Into the Breach: The Case for Robust Noncapital Proportionality Review Under State Constitutions

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Introduction

The Eighth Amendment forbids cruel and unusual punishments.[1] The Supreme Court has found in the Amendment a guarantee that punishment be proportionate to the crime.[2] Although the requirement technically applies equally to all punishment, in practice the Court has used the guarantee strictly to regulate capital punishment — a practice it recently extended to life without parole sentences for juveniles[3] — but has abdicated almost entirely on noncapital sentences.

States have authority to regulate excessive punishment under their state constitutions, but most have chosen to interpret their state proportionality clauses in lockstep with the Eighth Amendment. Even the states that have found greater protection in their constitutions have done so cautiously, striking down only the rare sentence so absurd that the legislature could not possibly have intended the result.

This Note suggests that states should aggressively police the proportionality of noncapital sentences under their state constitutions. Part I discusses extant noncapital proportionality, both the United States Supreme Court's Eighth Amendment doctrine and states' responses to either heighten standards of review or to march in lockstep with the Court. Part II discusses the primary basis for state courts' failure to regulate proportionality — that regulating sentences would be intervening into legislative judgment of retributive fit — and its deep flaws. State courts ignore that criminal codes bear little relation to actual crime and punishment — criminal liability is so broad and sentences so punitive that legislatures have essentially delegated decisions on criminality and sentence length to prosecutors. Prosecutors, in turn, routinely deliver disproportionate sentences because prosecutors are local political actors who push the actual costs of incarceration onto state governments; because the public pushes for ever-harsher sentences; and because prosecutors deliver trial penalties to defendants who refuse to plead guilty.

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[1] U.S. Const. amend. VIII.

[2] *See* Weems v. United States, 217 U.S. 349 (1910).

[3] *See* Miller v. Alabama, 132 S. Ct. 2455 (2012); Graham v. Florida, 560 U.S. 48 (2010).

Much of the Supreme Court's cautiousness comes from its broader fear about intervention in state criminal justice systems; this fear is legitimate but should carry no weight with state courts, which are part of state criminal justice systems. Part III addresses the remaining arguments against aggressive state proportionality review — that states should interpret their parallel provisions in the same manner as the federal provision and that judges are institutionally incompetent to make decisions about comparative blameworthiness. The Note concludes that states should use their constitutions to pursue aggressive noncapital proportionality review.

I. Proportionality Review Under State and Federal Constitutions

Weems v. United States[4] was the first case to invalidate a prison sentence as disproportionate and thus unconstitutional.[5] Paul Weems was a public official in the Philippines who was convicted of falsifying an official document.[6] He received a sentence of fifteen years of "hard and painful labor" along with accessory penalties including "civil interdiction" and "subjection to surveillance during life," a Philippine punishment known as "*cadena temporal*."[7] The Court found that the punishment was so disproportionate to the crime that it transcended "different exercises of legislative judgment" and instead became "cruel and unusual."[8]

Weems is interesting for our purposes for another reason: the case not only established the proportionality guarantee, but also was the first to address parallel proportionality provisions. Although scholars have written that the Court vacated the punishment "for violating the Eighth Amendment's prohibition on cruel and unusual punishment,"[9] this statement is not technically correct. *Weems* was decided in 1910, and the Eighth Amendment would not be incorporated against the states (or colonies) for another four decades.[10] The Court's analysis was thus of the Bill of Rights of the Philippines, which prohibited cruel and unusual punishment in language identical to its American equivalent.[11] The Court analyzed the meaning of the Philippine clause and its relation to the federal version, the same consideration state courts now perform. The Court found that "the provision of the Philippine Bill of Rights, prohibiting the infliction of cruel and unusual pun-

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[4] 217 U.S. 349.

[5] Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 Va. L. Rev. 677, 687 (2005).

[6] *Weems*, 217 U.S. at 357.

[7] *Id.* at 364.

[8] *Id.* at 381.

[9] Lee, *supra* note 5, at 688.

[10] Robinson v. California, 370 U.S. 660, 675 (1962) (Douglas, J., concurring) (incorporating the Cruel and Unusual Punishment Clause through the Fourteenth Amendment's Due Process Clause).

[11] *Weems*, 217 U.S. at 367.

ishment, was taken from the Constitution of the United States, and must have the same meaning."[12] This equivalence is why scholars and courts now consider the case to be the birth of the Eighth Amendment's proportionality guarantee.[13]

Weems's proportionality principle went largely uncited for decades, mainly because the Cruel and Unusual Punishment Clause was not yet incorporated against the states, and states and localities administered criminal justice.[14] Over the last four decades, however, the Supreme Court has often decided whether a given punishment is disproportionate, although the jurisprudence has bifurcated into a capital track and a noncapital track.[15] The capital track has dramatically narrowed the application of the death penalty, eliminating it as an available punishment for rape,[16] for aiders and abettors who lack both major participation in a death-causing crime and reckless indifference to human life,[17] for mentally disabled people,[18] and for juveniles.[19] The noncapital track has not had an equivalent effect on disproportionate prison sentences; instead, the Court has virtually abdicated the pursuit of noncapital proportionality entirely.

A. Eighth Amendment Proportionality Review of Noncapital Cases

Rummel v. Estelle[20] in 1980 was the first postincorporation case to directly address noncapital proportionality. Texas convicted William James Rummel of using a bad check to obtain one hundred and twenty dollars.[21] The charged offense was a felony punishable by a maximum of ten years in prison, but two prior convictions for writing bad checks — one for eighty dollars, one for twenty-eight — made him eligible for Texas's recidivist statute.[22] The prosecution chose to charge him as a recidivist, a choice that mandated a life sentence if the jury found him guilty.[23] The Supreme Court found the mandatory sentence constitutional, writing that any other result

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[12] *Id.*

[13] *See* Margaret Raymond, *"No Fellow in American Legislation":* Weems v. United States *and the Doctrine of Proportionality*, 30 VT. L. REV. 251, 295 (2006); *see also* Harmelin v. Michigan, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring) ("We first interpreted the Eighth Amendment to prohibit 'greatly disproportioned' sentences in *Weems v. United States*.").

[14] Lee, *supra* note 5, at 688 & n.42.

[15] Note, however, that the distinction has become slightly blurred in the past several years, although not as dramatically as some scholars have suggested.

[16] Coker v. Georgia, 433 U.S. 584, 584 (1977).

[17] *Cf.* Tison v. Arizona, 481 U.S. 137, 158 (1987) (holding "that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy" the culpability requirement for capital punishment).

[18] Atkins v. Virginia, 536 U.S. 304, 304 (2002).

[19] Roper v. Simmons, 543 U.S. 551, 551 (2005).

[20] 445 U.S. 263 (1980).

[21] *Id.* at 266.

[22] *Id.* at 264–66.

[23] *Id.* at 266.

would be an "extensive intrusion into the basic line-drawing process that is pre-eminently the province of the legislature."[24] The Court's opinion attacked the idea of any noncapital proportionality review and did not articulate a test by which any defendant could obtain relief.[25]

Three years later, the Court backtracked in *Solem v. Helm*,[26] finding a lengthy term for a petty crime due to a recidivist statute disproportionate.[27] Like William James Rummel, Jerry Helm was convicted of writing a bad check, his for one hundred dollars.[28] The felony was his seventh, although all were nonviolent and none was a crime "against a person."[29] Helm was subject to a recidivist statute similar to the one in Texas, although South Dakota law explicitly excluded the possibility of parole.[30] The Court, finding the availability of parole dispositive, distinguished the case from *Rummel* and vacated the sentence as constitutionally disproportionate.[31] In vacating Helm's sentence, the Court articulated the three factors for courts to consider when evaluating noncapital sentences: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."[32]

The Court next addressed noncapital proportionality in *Harmelin v. Michigan*,[33] when it found that a drug mule carrying less than a kilogram of cocaine convicted under a simple possession statute could be subject to a mandatory sentence of life without parole.[34] There was no majority opinion. Justice Scalia and Chief Justice Rehnquist relied on historical evidence to claim that the Eighth Amendment does not contain a proportionality requirement at all.[35] Justice Kennedy's concurrence, which has assumed the status of law, revised the standard from *Solem* to make the proportionality test more difficult to meet.[36] The initial factor, the comparison of the "gravity of the offense" to the "harshness of the penalty," became a threshold issue that defendants must show inherent gross disproportionality to satisfy.[37] Courts may only consider intrajurisdictional and interjurisdictional comparisons — previously the second and third factors of the test — in "the rare case" in

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[24] *Id.* at 275.
[25] *Id.* at 275–76.
[26] 463 U.S. 277 (1983).
[27] *Id.* at 284.
[28] *Id.* at 281.
[29] *Id.* at 279–80.
[30] *Id.* at 282.
[31] *Id.* at 303.
[32] *Id.* at 292.
[33] 501 U.S. 957 (1991).
[34] *Id.* at 996.
[35] *Id.* at 965 (plurality opinion).
[36] Lee, *supra* note 5, at 693.
[37] *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring).

which the threshold is met.[38] Justice Kennedy narrowed *Solem*'s test even though the parties could find only four cases[39] from 1983 to 1990 in which courts reversed noncapital sentences under the Eighth Amendment's proportionality guarantee.[40]

The Court again addressed noncapital proportionality in *Ewing v. California*.[41] Gary Ewing walked out of a pro shop in Los Angeles with three golf clubs concealed in his pants.[42] Under California law, prosecutors may charge certain offenses as either felonies or misdemeanors; the court system refers to such offenses as "wobblers."[43] The prosecutors charged Ewing with grand theft, a wobbler, and chose to charge the offense as a felony.[44] The prosecutor's decision triggered California's three-strikes law, which mandated a sentence of twenty-five years to life.[45] Applying Justice Kennedy's test from *Harmelin*, the Court found the sentence proportionate.[46]

Reconciling these cases is a challenge. Only in *Solem* did the Court find a sentence disproportionate, and although the case is nominally good law, attempting to determine which sentences might be declared disproportionate is difficult. The Court itself has acknowledged that these "cases exhibit a lack of clarity regarding what factors may indicate gross disproportionality."[47] Scholars have gone further, one writing, "On a number of dimensions far more central to the Clause's core meaning, the Court's work fails to satisfy minimal demands of doctrinal coherence. One would be hard pressed to identify any other area of constitutional law plagued by such confusion at its very roots."[48]

The theoretical incoherence of the doctrine may help to explain its impotence. Justice Scalia has written that "[p]roportionality . . . is inherently a retributive concept."[49] Under this theory, a life sentence for a traffic ticket may be successful in deterring or incapacitating speeders, but that success does not bear on whether the punishment is disproportionate — it is disproportionate because the speeders do not deserve it. Yet in *Ewing*, the Court stated that a law is proportionate as long as it advances *any* of the purposes of punishment, including deterrence and incapacitation.[50] This suggestion is

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[38] *Id.*

[39] Ashley v. State, 538 So. 2d 1181 (Miss. 1989); Clowers v. State, 522 So. 2d 762 (Miss. 1988); Naovarath v. State, 779 P.2d 944 (Nev. 1989); State v. Gilham, 549 N.E.2d 555 (Ohio Ct. App. 1988).

[40] *Harmelin*, 501 U.S. at 1015 (Kennedy, J., concurring).

[41] 538 U.S. 11 (2003). *Ewing*'s companion case addressed similar facts but in the context of habeas review. *See* Lockyer v. Andrade, 538 U.S. 63, 71 (2003).

[42] *Ewing*, 538 U.S. at 17–18.

[43] *Id.* at 16–17.

[44] *Id.* at 19.

[45] *Id.* at 20.

[46] *Id.* at 30–31.

[47] Lockyer v. Andrade, 538 U.S. 63, 72 (2003).

[48] Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 Wm. & Mary Bill Rts. J. 475, 477 (2005).

[49] *Ewing*, 538 U.S. at 31.

[50] *Id.* at 28.

what Professor Youngjae Lee calls "the disjunctive theory of the Eighth Amendment — that a punishment is constitutionally permitted as long as there is *a* punishment theory that justifies the punishment."[51] This theory of proportionality renders all punishment constitutional,[52] as the more brutal the punishment the greater the deterrence, and the longer the term of years the greater the incapacitation.

A more persuasive theory of the constitutional proportionality guarantee considers it a "side constraint" that sets a retributive cap on how legislatures can pursue their penological goals.[53] Criminal lawmaking can serve many ends, including retribution, deterrence, incapacitation, and rehabilitation.[54] Legislatures are free to pursue them so long as they operate within the retributivist guarantee "that the harshness of [the] punishment . . . not exceed the gravity of the crime."[55]

This interpretation of constitutional proportionality is consistent with historical evidence of the clause's meaning and runs through the Court's Eighth Amendment cases.[56] In his dissent in *Furman v. Georgia*,[57] Chief Justice Burger wrote that the Eighth Amendment:

> was included in the Bill of Rights to guard against the use of torturous and inhuman punishments, not those of limited efficacy. . . . The dominant theme of the Eighth Amendment debates was that the ends of the criminal laws cannot justify the use of measures of extreme cruelty to achieve them.[58]

The constitutional proportionality guarantee functioning as a retributive cap also comports with sensible institutional design. Legislatures may be better at consequentialist judgments than the judiciary. The Eighth Amendment and its state parallels, however, do not require analysis of consequentialist arguments but instead only the consideration of retributive fit, a moral judgment the judiciary is capable of making. By rejecting this interpretation of the Eighth Amendment for the disjunctive theory, the Court virtually guaranteed that federal noncapital proportionality review will continue to be so weak as to be nonexistent.

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[51] *See* Lee, *supra* note 5, at 733.

[52] The theory does not render *capital* punishment constitutional, however, because the disjunctive theory of the Eighth Amendment applies only in noncapital proportionality review.

[53] *See* Lee, *supra* note 5, at 683.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 705–06.

[57] 408 U.S. 238 (1972).

[58] *Id.* at 391–92 (Burger, J., dissenting).

B. The Graham *Caveat*

The above analysis makes one assumption that requires elaboration — that there is indeed such a thing as capital as opposed to noncapital proportionality review. Scholars and courts have widely accepted this claim for decades.[59] In capital proportionality review, the Court first looks to objective indicia of consensus like legislative enactments and jury verdicts for support of or opposition to capital punishment for a certain class of offenders.[60] Next, the Court turns to its "own judgment" to determine if capital punishment for the class of offenders matches the purposes of punishment.[61]

The Supreme Court appeared, however, to dismantle the distinction between capital and noncapital proportionality review in *Graham v. Florida*[62] in 2010 and *Miller v. Alabama*[63] in 2012. In *Graham*, the Court applied the stringent capital standard to find that life without parole sentences were categorically disproportionate for juveniles who did not commit homicides.[64] In *Miller*, the Court applied the same standard to overturn statutes that mandated life without parole for juveniles, even ones who committed homicide.[65]

Graham justified the use of the capital track by claiming the distinction between the tracks was not whether they involve the death penalty, but instead whether they "categorically" challenge entire sentencing practices or specifically challenge the "particular" defendant's sentence.[66] This distinction, as Justice Thomas pointed out in dissent, is not a plausible rereading of the two tracks but instead an entirely invented one — the difference between the two standards of review was always because "death is different."[67]

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[59] *See, e.g.*, Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 178 (2008). "The divergence of constitutional doctrine in capital and noncapital cases is nowhere more evident than in the Supreme Court's treatment of excessive or disproportionate punishment under the Cruel and Unusual Punishments Clause of the Eighth Amendment. Though the Court has recognized that the Eighth Amendment places substantive limits on both capital and noncapital punishments, the Court has developed two distinct lines of doctrine for the two different contexts. Indeed, these two lines of doctrine have diverged radically from their common constitutional origins in the Eighth Amendment, remaining virtually hermetically sealed from each other and resulting in two quite differently demanding thresholds for judicial invalidation of legislatively sanctioned punishment." *Id.*

[60] *See* Coker v. Georgia, 433 U.S. 584, 593 (1977).

[61] *Id.* at 597.

[62] 130 S. Ct. 2011 (2010).

[63] 132 S. Ct. 2455 (2012).

[64] *Graham*, 130 S. Ct. at 2021, 2033.

[65] *Miller*, 132 S. Ct. at 2460.

[66] *Graham*, 130 S. Ct. at 2021.

[67] *Id.* at 2046 (Thomas, J., dissenting). "The categorical proportionality review the Court employs in capital cases thus lacks a principled foundation. The Court's decision today is significant because it does not merely apply this standard — it remarkably expands its reach. For the first time in its history, the Court declares an entire class of offenders immune from a noncapital sentence using the categorical approach it previously reserved for death penalty cases alone." *Id.*

Some scholars and courts have attempted to work with Justice Kennedy's new distinction. Scholars have optimistically argued that strict capital proportionality review, now recast as "categorical," should categorically prohibit their chosen pathology of the criminal justice system.[68] State courts have attempted to faithfully apply the categorical/particular distinction to challenges under both the federal and state constitutions.[69]

The distinction, however, between "categorical" and "particular" is not only a disingenuous description of pre-*Graham* proportionality review, but also theoretically unsound. For example, the defendants in *Graham* and *Harmelin* both challenged the constitutionality of a type of punishment (life without the possibility of parole) for a certain class of offenders (juveniles who did not commit homicide in *Graham*, nonviolent drug offenders in *Harmelin*). The defendants challenged their own sentences, but a ruling on either's behalf may have applied to the category of defendant to which each belonged. As scholars wrote after *Graham*, to label the claim in *Harmelin* an individual challenge simply "because the petitioner did not label a specific subcategory for whom this rule should be applicable is conceptually challenging."[70] *Graham* has not resulted in a flood of successful proportionality challenges precisely because it did not obliterate the "death is different" doctrine, but instead merely extended it to a specific class of defendants (juveniles) for a specific punishment (life without the possibility of parole). The ineffective standard of noncapital proportionality review survives *Graham*, and its ineffectiveness is as great a concern as ever.

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[68] *See, e.g.*, Joseph B. Allen, *Extending Hope into "The Hole": Applying* Graham v. Florida *to Supermax Prisons*, 20 Wm. & Mary Bill Rts. J. 217 (2011) (arguing the analysis in *Graham* renders long-term solitary confinement in supermax prisons unconstitutional as applied to juveniles and nonviolent offenders); Elizabeth Bennion, *Death Is Different No Longer: Abolishing the Insanity Defense Is Cruel and Unusual Under* Graham v. Florida, 61 DePaul L. Rev. 1, 2 (2011) (arguing the principles in *Graham* render abolishment of insanity defenses constitutionally cruel and unusual); Rebecca Shepard, *Does the Punishment Fit the Crime?: Applying Eighth Amendment Proportionality Analysis to Georgia's Sex Offender Registration Statute and Residency and Employment Restrictions for Juvenile Offenders*, 28 Ga. St. U. L. Rev. 529, 540 (2012) (arguing the analysis in *Graham* renders Georgia's sex offender registry unconstitutional as applied to juveniles).

[69] *See, e.g.*, State v. Oliver, 812 N.W.2d 636, 641 (Iowa 2012). "We start by noting that Oliver has not technically made a 'categorical challenge' to his sentence. However, he has argued that life without parole for a violation of section 902.14 is unconstitutional 'on its face.' We will treat this argument as a categorical challenge under the federal framework. As noted above, categorical challenges to a particular sentence can be based on either the characteristics of the crime or the criminal. In this case, Oliver argues life without parole is an unconstitutional penalty for a violation of section 902.14." *Id.*

[70] Robert Smith & G. Ben Cohen, *Redemption Song:* Graham v. Florida *and the Evolving Eighth Amendment Jurisprudence*, 108 Mich. L. Rev. First Impressions 86, 91 (2010).

C. *State-Constitutional Review of Noncapital Cases*[71]

Every state has a provision in its constitution related to sentencing.[72] All but Connecticut and Vermont explicitly have limits on severe punishment of all kinds, and both of those states have provisions limiting severe fines, which Vermont courts have interpreted to apply to all penalties.[73]

The constitutional limitations on punishment severity fall into five categories.[74] Ten states have either explicit provisions requiring proportionate penalties or have interpreted other provisions as mandating the same.[75] Nineteen states prohibit cruel *or* unusual penalties, although states have interpreted this language in widely varying ways.[76] Six state constitutions pro-

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[71] As with the Eighth Amendment, there is a distinct history of the use of state cognates to regulate *capital* punishment. For example, in California, months before the United States Supreme Court would declare the death penalty in its then format unconstitutional in *Furman v. Georgia*, the California Supreme Court found that the state's Cruel or Unusual Punishment Clause was broader than the Eighth Amendment and declared the death penalty unconstitutional under its own constitution. *See* People v. Anderson, 493 P.2d 880, 882 (Cal. 1972). In response to the case, pro–death penalty advocates proposed a voter ballot initiative that added to the California Constitution a provision that stated, inter alia, "The death penalty provided for under these statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments." CAL. CONST. art. I, § 27; *see also* James. R. Acker & Elizabeth R. Walsh, *Challenging the Death Penalty Under State Constitutions*, 42 VAND. L. REV. 1299, 1363 (1989). The provision passed and capital punishment returned to California when the United States Supreme Court declared its constitutionality in 1976. *See* Gregg v. Georgia, 428 U.S. 153, 187 (1976). Other states have also used their parallel provisions to regulate the death penalty, but a longer analysis of this history is beyond the scope of this Note.

[72] Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 64 (2008).

[73] *Id.*

[74] *Id.* The numbers add up to more than fifty because some states have multiple provisions related to sentencing.

[75] *See* People v. Hauschild, 871 N.E.2d 1, 12 (Ill. 2007) (interpreting ILL. CONST. art. I, § 11 to bring heightened review relative to the Eight Amendment); Conley v. State, 972 N.E.2d 864, 879 (Ind. 2012) (writing of its proportionality guarantee that "[a]lthough the language [in IND. CONST. art. I, § 16] is not the same as the United States Constitution['s Eighth Amendment], the protections are the same"); State v. Stanislaw, 65 A.3d 1242, 1250 (Me. 2013) (interpreting ME. CONST. art. I, § 9 to bring heightened protection as "the Maine Constitution anticipates a broader proportionality review than the Eighth Amendment"); State v. Robinson, 769 N.W.2d 366, 378 (Neb. 2009) (interpreting NEB. CONST. art. I, § 15 to bring no heightened protection); State v. Dayutis, 498 A.2d 325, 329 (N.H. 1985) (holding N.H. CONST. pt. 1, art. 18 has granted slightly heightened protection); State v. Wheeler, 175 P.3d 438, 446 (Or. 2007) (holding OR. CONST. art. I, § 16 has granted slightly heightened protection); State v. Monteiro, 924 A.2d 784, 795 (R.I. 2007) ("[T]he Eighth Amendment's prohibition against cruel and unusual punishment and the provisions of article 1, section 8, of the Rhode Island Constitution are identical."); State v. Saari, 568 A.2d 344, 347 (Vt. 1989) (interpreting VT. CONST. ch. II, § 39 to extend to *all* penalties); State v. Fain, 617 P.2d 720, 723 (Wash. 1980) (interpreting WASH. CONST. art. I, § 14 to grant heightened protection); Wanstreet v. Bordenkircher, 276 S.E.2d 205, 210 (W. Va. 1981) (interpreting W. VA. CONST. art. III, § 5 in lockstep with the Eighth Amendment).

[76] *See* Mitchell v. State, 84 So. 3d 968, 995 (Ala. Crim. App. 2010) (interpreting ALA. CONST. art. I, § 15 not to grant heightened protection, reasoning "[t]his Court need not decide whether Art. I, § 15, affords broader protections than the Eighth Amendment . . ."); Bunch v. State, 43 S.W.3d 132, 138 (Ark. 2001) (using a different standard that actually provides *less*

hibit cruel penalties.[77] Twenty-two state constitutions have language identical to the Eighth Amendment, prohibiting cruel and unusual punishment.[78] Nine more states, all of which are included in one of the above categories, have additional constitutional protections related to excessive penalties or treatment.[79]

These provisions provide all states a state-constitutional basis to regulate excessive sentences if they so wish, but most have chosen not to do so.[80]

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protection than the federal provision, rendering ARK. CONST. art. II, § 9 meaningless); People v. Givens, No. C070625, 2013 WL 2249720 (Cal. Ct. App. May 20, 2013) ("[T]he California Constitution's prohibition against cruel or unusual punishment [in CAL. CONST. art. I, § 17] is broader than the United States Constitution's prohibition . . . ."); State v. Kahapea, 141 P.3d 440, 455 (Haw. 2006) (interpreting HAW. CONST. art. I, § 12 in lockstep with the Eighth Amendment); State v. Seward, 297 P.3d 272, 280 (Kan. 2013) (using a separate line of analysis for KAN. CONST. § 9, but not providing greater protection than the Eighth Amendment); State v. Alfaro, No. 13-KA-39, 2013 WL 5850745 (La. Ct. App. Oct. 30, 2013) (using a different method under LA. CONST. art. I, § 20, but considering it roughly equal in level of scrutiny to the Federal Constitution); State v. Stanislaw, 65 A.3d 1242, 1250 (Me. 2013) ("[T]he Maine Constitution anticipates a broader proportionality review than the Eighth Amendment [through ME. CONST. art. I, § 9]."); Martin v. Clavin, Civil Action No. 08-11971-MBB, 2010 WL 3607079 (D. Mass. Sept. 9, 2010) ("The rights guaranteed under [MASS. CONST. pt. 1, art. XXVI] are as broad as those rights protected under the Eighth Amendment."); People v. Bullock, 485 N.W.2d 886, 872 (Mich. 1992) (interpreting MICH. CONST. art. I, § 16 to grant heightened protection); State v. Mitchell, 577 N.W.2d 481, 488 (Minn. 1998) (interpreting MINN. CONST. art. I, § 5 to grant heightened protection); Tate v. State, 946 So. 2d 376, 386 (Miss. Ct. App. 2006) (interpreting MISS. CONST. art. III, § 28 to grant no heightened protection); Chavez v. State, 213 P.3d 476, 489 (Nev. 2009) (interpreting NEV. CONST. art. I, § 6 to grant no heightened protection); State v. Green, 502 S.E.2d 819, 828 (N.C. 1998) (applying no heightened standard under N.C. CONST. art. I, § 27); Bryson v. Oklahoma County, 261 P.3d 627, 633 (Okla. Ct. App. 2011) (interpreting OKLA. CONST. art. II, § 9 in lockstep with the Eighth Amendment); State v. Kiser, 343 S.E.2d 292, 293 (S.C. 1986) (applying no heightened standard based on S.C. CONST. art. I, § 15); Atchison v. State, 124 S.W.3d 755, 760 (Tex. Ct. App. 2003) (finding no proportionality guarantee at all in TEX. CONST. art. I, § 13); Oakley v. State, 715 P.2d 1374, 1377 (Wyo. 1986) (interpreting WYO. CONST. art. I, § 14 to grant no heightened protection).

[77] *See* Thomas v. State, 55 A.3d 839, 839 (Del. 2012) (declining to decide whether "there should be a different test for assessing a sentence under [DEL. CONST. art. I, § 11] because the United States Constitution prohibits 'cruel and unusual' sentences, whereas the Delaware Constitution prohibits 'cruel' sentences"); Mudd v. Kentucky, No. 2012-SC-000664-MR, 2013 WL 5436264 (Ky. Sept. 26, 2013) (interpreting KY. CONST. § 17 to afford no heightened protection); Commonwealth v. Knox, 50 A.3d 732, 735 n.2 (Pa. Super. Ct. 2012) ("[T]he Pennsylvania Constitution [(PA. CONST. art. I, § 13)] affords no broader protection against excessive sentences than that provided by the Eighth Amendment to the United States Constitution."); State v. Monteiro, 924 A.2d 784, 795 (R.I. 2007) ("[T]he Eighth Amendment's prohibition against cruel and unusual punishment and the provisions of article 1, section 8, of the Rhode Island Constitution are identical."); State v. Bonner, 577 N.W.2d 575, 579 n.4 (S.D. 1998) (interpreting S.D. CONST. art. VI, § 23 to provide no heightened standard as "we hardly wish to further burden sentencing law by adopting dual constitutional standards"); State v. Fain, 617 P.2d 720, 723 (Wash. 1980) (interpreting WASH. CONST. art. I, § 14 to bring heightened protection).

[78] Frase, *supra* note 72, at 65.

[79] *See id.*

[80] *Compare* State v. Stanislaw, 65 A.3d 1242, 1250 (Me. 2013) ("[T]he Maine Constitution anticipates a broader proportionality review than the Eighth Amendment."), *with* State v. Davis, 79 P.3d 64, 67–68 (Ariz. 2003) ("[W]e do not find in this case a compelling reason to interpret Arizona's cruel and unusual punishment provision differently from the related provision in the federal constitution.").

The following examples are illustrative of the different paths states have taken in response to their state constitutions and show the methodologies they have used to get there.

Michigan is one of the few states to aggressively police excessive sentences. In *Harmelin*, the United States Supreme Court upheld the sentence as proportionate and sent the case back to Michigan.[81] On remand, the Michigan Supreme Court found that even if the sentence did not violate the Eighth Amendment, it did violate the state constitution's Cruel or Unusual Punishment Clause.[82]

The Michigan Supreme Court stated that the opinion in *Harmelin* was "only persuasive authority for purposes of this Court's interpretation and application of the Michigan Constitution," finding three compelling reasons to systematically interpret the state clause as broader than its federal equivalent in *People v. Bullock*.[83] First, the court made the simple textual argument that "it seems self-evident that any adjectival phrase in the form 'A *or* B' necessarily encompasses a broader sweep than a phrase in the form 'A *and* B.'"[84] Second, the Michigan Constitution was adopted in 1963, fifty years after *Weems* had established that the Eighth Amendment contains some form of proportionality requirement.[85] Third, Michigan courts had long followed the approach of *Harmelin*'s dissenters when applying the state constitution.[86] Michigan proportionality cases predating *Solem* were imprecise in distinguishing between federal and state claims,[87] giving the *Bullock* court room to suggest that Michigan need not "reflexively follow the latest turn in the United States Supreme Court's Eighth Amendment analysis," but could instead take up a more aggressive standard.[88] The court in *Bullock* rejected "a simple, bright-line test"[89] but subsequent Michigan courts have considered as factors "the gravity of the offense and the harshness of the penalty," intrajurisdictional sentences for other crimes, interjurisdictional sentences for the same crime, and how the punishment serves the goal of rehabilitation.[90]

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[81] *See* Harmelin v. Michigan, 501 U.S. 957, 996 (1991).

[82] People v. Bullock, 485 N.W.2d 866, 872 (Mich. 1992).

[83] *Id.* at 870, 872.

[84] *Id.* at 872 n.11 (emphasis in original). For a lengthy analysis that ultimately supports the same finding in the Eighth Amendment context, see generally Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel and Unusual?*, 87 WASH. U. L. REV. 567, 572 (2010) (arguing that the Eighth Amendment prohibits only punishments that are both cruel and unusual and that each of these components of the clause should thus be independently assessed).

[85] *Bullock*, 485 N.W.2d at 872–73.

[86] *Id.* at 873.

[87] *See, e.g.*, People v. Lorentzen, 194 N.W.2d 827, 834 (Mich. 1972) (striking down a mandatory minimum using both federal and state authority).

[88] *Bullock*, 485 N.W.2d at 874.

[89] *Id.* at 877.

[90] *See, e.g.*, People v. Launsburry, 551 N.W.2d 460, 463 (Mich. Ct. App. 1996).

Michigan courts have used the aggressive standard of *Bullock* to vacate disproportionate punishments. In *People v. Dipiazza*,[91] a prosecutor charged Robert Dipiazza, who was eighteen years old, with criminal sexual conduct for dating a girl about to turn fifteen.[92] Both sets of parents approved of the relationship, and the pair would years later get married and have children.[93] Dipiazza agreed to complete a diversion program for youthful offenders in exchange for the dismissal of the case.[94] Despite the absence of a conviction, a Michigan statute placed him on Michigan's Sex Offender Registry, where he was scheduled to remain for twenty-five years.[95] Dipiazza's placement on the registry prevented him from finding employment and ostracized him from his community.[96] He could not have succeeded with an Eighth Amendment claim,[97] but the Michigan Court of Appeals contrasted the "devastating" effects on Dipiazza with the "not very grave" offense and ordered his name removed from the registry under the state constitution.[98]

Michigan is uncommon in explicitly stating an aggressive proportionality standard,[99] but states need not sharply distinguish their state clauses from the Eighth Amendment to justify at least slightly heightened review. In *State v. Bruegger*,[100] Iowa found no reason to interpret Iowa's Cruel and Unusual Punishment Clause differently than its federal equivalent, but nonetheless found the court could *apply* the federal standard in a "more stringent fashion."[101] Although the court's distinction between parallel interpretation and different application is difficult to parse, the court's reasoning relied on the fact that "review of criminal sentences for gross disproportionality under the Iowa Constitution should not be a 'toothless' review."[102] The court called for a "*Solem*-type approach" but with a more stringent application of *Solem*'s factors.[103] The court did not reveal what such an approach would

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[91] 778 N.W.2d 264 (Mich. Ct. App. 2009).
[92] *Id.* at 266.
[93] *Id.* at 273.
[94] *Id.* at 266.
[95] *Id.*
[96] *Id.* at 273.
[97] Indeed, the United States Supreme Court has found that sex offender registration is not punishment at all, let alone cruel and unusual punishment. *See* Smith v. Doe, 538 U.S. 84, 96 (2003).
[98] *Dipiazza*, 788 N.W.2d at 273.
[99] *See, e.g.*, State v. Davis, 79 P.3d 64, 67–68 (Ariz. 2003) ("[W]e do not find in this case a compelling reason to interpret Arizona's cruel and unusual punishment provision differently from the related provision in the federal constitution."); Thomas v. State, No. 211, 2012, 2012 WL 5499649, at *1 (Del. Nov. 9, 2012) (declining to decide whether "there should be a different test for assessing a sentence under the Delaware Constitution because the United States Constitution prohibits 'cruel and unusual' sentences, whereas the Delaware Constitution prohibits 'cruel' sentences").
[100] 773 N.W.2d 862 (Iowa 2009).
[101] *Id.* at 883.
[102] *Id.*
[103] *Id.* at 886.

look like, leaving to the trial court the task of determining an appropriate sentence in light of the aforementioned principles.[104]

The court in *Bruegger* used this heightened standard to vacate Jordan Bruegger's sentence.[105] Bruegger, who was twenty-one, had admitted to having sex with his fifteen-year-old girlfriend.[106] In addition to prosecuting Bruegger for statutory rape, the prosecution requested a sentencing enhancement based on an adjudication of delinquency made when Bruegger was just twelve years old.[107] When Bruegger was convicted of statutory rape, the delinquency finding enhanced the conviction, resulting in a mandatory twenty-five year prison sentence.[108] The Iowa Supreme Court vacated the sentence as disproportionate and remanded the case for further proceedings.[109]

While Michigan and Iowa are not the only states to review sentences more strictly than the Supreme Court,[110] most states engage in no heightened review.[111] For example, in *Hale v. State*,[112] a Florida defendant asked the Florida Supreme Court in the aftermath of *Harmelin* and *Bullock* to engage in a more searching proportionality inquiry based on Florida's Cruel or Unusual Punishment Clause.[113] While not explicitly shutting the door on the possibility of a more aggressive state standard, the court declined the invitation.[114]

More than a decade later, lower Florida courts were still citing *Hale* for the proposition that the Florida Constitution provided no greater protection than the Eighth Amendment.[115] The court refused to vacate the sentence of Richard Paey in *Paey v. State*.[116] Paey had gotten into a serious car accident while in law school and suffered severe and unremitting back pain.[117] After suspecting that he was fraudulently obtaining prescription painkillers, prosecutors charged him with several counts of drug trafficking.[118] There was no suggestion at trial that Paey was doing anything with the pills but consuming them, but Florida's drug trafficking statute allowed mere possession — at sufficient quantities — to constitute trafficking.[119] Paey, a first-time of-

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[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.* at 867.
[108] *Id.* at 868.
[109] *Id.* at 886.
[110] *See, e.g.*, People v. Miller, 781 N.E.2d 300, 306–09 (Ill. 2002); State v. Fain, 617 P.2d 720, 725–28 (Wash. 1980).
[111] *See, e.g.*, State v. Davis, 79 P.3d 64, 67–68 (Ariz. 2003); Thomas v. State, No. 211, 2012, 2012 WL 5499649, at *1 (Del. Nov. 9, 2012).
[112] 630 So. 2d 521 (Fla. 1993).
[113] *Id.* at 525–26.
[114] *Id.* at 526.
[115] *See* Paey v. State, 943 So. 2d 919, 926 (Fla. Dist. Ct. App. 2006).
[116] *Id.*
[117] *Id.* at 920.
[118] *Id.* at 921.
[119] *Id.*

fender, was convicted and sentenced to a mandatory minimum of twenty-five years in prison.[120] The Florida court found that such a sentence, however outrageous, was not constitutionally disproportionate under Supreme Court precedent and therefore did not violate the state constitution either.[121]

Some states simply refuse to engage in proportionality review at all. The Mississippi Supreme Court in *Jackson v. State*[122] held that "a sentence will be upheld if within statutory limits."[123] This position, that sentences within the bounds of state law are by definition proportionate, was considered and rejected eighty years earlier in *Weems* and has been bad law ever since.[124]

The Mississippi Supreme Court in *Jackson* went on to write, "The United States Supreme Court later overruled the bulk of the law created in *Solem* when it stated," that "the Eighth Amendment contains no proportionality guarantee" at all.[125] The Mississippi court's statement was plainly wrong. The cited passage quoted Justice Scalia writing in *Harmelin* for only himself and Chief Justice Rehnquist — the statement was thus not a statement of the United States Supreme Court and certainly did not overrule anything. Had the Mississippi Supreme Court flipped a few pages in *Harmelin* to the controlling opinion, Justice Kennedy's concurrence, they would have found an explicit affirmation of the Eighth Amendment's proportionality guarantee and over a dozen citations to *Solem* for authority.[126]

Jackson was not an isolated case. Mississippi has regularly asserted that sentences within the limits prescribed by statute are not amenable to a constitutional challenge,[127] a description of federal constitutional law that has been wrong for a century. Although doctrinally untenable, the suggestion is in a legal realist sense correct — federal noncapital proportionality review may as well not exist, so Mississippi pretends that it does not. If like Florida and a majority of other states,[128] Mississippi refuses to read greater protections into its state constitution than into the Eighth Amendment, there is little reason to go through perfunctory proportionality review in noncapital cases.

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[120] *Id.*
[121] *Id.* at 927.
[122] 740 So. 2d 832 (Miss. 1999).
[123] *Id.* at 835.
[124] *See* Weems v. United States, 217 U.S. 349, 377 (1910).
[125] *Jackson*, 740 So. 2d at 835.
[126] Harmelin v. Michigan, 501 U.S. 957, 996–1009 (1991).
[127] *See, e.g.*, Price v. State, 898 So. 2d 641, 655 (Miss. 2005).
[128] *See, e.g.*, State v. Davis, 79 P.3d 64, 67–68 (Ariz. 2003); Thomas v. State, No. 211, 2012, 2012 WL 5499649, at *1 (Del. Nov. 9, 2012).

D. The Prevention of Absurdities Model

Most states, like Florida and Mississippi, do not offer greater proportionality protections in their state constitutions.[129] Even those that do offer greater protection operate on a prevention of absurdities model, under which the court's job is not to question the wisdom of the legislature, but instead to weed out sentences the legislature never intended.

In *State v. Fain*,[130] Washington — one of the states that does engage in heightened proportionality review — examined Jimmy Fain's sentence.[131] In 1960, Fain wrote a check for thirty dollars on insufficient funds.[132] In 1965, he forged a friend's signature on another thirty-dollar check.[133] Twelve years later, Fain forged checks worth approximately four hundred dollars.[134] Prosecutors charged Fain under Washington's habitual offender statute, and he received a mandatory life sentence.[135]

After finding that the statute has few equals in other states, that the conduct was nonviolent and petty, and that the crimes were decades apart, the court "hasten[ed] to repeat that we must and do" grant great deference to the legislature.[136] The court found the penalty to be disproportionate and vacated the sentence, but not because the legislature's intent did not deserve deference.[137] It did so because the legislature could not have intended such a severe result.[138]

Gregory Schneider in *Sentencing Proportionality in the States*, which is written in support of the prevention of absurdities model, describes its logic well:

> Any legislature generating a sentencing scheme cannot foresee every application of its laws, which leaves open the possibility of rare cases that call for extraordinarily harsh penalties in situations that intuitively seem like they should require much lighter ones. By limiting proportionality review to these situations, the courts show proper deference to the legislature. The courts, then, are not commandeering a legislative role for themselves. Rather, they are supplementing the legislature's work by checking absurdities and helping the legislative sentencing scheme function in a sensible way that better approximates the legislative (and public) intent.[139]

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[129] *See, e.g.*, *Davis*, 79 P.3d at 67–68; *Thomas*, 2012 WL 5499649, at *1.
[130] 617 P.2d 720 (Wash. 1980).
[131] *Id.* at 721.
[132] *Id.*
[133] *Id.*
[134] *Id.* at 721–22.
[135] *Id.* at 722.
[136] *Id.* at 728.
[137] *Id.*
[138] *Id.*
[139] Gregory S. Schneider, *Sentencing Proportionality in the States*, 54 Ariz. L. Rev. 241, 243 (2012).

By this logic, courts never have any reason to cease their deep deference to legislatures. Any sentence that is truly absurd (say, a mandatory life sentence for three petty forgeries) was unintended by the legislature. Courts may check absurdities but do not consider whether the existence of these absurdities might mean that legislatures do not deserve such powerful deference.

This Note suggests a different conception of proportionality review. State courts should conceive of their duty not as culling absurdities that the legislature did not intend, but instead as a check on excessive sentencing, regardless of the legislature's intention. Part II, below, will consider why legislatures may not deserve the level of deference state courts currently give them.

II. The Flaws of Legislatures

A. The Merits of Proportionality Review

Before considering the most successful argument against aggressive proportionality review, this Part points out two potential areas of controversy that courts have *not* used to discredit proportionality review. First, courts agree that proportionate sentences are an end worth pursuing. Punishments should match crimes, not exceed them. Second, the United States Supreme Court and almost all state supreme courts agree that the Eighth Amendment and its state equivalents guarantee proportionate sentences.[140] Although Justices Scalia and Rehnquist have argued that the Eighth Amendment does not contain a proportionality guarantee,[141] and some states cite their language approvingly,[142] their opinion is in the minority in both the Supreme Court and in the state courts.[143]

The basis for the judiciary's abdication of proportionality review is thus not based on controversy over whether proportionality is worthwhile or whether it is constitutionally guaranteed. A disproportionate sentence is an unconstitutional one. Instead, courts' reluctance to review sentences relies on assumptions about the institutional roles of courts versus legislatures. Determining the appropriate sentence is "substantive" and therefore "properly within the province of legislatures, not courts."[144] Legislatures reflect

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[140] *See* Harmelin v. Michigan, 501 U.S. 957, 997 (1991); *see, e.g.*, Mitchell v. State, 84 So. 3d 968, 995 (Ala. Crim. App. 2010) ("This Court need not decide whether Art. I, § 15, affords broader protections than the Eighth Amendment.").

[141] *Harmelin*, 501 U.S. at 965.

[142] *See* Jackson v. State, 740 So. 2d 832, 835 (Miss. 1999).

[143] For a rare exception, where a state court finds no proportionality guarantee in its cognate state clause, see *Atchison v. State*, 124 S.W.3d 755, 760 (Tex. Ct. App. 2003).

[144] *Harmelin*, 501 U.S. at 998.

the will of the people, and judicial intervention would be mere policymaking that judges are ill suited to undertake.

This Part's suggestion that broken politics and misaligned incentives undermine legislative and prosecutorial judgments on sentence length is limited. It does not justify judicial intervention on nearly any topic merely because the politics are sufficiently broken. The authority of courts to review sentence length for proportionality is not at issue. The only question is the methodology that courts should use to determine which sentences are proportionate and which are not. Most states currently argue that courts lack the institutional competence to determine proportionality and thus that the proportionality guarantee exists solely at the legislative stage. This Part attempts to demonstrate that judicial reliance on this conception of legislative competence is wrong.

B. The Institutional Politics of Criminal Law

In granting powerful deference to state legislatures, the judiciary relies on two assumptions: first, that state laws embody a genuine legislative judgment about the retributive blameworthiness of criminal defendants, and second, that state legislatures' criminal statutes determine sentencing policies in practice. Both assumptions are deeply flawed, and the institutional politics of criminal lawmaking help to explain why.

State criminal codes are a mess of overlapping crimes and contradictory punishments.[145] William Stuntz in *The Pathological Politics of Criminal Law* puts it simply: "American criminal law's historical development has borne no relation to any plausible normative theory — unless 'more' counts as a normative theory."[146] The few exceptions that suggest that legislators may be working off of any theory of punishment are — like campaigns for the reform of rape law and drunk driving penalties — always movements towards broader liability rules, never narrower.[147] As we will see below, prosecutorial discretion ensures that legislatures need not worry about suffering political consequences for overshooting the appropriate level of punitiveness.

In enacting criminal statutes, the goal of meting out the just deserts of criminal activity is often overshadowed by two other goals — making convictions more likely and taking popular symbolic stands.

Legislatures can make convictions more likely by either broadening liability or increasing sentences. Enacting new criminal statutes overlapping with existing ones ensures that if criminal defendants cannot be caught for one crime, they likely can be caught for something else. Criminalizing the

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[145] William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001).

[146] *Id.* at 508.

[147] *Id.*

possession of burglars' tools[148] and the possession of drug paraphernalia[149] allows law enforcement to target suspects without proving essential elements of the behavior actually being targeted, burglary and drug use.[150] The multitude of statutes also allows prosecutors to "charge-stack," charging several different, overlapping crimes to arrive at vast potential sentences.[151] Increasing the potential cost of a conviction induces defendants to plead guilty.[152] Guilty pleas are best-case scenarios for legislators, who wish to see the guilty punished but ideally at a low cost.[153]

One might imagine that legislatures would face public outcries from such broad criminal liability, but prosecutorial discretion relieves them of this risk.[154] The prosecution of sympathetic defendants is rare because prosecutors themselves are political actors attempting to remain popular.[155] When the stray prosecutor does target politically sympathetic defendants, the public — aware of the discretion prosecutors have in charging — blames the prosecutor, not the legislature.[156] In a canonical example, the public expressed outrage at the overreach of Kenneth Starr in his prosecution of President Bill Clinton, not at Congress for the breadth of federal obstruction of justice and perjury laws.[157] More recently, the public outrage after the suicide of computer hacker Aaron Swartz during his prosecution for computer fraud was directed almost entirely at his prosecutor, Carmen Ortiz.[158]

The United States Supreme Court could have slowed this march towards ever-increasing criminal liability with constitutional regulation, but it did not. There is a plausible claim that the Double Jeopardy Clause should not allow defendants to face charges from several overlapping statutes. The Court in *United States v. Dixon*,[159] however, found that as long as each offense requires proof of a fact that another does not, the prosecution may charge and punish any number of offenses on the same conduct.[160] The Court also could have used the Due Process Clause to forbid prosecutors from charging wildly unfair sentences to induce plea bargains. In *Bordenkircher v. Hayes*,[161] a prosecutor threatened a defendant with a recidi-

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[148] *See, e.g.*, IOWA CODE § 713.7 (2013).
[149] *See, e.g.*, N.C. GEN. STAT. § 90-113.22 (2013).
[150] *See* Stuntz, *supra* note 145, at 516.
[151] *Id.* at 520.
[152] *Id.*
[153] *Id.* at 536–37.
[154] *Id.* at 548.
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *See, e.g.*, Tim Wu, *How the Legal System Failed Aaron Swartz — and Us*, NEW YORKER (Jan. 14, 2013), http://www.newyorker.com/online/blogs/newsdesk/2013/01/everyone-interesting-is-a-felon.html, *archived at* http://perma.cc/R9LF-8HYM ("The prosecutors forgot that, as public officials, their job isn't to try and win at all costs but to use the awesome power of criminal law to protect the public from actual harm.").
[159] 509 U.S. 688 (1993).
[160] *Id.*
[161] 434 U.S. 357 (1978).

vist statute's mandatory life sentence if the defendant did not plead guilty to writing a forged check.[162] The Court found no constitutional problem when the prosecutor followed through on his threat and forced the defendant into a life sentence for forging an eighty-eight dollar check.[163]

The combination of a criminal code growing ever more punitive and complete prosecutorial discretion results in a criminal system run not according to the rules of the lawmakers but instead to the rules of the law enforcers. As William Stuntz notes, "law enforcers, not the law, determine who goes to prison and for how long."[164] "Anyone who reads criminal codes in search of a picture of what conduct leads to a prison term, or who reads sentencing rules in order to discover how severely different sorts of crimes are punished, will be seriously misled."[165]

In addition to making convictions more likely, criminal law also allows legislators to take popular symbolic stands. In 1992, a wave of media stories about "carjacking" gave the public the impression that the phenomenon was common.[166] State legislatures in Florida, Louisiana, Michigan, New Jersey, and other states rushed to pass statutes that criminalized the armed robbery of cars.[167] They did so even though existing criminal law already punished the conduct at issue very severely with laws against homicide, assault, robbery, and auto theft.[168] The result was a series of carjacking statutes that are almost never invoked.[169] Such actions taken for symbolic reasons further broaden criminal liability, granting prosecutors more power to charge their way to disproportionate sentences.

Sentencing statutes are particularly susceptible to such symbolic odes to the seriousness of the struggle against crime. Most of the nuance in criminal law is in actus reus elements and mens rea standards, which do not lend themselves to inspiring press conferences.[170] Mandatory minimums and "three-strikes" policies, however, are simple enough for voters to understand and fit comfortably in a stump speech.[171]

The state proportionality cases discussed above in section I.C demonstrate the significance of prosecutorial discretion. Legislatures enact draconian antirecidivist statutes for their symbolic value with the expectation that prosecutors will use them to coerce plea deals and follow through only on serious criminals. When prosecutors decide instead to use them against a defendant like Jimmy Fain, who committed three petty offenses decades

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[162] *Id.*
[163] *Id.* at 358.
[164] *See* Stuntz, *supra* note 145, at 509.
[165] *Id.* at 506–07.
[166] *Id.* at 531.
[167] *See* FLA. STAT. § 812.133 (2013); LA. REV. STAT. § 14:64.2 (2013); MICH. COMP. LAWS § 750.529a (2013); N.J. STAT. § 2C:15-2 (2013).
[168] *See* Stuntz, *supra* note 145, at 531.
[169] *Id.* at 532.
[170] *Id.* at 530.
[171] *Id.*

apart, no discretion is left in the system to block the sentencing enhancements.[172] When reviewing such a sentence, the Washington Supreme Court pledged great deference to the legislature, with its institutional advantages in measuring public sentiment and crafting policy.[173] In practice, however, local prosecutors, not Washington's legislators, determined the sentence. Even under the prevention of absurdities model, considering whether the legislature truly *intended* the result as retributively proper may not be the right question to ask. The legislature was taking a symbolic stand against violent crime and giving prosecutors a tool to extract pleas, not considering the just deserts of Jimmy Fain.

C. The "Correctional Free Lunch," Surface Politics, and the Trial Penalty

Although the above section demonstrates why states have disproportionate sentences *available* for a wide range of conduct, the institutional politics of criminal law do not necessarily explain why states are awash in lengthy sentences that require judicial intervention. Even if courts were incorrect in assuming legislatures could enforce the constitutional mandate of proportionality better than themselves, because prosecutors are the ones actually determining sentence length, why would prosecutors be so poor at the job that courts should intervene? After all, prosecutors are also politically accountable[174] local officials with expertise in crime and punishment.

This section suggests three reasons why prosecutors might err in the direction of disproportionate punishment. First, state prosecutors are a part of local political systems, but states pay for prison sentences. This externalization leads prosecutors to overconsume prison sentences because they do not bear their costs. Second, the conventional politics of sentencing are alarming. The general public pushes for ever more punitive policies, influenced in large part by attitudes on race. Third, at its current funding levels, the criminal justice system requires that a vast majority of convictions come from plea bargaining. To induce pleas, prosecutors must charge high and be willing to follow through on their threats, resulting in a "trial penalty" that exceeds the retributive fit of the crime even in the opinion of the prosecutors.

Prosecutors are politically accountable only to their counties or municipalities, not to their states.[175] States, however, pay for and administer the prison system.[176] The states' beneficence does not extend to other, cheaper alternatives to prison, such as reentry programs or probation systems, whose

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[172] State v. Fain, 617 P.2d 720, 726 (Wash. 1980).
[173] *Id.* at 728.
[174] Most local prosecutors are elected. *See* Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 Ohio St. J. Crim. L. 581, 581 (2009).
[175] W. David Ball, *Defunding State Prisons*, 50 Crim. L. Bull. 1, 2 (2014).
[176] *Id.*

costs are typically borne by localities.[177] Although a year in prison tacked on to a sentence is a far more expensive response to crime than a rehabilitation program, to the prosecutors charging the case it is far cheaper. These skewed financial incentives help make prosecutors particularly ill-suited to determine proportionate sentences.

Another factor that may lead prosecutors to err in the direction of lengthy sentences is the surface politics of sentencing. By focusing on the perniciousness of institutional politics on sentencing policies, Stuntz likely undersells the perniciousness of conventional politics on them. On sentencing policies, Stuntz writes that in contrast to institutional politics, "Surface politics, the sphere in which public opinion and partisan argument operate, ebb and flow, just as crime rates ebb and flow."[178] Harsh sentencing preferences, however, rarely ebb. A recent report documents that increased advertising in judicial elections resulted in more convictions and harsher sentences.[179] The report documents numerous attack ads highlighting a judge's excessive leniency, but none that cast a judge as too punitive.[180]

Stuntz's claim that public opinion on sentencing policies vacillates is also suspect. Public opinion scholars have written that "public punitiveness does not seem to fluctuate — as one might expect of a rational public — as crime rates have risen, steadied, and fallen over the past two decades. Instead, preferences for harsher penalties have remained entrenched at high levels."[181]

Social scientists have suggested that racial attitudes go a long way in explaining this phenomenon. In one study, scholars found that after controlling for other variables, the prejudice of whites was a statistically significant factor in determining whether people thought criminals received sufficiently punitive sentences.[182] Another demonstrates that "racial typification," the tendency to associate African Americans and crime, is a statistically significant predictor of whites' level of support for increasing sentence length.[183] This research fits within a much broader literature, one that includes empirical, historical, and ethnographic research and goes beyond sentencing specif-

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[177] *Id.* at 3.

[178] Stuntz, *supra* note 145, at 510.

[179] *See* BILLY CORRIHER, CRIMINALS AND CAMPAIGN CASH: THE IMPACT OF JUDICIAL CAMPAIGN SPENDING ON CRIMINAL DEFENDANTS 9 (2013), *available at* http://www.americanprogress.org/wp-content/uploads/2013/10/CampaignCriminalCash-6.pdf, *archived at* http://perma.cc/3FPX-7J46.

[180] *Id.*

[181] Francis T. Cullen et al., *Public Opinion About Punishment and Corrections*, 27 CRIME & JUST. 1, 5 (2000) (citation omitted).

[182] Steven F. Cohn et al., *Punitive Attitudes Toward Criminals: Racial Consensus or Racial Conflict?*, 38 SOC. PROBS. 287, 291–93 (1991).

[183] Ted Chiricos, *Racial Typification of Crime and Support for Punitive Measures*, 42 CRIMINOLOGY 374 (2004).

ically to lodge the findings in the larger claim that racial politics are a powerful influence on the criminal justice system.[184]

These studies, of course, do not imply that punitive sentencing statutes are unconstitutional merely because they are in some respects a response to racially resentful public attitudes.[185] They do help undercut the notion, however, that an institution's ability to reflect public attitudes is an unmitigated good. Stuntz may understate the perverse incentives in conventional politics, but he has also written that:

> A lot of constitutional theory has been shaped by the idea, made famous by Carolene Products footnote four, that constitutional law should aim to protect groups that find it hard or impossible to protect themselves through the political process. If ever such a group existed, the universe of criminal suspects is it.[186]

Criminal suspects' inability to protect themselves is in large part due to race and class, and state courts should not be so eager to leave the decision of sentence length to prosecutors simply because they are more responsive to the public than the judiciary.

Prosecutors are also liable to systematically seek sentences that exceed their own opinions of retributive fit because of their use of the "trial penalty" — additional punishment sought to penalize the defendant for taking the case to trial.[187] Recall that in *Bordenkircher*, the prosecutor explicitly made a charge under a habitual offender statute conditional on taking the case to trial.[188] The prosecutor himself "deemed it unreasonable and not in the public interest to put this defendant in jeopardy of a sentence of life imprisonment," but threatened the charge to induce a plea bargain and then followed through when the defendant refused to plead out.[189]

The criminal justice system needs plea bargaining to produce the vast majority of convictions to function at current funding levels, a fact of which prosecutors are well aware.[190] Prosecutors must follow through on their

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[184] *See generally, e.g.*, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS (2010).

[185] Any claim based even remotely on such grounds would arouse the Court's fear, found in *McCleskey v. Kemp*, of "too much justice." 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

[186] William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 20 (1996).

[187] For a discussion of the trial penalty, see Rachel E. Barkow, *Institutional Design and the Policing of Prosecutors: Lessons from Administrative Law*, 61 STAN. L. REV. 869, 879 (2009).

[188] Bordenkircher v. Hayes, 434 U.S. 357, 358 (1978).

[189] *Id.* at 371 (Powell, J., dissenting).

[190] This necessity was true even before the modern advent of mass incarceration. *See* Santobello v. New York, 404 U.S. 257, 260 (1971). "The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the

charges or become known as pushovers whose threats are mere bluffs.[191] Plea bargaining is a repeat-play game. The same lawyers negotiate pleas with one another many times.[192] Prosecutors thus may threaten criminal charges that they do not believe retributively fit crimes to induce plea bargains, and then be forced to follow through on their threats when defendants refuse the bargain. These three incentives help explain how a defendant can receive a sentence that not even the prosecutor believes to be a retributive fit for the crime.

D. Federalism, Not Separation of Powers

At the root of much concern about federal proportionality review is not the separation of powers, but, instead, federalism. This concern may be a reasonable one for the Supreme Court, but state courts should not interpret their constitutions in lockstep with Court decisions made on federalism grounds.

The Supreme Court's noncapital proportionality jurisprudence is deeply adverse to intervention into state criminal justice systems. In *Harmelin*, Justice Scalia argued against the interjurisdictional comparison of sentences as evidence of disproportionality, writing that, "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State."[193] Justice Powell's dissent in *Rummel* described as dispositive the violation of "principles of federalism" and the majority's fears that "the courts would intervene in state criminal justice systems at will."[194] In *Solem*, the lone case in which the Court struck down a term of years, Justice Burger opened his dissent by writing that the majority "trespass[ed] gravely on the authority of the states."[195] He went on to write that the majority "trample[d] on fundamental concepts of federalism."[196]

The Court's Eighth Amendment federalism concerns are not limited to noncapital proportionality review but extend to the far more aggressive capital review as well. In *Atkins v. Virginia*,[197] the Court used its aggressive capital standard to forbid the execution of intellectually disabled defend-

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Federal Government would need to multiply by many times the number of judges and court facilities." *Id.*

[191] William J. Stuntz, Bordenkircher v. Hayes*: Plea Bargaining and the Decline of the Rule of Law*, *in* Criminal Procedure Stories 351, 354 (Carol S. Steiker ed., 2006).

[192] *Id.*

[193] Rummel v. Estelle, 445 U.S. 263, 282 (1980).

[194] *Id.* at 303–04 (Powell, J., dissenting).

[195] Solem v. Helm, 463 U.S. 277, 304 (Burger, J., dissenting).

[196] *Id.* at 309.

[197] 536 U.S. 304 (2002).

ants.[198] Justice Rehnquist wrote in dissent that the majority's method was "antithetical to considerations of federalism."[199]

State courts, of course, should give federalism concerns zero weight — after all, they are *part* of state criminal justice systems. The quotations cited above in *Harmelin*, *Rummel*, and *Solem* do not refer to state legislatures, but to entire criminal justice systems in which the state courts play a crucial role.

In *Fain*, the Washington Supreme Court made just this observation. The court wrote:

> the task before us is to decide whether Fain's sentence is 'cruel' within the meaning of the Washington Constitution. We observe that this approach frees us from at least one of the obstacles articulated by the majority in *Rummel*: the concern over the fear of the abuse of principles of federalism.[200]

State courts should pay no heed to tepid federal proportionality review insomuch as the Supreme Court's caution is based on a fear of intervention into the states, not intervention into legislatures. The fact that just such a fear plays a powerful role in the federal jurisprudence argues against the state practice of treating federal proportionality review as binding.

III. Defending Aggressive Proportionality Review in the States

Even were the analysis from Part II accepted, advocates against proportionality review believe there are other reasons for the courts not to intervene. First, many argue that states should interpret parallel constitutional clauses in lockstep with their federal equivalents unless there is a principled reason for distinguishing them, which they do not find with respect to the Eighth Amendment. Second, regardless of the legislature's flaws, proportionality review cannot consist of open-ended judicial policymaking. Some argue that aggressive proportionality review would inevitably become unmoored from objective criteria and instead simply consist of subjective opinions dressed up as constitutional rules. This Part will address both criticisms in turn.

A. Reading Parallel Provisions Differently

In the aftermath of *People v. Bullock* — the Michigan case on remand from *Harmelin* that distinguished between the Michigan and federal constitutions — a Note in the Harvard Law Review castigated the Michigan Supreme Court for "departing from the holding of the United States Supreme

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[198] *See id.* at 308.
[199] *Id.* at 322 (Rehnquist, C.J., dissenting).
[200] State v. Fain, 617 P.2d 720, 723 (Wash. 1980).

Court without providing compelling reasons."[201] The Note criticized Michigan for finding a significant textual difference between "and" and "or," for "misread[ing] history," and for misunderstanding Michigan's own precedent.[202] By putting forth these unpersuasive distinctions, "the court left significant doubts about its commitment to adhere to federal interpretation when interpreting parallel state constitutional provisions."[203]

Many state courts agree that, in the absence of compelling reasons, interpreting a parallel proportionality provision differently than the United States Supreme Court lacks legitimacy.[204] The interest in uniformity and legitimacy of interpretation requires the "lockstep" approach, in which federal interpretation attains a presumption of correctness from which state courts should be wary of parting.[205]

Scholars and some courts, however, have argued for a "primacy approach" to cognate state provisions that views United States Supreme Court opinions as mere persuasive authority when necessary to protect individual rights.[206] This movement, begun by Justice Brennan in *State Constitutions and the Protection of Individual Rights*,[207] encourages courts to find protection of rights and liberties within state constitutions.

Accepting some value in the uniformity and predictability of the lockstep approach, there are several compelling reasons for states to view federal precedent as merely persuasive and interpret their state constitutions independently in the context of proportionality review. One has already been addressed — the Supreme Court's federalism concerns. State courts should not march in lockstep with the Supreme Court when the Court demurs to avoid intervening into a state's criminal justice system.

There are other reasons as well for states to take agency over their own proportionality clauses. First, of course, some state proportionality provisions are not parallel to the Eighth Amendment, and state supreme courts have unquestioned authority to interpret unique provisions of their constitutions. The state constitution of Illinois provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship."[208] This provision is obviously not identical to the Eighth Amendment, and Illinois courts are plainly justified in developing their own methodologies and standards of re-

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[201] Note, *State Constitutions — Cruel or Unusual Punishment — Michigan Supreme Court Casts Doubt on Its Commitment to Adhere to Federal Interpretations of Parallel Constitutional Provisions*, 106 HARV. L. REV. 1230 (1993).

[202] *Id.* at 1233–35.

[203] *Id.* at 1235.

[204] *See* Robert F. Williams, *In the Supreme Court's Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 354–57 (1984).

[205] *See* Lawrence Friedman, *The Constitutional Value of Dialogue and the New Judicial Federalism*, 28 HASTINGS CONST. L.Q. 93, 102 (2000).

[206] *Id.* at 95.

[207] William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

[208] ILL. CONST. 1970, art. 1, § 11.

view to consider proportionality challenges, as they have done.[209] Indiana's constitution forbids cruel and unusual punishment and demands that "All penalties shall be proportioned to the nature of the offense,"[210] but its supreme court recently wrote without any further analysis that "[a]lthough the language is not the same as the United States Constitution, the protections are the same."[211] Even states with cruel *or* unusual punishment clauses, like Michigan, have made respectable arguments that textual and historical differences between the two phrases make those clauses nonparallel to the Eighth Amendment.[212]

Another justification for the primacy approach is especially fitting in proportionality review — what Lawrence Friedman calls "the constitutional value of dialogue."[213] Justice Brennan envisioned state court experiments in heightened protection leading to creative and innovative results, producing a "growing dialogue between the Supreme Court and the state courts on the topic of fundamental rights."[214] By interpreting cognate provisions in different ways, state courts provide alternative methods for constitutional clauses to be analyzed and considered.

Such a dialogue would be particularly beneficial in considering proportionality because a main concern of the Supreme Court is that aggressive proportionality review is unworkable.[215] This administrability argument is an empirical claim that state courts could test to either confirm or disprove. Julia Sheketoff in *State Innovations in Noncapital Proportionality Doctrine* argues that even the limited proportionality review occurring in a minority of states has already disproven the Supreme Court's statements about proportionality review's administrability.[216] Whether or not she is right, if more states attempt robust proportionality review, the Supreme Court's bromides about workability would face a real test. More robust proportionality review at the state level would teach the Supreme Court much about whether courts are institutionally capable of implementing aggressive noncapital proportionality review.

B. Defending the Ability of Judges to Determine Sentences

Opponents of proportionality review also claim that any constitutional regulation of sentences would inevitably rest on the whims of individual

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[209] *See, e.g.*, People v. Davis, 177 Ill. 2d 495 (1997).
[210] IND. CONST. art. I, § 16.
[211] Conley v. State, 972 N.E.2d 864, 879 (Ind. 2012).
[212] *See* People v. Bullock, 485 N.W.2d 886, 872 (Mich. 1992).
[213] *See* Friedman, *supra* note 205, at 93.
[214] William J. Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550 (1986).
[215] *See* Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1182 (2009).
[216] Julia Sheketoff, *State Innovations in Noncapital Proportionality Doctrine*, 85 N.Y.U. L. REV. 2209, 2215–16 (2010).

judges. In one sense, the concern is both predictable and sensible — after all, any judicial intervention into democratically legitimate legislation should arouse separation of powers concerns. In another sense, however, the concern is strange — judges are given great deference on exactly these decisions in the context of criminal sentencing. As the Court noted in *Solem*, the assumption that "courts are competent to judge the gravity of an offense" is "justified."[217]

Although sentencing judges are present in the room while appellate judges are merely examining a cold record, literature from social psychology has begun to demonstrate that the benefits of being in the room in determining factors like trustworthiness are virtually nonexistent.[218] Judges, including appellate judges, can make competent decisions about blameworthiness.

The Court in *Solem* articulates some of the many principles that could guide decisions of relative culpability that need not rely on the judiciary's whims.[219] Stealing a million dollars is worse than stealing one hundred; a lesser-included offense should not be punished more than the greater offense; attempts are less serious than completed crimes; negligent conduct is less blameworthy than intentional conduct.[220] Judges can evaluate sentences based on these widely accepted principles without whimsically vacating sentences they dislike.

If judges are indeed incompetent to make judgments about comparative blameworthiness, the accusation of judicial policymaking arouses an even deeper concern: if the judiciary is too institutionally incompetent to determine that stealing a golf club does not merit a life sentence,[221] then it is too institutionally incompetent to evaluate substantive criminal law in any respect. If this claim is true, the judiciary must abdicate review of substantive criminal law entirely to legislators and prosecutors and rely solely on procedure to protect the individual rights of defendants. The judiciary has largely left substantive criminal law unregulated in place of procedure, and many scholars believe the results have been counterproductive.[222]

More protective criminal procedure would make the job of prosecutors and police difficult, but legislators do not want law enforcement's job to be difficult.[223] The legislative response of broadening the substance of criminal law allows the state to do an end run around more protective procedure.[224] For example, probable cause makes arrests difficult, but turning traffic of-

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[217] Solem v. Helm, 462 U.S. 277, 292 (1983).

[218] *See* DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 167–68 (2012).

[219] *Solem*, 462 U.S. at 293–94.

[220] *Id.*

[221] *See* Ewing v. California, 538 U.S. 11, 20 (2003).

[222] *See, e.g.*, William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 54 (1997) (arguing that judges should play a larger role in defining crimes and determining sentences).

[223] *Id.* at 7.

[224] *Id.*

fenses into crimes undoes the obstacle and then some.[225] Expanded criminal procedure can thus cause overcriminalization, and overcriminalization leads to fewer rights for criminal defendants, not more. Stuntz ends his seminal article on the subject of the perverse way increased procedure can lead to fewer rights in practice with a plea for a new constitutional path that eschews procedure for substance. His suggestion? "[A] proportionality rule, requiring that the conduct criminalized [be] serious enough to justify the punishment attached to it."[226]

Conclusion

Inmates in prisons across the country are facing punishments that vastly exceed their culpability. The Supreme Court has nominally given these inmates an avenue of relief but has, in practice, left a test that no one can meet. Most states have followed the Court, writing their proportionality guarantees virtually out of existence.

States are losing an opportunity to correct injustice on the basis of deference to legislatures that is largely unearned. The deference they claim to give to legislatures too often ends up as deference to prosecutors instead. Due to misaligned financial incentives, political pressure for punitive policies, and the necessity of trial penalties, granting such power to prosecutors can end in disproportionate sentences.

State courts are also ruling in lockstep with doctrines that crucially rely on federalism concerns. Justice Brennan has written that when federal courts abdicate from providing remedies on federalism grounds, it is "a clear call to state courts to step into the breach . . . . With federal scrutiny diminished, state courts must respond by increasing their own."[227] The federal courts have indeed diminished their scrutiny, and it is time for states to step into the breach.

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[225] *Id.*
[226] *Id.* at 66.
[227] Brennan, *supra* note 207, at 503.