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Proportionality between Crimes, Offenses, and Punishments

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PROPORTIONALITY BETWEEN CRIMES, OFFENSES, AND PUNISHMENTS

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I. INTRODUCTION

Blackstone said of the Roman Empire, after it embraced unjust laws, "and then the Empire Fell."[1] The United States Supreme Court embraces unjust laws and is inconsistent regarding substantive due process and proportionality in criminal cases, and substantive due process and proportionality in civil cases. The Due Process Clause and the Eighth Amendment's prohibition against cruel and unusual punishment require proportionality and fairness, meaning that the punishment must fit the crime, and that the penalty must be appropriate to the offense.[2]

Throughout a long history of jurisprudence, the Supreme Court has developed or embraced two varying theories of due process or proportionality in criminal and civil cases. The Supreme Court has vacillated between recognizing and not recognizing a principle or theory of proportionality through the Eighth Amendment. Early on, the Supreme Court embraced the logical and just reasoning that crime and punishment required proportionality, and the Court followed that logical and just rationale until fairly recently. The purpose of this essay is to examine key Supreme Court decisions regarding the Due Process Clause, proportionality, and the Eighth Amendment's prohibition against cruel and unusual punishment, clarify where the Supreme Court has gone wrong, and discuss what the Supreme Court must do to restore a consistent and just theory of due process and proportionality.

Currently, in spite of more than two thousand years of western jurisprudence and legal theory, the Supreme Court does not effectively require proportionality between crime and punishment in criminal cases.[3]

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* This article is dedicated to Keith Kuincy and Doug Spruance.

1. 4 WILLIAM BLACKSTONE, COMMENTARIES 590 [hereinafter BLACKSTONE].

2. Procedural due process requires notice, a hearing, and fair process. Substantive due process requires actual fairness. This paper's focus is on substantive due process and actual fairness. The Due Process Clause is defined as "[t]he constitutional provision that prohibits the government from unfairly or arbitrarily depriving a person of life, liberty, or property." BLACK'S LAW DICTIONARY 517 (7th ed. 1999) (emphasis added).

3. *See generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 49-62 (3d ed. 2001) (providing a good discussion of proportionality).

Under current law, if one faces a loss of liberty upon conviction of a crime, the punishment does not have to be strictly proportional to the crime. On the other hand, if one faces a loss of money in the form of punitive damages in a civil suit, those damages must be reasonable and proportional. This inconsistency between punishment for crimes and punishment for civil wrongs is unjust and unwise. The Eighth Amendment provides "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[4] The Due Process Clause, justice, and the prohibition against cruel and unusual punishment all require proportionality, namely that the punishment should fit the crime, and that the penalty should be reasonable and appropriate to the offense.

Plainly, the government cannot unfairly deprive a citizen of life, liberty, or property.[5] Punishment for violation of a crime must be fair, and fairness is the essence of due process. A "magistrate must be esteemed both a weak and cruel surgeon, who cuts off every limb, which through ignorance or indolence he will not attempt to cure. It has been therefore ingeniously proposed, that in every state a scale of crimes should be formed, with a corresponding scale of punishment, descending from the greatest to the least . . . ."[6]

Aristotle, St. Thomas Aquinas, John Stuart Mill, Baron de Montesquieu, Sir William Blackstone, Thomas Jefferson, Justice Joseph Story, Justice Oliver Wendell Holmes, Jr., and Roscoe Pound each, in some way, recognized the link between proportionality in laws, punishments, and justice.[7] Aristotle said "[u]njust means either lawless or unfair; therefore

4. U.S. CONST. amend. VIII.

5. *See id.*; *see also* U.S. CONST. amend. XIV, § 1 (stating "nor shall any State deprive any person of life, liberty, or property, without due process of law").

6. *See* BLACKSTONE, *supra* note 1 (citing Beccaria).

7. *See* ARISTOTLE, THE NICOMACHEAN ETHICS 113 (J.A.K. Thomson trans., Penguin Books 2004) (350 B.C.E.) [hereinafter Aristotle]; ST. THOMAS AQUINAS, ON POLITICS AND ETHICS 49 (Paul E. Sigmund trans. & ed., W.W. Norton & Co. 1988) (1225-1274) [hereinafter ST. THOMAS AQUINAS]; BLACKSTONE, *supra* note 1; JUSTICE OLIVER WENDELL HOLMES, JR., THE COMMON LAW, CRIMINAL LAW (Dover Publications 1991); Letter from Thomas Jefferson to Edmund Pendleton (Aug. 26, 1776), *in* 1 THE PAPERS OF THOMAS JEFFERSON, 1760-1776, at 505 (Julian P. Boyd, et al., Princeton Univ. Press 1950) [hereinafter Jefferson, Letter to Edmund Pendleton]; THOMAS JEFFERSON, *A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital*, *in* 2 THE PAPERS OF THOMAS JEFFERSON, 1777-1779, at 492-93 (Julian P. Boyd, et al., Princeton Univ. Press 1950) [hereinafter JEFFERSON, *A Bill for Proportioning Crimes*]; JOHN STUART MILL, UTILITARIANISM 70-75 (Oskar Piest ed., The Bobbs-Merrill Co., Inc. 1957) (1861) [hereinafter MILL]; BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS 89-91 (Franz Neumann trans., Hafner Press 1949) [hereinafter MONTESQUIEU]; 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 750-51 (Hilliard, Gray, and Co. 1833); ROSCOE POUND, THE IDEAL ELEMENT IN LAW 107 (Liberty Fund, Inc. 2002) (1958) [hereinafter POUND].

just means either lawful or fair (equitable)."[8] Aristotle's rationale supports the precept of proportionality with his recognition that a just law must be a fair law.[9] Regarding justice and proportionality specifically, Aristotle said "[w]hat is just in this sense, then, is what is proportional, and what is unjust is what violates the proportion."[10]

Aquinas said "[h]ence, the first precept of law is that good is to be done and pursued, and evil is to be avoided."[11] Aquinas also stated "[n]ow the punishment should correspond with the fault, so that the will may receive a punishment in contrast with that for love of which it sinned."[12] Following the logic of Aquinas's first precept of law and reasoning, disproportionate and excessive punishments are unjust and unfair evils to be avoided. Mill said of proportionality that "the test of justice in penal infliction is that the punishment should be proportioned to the offence."[13] Montesquieu said regarding proportionality that "[i]t is an essential point, *that there should be a certain proportion in punishments*, because it is essential that a great crime should be avoided rather than a smaller, and that which is more pernicious to society rather than that which is less."[14]

Disproportionate punishments led to the prohibition against cruel and unusual punishments in the English Bill of Rights.

> But the spirit of the law clearly was that no misdemeanour should be punished more severely than the most atrocious felonies. The worst felon could only be hanged. The judges, as they believed, sentenced Oates to be scourged to death. That the law was defective is not a sufficient excuse: for defective laws should be altered by the legislature, and not strained by the tribunals; and least of all should the law be strained for the purpose of inflicting torture and destroying life. That Oates was a bad man is not a sufficient excuse; for the guilty are almost always the first to suffer those hardships which are afterwards used as precedents against the innocent. Thus it was in the present case. Merciless flogging soon became an ordinary punishment for political misdemeanours of no very aggravated kind. Men were sentenced, for words spoken against the government, to pains so excruciating that they, with unfeigned earnestness, begged to be brought to trial on capital charges, and sent to the gallows. Happily, the progress of this great evil was speedily stopped by the Revolution, and by that article of the Bill of Rights which condemns all cruel and

8. ARISTOTLE, *supra* note 7, at 113.
9. *See id.* at XXX.
10. *See id.* at 113.
11. *See* ST. THOMAS AQUINAS, *supra* note 7, at 49.
12. 4 SAINT THOMAS AQUINAS, THE SUMMA CONTRA GENTILES OF SAINT THOMAS AQUINAS 304 (The English Dominican Fathers trans., 1929).
13. MILL, *supra* note 7, at 70.
14. MONTESQUIEU, *supra* note 7, at 89 (emphasis added).

unusual punishments.[15]

The above-mentioned history of abuses by government undoubtedly influenced America's founding fathers, especially Jefferson.[16] Jefferson believed in proportionality of laws and punishments.[17] Jefferson wrote, "[p]unishments I know are necessary, and I would provide them, strict and inflexible, but *proportioned to the crime*."[18]

Only two years after Jefferson expressed those sentiments to Pendleton, Jefferson introduced legislation requiring proportionality between crimes and punishments.[19] In this proposed bill Jefferson noted,

> Whereas it frequently happens that wicked and dissolute men resigning themselves to the dominion of inordinate passions, commit violations on the lives, liberties and properties of others, and, the secure enjoyment of these having principally induced men to enter into society, government would be defective in it's principal purpose were it not to restrain criminal acts, by inflicting due punishments on those who perpetrate them; but it appears at the same time equally deducible from the purposes of society that a member thereof, committing an inferior injury, does not wholly forfiet the protection of his fellow citizens, *but, after suffering a punishment in proportion to his offence is entitled to their protection from all greater pain, so that it becomes a duty in the legislature to arrange in a proper scale the crimes which may be necessary for them to repress, and to adjust thereto a corresponding gradation of punishments*. . . . And forasmuch the experience of all ages and countries hath shewn that cruel and sanguinary laws defeat their own purpose by engaging the benevolence of mankind to withhold prosecutions, to smother testimony, or to listen to it with bias, when, if the punishment were only proportioned to the injury, men would feel it their inclination as well as their duty to see the laws observed.[20]

Jefferson then proposed a detailed, proportioned criminal code.[21] Ralph Lerner observed Jefferson's proposed criminal code, noting that, "[a]s a whole, however, Bill No. 64 presents itself as the studied, even artful, attempt of reason and experience to find alternatives to mindless

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15. 1 THOMAS BABINGTON MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II 440 (Philadelphia, Porter & Coates n.d.).

16. *See* JEFFERSON, *A Bill for Proportioning Crimes*, *supra* note 7, at 493.

17. *See* Jefferson, Letter to Edmund Pendleton, *supra* note 7, at 505. *See also* JEFFERSON, *A Bill for Proportioning Crimes*, *supra* note 7, at 492-93.

18. *See* Jefferson, Letter to Edmund Pendleton, *supra* note 7, at 505 (emphasis added).

19. *See* JEFFERSON, *A Bill for Proportioning Crimes*, *supra* note 7, at 492-504.

20. *Id.* at 492 (emphasis added). This statement by Jefferson also supports the argument that considering recidivism for purposes of punishment violates the Double Jeopardy Clause of the Constitution.

21. *See id.* at 492-504.

cruelty."[22] If only that could be true of all of our current laws.[23] Without proportional and just laws, and without just application of the laws, government will find itself found in contempt and its legitimacy is doomed.

Currently, there is a wide gulf between the ways the two classes, civil offenders and criminals, of culpable individuals are treated. The same formula to determine the fairness of civil and criminal punishment is not used, but could be and should be. It is helpful to examine the concept of proportionality in criminal and civil cases as recognized by the Supreme Court throughout the years.

II. PROPORTIONALITY BETWEEN SENTENCE AND PUNISHMENT REQUIRED IN CRIMINAL CASES THROUGH THE EIGHTH AMENDMENT - *WEEMS V. UNITED STATES*

In the year 1910, the Supreme Court reviewed a case from the Philippines to determine whether the punishment fit the crime.[24] An officer of the Bureau of the Coast Guard and Transportation of the United States Government of the Philippine Islands was convicted of deceiving and defrauding the United States Government of the Philippine Islands by falsifying a public document.[25]

He was convicted, and the following sentence was imposed upon him:

> To the penalty of fifteen years of Cadena, together with the accessories of section 56 of the Penal Code, and to pay a fine of four thousand pesetas, but not to serve imprisonment as a subsidiary punishment in case of his insolvency, on account of the nature of the main penalty, and to pay the costs of this cause.[26]

Weems argued, *inter alia*, that "[t]he punishment of fifteen years' imprisonment was a cruel and unusual punishment, and, to the extent of the sentence, the judgment should be reversed on this ground."[27] The Court was shocked by the sentence Weems received and announced a precept of proportionality:

Such penalties for such offenses amaze those who have formed their

22. RALPH LERNER, THE THINKING REVOLUTIONARY: PRINCIPLE AND PRACTICE IN THE NEW REPUBLIC 74 (Ithaca, Cornell Univ. Press 1987).

23. The precept of proportionality applies broadly, beyond laws to even the conduct of war. Proportionality is truly a universal precept. Robert McNamara, former Secretary of Defense under President Kennedy and President Johnson, acknowledges that proportionality applies in war. McNamara said that the fire bombing of Japan in World War II was not proportional. *See* THE FOG OF WAR (Sony Picture Classics 2003).

24. Weems v. U.S., 217 U.S. 349, 357 (1910).

25. *Id.*

26. *Id.* at 358. "Cadena" is a term for imprisonment.

27. *Id.* at 359.

> conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that *it is a precept of justice that punishment for a crime should be graduated and proportioned to the offense.*[28]

The Court acknowledged the power of the legislature to establish crimes and punishments, and eloquently explained why a precept of proportionality is necessary:

> With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts', or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked. We say 'coercive cruelty,' because there was more to be considered than the ordinary criminal laws. Cruelty might become an instrument of tyranny; of zeal for a purpose, either honest or sinister.[29]

The Court, as referenced in the quote above, realized that legislative power could be used by tyrants to make criminal, trivial actions, or in a time of zeal, the legislature could make criminal, actions that otherwise would be allowable. In other words, a legislature in good or bad faith may abuse its power to determine crimes and punishments. It follows that the legislature cannot morally or lawfully assign disproportionate punishments.

III. PRECEPT OF PROPORTIONALITY REQUIRED BY THE EIGTHTH AMENDMENT AFFIRMED - *SOLEM V. HELM*

In 1979, Helm pled guilty to "uttering a 'no account' check for $100."[30] As a result of a recidivist statute, Helm was sentenced to life in prison.[31] Justice Powell, writing for a majority of the Court said, "[t]he Eighth Amendment declares: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' *The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.*"[32] The Court then set out an objective test to help determine whether a sentence was disproportional

28. *Id.* at 366-67 (emphasis added).
29. *Id.* at 372-73.
30. Solem v. Helm, 463 U.S. 277, 281 (1983).
31. *Id.* at 282.
32. *Id.* at 284 (emphasis added).

and in violation of the Eighth Amendment. Courts when determining whether or not a punishment is disproportionate, unfair, and in violation of the Eighth Amendment, should consider the following factors: (1) "the gravity of the offense and the harshness of the penalty;" (2) "compare sentences imposed on other criminals in the same jurisdiction;" (3) "compare the sentences imposed for the commission of the same crime in other jurisdictions;" (4) "the absolute magnitude of the crime;" and (5) "the motive and culpability of the defendant."[33]

Applying the above mentioned rationale, the Court held "*[w]e conclude that his sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment.*"[34] The principle of proportionality recognized by the Court in *Weems* was properly affirmed in *Solem*. The *Weems* and *Solem* decisions should have settled the law regarding proportionality, at least as required by the Eighth Amendment, but they did not.

IV. PRECEPT OF PROPORTIONALITY IN CRIMINAL CASES HAMSTRUNG - NARROW PROPORTIONALITY PRINCIPLE AT BEST (ACCORDING TO THE CURRENT COURT)

Unfortunately, in 1991, the Supreme Court departed from a lengthy history of logic and justice in a convoluted plurality and Justice Scalia and Chief Justice Rehnquist announced that "the Eighth Amendment contains no proportionality guarantee."[35] Justice Kennedy, joined by Justices O'Connor and Souter, recognized that the Eighth Amendment "forbids only extreme sentences that are 'grossly disproportionate' to the crime."[36] Harmelin was convicted of possessing 650 grams of cocaine, had no prior convictions, and was sentenced to Michigan's highest punishment allowed by law: life in prison with no possibility of parole.[37] Harmelin appealed on the theory that the punishment was not proportional to the crime and that the punishment violated the Eighth Amendment.[38]

A plurality of justices in this case, one group led by Justice Scalia (joined by Chief Justice Rehnquist, and joined in part by Justices O'Connor, Kennedy, and Souter) who delivered the opinion of the Court, attempted to use this case as a vehicle to overturn a long history of cases

33. *Id.* at 290-94 (noting that this list is not exhaustive).
34. *Id.* at 303 (emphasis added).
35. Harmelin v. Michigan, 501 U.S. 957, 965 (1991).
36. *Id.* at 1001.
37. *Id.* at 961, 994.
38. *Id.* at 961.

that recognized an Eighth Amendment requirement of proportionality.[39] The Eighth Amendment contains no proportionality requirement, according to Scalia, and the Supreme Court decision announced in *Solem* "was simply wrong . . . ."[40] Further, in a ludicrous and incredible parsing of language, Justice Scalia argues that the founders, through the Eighth Amendment, prohibited only "cruel and unusual" punishment that "[t]he *Solem* Court simply assumed, with no analysis, that one included the other. As a textual matter, of course, it does not: a disproportionate punishment can perhaps always be considered 'cruel,' but it will not always be (as the text also requires) 'unusual.'"[41] Justice Scalia notes that "[t]he Magna Carta provided that '[a] free man shall not be fined for a small offence, except *in proportion* to the measure of the offense; and for a great offence he shall be fined *in proportion* to the magnitude of the offence . . . ."[42] Justice Scalia is essentially saying that since the drafters of the Eighth Amendment did not use the word "proportion" or "proportional" in the Eighth Amendment, as did the authors of the Magna Carta in the year 1215, then the drafters did not mean to require proportional punishment.[43]

In this case, Justice Scalia's strict, overly literal interpretation is absurd and works to render the Eighth Amendment utterly meaningless. Thirty years in prison for a minor theft could be cruel, but not unusual; life in prison for possessing a relatively small amount of controlled substances, could be cruel, but not unusual and not a violation of the Eighth Amendment (as in the *Harmelin* case).[44] Justice Scalia does waffle a bit, acknowledging that "[t]his is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent, . . . if a legislature made overtime parking a felony punishable by life imprisonment."[45] Justice Scalia and Justice Rehnquist are logically incorrect to deny the precept of proportionality.

Justices Kennedy, O'Connor, and Souter, concurred in part and concurred in the judgment, thus establishing a plurality of five justices agreeing on the judgment. Justice Kennedy wrote that "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather it forbids only extreme sentences that are 'grossly

39. *See* G. David Hackney, *A Trunk Full of Trouble:* Harmelin v. Michigan, 111 S. Ct. 2680 (1991), 27 HARV. C.R.-C.L. L. REV. 262 (1992).
40. *Harmelin*, 501 U.S. at 965.
41. *Id.* at 967 (citation omitted).
42. *Id.* (emphasis added).
43. *See id.* at 967-75.
44. *See id.*
45. *Id.* at 962 (citation omitted).

disproportionate' to the crime."[46] Justices Kennedy, O'Connor, and Souter, applying the "grossly disproportionate" test to the facts of Harmelin's case, determined that Harmelin's life imprisonment sentence is not grossly disproportionate to the crime committed—possessing 650 grams of cocaine.[47] Justices Kennedy, O'Connor, and Souter, offer no significant guidance on exactly what crimes and punishments would be grossly disproportionate, and they abandon the test to evaluate proportionality set out in *Solem*. It is hard indeed to imagine a fact pattern that would satisfy Kennedy, O'Connor, and Souter's definition of "grossly disproportionate" if the facts of the *Harmelin* case do not. Their concept of a narrow proportionality requirement is quite narrow indeed. In fact, it is so narrow as to also render the spirit of the Eighth Amendment's prohibition of cruel and unusual punishment effectively meaningless.[48] At a minimum, the spirit and function of the Eighth Amendment is severely marginalized with their definitions and application.

Justices White, Blackmun, and Stevens, joined in a well-reasoned and convincing dissent in the *Harmelin* case. Justice Marshall also dissented. The dissent recognizes that the Eighth Amendment contains a proportionality principle, and the dissent recognizes that the test set out in *Solem* is appropriate.[49] The dissent noted:

> [T]he *Solem* analysis has worked well in practice. Courts appear to have had little difficulty applying the analysis to a given sentence, and application of the test by numerous state and federal appellate courts has resulted in a mere handful of sentences being declared unconstitutional .... Courts have demonstrated that they are 'capable of applying the Eighth Amendment to disproportionate non-capital sentences with a high degree of sensitivity to principles of federalism and state autonomy.'[50]

The Court in *Solem* listed three factors to consider in determining proportionality: (1) the inherent gravity of the offense; (2) sentences imposed for similarly grave offences in the same jurisdiction; and (3) sentences imposed for the same crime in other jurisdictions.[51] Applying the *Solem* factors to the *Harmelin* facts, the dissent finds "[a]pplication of the *Solem* factors to the statutorily mandated punishment at issue here reveals that the punishment fails muster under *Solem* and, consequently, under the

46. *Id.* at 1001 (citation omitted) (Kennedy, J., concurring).
47. *See id.* at 996-1009 (Kennedy, J., concurring).
48. *See id.* at 1009-28 (White, J., dissenting).
49. *Id.* at 1013-16.
50. *Id.* at 1015-16.
51. *Solem*, 463 U.S. at 292.

Eighth Amendment to the Constitution."[52] The dissenting Justices argue convincingly that the Eighth Amendment does indeed contain a principle of proportionality and that the test announced in *Solem* works well.[53] "*To be constitutionally proportionate, punishment must be tailored to a defendant's personal responsibility and moral guilt.*"[54] That point by the dissent sounds like something President Thomas Jefferson would have said.

Proof that the Eighth Amendment's proportionality requirement has been effectively eviscerated lies in the *Harmelin* case, and also in the case of *Ewing v. California*,[55] in which again, a convoluted plurality found that an incredible fact pattern, as egregious if not more so than that in *Harmelin*, did not constitute a violation of the Eighth Amendment's proportionality requirement if it has one at all![56]

The *Ewing* case, a California three-strikes case, received significant media coverage.[57] In the *Ewing* case, Justice O'Connor announced the opinion of the Court, joined by Justice Kennedy and Chief Justice Rehnquist.[58] Justices Scalia and Thomas each filed concurring opinions. Justices Stevens, Souter, Ginsburg, and Breyer, dissented and two dissenting opinions were filed, each joined by all of the dissent.[59] The Court in this case considered whether California's three strikes laws under which Ewing was sentenced violated the Eight Amendment's principle of prohibiting grossly disproportionate penalties.[60]

Ewing was convicted of stealing the three golf clubs under California's three strikes laws and sentenced to a term of imprisonment of 25 years to life.[61] Ewing challenged the sentence as being grossly disproportionate to the crime committed.[62] The majority of the Court held, "Ewing's sentence is justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record."[63] The Court also held that Ewing's sentence of 25 years to life was not grossly disproportional to the crime(s)

52. *Harmelin*, 501 U.S. at 1021 (White, J., dissenting).
53. *Id.* at 1013-16.
54. *Id.* at 1023 (emphasis added).
55. Ewing v. California, 538 U.S. 11 (2003).
56. *Id.* at 30-31.
57. *See, e.g., id.* at 14-15.
58. *Id.* at 11.
59. *Id.* at 35.
60. *Id.* at 11.
61. *Id.* at 19-20.
62. *Id.* at 28.
63. *Id.* at 29-30.

committed.[64]

Justices Breyer, Stevens, Souter, and Ginsberg, all dissented. Justice Breyer's dissent is well-reasoned and could and should form the basis of a future majority opinion.[65] The dissent argued that under the *Solem* test, Ewing's sentence of 25 years to life, for recidivism and stealing three golf clubs valued at $1,197, is grossly disproportionate to the crime and violates the proportionality requirement of the Eighth Amendment.[66] If Harmelin's and Ewing's sentences are not grossly disproportionate to the crimes committed, then what *would* qualify as a grossly disproportionate punishment? Perhaps only the most outlandish fact pattern would qualify, and perhaps not—again the *Harmelin* and *Ewing* cases did not qualify as grossly disproportionate.[67]

Although the Supreme Court does not recognize a true and full principle of proportionality in criminal cases, ironically the Supreme Court does require proportionality in civil cases in which defendants face monetary punitive damages. Principles of due process, proportionality, and fairness, apply to cases involving the loss of property, but not the loss of liberty!

V. THROUGH THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE PROPORTIONALITY REQUIRED BETWEEN CIVIL MONETARY AND PUNITITVE DAMAGES

The Due Process Clause appears in the Fifth and Fourteenth Amendments.[68] The Virginia Declaration of Rights of 1776 and the

64. *Id.* at 30.

65. *See* Blake J. Delaney, *A Cruel and Unusual Application of the Proportionality Principle in Eighth Amendment Analysis,* Ewing v. California, 538 U.S. 11 (2003), 56 FLA. L. REV. 459, 466 (2004).

66. *Ewing*, 538 U.S. at 53 (Breyer, J., dissenting).

67. *See also* Lockyer v. Andrade, 538 U.S. 63 (2003). In this case, Andrade argued, among other things, that his two consecutive sentences of 25 years to life for a third strike of stealing approximately $150.00 worth of video tapes violated the Eighth Amendment's prohibition against cruel and unusual punishment. The majority held that the sentence was not extraordinary or a violation that amounted to "gross disproportionality" and upheld the sentence. Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, argues persuasively that Andrade's sentence is indeed in violation of the Eighth Amendment's prohibition against cruel and unusual punishment. *Id.*

68. U.S. CONST. amend. V states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall

Vermont Constitution of 1777 both state that a man cannot be deprived of his liberty "except by the law(s) of the land...."[69] Black's Law Dictionary defines "law of the land" as "Due process of law."[70] The term "due process" derives from the term "by the law of the land" as used in the Magna Carta and as described by Sir Edward Coke.[71] Lord Coke, in his exposition of the Magna Carta, asked "[n]ow it may be demanded, if a man be taken, or committed to a prison contra legem terrae (against the law of the land), what remedy hath the party grieved?"[72] Lord Coke then describes some of the possible legal remedies available to one who's right to due process had been violated including the right to habeas corpus review, and an action of false imprisonment, among others.[73]

This history is important because it demonstrates the origin of the Due Process Clause: it demonstrates that early on, unjust imprisonment or punishment was not tolerated by the law, and it provides examples of early legal remedies to the unjust application of laws.[74] The concept of due process has evolved into legal theories of procedural due process and substantive due process.[75] In other words, fairness is required in both procedure and substance. The Supreme Court embraced these broad concepts of fairness and due process and equated due process, fairness, and justice with reasonableness and proportionality in the *State Farm*[76] case discussed later in this paper.

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private property be taken for public use, without just compensation.

Id.

U.S. CONST. amend. XIV, § 2. The Due Process Clause of the Fourteenth Amendment states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

69. VA. DECL. OF RIGHTS § 8 (1776); VT. CONST. ch. 1, art. 10 (1777).

70. BLACK'S LAW DICTIONARY 894 (7th ed. 1999).

71. *See* 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1783, at 661 (Fred B. Rothman & Co. 1991) (1833) (where Story says "Lord Coke says, that these latter words, *per legem terrae* (by the law of the land,) mean by due process of law . . . .").

72. 2 SIR EDWARD COKE, THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 868 (Steve Sheppard, ed., Indianapolis, Liberty Fund, Inc. 2003) (1552-1634) [hereinafter COKE].

73. *Id.*

74. *See* David Clark, *The Icon of Liberty: The Status and Role of Magna Carta in Australian and New Zealand Law*, 24 MELB. U. L. REV. 866 (2000) (for an interesting discussion of the history of interpretation of the Magna Carta).

75. *See* Ursula Bentele, *Does the Death Penalty, by Risking Execution of the Innocent, Violate Substantive Due Process?*, 40 HOUS. L. REV., 1359 (2004) (for an excellent discussion of substantive due process, and of the death penalty in particular).

76. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

Interestingly, the Court discusses due process and the concept of proportionality extensively in *State Farm*, which involves the loss of property, not the loss of freedom.[77] In this case, Curtis Campbell decided to pass six vans on a two-lane highway.[78] A driver of a small car in the correct lane of traffic had to swerve to the shoulder to avoid Campbell's car.[79] The driver of the small car, Todd Ospital, lost control of his car and hit a vehicle driven by Robert Slusher.[80] Todd Ospital was killed in the accident and Robert Slusher was permanently disabled.[81] State Farm Mutual Automobile Insurance Company insured Campbell. However, despite the facts of the case, State Farm contested liability, denying Robert Slusher $25,000.00, and denying Todd Ospital's estate $25,000.00, which would have exhausted the $50,000.00 policy maximum.[82] The insurance company ignored the advice of one of its investigators and took the case to trial, assuring the Campbells that "their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to procure separate counsel."[83] The jury found Campbell liable for $185,849.00 in damages.[84] State Farm refused to pay the $135,849 in excess of the policy limits and told the Campbells, "[y]ou may want to put for sale signs on your property to get things moving."[85] Both Robert Slusher and Todd Ospital's estate agreed not to seek enforcement of their judgment against Campbell in exchange for the Campbells' pursuit of a bad faith claim against State Farm. Robert Slusher and Todd Ospital's estate would receive 90% of any resolution of the Campbells' bad faith claim against State Farm.[86] Ultimately, the jury awarded the Campbells $2.6 million in compensatory damages, and $145 million in punitive damages.[87] The trial court reduced the award to $1 million in compensatory damages and $25 million in punitive damages.[88] Both parties appealed.[89] Subsequently, the Supreme Court of Utah reinstated the $145 million dollar punitive damage award,[90] and determined

77. *See generally id.*
78. *Id.* at 412.
79. *Id.*
80. *Id.* at 412-13.
81. *Id.*
82. *Id.* at 413-14.
83. *Id.* at 413.
84. *Id.*
85. *Id.*
86. *Id.* at 413-14.
87. *Id.* at 415.
88. *Id.*
89. *Id.*
90. *Id.*

that the $145 million punitive damages award was not excessive.[91] The United States Supreme Court then decided to hear the case.[92]

The Supreme Court ruled:

> The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor . . . . In Haslip, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety . . . . Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in the range of 500 to 1 . . . . In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered. In the context of this case, we have no doubt that there is a presumption against an award that has a 145-to-1 ratio.[93]

The majority, Justices Kennedy, Rehnquist, Stevens, O'Connor, Souter, and Breyer, found a violation of the Due Process Clause and held *"[t]he punitive [damage] award of $145 million, therefore, was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant."*[94]

The majority got it partially wrong in this case. The majority is wrong to suggest specific ratios that should occur between compensatory and punitive damages, as the reasonableness of an award will not always, or even usually, fit a specific ratio. The determination of awards by the jury should only be overturned if no evidence supports the verdict and considering the circumstances, no reasonable jury would ever make such an award. In this case, the evidence supported the verdict, and considering the totality of the circumstances, the award was reasonable.

The majority is correct though, that an unreasonable and disproportionate award amounts to an irrational and arbitrary deprivation of property in violation of the Due Process Clause. The punishment must fit the crime, and the penalty must be proportionate to the offense, and the jury should make that determination. Logically, it follows that an unreasonable and disproportionate punishment amounts to an irrational and arbitrary deprivation of liberty in violation of the Due Process Clause and is prohibited by that same clause. Yet the Supreme Court in *Harmelin* and

91. *Id.* at 415-16.
92. *Id.* at 416.
93. *Id.* at 416, 425-26 (citations omitted) (emphasis added).
94. *Id.* at 429 (emphasis added).

Ewing held that proportionality essentially is not required between crime and punishment through the Eighth Amendment and did not address the argument that the Fourteenth Amendment Due Process Clause requires proportionality. One can only conclude that the Supreme Court chooses to protect a loss of property from disproportionate penalties, and to not protect a loss of liberty from disproportionate punishments. The loss of liberty is more serious than a loss of property and a loss of liberty should receive at least as much protection under the Due Process Clause of the Fourteenth Amendment as a loss of property.

VI. CONCLUSION: THE FUTURE OF PROPORTIONALITY AND SUBSTANTIVE DUE PROCESS IN CRIMINAL AND CIVIL CASES

The Eighth Amendment's prohibition against cruel and unusual punishment, and the Due Process Clause of the Fifth and Fourteenth Amendments, must be read to require proportionality between the penalty and the offense for the penalty to comport with fairness, reasonableness, and justice. The Supreme Court needs to consistently affirm and recognize that the principle of proportionality between the punishment and the offense in both civil and criminal cases is vital to ensure due process, fairness, and justice.

As Blackstone observed hundreds of years ago:

> We may further observe that sanguinary laws are a bad symptom of the distemper of any state, or at least a weak constitution . . . [t]he laws of the Roman kings, and the twelve tables of the decemviri, were full of cruel punishments . . . the Porcian law, which exempted all citizens from sentence of death, silently abrogated them all. In this period the republic flourished: under the emperors severe punishments were revived, *and then the empire fell.*[95]

Many of the laws of the United States today are tantamount to the sanguinary laws of Rome of which Blackstone spoke. Too many people in the United States are punished unreasonably, and many are punished too leniently.

> Almost 10 percent of all inmates in state and federal prisons are serving life sentences, an increase of 83 percent from 1992 . . . . In two states, New York and California, almost 20 percent of inmates are [now] serving life sentences . . . 68.9 percent [of those serving life sentences were] convicted of murder . . . 4 percent of those serving life sentences were convicted of drug crimes and 3.9 percent of property crimes, and a sizable number were battered women who killed their husbands after they themselves had been beaten . . . . [T]here were

95. 4 WILLIAM BLACKSTONE, COMMENTARIES 590 (emphasis added).

> 23,523 inmates serving a life sentence who were mentally ill and whose acts might have been caused by their illness . . . .[96]

A non-violent offender like *Harmelin* can receive life imprisonment, while a sex offender will likely be out in no time comparatively. Currently, there has been a failure of proportionality between many crimes and punishments in the United States. It makes no sense that drug offenders and those who commit property crimes receive life sentences, while some murderers and rapist receive much less.

In the extraordinary work, *The Ideal Element in Law*,[97] Roscoe Pound observed of the ancient Greek concept of natural law, "[a]s Socrates is reported in Plato's Minos to have put it, fire burns and water flows in Greece, in Persia, and at Carthage. The analogy of the physical order of the universe to the moral order and to the legal order has always appealed strongly."[98] The precept of proportionality applies to every society, to criminal and civil penalties as fire burns and water flows in all societies.[99] If proportionality of laws and punishments is not required in the United States, the result is unfair laws and sentences and contempt for the legal system (as Thomas Jefferson recognized), and the legal system and government will ultimately lose legitimacy.

VII. PROPOSED TEST TO DETERMINE VIOLATIONS OF THE EIGHTH AMENDMENT'S CRUEL AND UNUSUAL PROHIBITION, AND TO DETERMINE VIOLATIONS OF THE DUE PROCESS CLAUSE AS APPLIED TO CIVIL AND CRIMINAL CASES.

The Supreme Court could adopt one test to determine whether a criminal or civil penalty is appropriate and Constitutional: Would a reasonable person, considering the totality of the circumstances, say that the criminal or civil penalty was appropriate for the crime or was appropriate for the culpability of the wrongdoer? If the answer to that question is "*no*, the penalty or punishment is excessive," then the punishment or penalty is unconstitutional. It is also immoral, unjust, disproportionate, and violates the Eighth Amendment's prohibition against cruel and unusual punishment. Further, the punishment or penalty is unfair and violates the Due Process clause of the Fifth and Fourteenth Amendments, as the punishment or penalty would violate substantive due

96. Fox Butterfield, *Almost 10% of All Prisoners Are Now Serving Life Terms*, N.Y. TIMES, May 12, 2004, at A17.

97. POUND, *supra* note 7, at 40.

98. *Id.*

99. *See generally id.* at 40-42.

process and unfairly deprive the culpable person of life, liberty, or property. This test would further justice, proportionality, substantive due process, and would reconcile the Supreme Court's inconsistent decisions regarding the Eighth Amendment, the Due Process Clause, and the precept of proportionality.