Shocking the Eighth Amendment's Conscience: Applying a Substantive Due Process Test to the Evolving Cruel and Unusual Punishments Clause

by JENCY MEGAN BUTLER*

> A good act does not wash out the bad, nor a bad act the good. Each should have its own reward.
>
> –George R. R. Martin, *A Clash of Kings* (1998)[1]

> [T]hose who framed and approved the Federal Constitution chose, for whatever reason, not to include within it the guarantee against disproportionate sentences.
>
> –Justice Scalia, *Harmelin v. Michigan* (1991)[2]

> Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*.[3]

Introduction

From Rodney King in Los Angeles to Michael Brown in Ferguson, America has increasingly become aware of police officers using excessive force or committing other rights violations.[4] Excessive-force claims seem

* J.D. Candidate 2016, University of California Hastings College of the Law; B.A. 2012, Santa Clara University. Special thanks to Debashish Bakshi, Jennifer Hom Chen, and Professor Evan Lee for the motivation, my family and friends for the support, and the fine editors of *Hastings Constitutional Quarterly* who worked tirelessly to finalize this Note.

1. GEORGE R. R. MARTIN, A CLASH OF KINGS 460 (Bantam 2003).

2. Harmelin v. Michigan, 501 U.S. 957, 985 (1991).

3. U.S. CONST. amend. VIII (emphasis added).

4. *See generally* JEFFREY IAN ROSS, MAKING NEWS OF POLICE VIOLENCE (2000); Editorial Board, *Justice Department's Ferguson Report Points to the Devastating Consequences of Routine Rights Violations and Racial Bias: Editorial*, CLEVELAND.COM (Mar. 7, 2015, 6:58 PM), http://www.cleveland.com/opinion/index.ssf/2015/03/justice_departments_ferguson_r.html

to constantly be in the news.[5] Though depressing, this constant coverage of excessive-force cases does shape American citizens' views on guaranteed constitutional protections. What Americans do not typically understand are the valuable theories and philosophy that grow out of excessive-force case law. For example, recent history has brought to light a longstanding test that can and should be used to clarify confusing Eighth Amendment jurisprudence.

The United States Supreme Court has been split, or indecisive, for some time on whether the Eighth Amendment prohibits disproportionate punishments. The principle of proportionality, within the Eighth Amendment, commands that a criminal sentence be proportionate to the committed crime. Proportionality, in the context of general law, spurs notions of fairness, justice, and balance.[6] In criminal law, proportionality is "the notion that the punishment should fit the crime."[7] Intuitively, most people agree that there should be a correlation between the severity of a crime and the degree of suffering in the enforced punishment. This is in part due to proportional punishments having roots in early American philosophy. For over a century, the United States Supreme Court has recognized proportionality as part of the Eighth Amendment cruel and unusual punishment analysis.[8] Further, the accepted practice of the death penalty has increased discussion of proportionality within the Eighth Amendment.[9] This discussion of the principle of proportionality continues to be important regardless of whether the conversation is going nowhere under the current Court.

An originalist argument claims that proportionality is incompatible with consequentialist goals of punishment.[10] This note challenges such a view, reasoning that the Cruel and Unusual Punishments Clause requires

(U.S. Justice Department released a report that concluded that Ferguson, Missouri police officers used excessive force and committed other rights violations against blacks.).

5. An informal search of the *San Francisco Chronicle* and *San Jose Mercury* websites revealed dozens of articles dealing with charges and settlements of excessive-force claims over the last ten years.

6. Howard J. Alperin, *Length of Sentence as Violation of Constitutional Provisions Prohibiting Cruel and Unusual Punishment*, 33 A.L.R. 3d 335 (1970).

7. Ewing v. California, 538 U.S. 11, 31 (2003).

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

9. The Supreme Court has subsequently invoked the principle of proportionality to hold that the death penalty is prohibited for the rape of an adult woman, Coker v. Georgia, 433 U.S. 584 (1977), for offenders who formed no intent to kill, Enmund v. Florida, 458 U.S. 782 (1982), for juveniles, Roper v. Simmons, 543 U.S. 541, 560 (2005), or are mentally retarded, Atkins v. Virginia, 536 U.S. 304, 316 (2002).

10. Ian P. Farrell, *Gilbert & Sullivan and Scalia: Philosophy, Proportionality and the Eighth Amendment*, 55 VILL. L. REV. 321, 321 (2010).

proportionality. In fact, as recent as 2010, the Supreme Court reaffirmed proportionality within Eighth Amendment jurisprudence in *Graham v. Florida*.[11] Other federal and state courts have since used the principle of proportionality to hold that certain lengthy prison sentences are unconstitutional because they are grossly disproportionate.[12] Nevertheless, regardless of the Court relying on the principle of proportionality for over 120 years, it still remains divided in accepting proportionality within the Eighth Amendment.[13] The Court's Justices over the years have disagreed on whether proportionality applies depending on punishment type or solely to unusual punishments,[14] whether the Eighth Amendment forbids grossly disproportionate punishments, and how to objectively determine whether a punishment is proportionate to a crime.[15]

This Note will argue that proportionality should be naturally read into the Eighth Amendment. First, a brief historical discussion of the Eighth Amendment will illustrate that proportionality is essential within the doctrine. Second, Part II will review proportionality within Supreme Court Eighth Amendment precedents. Third, the Note looks at proportionality in the lens of substantive due process, namely in the context of excessive-force cases. Fourth, this Note proposes that the "shocks the conscience" standard can and should provide guidance to the proportionality question that divides the Supreme Court. Some of the criticisms, mainly the dissimilarities between Eighth Amendment and substantive due process, regarding the "shocks the conscience" test are also addressed. Because the Supreme Court's jurisprudence on this issue is notoriously lacking in clarity, this note provides a workable solution.[16] The Supreme Court has had near unanimity in this field, and perhaps this note's proposal, at the very least, may give the Court pause before construing the Eighth Amendment without the principle of proportionality.

11. Graham v. Florida, 560 U.S. 48, 59 (2010).

12. *See, e.g.*, United States v. Farley, No. 1:07-CR-196-BBM, 2008 U.S. Dist. LEXIS 104437 (N.D. Ga., Sept. 2, 2008) (a thirty-year mandatory minimum sentence for crossing a state line with the purpose of engaging in sexual conduct with a person under twelve years old is grossly disproportionate in violation of the Eighth Amendment); Bradshaw v. The State, 671 S.E.2d 485 (Ga. 2008) (a sentence of life imprisonment for a second failure to register as a sex offender is grossly disproportionate to the crime, and therefore unconstitutional).

13. The proportionality principle was first referred to by a dissenting judge in the earlier case of O'Neil v. Vermont, 144 U.S. 323 (1892), but *Weems* was the first decision in which the holding was based upon a requirement of proportionality.

14. Like the death penalty or torture.

15. *See* Part III.A below for a discussion of these cases.

16. *See* Lockyer v. Andrade, 538 U.S. 63, 72 (2003) ("Our precedents in this area have not been a model of clarity."); *see also* Harmelin v. Michigan, 501 U.S. 957, 998 (1991) ("Though our decisions recognize a proportionality principle, its precise contours are unclear.").

I. History of the Eighth Amendment

The Eighth Amendment to the United States Constitution protects American citizens from being forced to pay extremely high amounts of money for bail if they are accused of a crime, being charged exorbitant fines, and from cruel and unusual punishments being inflicted upon them by the government.[17] The Eighth Amendment is part of the Bill of Rights, the first ten amendments to the United States Constitution.[18] Our nation's Founding Fathers desired giving the people power in their government, instead of placing government in the hands of arbitrary rulers and judges.[19] The Kingdom of England previously inflicted excessive bail amounts and *cruel and unusual punishments* on their citizens.[20]

The Eighth Amendment is rooted in British law.[21] The Magna Carta of 1215 purported the idea that punishments should fit their respective crimes.[22] In 1689, the English Bill of Rights was created by Parliament, affirming that "cruel and unusual punishments" *ought* not to be inflicted.[23] The Titus Oates case is a famous example of the first application of the English Cruel and Unusual Punishments Clause.[24] Titus Oates, an Anglican cleric, was convicted of lying in court.[25] Oates's lies resulted in the execution of fifteen innocent people.[26] Oates was sentenced to imprisonment, annual pillory, and one day of whipping.[27] What offended the English Members of Parliament was that the pillory would occur

17. U.S. CONST. amend. VIII.

18. *Id.*

19. *See* JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (1690).

20. Stephen E. Meltzer, *Harmelin v. Michigan: Contemporary Morality and Constitutional Objectivity*, 27 NEW ENG. L. REV. 749, 784 (1993).

21. HUGO ADAM BEDAU, THE DEATH PENALTY IN AMERICA 1 (1964).

22. Magna Carta (1215) ("A free man shall not be [fined] for a small offense unless according to the measure of the offense, and for a great offense he shall be [fined] according to the greatness of the offense."). The Magna Carta was the first English document that placed restrictions on the sovereign from violating certain agreed-upon rights of the people. Solem v. Helm, 463 U.S. 277, 284–85 (1983).

23. Furman v. Georgia, 408 U.S. 238, 243 (1972).

24. Harmelin v. Michigan, 501 U.S. 957, 969 (1991).

25. John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. 899, 933 n.150 (2011).

26. *Id.*

27. *Id.* Pillory and whipping were common punishments at the time of the *Oates* case. Pillory is a device where the person's head and hands are secured in a wooden frame, which is usually placed in a public place where a passerby can taunt them and throw garbage at them. The main purpose for such a device is public humiliation. DICTIONARY.COM, http://dictionary.reference.com/browse/pillory (last visited Mar 30, 2015).

annually, and the repetition of pillory made the punishment excessive and disproportionate.[28]

The Virginia Declaration of Rights, written by George Mason, mirrored the English Bill of Rights.[29] Thomas Jefferson is thought to have drawn many of the concepts for the Declaration of Independence directly from the Virginia Declaration of Rights.[30] Our nation's Founding Fathers sought to prevent government abuse and James Madison, author of the Bill of Rights, included the Eighth Amendment in his original list of twelve amendments.[31] Congress ultimately adopted ten amendments to make the Bill of Rights, which included the Eighth Amendment.[32]

Courts today do not uniformly scrutinize violations of the Cruel and Unusual Punishments Clause within the Eighth Amendment. For example, some jurisdictions have held that the death penalty violates the Eighth Amendment.[33] Other courts see death as appropriate for certain capital crimes.[34]

II. The Eighth Amendment and Proportionality

The Supreme Court has not been clear on whether all sentences should be proportional to a completed crime. Overall, the Supreme Court has ruled that the Eighth Amendment forbids some punishments entirely, while prohibiting other punishments that are excessive in comparison to the crime. Nonetheless, Eighth Amendment proportionality jurisprudence lacks clarity. Thus, courts below have struggled in determining whether the Eighth Amendment prohibits disproportionate punishments.

28. Stinneford, *supra* note 25, at 934.

29. *Id.* at 944 n.210. The Virginia Declaration of Rights was the first statement of individual rights by an American government. Dan Friedman, *Tracing the Lineage: Textual and Conceptual Similarities in the Revolutionary-Era State Declarations of Rights of Virginia, Maryland, and Delaware*, 33 RUTGERS L.J. 929, 938 (2002).

30. *Id.*

31. Celia Rumann, *Tortured History: Finding Our Way Back to the Lost Origins of the Eighth Amendment*, 31 PEPP. L. REV. 661, 675 n.110 (2004).

32. *Id.* at 679.

33. Currently, nineteen states and the District of Columbia no longer permit the death penalty. *States with and Without the Death Penalty*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/states-and-withoutdeath-penalty (last visited Nov. 2, 2015). In addition, internationally, 140 countries have abolished capital punishment from either law or practice. *See Death Penalty Trends*, AMNESTY INTERNATIONAL, http:// www.amnestyusa.org/our-work/issues/death-penalty/us-death-penalty-facts/death-penalty-trends (last visited Nov. 10, 2015).

34. See *Crimes Punishable by the Death Penalty*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/crimes-punishable-death-penalty#BJS (last visited Nov. 7, 2015).

The Supreme Court first suggested that the Eighth Amendment requires the punishment be proportional to the offense in *O'Neil v. Vermont*.[35] In his dissent, Justice Field stated that the Cruel and Unusual Punishments Clause not only prohibited torture, but "all punishments which by their excessive length or severity are greatly disproportioned to the offense charged."[36]

Eighteen years later, the principle of proportionality was used to overturn the sentence given in *Weems v. United States*.[37] Weems was charged with falsifying public and official documents for the purposes of defrauding the government.[38] He was convicted and sentenced to fifteen years of incarceration, which included being chained from wrist to ankle and being compelled to do "hard and painful labor."[39] Delivering the opinion of the Court, Justice McKenna determined that the fifteen-year prison sentence constituted cruel and unusual punishment in violation of the Eighth Amendment because to serve Weem's sentence would have been "repugnant to the Bill of Rights."[40] Justice McKenna reasoned, "it is a precept of justice that punishment for crime should be graduated and proportioned to offense."[41] Chief Justice White, in his dissent, asserted that the Cruel and Unusual Punishments Clause embraced prohibitions against "inhuman bodily punishments of the past," as well as application of customary bodily punishments in an unusually severe manner, or judicial infliction of unusual, "not bodily," punishments that were not authorized by statute or were not otherwise within the discretion of the court to impose.[42] He did not agree with the majority in that there was "any assumed role of

35. O'Neil v. Vermont, 144 U.S. 323, 340 (1892) (O'Neil was convicted of 307 offenses of selling intoxicating liquor without authority. He was fined $6,638.72 and required to "stand committed" until the fine was paid, with the proviso that if the fine was not paid in full by a certain date, "he should be confined at hard labor . . . for the term of 19,914 days" (approximately fifty-four-and-a-half years)). *Id.* at 330. Please note that the Eighth Amendment had not yet been applied to the states: The majority of the Court did not address whether the sentence violated the Cruel and Unusual Punishments Clause.

36. *Id.* at 339–40 (Field, J. dissenting).

37. Weems v. United States, 217 U.S. 349 (1910). As a side note, the Court was applying not the Eighth Amendment but a statutory Bill of Rights to the Philippines, which it interpreted as having the same meaning. *Id.* at 367. The Court concluded that "[t]his contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice." *Id.* at 357.

38. *Id.* at 357.

39. *Id.* at 364.

40. *Id.* at 382.

41. *Id.* at 367.

42. *Id.* at 390 (White, J. dissenting).

apportionment" that the punishment fit the crime.[43] *Weems* can be viewed as establishing the "principle of proportionality," where the punishment should be relative to the crime.

Despite *Weems*, the Court rarely used proportionality in subsequent cases to explicitly invalidate a form of punishment. However, the Court implicitly used the principle in several cases. For example, in *Trop v. Dulles*,[44] the Court held that deprivation of citizenship could not be used as punishment, regardless of how reprehensible a crime might be.[45] Neither the majority nor dissent explicitly precluded proportionality within the Eighth Amendment.[46] The *Trop* Court seems to have used the principle of proportionality to determine that the punishment could not be considered disproportionate to the committed crime.[47]

Since *Weems*, Supreme Court Justices have turned away from reading proportionality into the Eighth Amendment and have instead adopted the position that the Eighth Amendment only insures certain punishments are forbidden regardless of the circumstances.[48] Certain punishments that have been unequivocally prohibited by the Eighth Amendment, in violation of the Cruel and Unusual Punishments Clause, include taking away citizenship from an American citizen,[49] executing a minor convicted of a crime,[50] and sentencing a minor to life without the possibility of parole for any crime besides murder.[51] Some punishments, including lethal injection, hanging, firing squad, and electric chair, have been challenged as violations of the Eighth Amendment, but the Courts have determined that they are not cruel and unusual.[52] The Supreme Court has also determined that prison

43. *Id.* at 398 (White, J. dissenting).

44. Trop v. Dulles, 356 U.S. 86 (1958).

45. *Id.* at 92–93. The Court concluded that, because of the peculiar nature of the penalty of denationalization, the punishment offended the "principle of civilized treatment guaranteed by the Eighth Amendment." *Id.* at 99.

46. *See generally id.*

47. Chief Justice Warren, in announcing the Court's opinion, noted, "[s]ince wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime." *Id.* at 99.

48. Further, the Court has also held that a person's status cannot dictate punishment. For example, it would be a violation of the Eighth Amendment to punish an individual because of the person's status of having a specific illness or addiction. This means that punishments can only be handed out for actions that are committed. *See* Part III.A for examples of these cases.

49. Weems v. United States, 217 U.S. 349 (1910).

50. *See* Part III.B.

51. *See* Miller v. Alabama, 132 S. Ct. 2455 (2012); *see also* People v. Gutierrez, 324 P.3d 245 (Cal. 2014).

52. Baze v. Rees, 553 U.S. 35, 62 (2008). The majority of Americans still find lethal injection, hanging, the firing squad, and the electric chair to be justifiable punishments. In reality,

conditions for those who have been convicted can be cruel and unusual.[53] Determining whether or not a punishment is cruel and unusual has not been an easy task for the Court, leading to inconsistency in lower state and federal courts.

A. The Principle of Proportionality Applied in Specific Cases

1. Status

The Eighth Amendment was not applied to the states until the decision in *Robinson v. California*.[54] Four years after *Trop*, the Court held the statute in *Robinson* to be unconstitutional because it punished the status of being an addict without any requirement of a showing that a defendant had ever used narcotics within the jurisdiction or had committed any act.[55] Additionally, the Court reasoned addiction is an illness that physiologically compels the victim to do drugs.[56] This case stands for either the proposition that one may not be punished for a status in the absence of some act, or the broader principle that it is cruel and unusual to punish someone for conduct she is unable to control, a holding of sweeping consequence. Justice Stewart did not explicitly refer to proportionality, but argued one depended on the relationship between the offense committed and the punishment to determine whether the punishment is cruel and unusual.[57] He stated, "[t]o be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be answered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[58]

lethal injection is the standard form of capital punishment that is still practiced, although one person was executed in Utah by firing squad in 2010 and one by electrocution in Virginia in 2010 as well. No one has been executed by hanging in the United States since 1996. *Id.*; *Methods of Execution*, DEATH PENALTY INFORMATION CENTER, http://www.deathpenaltyinfo.org/methods-execution (last visited Apr. 2, 2015).

53. Such things as unnecessarily harsh treatment, lack of basic life necessities, racial segregation for reasons other than prison security and restrictions on one's ability to petition the government for redress of grievances would fall into this category. *See generally* Jason D. Sanabria, *Farmer v. Brennan: Do Prisoners Have Any Rights Left Under the Eighth Amendment?*, 16 WHITTIER L. REV. 1113 (1995).

54. Robinson v. California, 370 U.S. 660 (1962).

55. *Id.* at 678. Interestingly, *Robinson* applied the Eighth Amendment to a state punishment for the first time. *Furman* v. Georgia, 408 U.S. 238, 422 n.4 (1972).

56. *Robinson*, 370 U.S. at 671.

57. *Id.* at 667.

58. *Id.* The concurrence of Justice Douglas invoked proportionality more directly: "The question presented in the earlier cases concerned the degree of severity with which a particular offense was punished or the element of cruelty present. A punishment out of all proportion to the

The Court in *Powell v. Texas* took the latter view of Robinson—that it is cruel and unusual to punish someone for conduct she is unable to control.[59] The Court invalidated a conviction of an alcoholic for public drunkenness.[60]

2. Rape

After the Court revived the death penalty in 1976,[61] the court used proportionality widely in disseminating new jurisprudence surrounding capital punishment. For example, in *Coker v. Georgia*, the Court held that "a sentence of death, is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."[62] The *Coker* Court reasserted that the Eighth Amendment barred not only barbaric punishments, but also disproportionate punishments that did not fit the crime.[63] It is interesting to note that while there were a number of different opinions within the Court's decision, not one member of the Court overtly opposed the principle of proportionality within the Eighth Amendment.[64]

Additionally, in *Kennedy v. Louisiana*, the Court held that capital punishment was disproportionate to the crime of raping a child less than twelve years old.[65] The Court reasoned that the death penalty is only proportional "for crimes that take the life of the victim."[66]

3. Murder

In *Enmund v. Florida*, the Court held that capital punishment for a person convicted of felony murder that "does not himself kill, attempt to kill, or intend that a killing take place," is not proportional.[67] Justice O'Connor, in her dissent, even recognized that the Eighth Amendment

offense may bring it within the ban against 'cruel and unusual punishments' . . . . [T]he principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick." *Id.* at 676.

59. *See* Powell v. Texas, 392 U.S. 514 (1968).

60. *Id.* at 532.

61. Gregg v. Georgia, 428 U.S. 153 (1976).

62. Coker v. Georgia, 433 U.S. 584, 592 (1977).

63. *Id.* at 591.

64. *See id.*

65. Kennedy v. Louisiana, 554 U.S. 407, 449 (2008).

66. *Id.* at 447.

67. Enmund v. Florida, 458 U.S. 782, 797 (1982).

forbid disproportionate punishments,[68] although she finally concluded, "the death penalty is not disproportionate to the crime of felony murder."[69]

The Court in *Atkins v. Virginia* held that the death penalty was disproportionate and excessive when applied to mentally retarded persons.[70] The *Roper v. Simmons* Court similarly held that the death penalty for juvenile homicide offenders was also a disproportionate punishment.[71]

B. The Current State of Proportionality Within the Eighth Amendment

The Court has gone back and forth in its recognition of proportionality in noncapital cases. Particularly, the Supreme Court has suggested that proportionality should only be applied to certain types of punishment. For example, *Rummel v. Estelle* upheld mandatory life sentence under a recidivist statute following a third felony conviction, even though the defendant's three nonviolent felonies were minimal.[72] The rule that came out of *Rummel* appeared to be that states might punish any behavior that is classified as a felony with any length of imprisonment. Justice Rehnquist argued that the Court should not invalidate the imprisonment on proportionality grounds and instead suggested that the proportionality principle was clearer with respect to specific modes of punishment (such as torture) than with respect to differences of degree (such as terms of imprisonment).[73]

In *Solem v. Helm*, the Court held unequivocally that the Cruel and Unusual Punishments Clause "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed," and that "[t]here is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences."[74] The Court viewed Helm's sentence of life imprisonment without the possibility of parole as more severe than the one described in *Rummel*.[75] The Court in *Solem* spelled out the objective criteria by which proportionality issues should be judged: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same

68. *Id.* at 811.

69. *Id.* at 827 (O'Connor, J. dissenting).

70. *See supra* note 9.

71. Roper v. Simmons, 543 U.S. 551, 564 (2005).

72. Rummel v. Estelle, 445 U.S. 263, 295 (1980) ("In total, the three crimes involved slightly less than $ 230.").

73. *Id.* at 275.

74. Solem v. Helm, 463 U.S. 277, 288 (1983).

75. *Id.* at 301 (1983) (describing *Rummel* as not convincing, distinguishing precedent).

jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[76] Using these objective factors, the Court held Helm's sentence was cruel and unusual because it was significantly disproportionate to his crime, and was therefore prohibited by the Eighth Amendment.[77]

Despite this holding, the Court was closely divided, particularly in regard to the facts (crime of uttering a "no account" check for $100).[78] Chief Justice Burger's dissent focused on the majority's inability to respect precedent.[79] The dissent argued that proportionality is not included in the Eighth Amendment and such a principle went against *stare decisis* with respect to *Rummel*.[80]

In 1991, the Court again changed its course with its decision in *Harmelin v. Michigan*.[81] The Court held that it is not unconstitutional for one to get life imprisonment for a nonviolent drug crime (possession of 672 grams of cocaine).[82] Justice Scalia argued, "Solem was simply wrong; the Eighth Amendment contains no proportionality guarantee."[83] He also argued "only certain modes or methods of punishment were prohibited."[84] With respect to the length of the sentence, Justices Kennedy, O'Connor, and Souter argued that there is a narrow proportionality principle in the Eighth Amendment.[85] These three Justices concurred in Scalia's plurality opinion, however, emphasizing the fact that the crime was severe and not grossly disproportionate to the sentence given.[86] Therefore, the Court held that severe mandatory penalties might be cruel, but were not necessarily unusual because states have been employing such sentences throughout history.[87]

76. *Id.* at 290–92.

77. *Id.* at 288. The *Solem* majority consisted of the remaining three Justices from the dissent in *Rummel* together with Justice O'Connor, and Justice Blackmun, who had voted with the majority in *Rummel*. The other members of the *Rummel* majority made up the rigorous *Solem* dissent. *See Id.*

78. *Id.* at 296.

79. *Id.* at 304 (Burger, J. dissenting).

80. *Id.* (Burger, J. dissenting).

81. Harmelin v. Michigan, 501 U.S. 957, 956 (1991).

82. *Id.* at 996.

83. *Id.* at 965.

84. *Id.* at 979.

85. *Id.*

86. *Id.* at 1008.

87. *Id.* at 994–95.

Moreover, in *Ewing v. California*, the Court upheld a recidivist statute against an Eighth Amendment challenge.[88] California's three-strikes law was under review for the possibility that the sentence being imposed was grossly disproportionate.[89] The implicated crime was theft of golf clubs, a crime that the Court did not consider to be particularly serious.[90] *Ewing* was a plurality opinion, but the Court ultimately held that California's three-strikes law was not grossly disproportionate, and therefore not unconstitutional.[91] The plurality upheld the broad *Solem* approach to the Eighth Amendment. Three Justices reiterated that the Eighth Amendment contains a narrow proportionality principle.[92] Justice Breyer rearticulated the "threshold of gross disproportionality" in his dissent.[93] Two Justices, Scalia and Thomas, argued that the Eighth Amendment contains no proportionality guarantee at all.[94]

In its 2012 *Miller v. Alabama* decision, the Court, by a slim five-to-four majority, held that the Eighth Amendment forbids the mandatory sentencing of life in prison without the possibility of parole ("LWOP") for juvenile homicide offenders.[95] Writing for the majority, Justice Elena Kagan argued that children are constitutionally different from adults for sentencing purposes.[96] She further concluded that while LWOP for adults does not violate the Eighth Amendment, such a sentence is an unconstitutionally disproportionate punishment for children.[97] Once again, Justice Scalia, joined by Justice Thomas, emphasized the absence of proportionality within the Cruel and Unusual Punishments Clause.[98]

88. Ewing v. California, 538 U.S. 11, 13 (2003).

89. *Id.* at 30.

90. *Id.* at 28.

91. *Id.* at 29–30.

92. *Id.* at 24–25. Interestingly, Justice O'Connor announced the opinion of the Court, with Chief Justice Rehnquist and Justice Kennedy concurring. *See id.* Note that in *Harmelin*, Chief Justice Rehnquist joined Justice Scalia in claiming that the Eighth Amendment contained no proportionality principle, but joined Justice O'Connor's assertion in Ewing that the Eighth Amendment did contain a narrow proportionality principle, applicable to both capital and noncapital punishments.

93. *Id.* at 36–37.

94. Justices Scalia and Thomas consistently argued that the Eighth Amendment does not include a proportionality requirement between punishments and committed crimes. *Id.* at 32.

95. Miller v. Alabama, 132 S. Ct. 2455, 2475 (2012).

96. *Id.* at 2464.

97. *Id.* at 2469.

98. *Id.* at 2483 (Scalia, J., dissenting).

The Court's most recent decision in cruel and unusual jurisprudence is *Glossip v. Gross*.[99] In *Glossip*, the Court once again doubled back and disregarded the principle of proportionality when determining whether a certain type of drug used in lethal injections violated the Eighth Amendment.[100] Additionally, in his concurring opinion, Justice Thomas explicitly stated that the proportionality principle has long been discredited.[101] After *Glossip*, lower courts continue to struggle with what to make of the principle of proportionality. Nonetheless, never having been explicitly overruled, *Ewing v. California* represents the law today: The only limit to the Eighth Amendment in place is whether the punishment is "grossly disproportionate" to the crime.

III. Substantive Due Process and the "Shocks the Conscience" Test

Substantive due process allows federal courts to protect certain fundamental rights from government interference under the authority of the due process clauses of the Fifth and Fourteenth Amendments to the Constitution.[102] The Fourteenth amendment provides that no "State [shall] deprive any person of life, liberty, or property, without due process of law."[103] Any type of government official or employee, including a police officer, prison guard, teacher, or high school principal, can perform the "State" intrusion.[104] Force is generally considered to be excessive when it

99. Glossip v. Gross, 135 S. Ct. 2726 (2015). Most interestingly, Justice Breyer, wrote a dissent in which he argued that the death penalty altogether violates the Eighth Amendment. *Id.* at 2776–77 (Breyer, J., dissenting). The *Glossip* decision questions whether long-standing Eighth Amendment precedents regarding the death penalty should be overruled, beginning with Trop v. Dulles. Capital punishment will surely be a pertinent topic for the Court in the near future. In fact, for its October 2015 term, the Court has already granted review on five Eighth Amendment cases, four of which deal with capital punishment. *See Supreme Court of the United States Granted & Noted List*, SUPREMECOURT.GOV, http://www.supremecourt.gov/orders/15grantednotedlist.pdf (last visited Apr. 8, 2016); *see also October Term 2015*, SCOTUSBLOG, http://www.supremecourt.gov/orders/15grantednotedlist.pdf (last visited Apr. 8, 2016); *and October Term 2015*, SCOTUSBLOG, http://www.scotusblog.com/case-files/terms/ot2015/ (last visited Apr. 8, 2016).

100. *See Glossip*, 135 S. Ct. at 2726.

101. *Id.* at 2751 (Thomas, J., concurring).

102. The Fifth and Fourteenth Amendments prohibit the federal and state governments from depriving any person of "life, liberty, or property, without due process of law." U.S. CONST. amend. V; U.S. CONST. amend. XIV.

103. U.S. CONST. amend. XIV, § 1.

104. *See* Golden Bach v. Anders, 324 F.3d 650 (8th Cir. 2003) (applying the Fourteenth Amendment "shocks the conscience" test to a claim of excessive force by a student against a principal).

exceeds the force that a reasonable and prudent law enforcement officer would use under the same circumstances. In excessive-force cases, the Fourteenth Amendment protects "the right to be free of state intrusions into realms of personal privacy and bodily security through means so brutal, demeaning, and harmful as literally to shock the conscience of a court."[105]

A. The Development of "Shocks the Conscience"

The "shocks the conscience" due process test comes from the 1952 case, *Rochin v. California*. In *Rochin*, the Court held that police officers violated Rochin's due process rights when they directed a doctor to force an emetic into Rochin's stomach in an effort to obtain evidence.[106] Justice Frankfurter, writing for the Court, held that conscience shocking conduct "offend[s] those canons of decency and fairness which express the notions of justice of English-speaking peoples."[107] Further, due process of law requires the state to observe those principles that are "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[108] The Court argued that the police conduct did "more than offend some fastidious squeamishness or private sentimentalism about combatting crime too energetically" and held "[t]his is conduct that shocks the conscience[,] . . . offend[ing] even those with hardened sensibilities."[109] The shocks-the-conscience standard developed as the analysis for determining whether State misconduct was so egregious as to violate substantive due process.

Judge Friendly further defined excessive-force law and the conscience-shocking standard. In *Johnson v. Glick*, a pretrial inmate claimed an officer injured him while he was in custody.[110] The Second Circuit held that under *Rochin*, "application of undue force by law enforcement officers deprives the suspect of liberty without due process of law."[111] Judge Friendly rejected the use of the Eighth Amendment, reasoning that the amendment only applies to claims of persons who have been convicted and sentenced.[112] In addition, the Second Circuit stated that the catchall protection of substantive due process within the Fourteenth

105. Hall v. Tawney, 621 F.2d 607, 613 (1980). *See also* Rochin v. California, 342 U.S. 165, 172 (1952); Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973).

106. *Rochin*, 342 U.S. at 166.

107. *Id.* at 169.

108. *Id.*

109. *Id.* at 172.

110. Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973).

111. *Id.*

112. *Id.*

Amendment applies to pretrial detainees' claims of excessive force.[113] *Glick* established that a plaintiff may prove an excessive-force claim under the Fourteenth Amendment if the plaintiff shows "conduct that shocks the conscience" under *Rochin*.[114] Judge Friendly delivered a four-factor test to determine whether a use of force shocked the conscience:

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.[115]

Judge Friendly's test influenced many subsequent excessive-force cases.[116]

The Supreme Court, in 1986, decided *Whitley v. Albers*, an excessive-force case brought by prisoners against guards involved in a prison riot.[117] The Court held that convicts must show that the use of force constituted an "unnecessary and wanton infliction of pain" under the Eighth Amendment's cruel and unusual punishment clause.[118] The Court held further that in order to meet this standard, the prisoner must focus on the fourth *Glick* factor, that the use of force was "maliciously and sadistically for the very purpose of causing harm."[119] The Court also noted that the other *Glick* factors may be used to help infer wantonness: "[E]qually relevant are such factors as the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them, and any efforts made to temper the severity of a forceful response."[120]

113. *Id.* at 1031.

114. *Id.* at 1033.

115. *Id.*

116. *See* Graham v. Connor, 490 U.S. 386, 393 (1989) (stating lower courts indiscriminately applied the *Glick* standard). Courts address an excessive-force claim brought under 42 U.S.C.A. § 1983 with the inquiry of whether conduct of state officials was so egregious or intolerable as to shock conscience of the court and constitute a constitutional violation as opposed to a mere violation of state law. *When Does Police Officer's Use of Force During Arrest Become So Excessive as to Constitute Violation of Constitutional Rights, Imposing Liability Under Federal Civil Rights Act of* 1871 (42 U.S.C.A. § 1983), 60 A.L.R. FED. 204, 3a.

117. Whitley v. Albers, 475 U.S. 312 (1986).

118. *Id.* at 319.

119. *Id.* at 320–21.

120. *Id.* at 321.

The most significant Supreme Court case since *Whitley* pertaining to the substantive due process and "shocks the conscience" test did not encompass the use of force per se, but a high-speed car chase. In *Sacramento County v. Lewis*, the Court, in a unanimous decision, reiterated the shock-the-conscience test, stating that an officer's conduct must be "so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."[121] The *Lewis* Court then held that the level of culpability required under a "shocks the conscience" standard is context dependent.[122] The Court reasoned, "[w]hile the measure of what is conscience-shocking is no calibrated yard stick, it does . . . 'point the way.'"[123]

Overall, throughout the development of excessive-force law, the Supreme Court has used a workable "shocks the conscience" test, a substantive due process test concerned with violations of personal rights so egregious, so disproportionate to the need presented, that the government action literally shocked the conscience.

IV. Problem: Eighth Amendment Proportionality Going Nowhere

The Supreme Court has been reviewing punishments under the Cruel and Unusual Punishments Clause for over more than a century, and yet the doctrine remains unclear. The Court has also failed to explicitly answer whether the principle of proportionality is legitimate, leaving Eighth Amendment jurisprudence confused. Given the Supreme Court's unsettled views on the principle of proportionality, lower courts are having trouble interpreting the Court's Eighth Amendment precedents. Such disagreement within the Court contributes to inconsistent and ineffective interpretations of the Cruel and Unusual Punishments Clause. Further, the Court today has—and in the near future will have—an unusual focus on the Eighth Amendment, particularly with death penalty cases.[124] Therefore, the Court should have a workable, flexible test to analyze excessive punishments. The test this Note proposes is a "shocks the conscience" standard with a proportionality lens.

121. Sacramento Cty. v. Lewis, 523 U.S. 833, 847 n.8 (1998). The Court adhered to *Rochin*, *Whitley*, and many other cases that used the "shocks the conscience" test. *Id.* at 846–47.

122. *Id.* at 850.

123. *Id.* at 847 (citing Judge Friendly in Johnson v. Glick).

124. *See Supreme Court of the United States Granted & Noted List*, SUPREMECOURT.GOV, http://www.supremecourt.gov/orders/15grantednotedlist.pdf (last visited Apr. 8, 2016); *October Term 2015*, SCOTUSBLOG, http://www.scotusblog.com/case-files/terms/ot2015/ (last visited Apr. 8, 2016).

Why is proportionality so important? Proportionality allows courts to understand and invalidate cruel and unusual punishments that may not be inherently cruel or unusual. Historically, the Cruel and Unusual Punishments Clause prohibited excessive and barbaric punishments. Because proportionality review naturally prohibits excessive, barbaric punishments, the Court should accept and use it today. A punishment is disproportionate, and therefore unconstitutional, if it is greater than what the wrongdoer deserves. Consequently, the principle of proportionality increases protection provided to criminal defendants, not society. While proportionality, by itself, is hard to understand, the Supreme Court has used "grossly disproportionate" as a common standard.[125] Further, proportionality review remains objective because it adheres to a greater societal standard. This allows courts to follow civilized, accepted standards of the past and present. Therefore, the Court should employ proportionality within their Cruel and Unusual Punishments Clause analyses. However, to put the principle of proportionality into practice, the Court still needs a standard for guidance.

Thus, there should be an Eighth Amendment proportionality doctrine, and it can and should be rearranged around a "shocks the conscience" standard similar to what is used in substantive due process review. Within this test, the *Solem* factors would become non-decisive guidelines for determining what shocks the conscience in any given case and courts would have a workable test to measure proportionality.

V. Proposal: Shocking the Conscience of the Eighth Amendment

Eighth Amendment jurisprudence has already implemented a conscience-shocking standard to determine unusual government behavior.[126] Courts have previously ruled that behavior that is inhumane, outrageous, or that shocks the social conscience is cruel and unusual

125. Kennedy v. Louisiana, 554 U.S. 407, 449 (2008).

126. Terrell v. Larson, 396 F.3d 975 (8th Cir. 2005); *see also* Sitzes v. City of West Memphis, 606 F.3d 461, 468 (8th Cir. 2010) ("Terrell forecloses inquiry into the situation objective nature of the emergency, as substantive due process liability turns on the intent of the government actor."). The Eighth Circuit's en banc panel held that to show conscience-shocking behavior in emergency circumstances, a plaintiff must show that the officer had an intent-to-harm unrelated to legitimate purpose, as in *Lewis*. *Terrell*, 396 F.3d at 980 (evaluating hot-pursuit cases under a substantive due process standard). When officers "subjectively believe that they [are] responding to an emergency," the intent-to-harm standard applies because substantive due process liability turns on a government official's "evil intent." Courts must "take at face value an officer's characterization of a situation as an emergency in all but the most egregious cases." *Sitzes*, 606 F.3d at 469 (So long as the professed belief is not "preposterous," the court must defer to the officer's subjective judgment.).

punishment.[127] In the history of excessive-force cases, the Supreme Court has used a "shocks the conscience" analysis, a substantive due process test concerned with violations of personal rights so egregious and so disproportionate to the need presented that the government action literally shocked the conscience. Thus, the "shocks the conscience" standard can and should be used with respect to Eighth Amendment Cruel and Unusual analysis.

A. "Shocks the Conscience" Within Proportionality

The application of "shocks the conscience" to a specific punishment in question would be as follows: (1) the court defines the societal conscience or range of acceptable punishments to the committed crime; (2) the court measures whether the specific punishment in question is within the acceptable range; and finally, (3) the court determines whether the punishment to a committed crime is disproportionate enough to shock the conscience, or whether the punishment outrages the moral sense of the community. Here, if the punishment is not within the acknowledged range, *and/or* shocks the moral sense of the community, it is cruel and unusual. The *Solem v. Helm* factors remain guidelines for determining what shocks in the conscience in any given case.

In applying the substantive due process "shocks the conscience" test to determine whether punishments are cruel and unusual, courts would use the principle of proportionality for all punishments. In order to prove that a punishment (government conduct) amounted to a substantive due process violation, a plaintiff must show that the societal moral consensus was against the sentence or imposed punishment. For example, a prison term so disproportionate in length compared to the crime of conviction would always be held to be cruel and unusual. This stems from the longstanding reasoning that there is a rational proportionality between a crime and its given sentence. Thus, punishments that shock the conscience are excessive and grossly disproportionate to the gravity of the offense committed. Therefore, a criminal sentence that shocks society's collective conscience is an unlawful, unconstitutional punishment.

B. Society's Moral Conscience and Its Accepted Range of Punishment

The Court has consistently and unambiguously reiterated its role to reflect society's evolving, yet *prevailing* attitudes.[128] To mirror such

127. This includes punishments such as castration, crucifixion, and cutting off body parts. *See* Furman v. Georgia, 408 U.S. 238 (1972); *see also* Adams v. State, 271 N.E.2d 425 (Ind. 1971).

128. *See* Trop v. Dulles, 356 U.S. 86 (1958).

attitudes, "Cruel and Unusual Punishments" is a clause that is inexact and open to interpretation. In addition, the Clause prevents the government from increasing punishments beyond their *traditional* bounds. For example, in *Weems v. United States*, the Supreme Court struck down the punishment in question, one reason being that the punishment was inconsistent with the prior practice of the American criminal justice system.[129] Using the "shocks the conscience" test to interpret cruel and unusual punishments would allow courts to adapt their interpretations of excessive punishments to fit contemporary and usual standards of what is considered decent.

Therefore, the conscience within "shocks the conscience" is society's present moral consensus. The "shocks the conscience" test remains objective because the conscience in question is that of the community the crime was committed, encompassing the jurisdictions of both the federal government and the states. It is necessary for courts to look at sentencing practices in *all* jurisdictions because that helps determine whether a punishment meets today's conscience or offends fundamental notions of human dignity. This allows the harshness of sentencing to increase or decrease over time, depending on the societal conscience. Because state and federal punishments vary across the board with respect to specific crimes, there is not one single punishment that fits a certain crime. Instead, there is a range of reasonableness, and punishments that fall within this range do not necessarily shock the conscience and are not unusual.

Accordingly, when courts evaluate the sentences imposed by federal and state jurisdictions, they will determine the range of accepted punishments. Punishments that are outside the accepted range are significantly harsher than the societal conscience would permit. Moreover, it follows that punishments that go astray from prior practice would shock the conscience as well. Basically, the judiciary branch should overturn punishments, when compared to the crimes committed, which are outside the range of what is and what has been accepted. For example, courts and individuals have articulated that the death penalty is out of proportion to punishing any other crime than murder and is "the only fitting retribution for murder."[130] The capital punishments that have been overturned have, in essence, shocked the conscience of the Court.

129. Weems v. United States, 217 U.S. 349, 366–67, 377 (1910) (noting that "such penalties for such offences amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths" and that this punishment "has no fellow in American legislation").

130. *See generally* Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1669 (1986) ("[Execution] is . . . the only fitting retribution for murder I can think

C. Using the *Solem v. Helm* Factors with "Shocks the Conscience"

In taking apart the words of the Cruel and Unusual Punishments Clause, "cruel" is defined as "causing pain or suffering," and "unusual" means "not habitually or commonly done or occurring."[131] Common law dictates that practices that enjoy long usage are presumptively reasonable and enjoy the consent of the people. Taking the Clause literally would mean that a painful punishment that is contrary to common usage would be considered unjust and unconstitutional. Every criminal punishment involves inflicting some kind of pain or suffering, whether physical or psychological. Therefore, courts need to determine whether such pain or suffering is unconstitutionally "unusual." To do so, early courts have compared a punishment to what has been previously permitted at common law.[132] This practice comports with the *Solem v. Helm* factors that guide courts to determine an acceptable range of sentences accepted in all jurisdictions.

Likewise, the "shocks the conscience" test does not disregard the *Solem* factors that are currently used in cruel and unusual analysis. In determining whether a punishment shocks the conscience, the Court would consider the offense's gravity and the stringency of the penalty, how the punishing jurisdiction punishes its other criminals, and how other jurisdictions punish the same crime. Furthermore, the factors would be seen in a conscious shocking light where society's conscience includes prior experience and current practice.

Because the issue of proportionality is going nowhere under the current Supreme Court, and the Court's current method of measuring proportionality is ineffective and unreliable, the "shocks the conscience" standard being recommended does provide a step towards a resolution. The proposed approach would provide the Supreme Court with a more conceivable basis to validate or invalidate certain punishments.

D. Example: Applying the "Shocks the Conscience" Standard to the Supreme Court's Recent Decisions Regarding Juvenile Offenders

In looking at the Court's most recent Eighth Amendment decisions, applying the principle of proportionality arranged around a "shocks the

of."); *see also* Igor Primorac, *On Capital Punishment*, 17 ISR. L. REV. 133, 138 (1982) (The death penalty is the proportionate penalty for murder.).

131. POCKET OXFORD AMERICAN DICTIONARY 188 (2d ed. 2008) (The word "cruel" means (1) "taking pleasure in the pain or suffering of others" or (2) "causing pain or suffering"; *id.* at 921 (The word "unusual" means "not habitually or commonly done or occurring.").

132. *See* Barker v. The People, 20 Johns. 457, 459 (N.Y. Sup. Ct. 1823); *see also* Com v. Hitchings, 71 Mass. 482, 486 (Mass. 1855).

conscience" test to each would lay a stronger foundation for their conclusions. For example, in *Roper v. Simmons* and *Kennedy v. Louisiana*, the Court argued that a societal consensus existed against capital punishment for juveniles and for non-homicide offenses.[133] Comparably, the Court in *Graham v. Florida* claimed to find societal consensus against LWOP sentences for juvenile non-homicide perpetrators.[134] The Court's conclusions in such cases may have been misplaced because there actually was popular public support for the respective punishments in each.

In *Roper*, *Kennedy*, and *Graham*, the Court could not articulate uniform reasons for the unconstitutionality of the punishments despite societal acceptance of the death penalty and LWOP applied towards juvenile offenders. The Court would have been able to justify their decisions by addressing proportionality in a conscience-shocking lens. Although the Court in *Roper* and *Kennedy* used proportionality in its analyses, it did not take into account the *Solem* factors. Using *Solem*, the *Graham* Court reasoned that LWOP for juvenile noncapital offenders is too severe a punishment, considering the character of juveniles and the nature of the crime committed.[135] Likewise, the *Roper* and *Kennedy* Courts could have used *Solem* to justify the harshness of giving the death penalty to juvenile capital offenders. In other words, the penalties of capital punishment and LWOP for juvenile offenders are so grossly disproportionate to the severity of any crime committed by a juvenile. Implementing such punishments would shock society's sense of justice because those sentences make no measureable contribution to accepted penal goals, imposing unnecessary pain and suffering. In all three cases, the Court would have been able to reason that the proposed punishments literally shocked the Court's conscience because they were too disproportionate to the nature of the crimes. Therefore, the Court would have come to the correct rulings with a "shocks the conscience" test and would have had more justification in reaching their decisions.

E. Misapplying Substantive Due Process to the Eighth Amendment

To counter this note's proposal, the Eighth Amendment may have a different purpose and history from substantive due process, so much so that applying the "shocks the conscience" test is not practical. For one, the

133. Roper v. Simmons, 543 U.S. 551, 567 (2005); Kennedy v. Louisiana, 554 U.S. 407, 422–26 (2008) (A death sentence for one who raped but did not kill a child, and who did not intend to assist another in killing the child, is unconstitutional under the Eighth and Fourteenth Amendments.).

134. Graham v. Florida, 560 U.S. 48, 82 (2010).

135. *Id.* at 74–78.

substantive due process line of attack has rarely been taken. Nonetheless, at least one scholar has considered a substantive due process challenge to imprisonment generally.[136] Justice Marshall also saw the connection between the death penalty and substantive due process.[137] Therefore, the groundwork to use substantive due process in typical Cruel and Unusual Punishments Clause claims is present.

The Court's decision in *Lewis* advances the argument that there is a fundamental right to life infringed upon some punishments, like the death penalty. In *Lewis*, the issue before the Court was "whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender."[138] The Court used the "shocks the conscience" test, rather than legislation. By doing so, the Court acknowledged the right to life in the Fourteenth Amendment's Due Process Clause (although the Court ultimately found that the police actions did not shock the collective conscience of the Court).

Another criticism of this note's solution is that "shocks the conscience" hints at a subjective interpretation and the test is not easily defined.[139] Regardless of the flexibility of the test, the *Lewis* Court was able to implement the test articulating, "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level."[140] Moreover, in response to the criticism that proportional review merely imposes subjective preferences of judges, the Supreme Court has held that proportionality can be measured by "the evolving standards of decency that mark the progress of a maturing society."[141] Under this theory, a punishment would be forbidden if society developed a moral consensus against it. Society's consensus may be hard to calculate, but it has been measured in a number of ways, including looking at what has recently been

136. *See* Sherry F. Colb, *Freedom From Incarceration: Why Is This Right Different From All Other Rights?,* 69 N.Y.U. L. REV. 781 (1994) (arguing the Supreme Court has failed to recognize the right to physical liberty itself as a fundamental right). "At first glance, this critique may strike the reader as radical," but nevertheless feel it should be pursued. *Id.* at 783.

137. Furman v. Georgia, 408 U.S. 238, 359 n.141 (1972) (per curiam) (Marshall, J., concurring) ("[Eighth Amendment] analysis parallels in some ways the analysis used in striking down legislation on the ground that it violates Fourteenth Amendment concepts of substantive due process.").

138. Sacramento Cty. v. Lewis, 523 U.S. 833, 836 (1998).

139. *Id.* at 857 (Kennedy, J., concurring).

140. *Id.* at 849.

141. Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

enacted by the legislature and what verdicts juries are ultimately agreeing to.[142]

Nonetheless, societal consensus is not clear. Public opinion about any one punishment is and will most likely be divided. The conscience is more than popular opinion. It includes justice and what makes up the decencies of civilized society. In the words of the *Lewis* Court, conscience-shocking behavior is "conduct intended to injure in some way unjustifiable by any government interest."[143] Thus, the Court's self-proclaimed duty to mold itself to the societal conscience can be achieved.

Further, unlike the Eighth Amendment's Excessive Bail and Excessive Fine Clauses, the Cruel and Unusual Punishments Clause does not clearly reference proportionality. This is why originalists like Justice Scalia argue that the Clause does not prohibit disproportionate punishments.[144] In *Harmelin v. Michigan*, Justice Scalia asserts that the textual basis for proportionality is implausible because "cruel and unusual" is an "exceedingly vague and oblique" way to forbid excessive punishments.[145]

Nevertheless, when one looks at the history of the Eighth Amendment, the Cruel and Unusual Punishments Clause forbids excessive punishments.[146] The Court, in *Solem v. Helm*, noted that the language of the Clause originated from the English Bill of Rights and can be read as a prohibition against excessive or disproportionate punishments.[147] Additionally, from the beginning of western civilization to the Framers and other early Americans, the Clause has been interpreted to encompass proportionality.[148] Furthermore, the Clause is flexible and "not fastened to

142. *See* Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 UCLA L. REV. 365, 368–69 (2009) (*see, e.g.*, Stanford v. Kentucky, 492 U.S. 361, 370–71 (1989); McCleskey v. Kemp, 481 U.S. 279, 300 (1987); Gregg v. Georgia, 428 U.S. 153, 175–76 (1976)). For jury verdicts, see *McCleskey*, 481 U.S. at 300; for public-opinion polls, see *Gregg*, 428 U.S. at 181 n.25; and for other countries' punishment standards, see Graham v. Florida, 560 U.S. 48, 80, and Roper v. Simmons, 543 U.S. 551, 575–80. Moreover, the Court's reference of international opinion in its Eighth Amendment decisions has drawn significant controversy and scholarly commentary. *See*, *e.g.*, Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. PA. L. REV. 63 (2007).

143. *Lewis*, 523 U.S. at 849.

144. *See supra* Section III.B.

145. Harmelin v. Michigan, 501 U.S. 957, 977 (1991).

146. *See also* O'Neil v. Vermont, 144 U.S. 323, 340 (1892) (Field, J., dissenting) ("The whole inhibition [of the Eighth Amendment] is against that which is excessive.").

147. Solem v. Helm, 463 U.S. 277, 285 (1983).

148. Aristotle once articulated that justice requires proportionality and that laws that inflict disproportionate burdens are unjust. *See* ARISTOTLE, NICOMACHEAN ETHICS, bk. V, ch. 3 (Roger Crisp trans., Cambridge Univ. Press 2004) (350 B.C.E.) ("What is just in this sense, then, is what is proportionate. And what is unjust is what violates the proportion."). Also, Pennsylvania, South Carolina, and New Hampshire all contained explicit references to proportionality in

the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[149] In other words, the Clause changes with an evolving society. Ultimately, the Court has also followed an ahistorical approach in interpreting the Eighth Amendment. Therefore, the principle of proportionality is justifiable on a historical level.

Conclusion

A proportionality requirement within the Eighth Amendment is consistent with the goals of criminal law—deterrence, incapacitation and rehabilitation. However, the current makeup of the Supreme Court cannot seem to agree on reading the principle of proportionality within the Cruel and Unusual Clause of the Eighth Amendment. Chief Justice Warren succinctly expressed the nature of the Eighth Amendment: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[150] A "shocks the conscience" standard for excessive punishments encompasses society's standard of decency of today and yesterday.

Additionally, the Court and lower courts have already been applying a workable proportionality test in excessive-force cases that allows for conformity to the ever-changing societal conscience. Successful excessive-force claims inherently involve an extreme lack of proportionality in the use of force, which is conscience shocking. The conscience of the United States is evolving, and therefore forever changing what constitutes cruel and unusual punishment. This is exactly why the flexible test this Note reiterates may provide the guidance the Court is looking for regarding the principle of proportionality. In conclusion, prison terms and other forms of punishments so disproportionate in comparison to the crime, that they shock the conscience, should be held to be cruel and unusual under the Eighth Amendment of the Constitution.

sentencing. N.H. Bill of Rights art. XVIII (1784); Pa. Const. § 38 (1776); S.C. Const. art. XL (1778).

149. Weems v. United States, 217 U.S. 349, 368, 378 (1910).

150. Trop v. Dulles, 356 U.S. 86, 101 (1958).