by randomly selected juries and hence should be entitled to less deference. Two lines of thought, however, cast doubt on the validity of this conclusion.

First, a simple hierarchical argument suggests that subjecting a defendant to incarceration is more serious than forcing a defendant to pay punitive damages.[16] In its death-penalty jurisprudence, the Supreme Court has recognized that deprivations of life are entitled to more protection than deprivations of liberty. If life is more important than liberty, it stands to reason that liberty in turn may be more important than property. Criminal sentences amount to deprivations of liberty, while punitive damages awards are only deprivations of property. Given that incarcerating a defendant is more serious than forcing him to pay punitive damages, more rigorous proportionality review should be afforded to excessive criminal sentences.

Second, a more complicated (and more compelling) political process argument suggests that criminal punishments should be subject to more rigorous proportionality review.[17] Political process theory posits that courts should abstain from meddling in legislative matters unless there has been a failure in the political process.[18] In the case of excessive criminal punishments there often has been such a failure. Criminals are consistently the most reviled group in American politics, and legislators compete to be the toughest on crime.[19] Given the "tough on crime" rhetoric pervading our dis-

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[16] See infra Part IV.B.

[17] See infra notes 240–68 and accompanying text.

[18] See infra notes 228–39 and accompanying text, explaining political process theory.

[19] For a recent example, see James Dao, Schumer and D'Amato Try to Out-Tough Each Other on Crime, N.Y. Times, Sept. 25, 1998, at B1. At the same time that "tough on crime" rhetoric has led to stiffer penalties on the legislative front, it has also led to fewer commutations by executives. See Susan E. Martin, Commutation of Prison Sentences: Practice, Promise, and Limitation, 29 Crime & Delinq. 593, 609–10 (1983) (concluding that where "tough on crime" rhetoric was prevalent, commuta-

course and the fact that there is no powerful lobby fighting for reasonable criminal sentences,[20] the political process cannot be counted on to remedy disproportionate punishments.[21] Conversely, the legislative process can and does successfully deal with the problem of excessive punitive damages awards.[22] Those who are likely to be the victims of punitive damages, such as large corporations, have the resources to lobby for limitations on punitive damages. This access to the political process is the reason why legislatures all across the country have considered and adopted a plethora of laws limiting punitive damages verdicts through caps, or even banning punitive damages altogether.[23] Since the political process can effectively deal with excessive punitive damages verdicts but not with disproportionate criminal punishments, it would make more sense

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tions decreased). One need look no further than the political brouhaha that erupted over President Clinton's decision to grant clemency to fourteen Puerto Rican nationalists (some would say terrorists) to understand the political pressure not to grant clemency. See Charles Babington, Puerto Rican Nationalists Freed From Prison, Wash. Post, Sept 11, 1999, at A2. Additionally, "tough on crime" rhetoric has infected the federal judicial confirmation process. Recently, the full Senate rejected a federal judicial nominee because he was insufficiently supportive of the death penalty. See Charles Babington & Joan Biskupic, Senate Rejects Judicial Nominee, Wash. Post, Oct. 6, 1999, at A1.

[20] Of course, there are groups, such as the American Civil Liberties Union, that do stand up against disproportionate criminal punishments. These groups, however, do not constitute an effective lobby capable of challenging the "tough on crime" discourse that pervades American politics. See infra notes 262–69 and accompanying text, explaining how the political process is not equipped to deal with claims of disproportionate prison sentences.

[21] See William J. Stuntz, Substance, Process, and the Civil-Criminal Line, 7 J. Contemp. Legal Issues 1, 20 (1996) ("A lot of constitutional theory has been shaped by the idea . . . that constitutional law should aim to protect groups that find it hard or impossible to protect themselves through the political process. If ever such a world existed, the universe of criminal suspects is it."); see also David S. Mackey, Rationality Versus Proportionality: Reconsidering the Constitutional Limits on Criminal Sanctions, 51 Tenn. L. Rev. 623, 643–44 n.126 (1984) (recognizing that public animosity toward prisoners prevents their rights from being adequately protected by the legislative process).

[22] See BMW of N. Am. v. Gore, 517 U.S. 559, 614–19 (1996) (Ginsburg, J., dissenting) (cataloging numerous recently enacted or proposed laws designed to limit punitive damages); Kimberly A. Pace, Recalibrating the Scales of Justice Through National Punitive Damages Reform, 46 Am. U. L. Rev. 1573, 1589 (1997) ("Forty-six states either have prohibited punitive damages or have enacted legislation aimed at reducing their frequency and size."); see also infra Part IV.C.1.

[23] See Pace, supra note 22, at 1589.

for the judiciary to exert its countermajoritarian weight[24] in the criminal punishment area. Under political process theory, therefore, the Supreme Court has its proportionality jurisprudence backwards.

Part I of this Note will review the Supreme Court's major decisions in the areas of excessive criminal punishments and punitive damages. Part II will then explain that the Court's most recent decisions—*BMW of North America v. Gore*,[25] in which the Court struck down a punitive damages verdict as excessive, and *Harmelin v. Michigan*,[26] in which the Court rejected a claim that a criminal punishment was disproportionate to the offense—announce more stringent proportionality review of punitive damages awards than of criminal punishments. Part III will review lower court decisions following *Harmelin* and *BMW* and demonstrate that lower courts have interpreted *Harmelin* to afford virtually no proportionality protection against excessive criminal punishments, while simultaneously interpreting *BMW* to require significant proportionality review of punitive damages verdicts. Part IV will first briefly argue that deprivations of liberty (criminal punishments) should be entitled to more rigorous judicial review than deprivations of property (punitive damages awards). Part IV will then explore political process theory: the idea that courts should be reluctant to enter into the fray unless there has been a failure in the political process. Finally, this Note will conclude that the Supreme Court's proportionality jurisprudence is backwards. Instead of affording greater protection against excessive punitive damages verdicts, the Court should concern itself with ensuring that criminal punishments are not disproportionate.

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[24] For the classic depiction of the countermajoritarian difficulty, see Alexander M. Bickel, The Least Dangerous Branch (1962). Although the idea that judicial review is countermajoritarian has pervaded the discourse, it is not universally accepted. See, e.g., Bruce A. Ackerman, The Storrs Lectures: Discovering the Constitution, 93 Yale L.J. 1013, 1050–51 (1984).

[25] 517 U.S. 559 (1996).

[26] 501 U.S. 957 (1991).

I. THE SUPREME COURT'S PROPORTIONALITY JURISPRUDENCE

A. Proportionality Review of Excessive Prison Sentences

A member of the Court first suggested that an excessively long criminal sentence could violate the Constitution in *O'Neil v. Vermont*.[27] O'Neil was convicted of multiple counts of selling intoxicating liquor without authority, for which he faced a possible sentence of fifty-four years of hard labor. While a majority of the Court declined to hear O'Neil's appeal, Justice Stephen Field argued in dissent that a fifty-four year sentence for selling liquor without authority was excessive and hence cruel and unusual in violation of the Eighth Amendment.[28] Specifically, Justice Field stated that the Eighth Amendment's cruel and unusual punishment clause prevents punishments that inflict torture as well as "all punishments which by their excessive length or severity are greatly disproportioned to the offences charged."[29]

Eighteen years after *O'Neil*, in *Weems v. United States*,[30] four of the six participating Justices concluded that a punishment was disproportionate and violative of the Eighth Amendment.[31] Weems, a public official in the Philippines, was convicted of falsifying an official public document.[32] For this seemingly minor offense, Weems was sentenced to fifteen years' imprisonment and subjected to hard and painful labor.[33] Additionally, after his release, Weems was forbidden from becoming a parent, administering property, voting, or holding office; he was also sentenced to a life of surveillance.[34] In finding this extremely punitive sentence to violate the Eighth Amendment's prohibition against cruel and unusual punishment,[35] the *Weems* Court noted that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense."[36]

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[27] 144 U.S. 323 (1892).

[28] See id. at 339–40 (Field, J., dissenting). The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

[29] *O'Neil*, 144 U.S. at 339–40 (Field, J., dissenting).

[30] 217 U.S. 349 (1910).

[31] See id. at 382.

[32] See id. at 357.

[33] See id. at 358, 363–64.

[34] See id. at 364–65.

[35] See id. at 382.

[36] Id. at 367.

Seventy years later, in *Rummel v. Estelle*,[37] the Supreme Court backtracked from *Weems* and upheld a sentence of life imprisonment with the possibility of parole for a recidivist who had committed three nonviolent property felonies involving less than $230.[38] The *Rummel* Court concluded that "one could argue without fear of contradiction . . . [that] the length of the sentence actually imposed is purely a matter of legislative prerogative."[39] The *Rummel* majority did, however, stop short of completely abdicating judicial supervision of states' power to punish offenders. The Court noted in a footnote that a proportionality principle might come into play in extreme cases such as "if a legislature made overtime parking a felony punishable by life imprisonment."[40]

Less than two years later, in *Hutto v. Davis*,[41] the Court reaffirmed *Rummel* by issuing a per curiam opinion upholding a forty-year sentence for possession with intent to distribute and distribution of approximately nine ounces of marijuana.[42] Once again, the Court noted in a footnote that proportionality review might be proper in extreme cases.[43] Nevertheless, the per curiam opinion reiterated that judicial review of prison sentences should be exceedingly rare because of the difficulty of comparing sentences and the need to avoid the imposition of the subjective views of individual Justices.[44]

Despite the Court's admonitions in *Davis* and *Rummel* that proportionality challenges to prison sentences should be exceedingly rare,[45] the Court itself struck down a sentence as excessive only one year after *Hutto v. Davis*. In *Solem v. Helm*,[46] the Court overturned

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[37] 445 U.S. 263 (1980).

[38] See id. at 265–66.

[39] Id. at 274. The decision in *Weems*, which seemed to contradict this statement, was distinguished because of the unusual conditions accompanying Weems's imprisonment. See id. at 274.

[40] Id. at 274 n.11.

[41] 454 U.S. 370 (1982) (per curiam).

[42] See id. at 370–75.

[43] See id. at 374 n.3.

[44] See id. at 373–74.

[45] See id. at 373; *Rummel*, 445 U.S. at 272.

[46] 463 U.S. 277 (1983). The *Helm* majority was composed of Justices William Brennan, Thurgood Marshall, Harry Blackmun, Lewis Powell, and John Paul Stevens. See id. at 279. Justice Blackmun had previously voted with the majorities in *Rummel v. Estelle* and *Hutto v. Davis*. See *Rummel*, 445 U.S. at 264; *Hutto*, 454 U.S. at 370.

a punishment of life imprisonment without the possibility of parole for the commission of a seventh nonviolent offense.[47] The Court concluded that the punishment was disproportionate because the length of the sentence was excessive.[48] Writing for the *Helm* majority, Justice Lewis Powell first made clear that the principle that a punishment should be proportionate to the crime is deeply rooted in our nation's history.[49] Having found that the punishment must be proportionate to the crime, the Court proceeded to promulgate a three-part objective test to determine whether prison sentences were disproportionate in violation of the Eighth Amendment.[50] Justice Powell stated that courts should look first "to the gravity of the offense and the harshness of the penalty."[51] Second, courts should "compare the sentences imposed on other criminals in the same jurisdiction."[52] If more serious crimes are subject to the same or less serious penalties, Justice Powell explained, then that is evidence that the penalty is disproportionate.[53] Finally, courts should judge proportionality by "compar[ing] the sentences imposed for commission of the same crime in other jurisdictions."[54] The majority did not mention that the *Rummel* and *Davis* Courts had explicitly rejected these types of "objective" criteria as too difficult to implement and for too easily disguising Justices' subjective opinions.[55] Instead, Justice Powell explained that there are widely shared views as to the seriousness of different crimes,[56] and while it may be hard to draw a line between sentences of different lengths,

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[47] See *Helm*, 463 U.S. at 279. Helm had been convicted, on separate occasions, of three third-degree burglaries, obtaining money under false pretenses, grand larceny, driving while intoxicated, and passing a no-account check. See id. at 279–81.

[48] See id. at 303.

[49] See id. at 284. Justice Powell contended that *Weems v. United States* endorsed this proportionality principle. See id. at 286–87.

[50] See id. at 290–92.

[51] Id. at 290–91.

[52] Id. at 291.

[53] See id.

[54] Id. at 291–92.

[55] See, e.g., Hutto v. Davis, 454 U.S. 370, 373 (1982) (per curiam) ("[T]he excessiveness of one prison term as compared to another is invariably a subjective determination, there being no clear way to make 'any constitutional distinction between one term of years and a shorter or longer term of years.'") (quoting Rummel v. Estelle, 445 U.S. 263, 275 (1980)).

[56] See *Helm*, 463 U.S. at 292.

courts are frequently called upon to draw these types of difficult lines.[57]

Applying its three-part proportionality test, the Court found that Helm's sentence of life imprisonment without the possibility of parole was disproportionate.[58] While recognizing that Helm was a recidivist, the Court found that the gravity of Helm's crime was minimal.[59] An intrajurisdictional comparison of sentences imposed in South Dakota demonstrated that the other crimes which carried mandatory sentences of life imprisonment without the possibility of parole were more serious felonies, including murder, second and third convictions for treason, first-degree manslaughter, first-degree arson, and kidnapping.[60] Finally, an interjurisdictional comparison showed that only one other state (Nevada) permitted such a harsh punishment, and even there the sentence of life without parole was not mandatory and had never been meted out for such a minor offense.[61]

In announcing that punishment must be proportionate to the crime and in finding the length of Helm's sentence to be disproportionate, the *Helm* Court appeared to depart dramatically from *Rummel*'s suggestion that the length of criminal sentences is a matter of legislative prerogative.[62] Contrary to *Rummel*—which suggested that successful proportionality challenges to criminal punishments would be rare (and possibly nonexistent)—*Helm* seemed to suggest that the Eighth Amendment contains a rigorous proportionality requirement. The existence of this rigorous proportionality review did not last long.

Eight years after *Helm*, the Court retreated from its conclusion that prison sentences must be proportionate to the crime. In *Harmelin v. Michigan*,[63] a fractured majority, composed of Chief Justice

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[57] See id. at 294.

[58] See id. at 303.

[59] See id. at 296. The Court remarked that passing a no-account check was "one of the most passive felonies a person could commit." Id. (internal quotation marks omitted).

[60] See id. at 298.

[61] See id. at 299–300.

[62] See id. at 307–10 (Burger, C.J., dissenting) (accusing the majority of disregarding *Rummel's* holding that the length of a sentence of imprisonment is a matter of legislative and not judicial discretion).

[63] 501 U.S. 957 (1991).

William Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, William Kennedy, and David Souter, rejected Ronnie Harmelin's claim that a sentence of life imprisonment without the possibility of parole was disproportionate for the crime of possession of more than 650 grams of cocaine.[64] A majority of the Court was unable, however, to agree upon how proportionality review should be conducted.

Justice Scalia, writing only for himself and Chief Justice Rehnquist, argued that the Court's conclusion in *Solem v. Helm* that the Eighth Amendment contains a proportionality guarantee was "simply wrong."[65] Justice Scalia posited that as a historical matter the Eighth Amendment was only intended to prohibit cruel and unusual modes of punishment, not disproportionately long sentences.[66] He also criticized *Helm*'s three-part test for determining disproportionate punishments, and argued that *Helm*'s first prong was improper because it is too difficult for judges to assess objectively whether the severity of the sanction is disproportionate to the gravity of the offense.[67] Justice Scalia found the same fault with *Helm*'s second prong, which required an intrajurisdictional comparison between the defendant's sentence and the sentence imposed on similar defendants in that jurisdiction; he concluded that there is no objective standard to judge if some offenses in a jurisdiction are more grave than others.[68] Finally, Justice Scalia balked at *Helm*'s third prong, which required an interjurisdictional comparison of the actual punishment to potential sentences the defendant could have received in other jurisdictions. Justice Scalia contended that a state is entitled to criminalize and severely punish behavior that other states would punish mildly or not at all.[69]

While Justice Scalia wrote the lead opinion in *Harmelin*, it was Justice Kennedy's plurality opinion—joined by Justices O'Connor and Souter—that was actually controlling. At the outset, Justice

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[64] See id. at 996; id. at 1009 (Kennedy, J., concurring).

[65] Id. at 965 (Opinion of Scalia, J.).

[66] See id. at 966–85 (Opinion of Scalia, J.).

[67] See id. at 987–88 (Opinion of Scalia, J.). Moreover, even if it were possible for judges to accurately assess the severity of the punishment and the gravity of the offense, Justice Scalia argued that such decisions are properly in the province of the legislature and not the courts. See id. (Opinion of Scalia, J.).

[68] See id. at 988–89 (Opinion of Scalia, J.).

[69] See id. at 989–90 (Opinion of Scalia, J.).

Kennedy recognized that the Court's proportionality decisions "have not been clear or consistent in all respects."[70] Justice Kennedy nevertheless tried to reconcile the Court's past opinions by concluding that the Court's Eighth Amendment jurisprudence has recognized a "narrow proportionality principle."[71] More specifically, Justice Kennedy took a step back from *Helm*'s conclusion that the crime and sentence must be proportionate, concluding instead that the Eighth Amendment forbids only extreme sentences that are grossly disproportionate to the crime.[72] Hence, strict proportionality between the crime and the sentence is not required.[73]

Justice Kennedy also backtracked from *Helm*'s three-part proportionality test, contending that none of the prongs themselves was intended to be dispositive.[74] Justice Kennedy stated that courts should still undertake *Helm*'s first prong by considering whether the crime and the accompanying sentence created an inference of gross disproportionality.[75] However, if the court did not perceive gross disproportionality between the crime and the sentence then the second and third prongs of the *Helm* test—the intrajurisdictional and interjurisdictional comparisons of comparable punishments—need not be undertaken.[76] According to Justice Kennedy, this framework explained *Weems*, *Rummel*, *Davis*, and *Helm*: Intrajurisdictional and interjurisdictional analysis was undertaken in *Weems* and *Helm* to validate an initial inference of gross disproportionality,[77] while no comparative analysis was undertaken in *Rummel* and *Davis* because there was no initial inference of gross disproportionality.[78] Applying this test to Harmelin's case, Justice Kennedy concluded that the magnitude of Harmelin's crime was so great that the punishment could not give rise to an inference of disproportionality.[79] Without such an inference, Harmelin's sentence could be

[70] Id. at 996 (Kennedy, J., concurring).
[71] Id. (Kennedy, J., concurring).
[72] See id. at 1001 (Kennedy, J., concurring).
[73] See id. (Kennedy, J., concurring).
[74] See id. at 1004 (Kennedy, J., concurring).
[75] See id. at 1005 (Kennedy, J., concurring).
[76] See id. (Kennedy, J., concurring).
[77] See id. (Kennedy, J., concurring).
[78] See id. (Kennedy, J., concurring).
[79] See id. (Kennedy, J., concurring).

upheld without conducting intrajurisdictional or interjurisdictional comparisons of similar crimes and sentences.[80]

Justices Byron White, Thurgood Marshall, Harry Blackmun, and John Paul Stevens dissented in *Harmelin*, concluding that a sentence of life imprisonment without the possibility of parole for the possession of over 650 grams of cocaine was disproportionate.[81] Justice White's dissent[82] first took issue with Justice Scalia's conclusion that the Eighth Amendment did not require proportionate punishments. Justice White argued that the history of the Eighth Amendment and the Court's interpretation of it in cases like *Weems*, *Helm*, and a number of death-penalty cases[83] demonstrated that the Eighth Amendment affords a proportionality guarantee.[84] Justice White further criticized Justice Scalia for failing to take account of the hypothetical in *Rummel* in which a legislature makes overtime parking a felony punishable by life imprisonment without the possibility of parole.[85]

Justice White also sharply disagreed with Justice Kennedy's plurality opinion, noting that "Justice Kennedy's abandonment of the second and third factors set forth in *Solem* makes any attempt at an objective proportionality analysis futile."[86] Justice White contended that intrajurisdictional and interjurisdictional comparisons of simi-

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[80] See id. (Kennedy, J., concurring).

[81] See id. at 1027 (White, J., dissenting); id. at 1028 (Marshall, J., dissenting).

[82] Justice White's dissent was joined only by Justices Blackmun and Stevens. Justice Marshall wrote a separate dissent in which he agreed (for the most part) with Justice White's dissent. See id. at 1009 (White, J., dissenting); id. at 1027 (Marshall, J., dissenting).

[83] Justice White cited Gregg v. Georgia, 428 U.S. 153, 173, 187 (1976) (upholding the constitutionality of the death penalty but noting that the punishment must not be grossly out of proportion to the crime), Coker v. Georgia, 433 U.S. 584, 592 (1977) (striking down the death penalty for the rape of an adult woman because it was grossly disproportionate to the severity of the crime), and Enmund v. Florida, 458 U.S. 782, 801 (1982) (striking down a felony-murder death sentence as disproportionate for a getaway driver who had a minor role in the crime and had not intended to kill the victim). Justice White pointed out that it would make no sense to hold that the words "cruel and unusual" afford proportionality protection for death sentences but not for other types of sentences. See *Harmelin*, 501 U.S. at 1013–14 (White, J., dissenting).

[84] See *Harmelin*, 501 U.S. at 1009–16 (White, J., dissenting).

[85] See id. at 1018 (White, J., dissenting).

[86] Id. at 1020 (White, J., dissenting).

lar crimes and sentences are the only way for judges to compare the gravity of the offense with the severity of the punishment.[87]

Piecing together the various *Harmelin* opinions, it is clear that Justice Kennedy's plurality opinion is controlling.[88] Six other Justices supported Justice Kennedy's conclusion that a narrow proportionality guarantee exists.[89] Additionally, a majority of the Court supported Justice Kennedy's position that *Helm*'s intrajurisdictional and interjurisdictional analyses should not be conducted in all but the rarest instances.[90] While Justice Kennedy's concurrence recognized that a proportionality guarantee does exist, his opinion suggested that successful proportionality challenges to criminal punishments would be exceedingly rare.[91] Thus, after a century of conflicting decisions, it appears that while proportional-

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[87] See id. at 1021 (White, J., dissenting). Justice White argued that intrajurisdictional and interjurisdictional comparisons proved that Harmelin's life sentence without the possibility of parole was disproportionate. The only crimes receiving comparable punishment in Michigan were first-degree murder and distribution of more than 650 grams of narcotics, both of which are more serious offenses than Harmelin's crime. Additionally, Harmelin would not have been punished as harshly in any other state in the nation. See id. at 1025–27 (White, J., dissenting).

[88] 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.") (internal quotation marks omitted); see also United States v. Van Winrow, 951 F.2d 1069, 1071 n.2 (9th Cir. 1991) (applying *Marks* to the *Harmelin* decision); Les A. Martin, Note, *Harmelin v. Michigan*—The Demise of the Eighth Amendment's Proportionality Guarantee, 38 Loy. L. Rev. 255, 272 (1992) ("Although only three Justices subscribed to the reasoning in [Justice Kennedy's] opinion, the four dissenting Justices would certainly . . . call for the application of the grossly disproportionate test in lieu of no evaluation at all . . . .").

[89] Justice Kennedy, joined by Justices O'Connor and Souter, argued for a narrow proportionality principle. The dissenting Justices—White, Blackmun, Stevens, and Marshall—advocated a rigorous proportionality review. Hence at least seven Justices supported some level of proportionality guarantee.

[90] Justice Scalia and Chief Justice Rehnquist would have eliminated the intrajurisdictional and interjurisdictional comparisons in all instances, thus creating a five-Justice majority—Scalia, Rehnquist, Kennedy, O'Connor, and Souter—for the proposition that intrajurisdictional and interjurisdictional comparisons need not be conducted in most cases. Conversely, Justices White, Blackmun, and Marshall advocated using the entire *Helm* framework in every case, thus creating a seven-Justice majority—Blackmun, White, Marshall, Stevens, Kennedy, O'Connor, and Souter—for the proposition that when there is an inference of gross disproportionality the *Helm* intrajurisdictional and interjurisdictional comparisons must be conducted.

[91] See *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring).

ity review of excessive criminal punishments survives, successful challenges are nearly impossible.[92]

B. Proportionality Review of Excessive Punitive Damages Awards

Unlike constitutional challenges to excessive criminal punishments, which can be traced back over 100 years, constitutional challenges to excessive punitive damages awards are a fairly recent phenomenon. Even though punitive damages have been around for a long time,[93] it was not until recently that the frequency and size of punitive damages verdicts increased dramatically.[94] The explosion of punitive damages, not surprisingly, led to constitutional objections. In large part, these constitutional challenges find their genesis in a 1986 article by Professor John Calvin Jeffries, Jr.[95] Professor Jeffries posited that repetitive punitive damages awards arising out of a single course of conduct could amount to an excessive fine in violation of the Eighth Amendment[96] or could violate due process.[97] In making the due process argument, Professor Jeffries first argued that multiple punitive damages verdicts for the same course of conduct would amount to a double penalty and hence would violate the guarantee of fundamental fairness inher-

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[92] See Deborah M. Furhan, Note, Harmelin v. Michigan: Should the Existence of an Eighth Amendment Guarantee of Proportionate Prison Sentences Rest on the Fate of Titus Oates and the Dreaded Consequences of Overtime Parking?, 22 Sw. U. L. Rev. 1133, 1176 (1993) ("[I]n one fell swoop, the highest Court of this nation destroyed one hundred years of American common law that had rightly declared that the Supreme Court, under the Eighth Amendment, should function as a check against abuses of power by elected officials when setting criminal prison sentences."); Kelly A. Patch, Note, *Harmelin v. Michigan*: Is Proportionate Sentencing Merely Legislative Grace?, 1992 Wis. L. Rev. 1697, 1723 ("[The *Harmelin*] Court has virtually eliminated any proportionality guarantee . . . .").

[93] Punitive damages awards date back to eighteenth century common law. See Dorsey D. Ellis, Jr., Fairness and Efficiency in the Law of Punitive Damages, 56 S. Cal. L. Rev. 1, 12–20 (1982) (discussing the origins of punitive damages); Note, Exemplary Damages in the Law of Torts, 70 Harv. L. Rev. 517, 518 (1957).

[94] See supra note 4. A recent example is a California jury's award of almost $5 billion in punitive damages to a family burned because of the location of a gas tank in a GM car. See Sarah Tippit, Jury Awards $4.9 Billion in Car Crash, Pittsburgh Post-Gazette, July 10, 1999, at A1, *available in* 1999 WL 5282088.

[95] See Jeffries, supra note 4.

[96] See id. at 147–51.

[97] See id. at 151–58.

ent in the Due Process Clause.[98] Professor Jeffries then turned to history, particularly the Magna Carta, to assert that the Due Process Clause of the Fifth Amendment was intended to incorporate a prohibition against excessive civil penalties.[99]

Although the Supreme Court rejected the suggestion that excessive punitive damages could violate the Excessive Fines Clause of the Eighth Amendment[100] (as well as the argument that punitive damages awards could violate the Double Jeopardy Clause of the Fifth Amendment[101]) the Court has, in a series of cases, embraced the idea that excessive punitive damages can violate due process.

In *Pacific Mutual Life Insurance Co. v. Haslip*,[102] the Supreme Court upheld a punitive damages verdict against a due process challenge that the verdict was excessive. In doing so, however, the Court made clear for the first time that excessive punitive damages verdicts *could* be violative of due process.[103]

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[98] See id. at 153.

[99] See id. at 156–58.

[100] See Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 263–64 (1989) ("Whatever the outer confines of the [Excessive Fines] Clause's reach may be, we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded."). Justice O'Connor, joined by Justice Stevens, dissented from the Court's conclusion that punitive damages do not come within the purview of the Excessive Fines Clause, arguing as a historical matter that the clause did place limits on punitive damages. See id. at 287–97 (O'Connor, J., concurring in part and dissenting in part). More interesting, however, was Justice O'Connor's contention that the Court should adopt the *Solem v. Helm* framework to determine which punitive damages awards amounted to excessive fines. See id. at 300–01 (O'Connor, J., concurring and dissenting in part). The inconsistency of Justice O'Connor's position is explained infra at note 157.

[101] See United States v. Halper, 490 U.S. 435, 451 (1989) ("[N]othing in today's opinion precludes a private party from filing a civil suit seeking damages for conduct that previously was the subject of criminal prosecution and punishment. The protections of the Double Jeopardy Clause are not triggered by litigation between private parties.") (citation omitted).

[102] 499 U.S. 1 (1991).

[103] See id. at 18. Prior to *Haslip*, the Court had hinted that excessive punitive damages verdicts could be constitutionally infirm on due process grounds. See *Browning-Ferris*, 492 U.S. at 276 ("The parties agree that due process imposes some limits on jury awards of punitive damages . . . ."); id. at 280 (Brennan, J., concurring) ("Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are 'grossly excessive . . . .'"). Nevertheless, the Court refused to address squarely the applicability of the Due Process Clause to excessive punitive damages claims prior to *Haslip*. See Bankers Life & Cas. Co., v. Crenshaw, 486 U.S.

In 1981 an agent of Pacific Mutual Life Insurance Company embezzled insurance premiums, which resulted in the cancellation of Cleopatra Haslip's insurance and an adverse effect on her credit.[104] An Alabama jury awarded Haslip $1,040,000 in general damages, likely including $200,000 in compensatory damages and $840,000 in punitive damages.[105] Pacific Mutual appealed the verdict, contending that unlimited jury discretion in awarding punitive damages violated due process.[106]

Writing for the Court, Justice Blackmun[107] first explained that the common-law method of allowing juries to assess punitive damages did not itself violate due process,[108] and further that the punitive damages award assessed against Pacific Mutual did not violate due process.[109] While recognizing that unlimited jury discretion might result in extreme verdicts, Justice Blackmun stated that the Court could not draw a mathematical bright line between constitutionally acceptable and constitutionally unacceptable punitive damages verdicts.[110] The Court did remark, however, that the punitive damages award—which was four times greater than the compensatory damages—was "close to the line."[111] Therefore, while the *Haslip* Court focused primarily on procedural due process, the Court's final comment that a four-to-one punitive-to-compensatory damages ratio came "close to the line" implied the existence of a substantive guarantee against excessive punitive damages.

Two years after *Haslip*, in *TXO Production Corp. v. Alliance Resources Corp.*,[112] a plurality of the Court expressly recognized what

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71, 76–80 (1988) (declining to decide whether the Due Process Clause placed limits on punitive damages because the issue had not been raised in state court); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 828–29 (1986) (refusing to decide the applicability of the Due Process Clause because the case could be resolved on narrower grounds).

[104] See *Haslip*, 499 U.S. at 4–5.

[105] See id. at 7 n.2.

[106] See id. at 7.

[107] Justice Blackmun's opinion was joined by Chief Justice Rehnquist and Justices White, Marshall, and Stevens. Justices Scalia and Kennedy also voted with the majority but concurred in separate opinions. Justice O'Connor issued a dissenting opinion. Justice Souter did not participate in *Haslip*. See id. at 2.

[108] See id. at 17.

[109] See id. at 19.

[110] See id. at 18.

[111] Id. at 23.

[112] 509 U.S. 443 (1993).

had been implied in *Haslip*: The Due Process Clause affords substantive protection against excessive punitive damages awards. During a property dispute, TXO frivolously alleged a cloud on the property's title in an attempt to defraud Alliance Resources.[113] Although Alliance Resources suffered only $19,000 in actual damages, the jury awarded $10 million in punitive damages, a ratio of 1 to 526.[114] Justice Stevens, joined by Chief Justice Rehnquist and Justice Blackmun, sought to determine if the punitive damages awarded were so "'grossly excessive' as to violate the substantive component of the Due Process Clause."[115] Although Justice Stevens recognized that the 526-to-1 punitive-to-compensatory damages ratio was high (and was certainly higher than the four-to-one ratio that the *Haslip* Court had called "close to the line"), the Court concluded that the award was not grossly excessive.[116]

Shortly after *TXO*,[117] in *BMW of North America v. Gore*,[118] a majority of the Court struck down a punitive damages award as grossly excessive. Building on *Haslip* and *TXO*, a majority of the Court explicitly recognized a substantive due process protection against unreasonable punitive damages awards.

Dr. Ira Gore, Jr., purchased an automobile from BMW of North America ("BMW"). After he discovered that BMW had repainted the car after the paint was damaged in transit,[119] Gore sued BMW

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[113] See id. at 447–51 (Opinion of Stevens, J.).

[114] See id. at 451, 453 (Opinion of Stevens, J.).

[115] Id. at 458 (Opinion of Stevens, J.).

[116] See id. at 460–62 (Opinion of Stevens, J.). Justices Scalia, Kennedy, and Thomas joined Chief Justice Rehnquist and Justices Blackmun and Stevens to uphold the punitive damages verdict. However, Justice Scalia and Justice Thomas adamantly opposed the creation of a substantive due process protection against unreasonable punitive damages. See id. at 470–72 (Scalia, J., concurring in the judgment).

[117] One year after *TXO*, the Court decided another excessive punitive damages case, Honda Motor Co. v. Oberg, 512 U.S. 415 (1994). Oberg had been awarded $5 million in punitive damages by an Oregon jury for an injury resulting from a design defect in his three-wheel Honda vehicle. See id. at 418. Honda alleged that the $5 million punitive damages verdict—an award five times Oberg's compensatory damages—was violative of the Fourteenth Amendment Due Process Clause. See id. The Court reiterated that the Constitution places substantive limits on the size of punitive damages awards. Explaining that post-trial review of punitive damages awards is a key procedural safeguard to protect big business from jury bias, the Court struck down the award because Oregon lacked such post-trial review. See id. at 432.

[118] 517 U.S. 559 (1996).

[119] See id. at 563.

for the depreciation in value of his car. An Alabama jury awarded him $4,000 in compensatory damages and $4 million in punitive damages;[120] the Alabama Supreme Court reduced the punitive damages award to $2 million.[121]

On appeal, a majority of the Supreme Court[122] announced, for the first time, that the Due Process Clause of the Fourteenth Amendment affords substantive protection against grossly excessive punitive damages awards.[123] Writing for the Court, Justice Stevens established three guideposts to determine when punitive damages verdicts are so excessive as to be unconstitutional. First, a court should look to the degree of reprehensibility of the conduct that gave rise to the punitive award.[124] For example, trickery and deceit are more reprehensible than negligence.[125] Second, courts should compare the ratio of punitive to compensatory damages.[126] Justice Stevens noted, however, as the Court had in *Haslip*, that no mathematical formula can determine when a ratio of punitive to compensatory damages is excessive; instead, case-by-case analysis is necessary.[127] Third and finally, the majority instructed that punitive damages awards should be compared with existing civil or criminal sanctions for comparable misconduct.[128]

All three guideposts suggested that the punitive damages award in *BMW v. Gore* was grossly excessive. The Court found that BMW's actions did not injure anyone and were not reprehensible,[129] that the ratio of punitive to compensatory damages—a ratio of 500 to 1—was extremely high[130] (and greater than the ratio in both *Haslip* and *TXO*[131]), and that the $2 million punitive damages

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[120] See id. at 565.

[121] See id. at 567.

[122] The majority was composed of Justices Stevens, O'Connor, Kennedy, Souter, and Breyer. See id. at 561.

[123] See id. at 568.

[124] See id. at 575.

[125] See id. at 576.

[126] See id. at 580.

[127] See id. at 582–83.

[128] See id. at 583.

[129] See id. at 576.

[130] See id. at 582.

[131] The Court stated that the ratio in *TXO* had only been ten to one, even though the actual punitive damages award was 526 times greater than the compensatory damages. See id. at 581. Justice Stevens explained that the $10 million punitive damages

verdict was substantially greater than any statutory fine that could have been imposed, in Alabama or any other jurisdiction, for BMW's conduct.[132] As a result, the Supreme Court struck down the $2 million punitive damages verdict as unconstitutional.[133]

Justice Ruth Bader Ginsburg, joined by Chief Justice Rehnquist, dissented. Justice Ginsburg argued that review of state punitive damages verdicts was an area traditionally left to the states and that the federal courts should not intervene.[134] Moreover, Justice Ginsburg pointed out that numerous state legislatures had enacted or had proposed legislation to limit large punitive damages awards.[135] In light of this legislative activity, Justice Ginsburg concluded that the Court should defer to the states rather than involve the federal courts.[136]

Justice Scalia, joined by Justice Clarence Thomas, also dissented, remarking, "I do not regard the Fourteenth Amendment's Due Process Clause as a secret repository of substantive guarantees against 'unfairness.'"[137] While acknowledging that the Fourteenth Amendment provides an opportunity for defendants to contest the reasonableness of a punitive damages verdict in state court, Justice Scalia contended that the Fourteenth Amendment does not offer a federal guarantee that the award actually be reasonable.[138] Finally,

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verdict in *TXO* had to be considered in context with the potential harm likely to result from TXO's conduct. Even though only $19,000 in actual harm was suffered, the potential harm would have been at minimum $1 million. As a result, the *BMW* Court determined that the *TXO* punitive damages award of $10 million was only ten times greater than the compensatory damages. See id.

[132] See id. at 584.

[133] See id. at 585–86. Justice Breyer, joined by Justices O'Connor and Souter, concurred, adding that Alabama's lack of procedural safeguards coupled with the "gross excessiveness" of the award was sufficient to surmount the otherwise "strong presumption of validity" that is given to punitive damages awards. See id. at 596–97 (Breyer, J., concurring).

[134] See id. at 607 (Ginsburg, J., dissenting).

[135] See id. at 614–19 (Ginsburg, J., dissenting). Justice Ginsburg added an appendix to her dissent listing twenty-five state laws (or proposed laws) designed to limit punitive damages. These laws included caps on punitive damages, allocation of portions of punitive damages awards to state agencies, and bifurcation of the liability and punitive damages portions of trials. See infra Part IV.C.1 for an explanation of how this flurry of legislative activity militates against the Court reaching out to conduct excessiveness review of punitive damages verdicts.

[136] See *BMW*, 517 U.S. at 607 (Ginsburg, J., dissenting).

[137] Id. at 598–99 (Scalia, J., dissenting).

[138] See id. at 599 (Scalia, J., dissenting).

Justice Scalia criticized the majority for announcing a substantive due process protection against excessive punitive damages without offering sufficient guidance to other courts on what constitutes an acceptable level of punitive damages.[139]

Regardless of whether the dissenters were correct in arguing that review of punitive damages awards is a matter better left to legislatures, it is clear that Justice Scalia validly criticized the majority for offering malleable guideposts that failed to provide lower courts with sufficient guidance. Even though the three guideposts in *BMW* appear to offer an objective test providing lower courts with guidance, in actuality the guideposts are quite vague.[140] The first *BMW* benchmark, which instructs courts to assess the reprehensibility of the defendant's conduct, forces judges to make almost entirely subjective determinations. The Court's explanation that intentional torts are more reprehensible than negligent ones affords lower courts neither help nor constraints in deciding if the conduct at issue is reprehensible enough to merit a large punitive damages award. The second and third guideposts—comparing the punitive damages to the compensatory damages and comparing the punitive damages to any potential civil or criminal sanction—are also subjective to a large degree.[141] For instance, since there is no bright line rule, one court is free to determine that a punitive to compensatory damages ratio of 300 to 1 is not disproportionate while another court could find that a ratio of 30 to 1 is excessive. As such, not only are the three guideposts vague, they also provide judges with

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[139] See id. at 602 (Scalia, J., dissenting).

[140] See Peter J. Sajevic, Case Note, Failing the Smell Test: Punitive Damages Awards Raise the United States Supreme Court's Suspicious Judicial Eyebrow in *BMW of North America, Inc. v. Gore*, 20 Hamline L. Rev. 507, 538 (1996) ("[T]he Court's guideposts [in *BMW*] symbolize the Court's current role in the punitive damage arena: murky and vague.").

[141] See *BMW*, 517 U.S. at 605 (Scalia, J., dissenting) ("[T]he 'guideposts' mark a road to nowhere . . . ."); Neil B. Stekloff, Note, Raising Five Eyebrows: Substantive Due Process Review of Punitive Damages Awards After *BMW v. Gore*, 29 Conn. L. Rev. 1797, 1817 (1997) ("While they may not 'mark a road to nowhere,' each guidepost is far too subjective and malleable to be meaningful beyond the facts of *BMW v. Gore*."); Paul M. Sykes, Note, Marking a Road to Nowhere? Supreme Court Sets Punitive Damages Guideposts in *BMW v. Gore*, 75 N.C. L. Rev. 1084, 1114 (1997) ("[T]he *BMW* standard is in many ways subjective and requires an ad hoc determination of constitutionality . . . .").

wide latitude to uphold or strike down punitive damages awards as they see fit.[142]

Thus, in the punitive damages area, the Court has not only found a substantive due process protection against excessive punitive damages awards, it has also empowered lower courts with wide discretion to strike down punitive damages verdicts.

II. COMPARING PROPORTIONALITY REVIEW OF EXCESSIVE CRIMINAL PUNISHMENTS WITH REVIEW OF EXCESSIVE PUNITIVE DAMAGES AWARDS

The Supreme Court's decisions in *Harmelin v. Michigan* and *BMW v. Gore* announce different levels of proportionality review for criminal punishments and punitive damages awards. On the one hand, the Court has set the bar for successful proportionality challenges to criminal punishments at an impossibly high level. On the other hand, the Court has promulgated a vague but potentially more rigorous review of punitive damages that affords lower courts the opportunity to strike down excessive punitive damages verdicts with ease.

Justice Kennedy's concurring opinion in *Harmelin*—widely recognized as the holding[143]—bluntly stated, "The Eighth Amendment does not require strict proportionality between crime and sentence."[144] Since the Eighth Amendment forbids only extreme sentences that are "grossly disproportionate," Justice Kennedy opined that "*successful* challenges to the proportionality of particular sentences [are] exceedingly rare."[145] Having announced that there could be few, if any, successful excessiveness challenges to a criminal punishment, Justice Kennedy promulgated a test whereby lower courts easily could reject proportionality claims with the

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[142] See Jim Davis II, Note, *BMW v. Gore:* Why the States (Not the U.S. Supreme Court) Should Review Substantive Due Process Challenges to Large Punitive Damage Awards, 46 U. Kan. L. Rev. 395, 413 (1998) ("The lower courts' initial and varied interpretations of *BMW* indicate the three guideposts may 'provide no real guidance at all' and may merely arm judges with a subjective framework (endorsed by the Supreme Court of the United States) that they can manipulate to justify practically any desired judgment.").

[143] See supra note 88 and accompanying text.

[144] *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring).

[145] Id. (Kennedy, J., concurring) (citing Rummel v. Estelle, 445 U.S. 263, 272 (1980)) (emphasis added).

simple aud subjective conclusion that the punishment does not seem too severe for the gravity of the offense. Courts no longer need to consider whether the defendant is being punished more harshly than other individuals in that jurisdiction or more harshly than he would be punished in other states. In short, unless a judge believes that a punishment is so outrageous as not to be commensurate to the crime, the court should dispose of the proportionality challenge without any further inquiry.[146]

Moreover, given the facts and the disposition of *Harmelin* itself, the possibility that a court could reasonably conclude that a punishment is so outrageous as to be grossly disproportionate to the crime is unlikely. In *Harmelin*, the Supreme Court upheld Harmelin's sentence of life imprisonment without the possibility of parole—the most severe punishment possible in the State of Michigan—for mere possession of 672 grams of cocaine.[147] Any judge faced with a punishment which she believes might create an inference of gross disproportionality will likely conclude otherwise once she determines that the punishment at hand is no more disproportionate than the one upheld in *Harmelin*.[148] In short, after *Harmelin*, the prospects that defendants can make successful proportionality challenges to criminal punishments are bleak.

Conversely, after *BMW v. Gore*, it seems clear that civil defendants can make successful proportionality challenges to punitive

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[146] Unfortunately, many judges will not be willing to find that a punishment enacted by a popularly elected legislature creates an inference of gross disproportionality. At the state level, many judges are elected and must perpetuate an image that they are "tough on crime." If the Supreme Court does not require rigorous Eighth Amendment proportionality analysis of criminal punishments, it is difficult to believe that elected state judges will take it upon themselves to conduct rigorous analysis. Faced with the need to be "tough on crime," and a proportionality test that allows easy affirmation of criminal punishments, some elected state judges may use the *Harmelin* test to affirm punishments without hesitation. For a discussion of the problem of judicial review of punishments—albeit capital punishments—and the interplay of politics, see Stephen B. Bright & Patrick J. Keenan, Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases, 75 B.U. L. Rev. 759 (1995).

[147] See *Harmelin*, 501 U.S. at 996.

[148] See, e.g., United States v. Mack, 1998 U.S. App. LEXIS 26846, at *8–9 (6th Cir. Oct. 15, 1998) ("Furthermore, if the life sentence for the possession of 672 grams of cocaine in *Harmelin v. Michigan* was constitutional, the same punishment for a crime involving fifty kilograms of cocaine also must be constitutional.") (internal citations omitted); see also infra note 160 for additional examples.

damages verdicts. Unlike in the criminal punishment context, where the Court announced that successful proportionality challenges would be exceedingly rare, the *BMW* Court found an unqualified substantive due process protection against excessive punitive damages awards.[149] The Court made no effort to limit this new right: Instead, the Court simply concluded that the Due Process Clause protects defendants against excessive punitive damages verdicts. Thus, the scope of the right to reasonable punitive damages awards created in *BMW* is more expansive than the limited protection against grossly disproportionate criminal punishments that the Court grudgingly recognized in *Harmelin*.

Clear evidence of this can be found in the $2 million punitive damages verdict struck down in *BMW* itself. While $2 million is certainly a sizable sum of money, it pales in comparison to the multi-million or even billion-dollar punitive damages awards handed down in recent years.[150] Thus, comparatively speaking, the *BMW* Court struck down a "mild" excessive punitive damages award. To make a more applicable—though admittedly rough—comparison, the $2 million punitive damages award struck down in *BMW* might be akin to a Court striking down a prison sentence of five or ten years for possession of narcotics.[151] Given that the Supreme Court has been unwilling to find criminal sentences of five or ten years (or even life sentences) to be disproportionate, the Court's decision to strike down a comparatively "mild" excessive punitive damages award signals more rigorous proportionality review of punitive damages awards.

The three *BMW* guideposts reinforce this conclusion. Unlike the *Harmelin* test for criminal punishments, the *BMW* framework requires courts to assess the reprehensibility of the defendant's conduct, *as well as* the ratio of punitive to compensatory damages and the degree of criminal or civil sanctions that could be imposed for the defendant's misconduct. The latter two *BMW* guideposts require courts to measure objective factors before disposing of a proportionality challenge; *Harmelin* does not require courts to consider similar objective factors in proportionality challenges to

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[149] See supra notes 118-42 and accompanying text.

[150] See supra note 4.

[151] I thank Professor William Stuntz for making this point to me.

criminal punishments (and in fact the Court specifically rejected such objective benchmarks by replacing the *Helm* framework with the *Harmelin* test).

Taken alone, the presence of objective guideposts to measure the proportionality of punitive damages awards seems to indicate that punitive damages verdicts are subject to rigorous review. Interestingly, however, it is the vagueness of the objective guideposts in *BMW* that provides for truly rigorous proportionality review of punitive damages by giving lower courts great flexibility. For instance, the second guidepost under *BMW* is an analysis of the ratio of punitive to compensatory damages. Since the Supreme Court refused to draw a mathematical bright line defining what ratio of punitive to compensatory damages is unacceptable,[152] lower courts have discretion to determine what ratios are unconstitutionally excessive. Thus, one court could strike down a punitive damages verdict thirty times higher than the compensatory damages even though another court might conclude that a 300-to-1 ratio was permissible. Absent a mathematical bright line, the *BMW* Court gave lower courts tremendous flexibility to assess the proportionality of punitive damages awards and to utilize this flexibility to strike down punitive damages verdicts.

The creation of an unqualified substantive due process right to reasonable punitive damages verdicts and malleable guideposts that afford lower courts flexibility to strike down punitive damages verdicts demonstrates that the Supreme Court has afforded rigorous proportionality review to punitive damages awards. Conversely, in the criminal punishment area, the Court has explicitly stated that successful challenges to the proportionality of punishments will be exceedingly rare, and the Court has instructed lower courts to dispose of such challenges without even consulting any objective criteria. It thus seems clear that the Supreme Court has afforded much more rigorous proportionality review to excessive punitive damages awards than to excessive criminal punishments.

In spite of its differing treatment of criminal punishments and punitive damages awards, the Supreme Court has not offered a

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[152] See *BMW*, 517 U.S. at 582–83 ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.") (quoting *Haslip*, 499 U.S. at 18).

consistent explanation of why punitive damages verdicts should receive more rigorous proportionality review than criminal punishments. The Court's explanation for declining to conduct rigorous proportionality review of potentially excessive criminal sentences is based, in part, on federalism concerns. Justice Kennedy remarked in *Harmelin* that "the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts.'"[153] As such, it is "not to be interfered with lightly."[154] In the punitive damages area, the Court has completely ignored similar federalism concerns. The *BMW* decision created a federal substantive due process right to reasonable punitive damages verdicts and in doing so it subordinated the judgments of state courts and state juries.[155] Additionally, by imposing a federal right to reasonable punitive damages verdicts, the Court has invaded the province of the state legislatures that might have passed (or declined to pass) laws limiting punitive damages awards.[156] By ignoring the interests of state juries, courts, and legislatures, the *BMW* Court showed little regard for the federalism concerns that the Court had relied upon only a few years earlier in *Harmelin*, when declining to review rigorously the proportionality of criminal punishments.

Thus, not only does the Supreme Court afford more rigorous proportionality review to punitive damages verdicts than to excessive criminal punishments, it has also failed to explain why one area of law is entitled to more rigorous review than the other.[157]

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[153] *Harmelin*, 501 U.S. at 998 (1991) (Kennedy, J. concurring) (citing Rummel v. Estelle, 445 U.S. 263, 275–76 (1980)).

[154] Id. at 1000 (Kennedy, J., concurring) (quoting Weems v. United States, 217 U.S. 349, 379 (1910)).

[155] See *BMW*, 517 U.S. at 600 (Scalia, J., dissenting).

[156] See id. at 607 (Ginsburg, J., dissenting).

[157] Justice O'Connor's jurisprudence demonstrates an even clearer example of inconsistency in proportionality review. In both Harmelin v. Michigan, 501 U.S. 957 (1991), and Solem v. Helm, 463 U.S. 277 (1983), Justice O'Connor voted against objective intrajurisdictional and interjurisdictional comparisons of potentially excessive criminal punishments. But Justice O'Connor twice voted to conduct intrajurisdictional and interjurisdictional comparisons of potentially excessive punitive damages awards. See TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 482 (1993) (O'Connor, J., dissenting); Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 300–01 (1989) (O'Connor, J., dissenting). Justice O'Connor thus seemed willing to conduct vigorous comparative review of punitive damages awards, yet she was unwilling to undertake the same type of objective review of criminal punishments. Like

III. THE PROOF IS IN THE PROGENY: LOWER COURT PROPORTIONALITY DECISIONS AFTER *HARMELIN* AND *BMW*

An analysis of lower court decisions following *Harmelin* and *BMW* reinforces the conclusion that punitive damages verdicts are afforded greater proportionality review than potentially excessive criminal punishments. Lower courts have rejected hundreds of proportionality challenges to criminal punishments; only two courts have relied on *Harmelin* to find punishments to be disproportionate.[158] Moreover, the two courts that struck down punishments as disproportionate arguably did so only after misapplying *Harmelin*. Conversely, after *BMW v. Gore*, proportionality review of potentially excessive punitive damages awards is alive and well. Lower courts have seriously analyzed many punitive damages verdicts and in a number of cases have found the awards to be unconstitutionally excessive.

A. Excessive Criminal Punishment Cases

In the nine years since *Harmelin*, lower courts have interpreted that decision narrowly and have primarily rejected proportionality challenges to excessive punishments on two rationales. First, and most simply, a number of courts have upheld appellants' punishments on the grounds that their offenses were more serious than Harmelin's or that their punishments were less severe.[159] Second,

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the Court as a whole, Justice O'Connor offered no explanation for this differing treatment of punitive damages and criminal punishments.

[158] See State v. Bartlett, 830 P.2d 823, 832 (Ariz. 1992); State v. Bonner, 577 N.W.2d 575, 581 (S.D. 1998).

[159] See Wayne A. Logan, Proportionality and Punishment: Imposing Life Without Parole on Juveniles, 33 Wake Forest L. Rev. 681, 703 n.109 (1998) ("Not surprisingly, the Supreme Court's decisions approving sentences of life (*Rummel*) and LWOP (*Harmelin*) for nonviolent recidivist acts and drug possession, respectively, have been used as 'benchmarks' to readily deny proportionality challenges to heavy sentences for violent crime."). For a few (of many) examples, see United States v. Mack, 1998 U.S. App. LEXIS 26846, at *8–9 (6th Cir. Oct. 15, 1998) ("Furthermore, if the life sentence for the possession of 672 grams of cocaine in *Harmelin v. Michigan* was constitutional, the same punishment for a crime involving fifty kilograms of cocaine also must be constitutional.") (citations omitted); United States v. Van Winrow, 951 F.2d 1069, 1071 (9th Cir. 1991) ("Winrow was convicted of an offense as serious as the offense in *Harmelin*. We are therefore bound by *Harmelin* to hold a mandatory sentence of life without parole was not unconstitutionally disproportionate to Winrow's offense."); United States v. Dunson, 940 F.2d 989, 995 (6th Cir. 1991) ("If the life sentence imposed in *Harmelin* was constitutional, it follows *a fortiori* that Mr.

and more commonly, a majority of courts have disposed of disproportionality challenges by following Justice Kennedy's concurring opinion in *Harmelin* and concluding that defendants' punishments did not create inferences of gross disproportionality. This latter category can be divided into two subcategories: cases in which courts undertook substantial analysis to conclude that the punishment did not appear grossly disproportionate,[160] and cases in which courts curtly concluded, without any substantive analysis, that the defendants' challenges were not disproportionate under *Harmelin*.[161]

In the aftermath of *Harmelin*, lower courts have upheld many arguably disproportionate punishments. For instance, a Ninth Circuit Court of Appeals panel relied on *Harmelin* to affirm a ten-year sentence for intent to sell three ounces of marijuana.[162] Similarly, the District Court for the District of Columbia upheld a thirty-year sentence for a recidivist convicted of possession of eight grams of narcotics.[163] A Texas appeals court relied on *Harmelin* to uphold a five-year sentence for a nonviolent offender convicted of second-degree burglary of habitation.[164] *Harmelin* also provided the impetus for a Missouri appeals court to uphold an eighty-year sentence

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Dunson's 20-year sentence [for possession and intent to distribute seven kilograms of cocaine] is constitutional."); State v. Silverman, 977 P.2d 1186 (Or. App. 1999) (upholding a 75-month sentence for first-degree sexual abuse of a child after comparing the offense to *Harmelin*).

[160] See, e.g., United States v. Bland, 961 F.2d 123, 129 (9th Cir. 1992) (reviewing the government's interest in punishing repeat offenders and the defendant's 13 prior violent felonies to conclude that a sentence of life without parole for the crime of being a felon in possession of a firearm does not create an inference of gross disproportionality); United States v. Hickey, 822 F. Supp. 408, 411 (E.D. Mich. 1993) (analyzing the Congressional purpose behind long prison sentences for repeat drug offenders and concluding that there is no extreme disparity between a sentence of life imprisonment and the crime of distributing drugs near a school).

[161] See, e.g., Porter v. Burns, 1998 U.S. App. LEXIS 8385, at *3 (9th Cir. Apr. 27, 1998) (rejecting defendant's disproportionality challenge to a 10-year sentence for intent to sell less than three grams of marijuana simply because it "fails under *Harmelin v. Michigan*"); United States v. Morse, 983 F.2d 851, 855 (8th Cir. 1993) (concluding without analysis that a 36-month sentence for possession of unauthorized credit cards with intent to defraud is not grossly disproportionate); State v. Robertson, 939 P.2d 863, 865 (Idaho Ct. App. 1997) (upholding a life sentence for second-degree murder after stating only that "[u]pon review of the entire record presented, we conclude that the sentence imposed under the facts of this case is not grossly disproportionate").

[162] See *Porter*, 1998 U.S. App. LEXIS 8385 at *4.

[163] See United States v. Spencer, 817 F. Supp. 176 (D.D.C. 1993).

[164] See Sullivan v. State, 975 S.W.2d 755, 757–58 (Tex. Ct. App. 1998).

for a recidivist convicted of two daytime burglaries.[165] Despite a plethora of cases meting out lengthy punishments for arguably minor crimes, only two courts have struck down punishments as disproportionate in the nine years since *Harmelin*. Perhaps more telling than the small number is the fact that both of those cases misinterpreted *Harmelin*. Under a proper *Harmelin* analysis those two "excessive" punishments might well have been upheld.

In *State v. Bartlett*,[166] the Arizona Supreme Court relied on *Harmelin* to strike down a forty-year sentence for two statutory rape convictions. Rather than asking whether a forty-year sentence created an inference of gross disproportionality, and only then proceeding to intrajurisdictional and interjurisdictional comparisons, the Arizona Supreme Court immediately undertook a searching review of the merits of Bartlett's punishment. The court observed that Bartlett's offenses were nonviolent and that the trend in the law was to construe statutory rape as a less serious crime.[167] Under a proper reading of *Harmelin*, however, the court should not have considered these factors. Since statutory rape is a serious offense, one could easily conclude that a forty-year sentence for two convictions does not create an inference of gross disproportionality.[168] Without such an inference, *Harmelin* instructs lower courts to end the inquiry and to uphold the sentence. As such, a proper reading of *Harmelin* required the court to uphold Bartlett's sentence.

The same flaw occurred in the South Dakota Supreme Court's decision in *State v. Bonner*.[169] In *Bonner*, the court found a fifteen-year sentence for second-degree burglary to be unconstitutionally excessive.[170] The court established an inference of gross disproportionality by finding that Bonner's two codefendants received substantially less punishment and that South Dakota punished

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[165] See State v. Williams, 936 S.W.2d 828, 829 (Mo. Ct. App. 1996).

[166] 830 P.2d 823 (Ariz. 1992).

[167] See id. at 828–29.

[168] See id. at 835 (Corocan, J., dissenting) ("I believe that the sentences imposed in this case are not grossly disproportionate to the offenses committed in light of the threat posed to the individual and to society by engaging in sexual misconduct with children.").

[169] 577 N.W.2d 575 (S.D. 1998).

[170] See id. at 581.

more serious offenses with shorter prison terms.[171] Such findings, however, result from intrajurisdictional comparisons that the court should not undertake unless it already has found an inference of gross disproportionality. Thus, the information about Bonner's co-defendants and the comparison of other punishments in South Dakota should not have been considered unless the court was convinced, in the abstract, that a fifteen-year sentence for second-degree burglary appeared grossly disproportionate. Hence, as another commentator has observed, the result in *Bonner* was probably erroneous.[172]

The *Harmelin* progeny demonstrate that the Supreme Court has not afforded rigorous proportionality review of criminal punishments. First, and most importantly, courts have rejected hundreds of proportionality challenges—including some legitimate challenges—to criminal punishments under the *Harmelin* framework. Second, the only two post-*Harmelin* findings of disproportionate punishment were the result of misapplication[173] of the *Harmelin* framework and probably should have been upheld. As such, the evidence demonstrates that virtually no appellate protection against disproportionate criminal punishments exists.

B. Excessive Punitive Damages Cases

While *Harmelin* has rendered proportionality review of criminal punishments dead in the lower courts, *BMW v. Gore* has afforded those same courts wide latitude to determine that excessive puni-

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[171] See id. at 581–82.

[172] See Joel E. Hunter, Note, *State v. Bonner:* In Search of an Objective Eighth Amendment Analysis for "Cruel and Unusual Punishment" in South Dakota, 44 S.D. L. Rev. 399, 428 (1999) ("If, however, the [*Bonner*] court had strictly constrained its analysis to the test supplied by Justice Kennedy in *Harmelin*, a different result would have invariably been reached.").

[173] *Bartlett* and *Bonner* are not the only cases to apply the *Harmelin* framework incorrectly; other courts have continued to conduct intrajurisdictional and interjurisdictional comparisons without first finding an inference of gross disproportionality. See United States v. Kratsas, 45 F.3d 63 (4th Cir. 1995) (undertaking the full *Helm* test); United States v. D'Anjou, 16 F.3d 604 (4th Cir. 1994) (same); United States v. Angulo-Lopez, 7 F.3d 1506 (10th Cir. 1993) (undertaking a very limited *Helm* analysis); United States v. Lowden, 955 F.2d 128 (1st Cir. 1992) (applying an interjurisdictional comparison); State v. Price, 721 So. 2d 511 (La. Ct. App. 1998) (conducting an intrajurisdictional comparison). While all of these courts misapplied *Harmelin*, none struck down a punishment as disproportionate.

tive damages verdicts violate due process. Appellate courts have not hesitated to utilize this discretion.[174] While a number of courts have applied *BMW* and subsequently rejected what could be seen as plausible challenges to the constitutionality of punitive damages verdicts,[175] at minimum, ten courts have relied on *BMW* to explicitly find punitive damages verdicts to be so excessive as to violate due process[176] and hence to be unconstitutional.[177]

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[174] But see Theodore Eisenberg & Martin T. Wells, The Predictability of Punitive Damages Awards in Published Opinions, the Impact of *BMW v. Gore* on Punitive Damages Awards, and Forecasting Which Punitive Damages Awards Will Be Reduced, 7 Sup. Ct. Econ. Rev. 59, 79–83 (1999) (finding no significant difference either in the pattern of awards before or after *BMW* or in the rate at which courts ordered reduction of punitive damages after *BMW*).

[175] See, e.g., United States v. Big D Enterprises, 184 F.3d 924, 928 (8th Cir. 1999) (upholding a $100,000 punitive damages verdict for a Fair Housing Act violation resulting in $1,000 in compensatory damages); Johansen v. Combustion Engineering, 170 F.3d 1320, 1327, 1340 (11th Cir. 1999) (finding that a $4.35 million punitive damages verdict for a nuisance and trespass water pollution claim was not excessive even though compensatory damages were only $47,000); Daka, Inc. v. Breiner, 711 A.2d 86, 88 (D.C. 1998) (upholding a $390,000 punitive damages verdict that was 39 times higher than compensatory damages); Walston v. Monumental Life Ins. Co., 923 P.2d 456, 458, 468 (Idaho 1996) (holding that a $3.2 million punitive damages verdict that was 26 times higher than the compensatory damages did not violate due process); Ford Motor Co. v. Ammerman, 705 N.E.2d 539, 544, 564 (Ind. Ct. App. 1999) (refusing to find a $13.8 million punitive damages verdict for a defectively made vehicle resulting in injuries to be unconstitutional); Axen v. American Home Prods. Corp. ex. rel. Wyeth-Ayerst Labs., 974 P.2d 224, 228, 244 (Or. Ct. App. 1999) (finding that a $20 million punitive damages verdict for a medication resulting in blindness was not unconstitutionally excessive); Stranahan v. Fred Meyer, Inc., 958 P.2d 854, 857 (Or. Ct. App. 1998) (refusing to find a $2 million punitive damages verdict for a false arrest claim resulting in $125,000 in compensatory damages to be excessive); Schaffer v. Edward D. Jones & Co., 552 N.W.2d 801, 804, 817 (S.D. 1996) (finding that a $750,000 punitive damages verdict for a fraud claim of $25,000 in actual damages was not a violation of substantive due process).

[176] See Watkins v. Lundell, 169 F.3d 540, 547 (8th Cir. 1999) (finding a $3.5 million punitive damages verdict for fraudulent business practices to be unconstitutional); FDIC v. Hamilton, 122 F.3d 854, 862 (10th Cir. 1997) (holding that a $1.2 million punitive damages verdict for fraud is unconstitutional); Continental Trend Resources v. OXY USA, 101 F.3d 634, 642 (10th Cir. 1996) (striking down a $30 million punitive damages verdict for tortious interference with contract as unconstitutional); Life Ins. Co. v. Parker, 726 So. 2d 619, 625 (Ala. 1998) (finding that a $200,000 punitive damages award for insurance fraud and misrepresentation violates due process); Ford Motor Co. v. Sperau, 708 So. 2d 111, 125 (Ala. 1997) (finding that a $6 million punitive damages verdict for fraud and misrepresentation violates due process); American Pioneer Life Ins. Co. v. Williamson, 704 So. 2d 1361, 1367 (Ala. 1997) (holding that a $2 million punitive damages verdict for insurance fraud and breach of contract violates due process); Cates Constr. v. Talbot Partners, 62 Cal. Rptr. 2d 548, 571 (Cal. Ct.

The Tenth Circuit's decision in *Continental Trend Resources v. OXY USA*,[178] finding a $30 million punitive damages verdict to be so excessive as to violate due process, provides an excellent example of the willingness of post-*BMW* courts to strike down punitive damages awards as unconstitutional, as well as the flexibility those courts have to do so. OXY had intentionally and repeatedly interfered with the plaintiff's business contracts and falsified documents in order to harm the plaintiffs; this resulted in a $30 million punitive damages award.[179] The *OXY* court applied *BMW*'s first prong and assessed the reprehensibility of this conduct.[180] While the court found this conduct to be reprehensible, it concluded that the highest possible punitive damages award was not permissible because OXY's actions resulted only in economic harm.[181] Turning to

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App.) (striking down a $28 million punitive damages verdict for breach of good faith and fair business dealing as unconstitutional); Langmead v. Admiral Cruises, 696 So. 2d 1189, 1194 (Fla. Dist. Ct. App. 1997) (finding that a $3.5 million punitive damages verdict for failure to pay plaintiff's salary while she was injured violates substantive due process); Parrott v. Carr Chevrolet, 965 P.2d 440, 452 (Or. Ct. App. 1998) (holding that a $1 million punitive damages verdict for fraudulently selling a vehicle without disclosing extensive defects is unconstitutional); Apache Corp. v. Moore, 960 S.W.2d 746, 750 (Tex. Ct. App. 1997) (striking down as unconstitutional a punitive damages verdict of $562,500 for negligently causing a gas well to explode). Virtually all of the cases finding punitive damages verdicts to be unconstitutional on excessiveness grounds involved economic harm; high punitive damages awards for fraud and misrepresentation have frequently been struck down.

[177] The conclusion that ten cases have found punitive damages verdicts to be unconstitutional is a conservative estimate. Some courts have employed *BMW* to find punitive damages verdicts to be excessive without actually stating that they were finding the size of the verdict to be unconstitutional. See Inter Med. Supplies v. EBI Med. Sys., 181 F.3d 446, 465–67 (3d Cir. 1999) (relying on *BMW* to find a $100.6 million punitive damages verdict for torts flowing from breach of contract to be excessive, but never stating that the verdict was unconstitutional or violated due process); Denesha v. Farmers Ins. Exch., 161 F.3d 491, 502–05 (8th Cir. 1998) (mentioning that due process is one consideration in punitive damages cases, but not explaining whether a due process violation was the reason a $4 million punitive damages verdict was found to be excessive); Wilson v. IBP, Inc., 558 N.W.2d 132, 145–48 (Iowa 1996) (explaining that punitive damages verdicts must comport with the due process standards set down in *Haslip*, *TXO*, and *BMW*, but only finding that a $15 million punitive damages award was "excessive"). Though some of these cases may be construed as finding punitive damages verdicts to be unconstitutional, this Note has omitted them from the analysis since the courts themselves never explicitly found the verdicts to be unconstitutional.

[178] 101 F.3d 634 (10th Cir. 1996).

[179] See id. at 638–39.

[180] See id.

[181] See id.

BMW's second factor, the Tenth Circuit panel compared the ratio of punitive to compensatory damages. The court concluded that because this was only an economic-injury case, the ratio of punitive to compensatory damages should not exceed ten to one, a ratio substantially smaller than the thirty-to-one verdict awarded by the jury.[182] Applying *BMW*'s third factor, comparable civil and criminal penalties for the defendant's misconduct, the court determined that OXY's misconduct amounted to a common-law tort that could not easily be compared to civil or criminal penalties.[183] Finally, although *BMW* did not instruct it do so, the Tenth Circuit panel considered OXY's wealth in deciding whether the $30 million punitive damages verdict was excessive.[184] The court concluded that $30 million was far more than necessary to punish and affect the conduct of a defendant of OXY's size.[185] Based on all of these factors, the court concluded that the maximum constitutionally permissible punitive damages verdict was $6 million.[186] The court ordered remittitur to that amount, instructing the plaintiffs to accept $6 million or to undertake a new trial.[187]

OXY speaks volumes about the discretion post-*BMW* courts have to strike down (or uphold, for that matter) punitive damages awards. On the one hand, the Tenth Circuit panel could have determined that, while offensive, tortious interference with contract was not reprehensible enough to merit a sizable punitive damages award;[188] on the other hand, the court just as easily could have upheld the $30 million verdict because OXY's intentional and repeated conduct was sufficiently reprehensible.[189] The court had equal discretion in assessing the ratio of punitive to compensatory damages. Purportedly reasoning from the Supreme Court's deci-

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[182] See id. at 639–40.

[183] See id. at 641.

[184] See id. at 642.

[185] See id.

[186] See id. at 643.

[187] See id.

[188] Cf. Dyer v. Bergman & Assocs., 657 A.2d 1132, 1139 n.10 (D.C. 1995) (suggesting that punitive damages might not be available for tortious interference with contract).

[189] The dissent, for instance, argued that OXY's conduct was sufficiently egregious to support a $20 million punitive damages verdict. See *OXY*, 101 F.3d at 644–45 (Brown, J., dissenting); see also Central Telecommunications v. TCI Cablevision, 800 F.2d 711, 730–31 (8th Cir. 1986) (upholding a $25 million punitive damages verdict for tortious interference with contract).

sions in *Haslip* and *TXO*,[190] the *OXY* court concluded that the maximum permissible punitive to compensatory damages ratio in economic-injury cases was ten to one.[191] While ten to one sounds like a fair ratio, the court could just as easily have concluded that the constitutional ceiling for a punitive to compensatory damages ratio in economic-injury cases was four to one,[192] or forty to one.[193] The *OXY* decision also demonstrates that lower courts have flexibility to stray from the three *BMW* factors in assessing the proportionality of punitive damages. The Tenth Circuit panel essentially ignored the third *BMW* prong[194]—comparable civil and criminal penalties—and at the same time considered the defendant's wealth,[195] a factor not even present in the Supreme Court's *BMW* test.

The *OXY* decision demonstrates that the supposedly "objective" *BMW* guideposts provide almost no objective constraints. The Supreme Court's failure to announce a maximum ratio of punitive to compensatory damages permits lower courts to make up any ratio

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[190] See supra notes 102–16 and accompanying text.

[191] See *OXY*, 101 F.3d at 639.

[192] See Ford Motor Co. v. Sperau, 708 So. 2d 111, 120 (Ala. 1997) (finding a $6 million punitive damages award unconstitutionally excessive even though it was only 3.5 times greater than the compensatory damages).

[193] See Daka, Inc. v. Breimer, 711 A.2d 86, 88 (D.C. 1998) (finding that a $390,000 punitive damages verdict that was 39 times higher than the compensatory damages was not so grossly excessive as to violate due process); Walston v. Monumental Life Ins. Co., 923 P.2d 456, 458, 468 (Idaho 1996) (finding that a $10 million punitive damages verdict for bad faith denial of insurance benefits did not offend the Constitution even though it was 26 times greater than the actual damages); Williams v. Aetna Fin. Co., 700 N.E.2d 859, 870–71 (Ohio 1998) (finding that a $1.5 million punitive damages verdict for conspiracy and fraud did not violate due process even though it was 100 times greater than the economic damages); Schaffer v. Edward D. Jones & Co., 552 N.W.2d 801, 804 (S.D. 1996) (finding that a $750,000 punitive damages verdict for fraud did not offend due process even though it was 30 times greater than the compensatory damages).

[194] The *OXY* court at least mentioned the third *BMW* prong before declining to utilize it. Other courts have neglected to even mention the third prong in their analysis. See, e.g., Dean v. Olibas, 129 F.3d 1001, 1003, 1008 (8th Cir. 1997) (upholding a $70,000 punitive damages verdict against a constitutional challenge without discussing comparable civil or criminal penalties).

[195] For additional examples of lower courts using the wealth factor to strike down punitive damages verdicts, see Watkins v. Lundell, 169 F.3d 540 (8th Cir. 1999); FDIC v. Hamilton, 122 F.3d 854 (10th Cir. 1997); Ford Motor Co. v. Sperau, 708 So. 2d 111 (Ala. 1997); American Pioneer Life Ins. Co. v. Williamson, 704 So. 2d 1361 (Ala. 1997).

they see fit. Additionally, the flexibility of the *BMW* test permits lower courts to ignore some guideposts—such as comparable civil and criminal sanctions—and create other guideposts, such as the defendant's wealth.[196] *BMW* thus provided courts with overly broad discretion to strike down (or uphold) punitive damages awards as unconstitutionally excessive.

Despite this flexibility, there is also evidence that *BMW* has lowered the constitutional ceiling, thus forcing lower courts to assess more rigorously the constitutionality of punitive damages verdicts. In *OXY*, the Tenth Circuit had originally upheld the $30 million punitive damages verdict.[197] However, after deciding *BMW*, the United States Supreme Court vacated the judgment in *OXY* so that it could be reconsidered in light of the *BMW* holding.[198] Subsequently, the Tenth Circuit relied on *BMW* to reduce the previously acceptable $30 million punitive damages verdict to $6 million.[199] In a similar turn of events, three other punitive damages verdicts were struck down as unconstitutional after the *BMW* decision, even though the verdicts had originally been upheld.[200] Thus, there is some evidence that *BMW* not only provides lower courts with the opportunity to strike down punitive damages awards, but also that it encourages them to do so.

Three conclusions can be drawn from the *BMW* progeny. First, *BMW* sends a signal to lower courts that they should rigorously assess the proportionality of punitive damages verdicts. Second, the *BMW* framework affords lower courts tremendous discretion to carry out this task. Finally, lower courts have used their discretion

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[196] One court has interpreted *BMW* so flexibly as to allow for comparisons of punitive damages verdicts handed down in other cases. See Parrot v. Carr Chevrolet, 965 P.2d 440, 453 (Or. Ct. App. 1998).

[197] See Continental Trend Resources v. OXY USA, 44 F.3d 1465, 1480 (10th Cir. 1995), vacated sub nom. OXY USA v. Continental Trend Resources, 517 U.S. 1216 (1996).

[198] See OXY USA v. Continental Trend Resources, 517 U.S. 1216, 1216–17 (1996).

[199] See Continental Trend Resources v. OXY USA, 101 F.3d 634, 643 (10th Cir. 1996).

[200] See Ford Motor Co. v. Sperau, 708 So. 2d 111 (Ala. 1997); American Pioneer Life Ins. Co. v. Williamson, 704 So. 2d 1361 (Ala. 1997); Apache Corp. v. Moore, 960 S.W.2d 746 (Tex. Ct. App. 1997).

to strike down a number of punitive damages awards that otherwise would have been upheld.[201]

The *Harmelin* and *BMW* progeny confirm that more rigorous proportionality review is afforded to punitive damages verdicts than to criminal punishments. Except for two cases that misinterpreted *Harmelin*, lower courts have rejected all proportionality challenges to criminal punishments, often after only cursory analysis. Those same courts have rigorously assessed the proportionality of punitive damages awards and have not hesitated to find verdicts unconstitutionally excessive.

IV. JUDICIAL REVIEW OF EXCESSIVE CRIMINAL PUNISHMENTS AND EXCESSIVE PUNITIVE DAMAGES VERDICTS: WHICH AREA *SHOULD* BE AFFORDED GREATER PROPORTIONALITY REVIEW?

It is clear that the Supreme Court has endorsed more rigorous proportionality review of punitive damages verdicts than of criminal punishments. Putting aside arguments that courts should not conduct proportionality review in either context,[202] the key question is whether punitive damages verdicts should be entitled to more rigorous proportionality review. Put another way, the question is whether punitive damages verdicts and excessive punishments should be given the same degree of judicial review, or whether one area is entitled to more stringent review than the other.

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[201] *BMW* has been so far-reaching that it has had impact outside the constitutional domain; courts have relied on the *BMW* framework to strike down excessive punitive damages on nonconstitutional grounds. See, e.g., Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927, 943 (5th Cir. 1996) ("We understand that *BMW* deals with *constitutional limits* on punitive damages, but we find it *instructive* [in a statutory challenge to excessive punitive damages].") (emphasis added).

[202] See, e.g., Mackey, supra note 21, at 635–45 (reviewing arguments against federal courts' involvement in proportionality review of criminal punishments). Opponents of appellate proportionality review maintain that legislatures are better equipped than courts to make such decisions, and that principles of federalism entitle legislatures to promulgate their own laws even in the face of less punitive laws of other states. See Kevin L. Hicks, Note, Worse Than *TXO*: Substantive Due Reasonableness in *BMW of North America, Inc. v. Gore*, 20 Harv. J.L. & Pub. Pol'y 310, 320 (1996) ("Imposition of constitutional 'reasonableness' standards through substantive review of punitive awards is quite simply an infringement of the States' power to make and enforce their own laws.").

A. The (Incorrect) Argument That Punitive Damages Awards Should Be Afforded More Rigorous Proportionality Review

At first glance, it makes sense for the Court to afford more strenuous judicial review to punitive damages verdicts. Punitive damages awards are handed down by juries, usually composed of twelve randomly selected persons who typically have no expertise in the law or the subject matter of the case. As such, these jurors may not have the ability to mete out a proper penalty, and excessive verdicts may result.[203] Conversely, criminal sentences are prescribed by statutes that were drafted by sovereign and (hopefully) competent legislatures. Unlike punitive damages verdicts, which are assigned by juries without reference to the size of other punitive damages awards, legislatures carefully determine criminal penalties in the context of other offenses so as to create a graduated system of punishments.[204] The argument, therefore, is that the Supreme Court should be more inclined to allow carefully determined legislative criminal punishments to stand while affording greater judicial review to randomly assessed punitive damages verdicts. This logic, however, is flawed.

Quite simply, juries do not have the final say on the size of punitive damages awards. Nearly all jury verdicts are subject to review by the trial judge.[205] If the judge believes the verdict is excessive, she may order remittitur. Remittitur is a reduction of the jury's ex-

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[203] See Paul Mogin, Why Judges, Not Juries, Should Set Punitive Damages, 65 U. Chi. L. Rev. 179, 207–15 (1998) (arguing that juries are not in a good position to set punitive damages because they are susceptible to emotional factors, are unduly influenced by a defendant's wealth, and are often unfamiliar with the sanctions imposed for similar misconduct); see also Ellis, supra note 93, at 37–39 (lamenting jury discretion in punitive damages cases because juries have no independent knowledge of the legal standards, and the instructions jurors are given are vague and unilluminating); Dorsey D. Ellis, Jr., Punitive Damages, Due Process, and the Jury, 40 Ala. L. Rev. 975, 1003–07 (1989) (recommending that judges determine punitive damages).

[204] In addition to the well-known federal sentencing guidelines, a number of states have also enacted rigid sentencing guidelines that carefully determine the punishment for a given offense. See Michael Tonry, Sentencing Matters 25–31 (1996). Moreover, while many states still entrust judges and juries with wide discretion to make sentencing decisions, even these states constrain sentencing discretion by providing a range of minimum and maximum punishments.

[205] See Irene Deaville Sann, Remittiturs (And Additurs) in the Federal Courts: An Evaluation with Suggested Alternatives, 38 Case W. Res. L. Rev. 157, 165–67 (1987) (explaining that remittitur has been utilized in every federal circuit and most state courts).

cessive verdict to an amount of damages that reasonably could have been assessed against the defendant; the plaintiff then has the option of accepting this reduced award or undergoing a new trial.[206] Trial judges frequently order remittitur of large punitive damages verdicts[207] without a finding that the verdict is unconstitutionally excessive.[208] Moreover, if a trial court decides not to order remittitur, the defendant may appeal the verdict,[209] contending that the trial court abused its discretion by failing to reduce the award.[210] The appellate court then has authority to order remittitur of the punitive damages verdict.[211]

Given that judges can, and frequently do, order remittitur of punitive damages verdicts and that defendants can appeal trial courts'

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[206] See id. at 160–63.

[207] See, e.g., Food Lion v. Capital Cities/ABC, 984 F. Supp. 923 (M.D.N.C. 1997) (ordering remittitur of a $5.5 million punitive damages verdict to $315,000); Geuss v. Pfizer, Inc., 971 F. Supp. 164 (E.D. Pa. 1996) (remitting a $150,000 punitive damages verdict to $17,500); Iannone v. Frederic R. Harris, Inc., 941 F. Supp. 403 (S.D.N.Y. 1996) (ordering remittitur of a $250,000 punitive damages award to $50,000).

[208] Remittitur is a tricky subject, as it appears to conflict with the Seventh Amendment. The Seventh Amendment, which is only binding against the federal government, see Walker v. Sauvinet, 92 U.S. 90, 92–93 (1876), provides in relevant part that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law." U.S. Const. amend. VII. Despite this language, the Supreme Court has held that trial judges may reduce a jury's award of excessive damages to a permissible level. The logic is that if a trial judge could order a new trial because the damages were excessive, then the judge surely has the power to reduce the damages to a permissible level while still awarding the plaintiff the option of a new trial. See Dimick v. Schiedt, 293 U.S. 474, 486–87 (1934). For a history and analysis of remittitur, see Lopez, supra note 5, at 1326–42.

[209] The Supreme Court recently held that this practice, referred to as appellate remittitur, does not violate the Seventh Amendment. See Gasperini v. Center for Humanities, 518 U.S. 415, 436 (1996).

[210] Under the *Erie* doctrine, see Erie R.R. v. Tompkins, 304 U.S. 64 (1938), the "abuse of discretion" standard applies only to claims based on federal law. When a claim is based on state law—even if the case is brought pursuant to diversity jurisdiction in federal court—the court must look to state law to determine whether remittitur is recognized, and, if so, what standard applies. See *Gasperini*, 518 U.S. at 436–39.

[211] See, e.g., Hillcrest Center v. Rone, 711 So. 2d 901 (Ala. 1997) (ordering remittitur of a $130,000 punitive damages verdict to $94,000); Union Sec. Life Ins. Co. v. Crocker, 709 So. 2d 1118 (Ala. 1997) (ordering remittitur of a $2 million punitive damages verdict to $1 million); Notrica v. State Compensation Ins. Fnnd, 83 Cal. Rptr. 2d 89 (Cal. Ct. App. 1999) (ordering remittitur of a $20 million punitive damages verdict to $5 million). Frequently, however, the appellate court will remand the case to a lower court to determine the proper remittitur. See, e.g., Smith v. Lightning Bolt Productions, 861 F.2d 363 (2d Cir. 1988).

decisions not to grant remittitur, it is not accurate to assert that juries impose punitive damages with free rein. Since hefty punitive damages verdicts are not the work of rogue or incompetent juries, but rather are judgments approved by trial and appellate courts as reasonable, there seems little reason for punitive damages verdicts to be entitled to less constitutional deference than criminal punishments. To the contrary, two arguments suggest that courts should conduct more rigorous proportionality review of criminal punishments than of punitive damages verdicts.

B. A Brief Argument That Deprivations of Liberty Are More Serious and in Greater Need of Judicial Review Than Deprivations of Property

The Declaration of Independence articulated the rights to "life, liberty, and the pursuit of happiness."[212] The Constitution—in the Due Process Clauses of the Fifth and Fourteenth Amendments—reiterated the importance of these concepts, this time by speaking of life, liberty, and property.[213] While life, liberty, and property are all important values, it is important to consider whether one value is more important than another. If liberty is more important than property, then excessive criminal punishment cases (which amount to deprivations of liberty) should be entitled to more rigorous proportionality review than excessive punitive damages verdicts (which are deprivations of property). While a textual argument can be made that life, liberty, and property are hierarchical rights of descending importance, ultimately it is the Supreme Court's capital punishment and criminal procedure jurisprudence which suggests that deprivations of liberty are more important than deprivations of property.

The textual argument that liberty is more important than property is fairly simple (and perhaps, as a result, not very convincing). The Due Process Clause of the Fourteenth Amendment states, "Nor shall any State deprive any person of life, liberty, or property, without due process of law."[214] Notably, "life" is listed first, "liberty" second, and "property" third. If the Framers had intended

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[212] The Declaration of Independence para. 2 (U.S. 1776).

[213] See U.S. Const. amend. V; U.S. Const. amend. XIV, § 1.

[214] U.S. Const. amend. XIV, § 1.

property to be more important than liberty, they would have listed property before liberty in the text of the amendment. The text therefore seems to indicate, at minimum, that property was not considered to be more important than liberty. That, of course, does not mean that the text proves that the Framers thought that property was less important than liberty. The Framers could have intended for deprivations of life, liberty, and property to be considered equally important, in which case the order of the words "life, liberty, and property" would have been merely coincidental and hence meaningless. Thus, while the language of the amendments seems to indicate that property is not more important than liberty, the text does not prove that the Framers thought that property was any less important than liberty. The Court's capital punishment and criminal procedure jurisprudence is more telling, however.

Over the last twenty-five years, the Supreme Court has operated under the proposition that "death is different."[215] Since capital punishment, in its finality, is different from every other type of punishment, the Court has required increased procedural safeguards in capital cases.[216] Additionally, the Court has instituted substantive restrictions on the use of capital punishment. For instance, the Court has forbidden the imposition of the death penalty on minors under the age of sixteen[217] as well as for those convicted of rape (of an adult woman).[218] Similar procedural safeguards and substantive restrictions do not apply to criminal defendants who merely face the possibility of prison sentences. The Court's basis for the heightened requirements in capital cases is that a death sentence is a more serious punishment than a prison sentence. Put more technically, the Court has concluded that the deprivation of life is more serious than the deprivation of liberty.

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[215] Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

[216] See Lockett v. Ohio, 438 U.S. 586, 605 (1978) ("Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.").

[217] See Thompson v. Oklahoma, 487 U.S. 815, 838 (1988).

[218] See Coker v. Georgia, 433 U.S. 584, 595–99 (1977).

The Supreme Court's conclusion that life is more important than liberty suggests that a hierarchy of rights does exist. As such, if life is more important than liberty, it is plausible to suggest that liberty in turn might be more important than property. The Court's non-capital criminal procedure jurisprudence supports and completes this argument. Drawing on the Bill of Rights, the Court has created a code of criminal procedure[219] that affords unique procedural protections to criminal defendants.[220] For instance, the Court has incorporated the Sixth Amendment right to a jury trial in criminal cases to be binding against the states,[221] but has declined to do the same for the Seventh Amendment right to a jury trial in civil cases.[222] Consider also the differing standards of proof required in criminal and civil cases. The Court has mandated that a criminal defendant can be convicted only upon proof beyond a reasonable doubt;[223] conversely, a civil defendant will be found liable if the plaintiff meets the less stringent preponderance-of-the-evidence standard.[224] The existence of these heightened procedural safeguards in criminal cases lends credence to the idea that there is a hierarchy of rights and that deprivations of liberty are more important than deprivations of property.

This conclusion makes intuitive sense. In most cases, deprivation of liberty is more stigmatizing than the deprivation of property; being sent to prison is viewed as more shameful than being ordered to pay a fine.[225] In addition to shame, the incarcerated offender usually suffers more than the fined offender. Although a defendant

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[219] See Henry J. Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Cal. L. Rev. 929 (1965); see also Akhil Reed Amar, The Constitution and Criminal Procedure: First Principles 146–47 (1997) (explaining that the Warren Court created "a remarkable doctrinal edifice of . . . constitutional criminal procedure").

[220] Interestingly, as noted above, increased procedural safeguards in capital cases separate death-penalty cases from ordinary criminal cases and help to support the argument that deprivations of life are more important than deprivations of liberty. In turn, the fact that ordinary criminal cases involve greater procedural safeguards than civil cases supports the argument that deprivations of liberty are more important than deprivations of property.

[221] See Duncan v. Louisiana, 391 U.S. 145, 157–58 (1968).

[222] See Walker v. Sauvinet, 92 U.S. 90, 92–93 (1876).

[223] See In re Winship, 397 U.S. 358, 364 (1970).

[224] See James Brook, Inevitable Errors, The Preponderance of the Evidence Standard in Civil Litigation, 18 Tulsa L.J. 79, 79–80 (1982).

[225] See Hugo Adam Bedau, Death is Different: Studies in the Morality, Law, and Politics of Capital Punishment 26 (1987).

may struggle to pay a civil sanction, in most cases the fined offender pays the fine and moves on. The incarcerated offender, however, must continue to live in an environment of restricted liberty, physical danger, and general discomfort until his sentence is over.[226] Thus, to put it simply, being deprived of liberty is worse than being deprived of property.[227]

Having established a plausible argument that liberty is more important than property, it follows that courts should afford more rigorous proportionality review to criminal punishments than to punitive damages awards. In other words, if it is more serious to imprison someone than to fine him, then courts should expend more resources to prevent disproportionate criminal sentences and be less concerned about disproportionate punitive damages awards.

C. The Political Process Theory Argument for Proportionality Review of Excessive Criminal Punishments but Not Excessive Punitive Damages Awards

While it makes sense to argue that liberty is more important than property (and hence that criminal punishments should be more rigorously reviewed than punitive damages awards), the best argument for heightened proportionality review of criminal punishments comes from political process theory. The political process idea, first articulated by Justice Harlan Fiske Stone in the famous footnote four of *United States v. Carolene Products Co.*,[228] was crafted into a prominent theory of judicial review by John Hart Ely in his seminal work, *Democracy and Distrust*.[229] The *Carolene Products* footnote suggested that the Court would be deferential to economic legislation but would carefully scrutinize individual liberty cases where a failure in the political process had prevented a group's voice from being heard or where a law prejudiced a dis-

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[226] See Stuntz, supra note 21, at 24–25 (explaining that incarceration is a worse punishment than damages and that the former should be reserved for worse offenders).

[227] Of course, counter-examples can be imagined. For instance, a fine exceeding one's assets is probably worse than one hour of incarceration. Nevertheless, in the majority of cases it is certainly plausible to suggest that deprivations of liberty are more invasive than deprivations of property.

[228] 304 U.S. 144, 152–53 n.4 (1938).

[229] John Hart Ely, Democracy and Distrust: A Theory of Judicial Review (1980).

crete or insular minority. Ely developed this brief footnote into what he termed a "representation-reinforcing"[230] theory of judicial review.[231]

Ely's political process model calls for judges to stay out of the substantive decisionmaking business (an area our democratic system leaves to legislatures) and instead to concentrate on what judges are most qualified to do: ensure proper process.[232] In opposing substantive policy judgments by the judiciary, Ely posited that courts should strike down laws under only three circumstances. First, a law is constitutionally infirm when it unequivocally conflicts with the text of the Constitution.[233] The unambiguous constitutional provision requiring that the President be thirty-five years of age falls within this category; the vague Eighth Amendment protection against cruel and unusual punishment does not.[234] Second, courts should intervene when access to the political process has been cut off. When "out groups" are cut off from the political process and are subsequently disadvantaged by "in groups" that control the political process, it is the judiciary's job to intervene by clearing the channels of political participation.[235] Put another way, it is the judiciary's job to prevent the majority from suppressing the political voice of the minority. Third and finally, courts should strike down laws designed to prejudice discrete or insular minority groups, even if the minority group had full access to the political process.[236] The prejudice prong calls on courts to protect those groups whose needs and wishes legislatures have no interest in protecting.[237] Al-

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[230] Ely, supra note 229, at 88.

[231] Although his theory is largely based on the *Carolene Products* footnote, Ely makes a case for political process theory based on the provisions of the Constitution as well as American democratic history. See Raoul Berger, Ely's "Theory of Judicial Review," 42 Ohio St. L.J. 87, 87 (1981) ("[W]here Justice Stone spun his footnote out of thin air, Ely would root it in the Constitution."). For instance, Ely argues that the Constitution is an inherently procedural document concerned with reinforcing democratic values and access to the political process. He explains that five of the eleven (now twelve) twentieth-century amendments to the Constitution were concerned with the franchise. See Ely, supra note 229, at 99.

[232] See Ely, supra note 229, at 88.

[233] See id. at 75–76.

[234] See id. at 13.

[235] See id. at 102–03.

[236] See id.

[237] See id. at 151.

though Ely's theory has given rise to prolific and substantial criticism,[238] it is nevertheless considered one of the most important contributions to the theory of judicial review in the last century.[239]

1. How the Political Process Succeeds in Protecting Defendants from Excessive Punitive Damages Awards

As will become readily apparent, the Court's proportionality jurisprudence does not conform to political process theory. Let us begin with proportionality review of punitive damages. First, we must ask if disproportionate punitive damages awards contravene a direct and unambiguous constitutional provision. While the Supreme Court found in *BMW v. Gore* that excessive punitive damages awards could be so unreasonable as to violate due process, substantive due process hardly constitutes a direct and unambiguous constitutional provision.[240] In fact, the idea that courts should be able to reach out to the meta-text to discover a

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[238] See, e.g., Berger, supra note 231, at 88–89 (questioning the historical accuracy of Ely's arguments and assumptions); Michael J. Klarman, Puzzling Resistance to Political Process Theory, 77 Va. L. Rev. 747, 782–88 (1991) (arguing that while the "process" part of Ely's theory survives, the "prejudice" aspect of the theory fails because there cannot be a nonsubstantive theory of prejudice); Laurence H. Tribe, The Puzzling Persistence of Process-Based Constitutional Theories, 89 Yale L.J. 1063, 1064, 1072–77, (1980) (arguing that process-based models fail because at some point proper process must be guided by substantive decisions, such as which groups are discrete and insular minorities); Mark Tushnet, Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory, 89 Yale L.J. 1037, 1051–53 (1980) (positing that it is often difficult to define who is the "out-group" or the "they" in "we/they" process theories). Critics have been largely successful in attacking the prejudice prong of Ely's theory because, even promulgated as a representation-reinforcing idea, it forces the judiciary to make the same type of substantive judgments that Ely opposes. The process component of Ely's theory, however, has weathered the academic storm. See Klarman, supra, at 748 ("My bottom line is that the access, but not the prejudice, prong of political process theory has emerged relatively unscathed from the barbs of Ely's critics.").

[239] See, e.g., Daniel R. Ortiz, Pursuing a Perfect Politics: The Allure and Failure of Process Theory, 77 Va. L. Rev. 721, 721 (1991) ("Few, if any, books have had the impact on constitutional theory of John Hart Ely's *Democracy and Distrust*.").

[240] A more plausible argument could be made that excessive punitive damages awards violate the Excessive Fines Clause of the Eighth Amendment. The Supreme Court, however, has rejected such a challenge. See Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 263–64 (1989) ("Whatever the outer confines of the [Excessive Fines] Clause's reach may be, we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.").

fundamental protection against unreasonable punitive damages is anathema to the entire premise of political process theory; it amounts to unelected judges making substantive decisions that should be made by legislators.

Second, political process theory instructs us to consider whether there has been a failure in the political process whereby an "out group" has been cut off from the process and adversely affected by a law (or, in this case, a lack thereof). To qualify as an "out group," victims of excessive punitive damages would have to contend first that they did not have access to the political process, and second that if they had had access they might have been able to pass laws limiting or eliminating punitive damages awards. This "process" challenge to punitive damages undoubtedly fails. Simply put, those claiming that punitive damages awards are unconstitutionally excessive do not constitute an "out group." Victims of excessive punitive damages awards cases are typically large companies with unimpeded access to the political process. As such, they had access to the political process, and the absence of laws limiting punitive damages is not the result of a failure in the political process, but rather a conscious choice on the part of legislatures not to restrict the size of punitive damages awards.

Finally, defendants facing large punitive damages verdicts would also be unsuccessful in contending that they constitute a discrete or insular minority whose interests have been ignored by the political process. Defendants likely to be subject to excessive punitive damages verdicts are often large corporations with substantial capital. In terms of success in the political process, "money talks," and it is nearly untenable to suggest that large corporations with substantial economic resources would be unable to find sympathetic allies in the legislatures.[241] Additionally, even if legislators were unsympathetic to the prospect of corporate contributions, victims of excessive punitive damages verdicts could still find overwhelming support in the general population. In the face of extremely large punitive damages awards—such as the infamous $2.9 million punitive damages award for burus resulting from McDonald's

[241] To the contrary, the charge is usually that substantial economic resources give groups too much access to the political process. See, e.g., Charles Lewis, The Buying of the Congress: How Special Interests Have Stolen Your Right to Life, Liberty and the Pursuit of Happiness (1998).

coffee[242]—the general public often perceives a tort crisis in which punitive damages are out of control.[243]

The ability to gain the support of legislators through campaign contributions, coupled with the support of the majority of the public, makes it inconceivable that victims of excessive punitive damages constitute a discrete or insular minority group likely to be prejudiced by the legislative process.

A cursory glance at punitive damages laws enacted across the country in recent years demonstrates that those opposed to excessive punitive damages are anything but a discrete or insular minority group ignored by the political process. Not only have opponents of excessive punitive damages had access to the political process, they have also had overwhelming success. No fewer than sixteen states have enacted caps on punitive damages to protect defendants from excessive awards in all causes of action.[244] For instance, Virginia limits punitive damages awards to $350,000.[245] New Hampshire has gone even further by prohibiting punitive damages in virtually all cases.[246] Other states have capped punitive damages awards for specific types of claims, such as medical mal-

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[242] See Jurors Sting McDonalds for Scalding Coffee, Chi. Trib., Aug. 19, 1994, at 6, available in LEXIS, Chicago Tribune File. Although it is not surprising that a $2.9 million award for hot coffee outraged the public, there are factors that make the verdict seem more reasonable. See Marc Galanter, An Oil Strike in Hell: Contemporary Legends About the Civil Justice System, 40 Ariz. L. Rev. 717, 731–32 (1998) (explaining that the plaintiff suffered third-degree burns, that the coffee was 20 degrees hotter than the industry standard, and that the defendant originally refused to pay the plaintiff's medical expenses).

[243] See Gregory Nathan Hoole, Note, In the Wake of Seemingly Exorbitant Punitive Damages Awards America Demands Caps on Punitive Damages—Are We Barking Up the Wrong Tree?, 22 J. Contemp. L. 459, 461–62 (1996) (describing the hostile reaction to the punitive damages awards in *BMW v. Gore* and the McDonald's coffee case).

[244] See Ala. Code § 6-11-21 (1999); Colo. Rev. Stat. § 13-21-102(1) (1999); Conn. Gen. Stat. § 52-240b (1999); Fla. Stat. Ann. ch. § 768.73(1) (West 1999); Ga. Code Ann. § 51-12-5.1 (1999); 735 Ill. Comp. Stat. 5/2-1115.05 (West 1999); Ind. Code Ann. § 34-51-3-4 (Michie 1999); Kan. Stat. Ann. § 60-3701(e) (1999); Nev. Rev. Stat. Ann. § 42.005(1) (Michie 2000); N.J. Stat. Ann. § 2A: 15-5.14 (West 1999); N.C. Gen. Stat. § 1D-25 (1999); N.D. Cent. Code § 32-03.2-11(4) (2000); Ohio Rev. Code Ann. § 2315.21(D)(1)(a) (West 1999); Okla. Stat. tit. 23, §§ 9.1(B)–(D) (1999); Tex. Civ. Prac. & Rem. Code Ann. § 41.008 (West 2000); Va. Code Ann. § 8.01-38.1 (Michie 1999).

[245] See Va. Code Ann. § 8.01-38.1 (Michie 1999).

[246] See N.H. Rev. Stat. Ann. § 507:16 (1999).

practice claims.[247] Perhaps most notably, even Alabama, a state legendary for its exorbitant punitive damages verdicts[248] (including the $4 million award in *BMW v. Gore*), recently passed legislation capping all punitive damages awards.[249] These statutes capping punitive damages—particularly in Alabama, arguably the most pro-plaintiff state in the nation—demonstrate that legislatures are able and willing to deal with the problem of excessive punitive damages awards.

In some cases, courts applying the *BMW* framework have run head-on into these recently enacted punitive damages caps. A Texas case provides a useful example. In *Apache Corp. v. Moore*,[250] a gas well exploded causing property damage.[251] A jury awarded each of the three plaintiffs $562,500 in punitive damages, despite finding only a few thousand dollars in actual damages.[252] A Texas appellate court originally upheld the verdict. However, the United States Supreme Court vacated it in light of *BMW v. Gore*,[253] and on remand the Texas appellate court reduced the award.[254] What is particularly notable is that in between the two appellate court decisions, the Texas legislature passed a law limiting the amount of punitive damages that can be awarded in negligence cases like *Moore*.[255] The enactment of this punitive damages restriction dem-

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[247] See 40 Pa. Cons. Stat. § 1301.812-A(g) (1999). Another common restriction is the prohibition of punitive damages in tort actions against government entities. See, e.g., N.H. Rev. Stat. Ann. § 507-B: 4 (1999) (prohibiting the award of punitive damages against a governmental entity for personal injury or property damage).

[248] See David Firestone, Alabama Acts to Limit Huge Awards by Juries, N.Y. Times, June 2, 1999, at A16.

[249] See Ala. Code § 6-11-21 (1999). The Alabama law, enacted in June of 1999, caps punitive damages at the greater of $500,000 or three times the compensatory damages in economic-injury cases and at the greater of $1.5 million or three times the compensatory damages in physical injury cases. When the defendant is a small business in an economic injury case, the punitive damages are capped at the greater of $50,000 or 10% of the business' net worth. See id.

[250] 891 S.W.2d 671 (Tex. Ct. App. 1994), vacated, 517 U.S. 1217 (1996).

[251] See id. at 674.

[252] See id. at 678. In addition to the three plaintiffs at issue in this appeal, five other plaintiffs were each awarded $562,500 in punitive damages, amounting to a total punitive damages award of $4,500,000.

[253] See Apache Corp. v. Moore, 517 U.S. 1217 (1996).

[254] See Apache Corp. v. Moore, 960 S.W.2d 746, 750 (Tex. Ct. App. 1997). The Texas appellate court reduced the punitive award to $10,820 for two of the plaintiffs and to $21,700 for the third plaintiff. See id.

[255] See Tex. Civ. Prac. & Rem. Code Ann. § 41.008 (West 2000) (limiting exemplary damages to either $200,000, or twice the amount of economic damages plus up to

onstrates that the legislature was not only aware of the excessive punitive damages problem, but was willing to fix it. In short, the political process worked, and there was no need for the judiciary to intervene.[256]

The evidence demonstrates that the political process can handle the problems of excessive punitive damages without help from the judiciary. Victims of potentially excessive punitive damages awards have the resources to lobby politicians and affect the political process. Moreover, the general public supports the movement to cap punitive damages awards. As such, it is not surprising that legislation designed to prevent excessive punitive damages awards has been successful in a sizable number of states. As we shall see, criminal defendants cannot expect such favorable treatment from the political process.

2. How the Political Process Fails to Protect Defendants from Excessive Criminal Punishments

Political process theory demonstrates the need for rigorous judicial review of potentially disproportionate criminal punishments. Arguments can be made that disproportionate punishments contravene a direct constitutional provision, and that criminal defendants lack access to the political process that metes out their disproportionate punishments. An even more persuasive argument can be made that criminal defendants constitute a discrete and insular minority group in need of the judiciary's protection. This Note shall take each argument in turn.

Political process theory first questions whether disproportionate criminal punishments directly contravene a provision of the Constitution. Arguably, the Framers intended the Eighth Amendment's Cruel and Unusual Punishment Clause to protect against disproportionate punishments. While this argument is certainly more

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$750,000 in noneconomic damages, whichever is greater). Under the new statute—which was not retroactive—the maximum punitive damages verdict for each of the plaintiffs in *Moore* would have been twice the amount of their economic damages (since there were no noneconomic damages); two of the plaintiffs could have received a maximum of $5,410 in punitive damages and the third plaintiff could have received a maximum of $10,820 in punitive damages.

[256] It is important, however, to point out that the Texas statute was not retroactive and, without *BMW*, the excessive *Moore* verdict would have been upheld. The more important point remains that the political process functioned properly.

plausible than the idea that the Framers intended that the Due Process Clause of the Fourteenth Amendment provide substantive protection against unreasonable punitive damages verdicts, it is not clear that the Cruel and Unusual Punishment Clause was intended to proscribe disproportionate punishments.[257] While it is plausible to argue that the Eighth Amendment should protect defendants against disproportionate punishments,[258] an equally plausible argument suggests that the phrase "cruel and unusual punishment" proscribes only modes of punishment, not severity.[259] With no clear textual answer, it is impossible to conclude that strenuous judicial review of disproportionate punishments is warranted. Thus, we should next turn to see if criminal defendants have clear access to the political process.

A credible argument can be made that victims of disproportionate punishments do not have unfettered access to the political process. Because many convicted felons cannot vote, they lack access to the political process that is creating disproportionate punishments. Specifically, disenfranchised felons are unable to access the political process to oppose recidivist ("three strikes and you're out"[260]) statutes that lead to disproportionate punishments. For instance, imagine a defendant who committed two felonies and was incarcerated. After being released from prison, he was stripped of his right to vote and could not vote against candidates who supported a new "three strikes" bill that made the commission of a third felony punishable by a sentence of life imprisonment. Subse-

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[257] See Ely, supra note 229, at 97 ("It is possible that part of the point [of the Eighth Amendment] was to ban punishments that were unusually severe in relation to the crimes for which they were being imposed.").

[258] See, e.g., Harmelin v. Michigan, 501 U.S. 957, 1009–10 (1991) (White, J., dissenting) (arguing that it is unreasonable to believe that the Eighth Amendment was intended to protect against excessive fines and excessive bail, but not excessive prison sentences).

[259] Justice Scalia advanced this position in his *Harmelin* opinion. Justice Scalia based his conclusion on historical analysis dating back to the English Declaration of Rights of 1689. See *Harmelin*, 501 U.S. at 966–85 (Opinion of Scalia, J.); see also Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Cal. L. Rev. 839 (1969) (explaining that the American colonists misinterpreted English history to create a doctrine whereby the prohibition against "cruel and unusual" punishment proscribes tortuous but not excessive punishments).

[260] For a list of states that disenfranchise ex-felons, see Alice E. Harvey, Comment, Ex-Felon Disenfranchisment and Its Influence on the Black Vote: The Need for a Second Look, 142 U. Pa. L. Rev. 1145, 1146 n.6 (1994).

quently, when the defendant committed a third felony he was sentenced to life imprisonment under this recidivist statute. Arguably, the defendant's life sentence represents a process failure that merits the judiciary's involvement.

This argument, however, does not provide a particularly strong justification for judicial review of all criminal punishments. Many victims of disproportionate punishments are not recidivists, and as such had the right to vote up until their conviction.[261] Since their punishments are not the result of process failures, an "out group" challenge to disproportionate punishments is not particularly convincing.

Nevertheless, an extremely simple and convincing political process theory argument can be made that courts should engage in rigorous proportionality review of potentially disproportionate criminal punishments. Under the third prong of Professor Ely's representation-reinforcing theory, criminal defendants constitute a discrete and insular minority group that will be prejudiced by the legislative process.[262]

In defining a discrete and insular minority, Ely explained, "The whole point of the approach is to identify those groups in society to whose needs and wishes elected officials have no apparent interest in attending."[263] It is hard to imagine a group more fitting of this description than criminal defendants.[264] While some criminals can

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[261] See, e.g., *Harmelin*, 501 U.S. at 1021 (White, J., dissenting). The crime that resulted in Harmelin being sentenced to life imprisonment without the possibility of parole (possession of more than 650 grams of cocaine) was Harmelin's first offense.

[262] In making this argument, this Note is mindful that the "prejudice" prong of Ely's political process theory has been roundly criticized by commentators. See supra note 238. This Note will make no attempt to defend the theoretical underpinnings of the "prejudice" prong. Relying on Ely's original theory, this Note simply offers an argument that the victims of disproportionate punishments constitute a discrete and insular minority group that will be prejudiced by the legislative process.

[263] Ely, supra note 229, at 151.

[264] See Stuntz, supra note 21, at 20 ("A lot of constitutional theory has been shaped by the idea . . . that constitutional law should aim to protect groups that find it hard or impossible to protect themselves through the political process. If ever such a world existed, the universe of criminal suspects is it."); Jennifer Buehler, Note, *Hudson v. McMillian:* Rejecting the Serious Injury Requirement But Embracing the Malicious-and-Sadistic Standard, 42 Cath. U. L. Rev. 683, 715 (1993) ("Prisoners, by virtue of their inability to vote and their physical isolation from the rest of society, represent the quintessential 'discrete and insular minority' whose claims, under the Eighth Amendment, should be heard and addressed by the courts.").

vote, and while citizens can lobby the legislatures for reasonable prison sentences, the reality is that legislatures often do not consider the interests of criminal defendants. In a "tough on crime" political world, politicians do not win elections unless they announce that they will punish criminals severely.[265] Subsequently, elected officials know that they will not win re-election—something virtually every politician is interested in—unless they maintain their "tough on crime" image by passing strict penalties for criminal behavior. The need to be "tough on crime" does not end there, however. Frequently, incumbents who have drafted what could be considered proportionate prison sentences are nevertheless accused of being soft on crime by their opponents. As such, the ever-escalating "tough on crime" rhetoric leads incumbents to pass even more severe sentences in order to avoid charges from potential challengers that they are soft on crime.[266] Since it is almost unthinkable that a candidate could be accused of being too hard on crime, there is little incentive for elected officials to stop increasing penalties once they have reached a proportionate punishment for a particular offense.[267] To a great extent, therefore,

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Interestingly, Justice O'Connor has recognized the possibility of prejudice against defendants, but only civil defendants. Objecting to the amount of discretion juries have to award punitive damages, Justice O'Connor observed, "Juries are permitted to target unpopular defendants, penalize unorthodox or controversial views and redistribute wealth." Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting). Unfortunately, while Justice O'Connor recognized the problem of prejudice against punitive damages defendants, she did not point out—either in *Helm* or *Harmelin*—that excessive criminal punishments can also be the result of prejudice against unpopular defendants.

[265] For instance, in the 1998 New York Senate election, the candidates competed for votes by claiming to be tough on crime. Democratic challenger Chuck Schumer boasted that "Al D'Amato is not close to being as tough on crime as Chuck Schumer," while Senator D'Amato, a Republican, responded, "It was Chuck Schumer who . . . voted against tougher penalties for dangerous criminals." Dao, supra note 19, at B1.

[266] One scholar contends that the war on crime and drugs has not been a response to public concerns about crime. See Katherine Beckett, Making Crime Pay: Law and Order in Contemporary American Politics (1997). To the contrary, Beckett argues that politicians' "tough on crime" rhetoric itself generated the public's concern about crime.

[267] See Mark Tushnet & Larry Yackle, Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act, 47 Duke L.J. 1, 1 (1997) ("No politician in recent memory has lost an election for being too tough on crime."); see also Solem v. Helm, 463 U.S. 277, 315 (1983) (Burger, C.J., dissenting) (castigating the Court for conducting propor-

penalties will remain severe and, at times, disproportionate. As a result, unless there were to be a public backlash against these disproportionate sentences, something not on the horizon, criminal defendants can expect little consideration from the legislatures.[268]

Thus, even if we eschew the argument that the Eighth Amendment was not intended to protect against disproportionately severe criminal punishments, political process theory still provides a compelling reason for courts to scrutinize criminal punishments. Elected officials have no interest in ensuring proportionate prison sentences. To the contrary, legislators actually benefit from imposing disproportionate sentences because it enhances their image as being "tough on crime." Since criminal defendants are a discrete and insular minority that will be prejudiced by the political process, the courts must protect criminal defendants from disproportionate punishments.[269]

CONCLUSION

The Supreme Court's proportionality jurisprudence in the areas of criminal punishments and punitive damages is backwards. The

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tionality review of criminal sentences because "Congress has pondered for decades the concept of appellate review of sentences and has hesitated to act").

[268] The argument that criminals are a discrete and insular minority that will not be protected by the political process is not new. Professor Ely recognized this when he stated, "[I]f the system is constructed so that 'people like us' run no realistic risk of such punishment, some nonpolitical check on excessive severity is needed." See Ely, supra note 229, at 173. Justice Marshall has also embraced the prejudice argument. See Rhodes v. Chapman, 452 U.S. 337, 377 (1981) (Marshall, J., dissenting) ("In the current climate, it is unrealistic to expect legislatures to care whether the prisons are overcrowded . . . .").

[269] By arguing that criminal defendants are a discrete and insular minority that will be prejudiced by the political process, this Note does not mean to suggest that criminal defendants constitute a suspect class for equal protection or other purposes. See Prisoners' Rights, 84 Geo. L.J. 1465, 1494 n.2975 (1996) (collecting cases holding that prisoners are not a suspect class). Independent of suspect classifications, the argument has been made that it is the judiciary's job to protect those who cannot count on the political process for protection. See Susan R. Klein, The Discriminatory Application of Substantive Due Process: A Tale of Two Vehicles, 1997 U. Ill. L. Rev. 453, 489 (arguing that criminals can be viewed as politically powerless and in need of the judiciary's protection without being viewed as a suspect class); Barry R. Bell, Note, Prisoners' Rights, Institutional Needs, and the Burger Court, 72 Va. L. Rev. 161, 190 n.193 (1986) ("Prisoners...are not perceived as a 'suspect class.' At the same time, however, they are a peculiarly 'discrete and insular' minority poorly protected by the political process, and thus require a measure of judicial protection.").

Court has provided rigorous proportionality protection to punitive damages awards while affording only curt proportionality review to criminal punishments. The Court's jurisprudence ignores the reality that criminal defendants are in much greater need of the judiciary's protection than those likely to be victimized by excessive punitive damages.

The legislative process is equipped to deal with the problem of excessive punitive damages awards, and a plethora of laws have been enacted to combat that problem. Those advocating limits on punitive damages do not face obstacles in the political process nor can they be construed as a discrete and insular minority that will face prejudice and inaction from legislatures. Finally, since no clear constitutional provision forbids excessive punitive damages awards, the courts have no reason to intervene in this legislative domain.

Conversely, there is a sound reason for the judiciary to exert its countermajoritarian weight in the criminal punishment area. Putting aside the plausible, though inconclusive, argument that the Eighth Amendment was intended to protect against disproportionate punishments, as well as the plausible argument that some criminal defendants were denied access to the political process because they could not vote, a compelling argument can be made that, even with access to the political process, criminal defendants constitute a discrete and insular minority that will face prejudice in the political process. In a political world where winning elections depends in part on being "tough on crime," proportionate punishments become an expendable commodity. Since it appears impossible to lose an election by being too tough on crime, it is not realistic to believe that the political process will adequately protect criminal defendants, even those who vote. Since criminal defendants facing disproportionate punishments cannot turn to the political process, it falls to the judiciary to protect them from disproportionate punishments.

The Supreme Court must reconsider its decisions affording more rigorous proportionality review to excessive punitive damages awards than to excessive criminal punishments. Instead of protecting the beneficiaries of the political process, the Court should focus on protecting those who cannot protect themselves.