



2005

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Recommended Citation

Elizabeth N. Dewar, *The Inadequacy of Fiscal Constraints as a Substitute for Proportionality Review*, 114 *Yale L.J.* (2005).
Available at: <http://digitalcommons.law.yale.edu/ylj/vol114/iss5/7>

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Legislation Comment

The Inadequacy of Fiscal Constraints as a Substitute for Proportionality Review

An Act Concerning Prison Overcrowding, Pub. Act No. 04-234, 2004 Conn. Acts 982 (Reg. Sess.).

The Constitution does not prohibit “everything that is intensely undesirable.”¹ In particular, Justice Scalia argues, the Eighth Amendment does not prohibit disproportionately long prison sentences.² Yet Scalia seems to offer some consolation to those who worry about the “intensely undesirable” prospect of disproportionate punishments: He implies that the cost of incarceration acts as a check on the length of prison terms, a check loosely standing in for proportionality review.³ Thus, Scalia tenders an economic rationale for his contested interpretation of the Eighth Amendment. Unfortunately, his rationale is faulty.

Fourteen years after *Harmelin v. Michigan*, Scalia’s allusion to the costs of incarceration seems prescient: Grappling with budget deficits, state legislators across the country have indeed attempted to save money by curtailing the growth of their prison populations.⁴ However, this wave of

1. *Harmelin v. Michigan*, 501 U.S. 957, 986 n.11 (1991) (opinion of Scalia, J.) (upholding a mandatory life sentence for possession of 672 grams of cocaine pursuant to a Michigan statute).

2. *Id.* at 962. Only Chief Justice Rehnquist joined the parts of the opinion in which Justice Scalia argues that the Eighth Amendment contains no proportionality principle. The Amendment states, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

3. *Id.* at 978 n.9.

4. For a comprehensive review of such laws in the 2003 legislative sessions, see JON WOOL & DON STEMEN, VERA INST. OF JUSTICE, CHANGING FORTUNES OR CHANGING ATTITUDES?: SENTENCING AND CORRECTIONS REFORMS IN 2003 (2004), available at http://www.vera.org/publication_pdf/226_431.pdf. “In addition to continued cutting of administrative costs, more than 25 states took steps to lessen sentences and otherwise modify sentencing and corrections policy” *Id.* at 1. The Vera Institute of Justice also convened a symposium of state legislators to discuss current policy challenges and the political climate surrounding them. See ROBIN CAMPBELL, VERA INST. OF JUSTICE, DOLLARS & SENTENCES:

legislation does not support Scalia's further suggestion that the costs of imprisonment should allay concern about disproportionate sentences.⁵ This Comment examines one typical response to rising prison costs, Connecticut's Act Concerning Prison Overcrowding.⁶ The Act trimmed small amounts of time served for a large number of incarcerated people, without altering the statutory penalty for any particular crime. Such laws are common because they quickly reduce corrections costs without making legislators appear "soft on crime." But, written to control the aggregate time served in states' prisons, they neither purport to address nor in effect do significantly alter the proportionality of individual sentences. Thus, although Scalia correctly posited the existence of fiscal limits to incarceration, he erred in asserting that fiscal considerations might obviate the need for proportionality review.

This Comment does not attempt to resolve the debate among legal historians about the existence of a proportionality principle in the Cruel and Unusual Punishments Clause. But it does refute the hypothetical rationalization Scalia offers to support his interpretation of the Founders' intent over that of the dissenters. Part I sets forth the relevant portion of Scalia's argument in *Harmelin*. Part II discusses the Connecticut Act, a representative example of states' attempts to reduce prison costs. Part III debunks Scalia's reasoning in *Harmelin* and concludes that fiscal checks are not a substitute for proportionality review.

I

Justice Scalia proposes in *Harmelin* that the cost of incarceration relieves the judiciary from scrutinizing the proportionality of prison sentences. Part of his argument is that the difference in adjectives among the *Excessive Fines*, *Excessive Bail*, and *Cruel and Unusual Punishments* Clauses signifies that while excessive fines and bail are barred, excessive punishments are not; the Framers "chose, for whatever reason, not to include within [the Eighth Amendment] the guarantee against disproportionate sentences that some State Constitutions contained."⁷ The

LEGISLATORS' VIEWS ON PRISONS, PUNISHMENT, AND THE BUDGET CRISIS (2003), available at http://www.vera.org/publication_pdf/204_398.pdf.

5. This Comment leaves aside federal sentencing laws, in part because the budgetary considerations at the federal level are so different from those of the states.

6. An Act Concerning Prison Overcrowding, Pub. Act No. 04-234, 2004 Conn. Acts 982 (Reg. Sess.).

7. *Harmelin*, 501 U.S. at 985. The central contention of Justice Scalia's opinion, which Chief Justice Rehnquist joined and with which Justice Thomas has since voiced his agreement, see *Ewing v. California*, 538 U.S. 11, 32 (2003) (Thomas, J., concurring), is that the Clause does not bar excessively long prison sentences because, although such sentences may be cruel, imprisonment is not an unusual punishment per se, see *Harmelin*, 501 U.S. at 967. After arguing that the Framers did not intend that the Amendment should encompass a proportionality principle,

scant legislative history of the Amendment⁸ is silent on this “choice,” and Scalia delves extensively into the history of the equivalent provision in the English Declaration of Rights to make his argument.⁹ However, he acknowledges that some historians, cited by the dissenters,¹⁰ disagree with his interpretation that both the English and American provisions exclude a proportionality principle for prison sentences.¹¹

In the context of seeking “*the most plausible meaning*”¹² from this conflicted history, Scalia posits a reason of his own for why the Founders might have intentionally excluded a proportionality principle from the Cruel and Unusual Punishments Clause. He asks rhetorically, “[W]hy would any rational person be careful to forbid the disproportionality of fines but provide no protection against the disproportionality of more severe punishments?”¹³ His response: “Imprisonment, corporal punishment, and even capital punishment cost a State money; fines are a source of revenue. As we have recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit.”¹⁴ Note the illogical gap between Scalia’s common-sense notion and the use to which he puts it: Courts should scrutinize the government “more closely when the State stands to benefit”; therefore, it “makes sense” to give *no scrutiny* to the length of prison sentences. Although this reasoning is not crucial to Scalia’s argument against proportionality review, it is his only explanation for why the Framers might rationally have chosen to impose a proportionality requirement for bail and fines, but not for punishments.

The idea that courts should scrutinize the government more closely when it stands to gain financially evidently appeals to jurists. Justices

id. at 966-85, Scalia asserts that “proportionality does not lend itself” to an analysis using “relatively clear historical guidelines and accepted practices that enable judges to determine” which sentences are proportionate, *id.* at 985 (emphasis omitted). In contrast, Justices O’Connor, Kennedy, and Souter, concurring in the judgment, crafted from the Court’s precedents a test to strike down “extreme sentences that are grossly disproportionate to the crime,” *id.* at 1001 (Kennedy, J., concurring) (internal quotation marks omitted), but did not find Harmelin’s to be such a sentence, *id.* at 1001-05.

8. See *Harmelin*, 501 U.S. at 979 (opinion of Scalia, J.). There are only two short comments in the congressional record. Legislators objected, first, ironically, that the Amendment’s language was “too indefinite” and, second, that although the Amendment “seems to express a great deal of humanity,” it “seems to have no meaning in it” because “we ought not to be restrained from making necessary laws” until such time as “a more lenient mode of correcting vice and deterring others from the commission of it could be invented.” 1 ANNALS OF CONG. 754 (Joseph Gales, Sr. ed., 1789). It was nevertheless “agreed to by a considerable majority.” *Id.*

9. The Amendment’s language and syntax come from the English Declaration of Rights of 1689. See *Harmelin*, 501 U.S. at 966. Scalia also draws on the state ratifying conventions, state constitutions, and early judicial decisions. *Id.* at 979-85.

10. *Id.* at 1010, 1011 n.1 (White, J., dissenting).

11. *Id.* at 974-75, 981 (opinion of Scalia, J.).

12. *Id.* at 977 n.6.

13. *Id.* at 978 n.9 (paraphrasing Justice White’s dissent).

14. *Id.* at 979 n.9.

Kennedy and Souter have both since quoted Justice Scalia's footnote,¹⁵ and lower courts frequently cite it when reviewing the proportionality of fines or when commenting more generally on the government's financial incentives.¹⁶ But Scalia moves one step further in proposing that financial *disincentives* might justify the *nonexistence* of scrutiny of the length of prison sentences. A recent wave of fiscally driven legislation aiming to reduce prison populations refutes this notion that fiscal pressures can replace proportionality review by the courts.

II

State legislatures have indeed passed laws to reduce the size or growth of their prison populations in recent years. During 2003 alone, more than half the states passed such laws, changing rules on probation and parole violations; expanding early release programs; and, in a few states, repealing mandatory minimums or otherwise reducing sentences.¹⁷ Empirical and anecdotal evidence suggests that these changes have come about primarily due to state budget crises.¹⁸

Following years of growth in Connecticut's incarcerated population,¹⁹

15. *Hudson v. United States*, 522 U.S. 93, 114 (1997) (Souter, J., concurring); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 56 (1993) (Kennedy, J.).

16. *See, e.g.*, *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974, 984 (9th Cir. 1995); *United States v. 38 Whalers Cove Drive*, 954 F.2d 29, 39 (2d Cir. 1992); *People v. \$1,124,905 U.S. Currency*, 685 N.E.2d 1370, 1391 (Ill. 1997); *One (1) Charter Arms, Bulldog 44 Special, Serial #794774 v. State ex rel. Moore*, 721 So. 2d 620, 624 (Miss. 1998).

17. WOOL & STEMEN, *supra* note 4, at 1. The survey found that six states made changes to their laws on technical probation and parole violation to facilitate release, *id.* at 6; eleven states "expanded emergency and early release mechanisms," many of which apply only to low-level or drug offenders, *id.* at 5; one state, Iowa, "decreased the amount of time violent offenders are required to serve from 85 to 70 percent" of their sentences, *id.*; and five states repealed mandatory minimums or otherwise reduced sentences, but only for drug offenses, *id.* at 7.

18. *See* CAMPBELL, *supra* note 4; RYAN S. KING & MARC MAUER, THE SENTENCING PROJECT, STATE SENTENCING AND CORRECTIONS POLICY IN AN ERA OF FISCAL RESTRAINT (2002), available at <http://www.sentencingproject.org/pdfs/9091.pdf>; WOOL & STEMEN, *supra* note 4; *see also* Michael Vitiello, *California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?*, 37 U.C. DAVIS L. REV. 1025, 1101 & n.614 (2004) (mentioning various fiscally motivated proposals for scaling back or repealing California's three-strikes law). *But see* WOOL & STEMEN, *supra* note 4, at 14 ("[W]hile the budget crises are providing the occasion for change, the reforms are often anchored in changing attitudes and philosophy."). It is difficult if not impossible to separate the waning of the crack cocaine and other drug epidemics (and the corresponding reduction in public outcry) from the budget crises in analyzing recent changes in drug sentencing; clearly both factors are important. Even the Michigan statute at issue in *Harmelin* has been amended: In 1998, the Michigan legislature moved to an optional rather than a mandatory life sentence and, in 2002, raised the triggering quantity from 650 to 1000 grams. MICH. COMP. LAWS § 333.7403(2)(a)(i) (2004); *see also* Gary Heinlein, *Michigan Eases Drug Sentences; Judges' Discretion Replaces Mandatory Terms for Offenders*, DETROIT NEWS, Dec. 29, 2002, at A1 (citing changing views on the efficacy of the policy, the waning of the crack epidemic, and prison overcrowding as causes of the change).

19. Between 1992 and 2003, the average number of people confined in Connecticut institutions rose by eighty-two percent. KEVIN P. JOHNSTON & ROBERT G. JAEKLE, AUDITORS OF PUB. ACCOUNTS, STATE OF CONNECTICUT: PERFORMANCE AUDIT: ALTERNATIVE

the legislature passed the Act Concerning Prison Overcrowding last year.²⁰ Styled as a budgetary measure,²¹ the Act focuses on the administration of parole and other forms of supervised release, but it excludes any consideration of the sentences for individual crimes.

The law's primary effect is to make the granting of parole and pardons more efficient. A reorganized Board of Pardons and Paroles is charged with implementing, inter alia, a "parole orientation program for all parole-eligible inmates" and an "incremental sanctions system for parole violations including, but not limited to, reincarceration."²² It also requires the Board to hold hearings for all eligible inmates and to "articulate for the record the specific reasons why such person and the public would not benefit" when it denies parole in any case.²³

The law also increases the number of people eligible to be released to alternative forms of state supervision. It authorizes the Board to transfer parolees to a "halfway-house group home or mental health facility, or to an approved community or private residence" eighteen months before their release date,²⁴ and authorizes the Department of Correction to release to an "approved residence" people incarcerated pretrial on most charges categorized as class D felonies or misdemeanors.²⁵ And the law creates "compassionate parole release" for people "physically incapable of presenting a danger to society" who have served at least half of their sentences.²⁶

In addition to these immediate changes, the Act calls for a legislative study of the fiscal impact of mandatory minimum sentences²⁷ and requires both the Department of Correction and the judicial branch to devise plans to

INCARCERATION 16 (2003), available at <http://www.state.ct.us/apa/pdf2003/Alternate%20Inc%20P302-P-03.pdf>. Between July and December 2002, thirteen of twenty Connecticut state prisons reported being over capacity during the entire period or for more than half the time. *Id.* at i.

20. 2004 Conn. Acts 982.

21. The bill sent to the Senate from the House began, "Passage of the bill results in significant costs and savings primarily related to increasing the supervision of offenders in the community and decreasing the incarceration of certain offenders." H.R. 5211, 2004 Gen. Assemb. (Reg. Sess.) (Conn. 2004).

22. § 1(e)(1)-(2), 2004 Conn. Acts at 985.

23. *Id.* § 3(d)-(e), 2004 Conn. Acts at 987-88. Previously the Board was required only to report regularly the number of eligible inmates not paroled.

24. *Id.* § 9, 2004 Conn. Acts at 990-91.

25. *Id.* § 10, 2004 Conn. Acts at 991.

26. *Id.* § 28, 2004 Conn. Acts at 1000. The provision does not apply to people convicted of capital felonies. *Id.*

27. *Id.* § 22, 2004 Conn. Acts at 997-98. Since the Act's passage, the General Assembly has not altered mandatory minimums, which are "specified in only a few instances" in Connecticut; most crimes carry only maximum sentences. Michael Lawlor, *Reforming Mandatory Minimum Sentences in Connecticut*, 15 FED. SENTENCING REP. 10, 14 (2002). Mandatory minimums include one year for a third conviction of driving under the influence, CONN. GEN. STAT. § 14-227(g) (2003), and five years for the selling of certain quantities of drugs by a non-drug-dependent person, with departures for minors or those with impaired mental capacity, *id.* § 21a-278.

“reduce by at least twenty percent” the number of people serving time for technical parole violations, the largest category of inmates.²⁸

The Act does not alter the penalty for any crime and, therefore, does not directly affect the proportionality of sentences under law. Moreover, it does not link reductions to differences in culpability among people who have committed the same crime, which might indirectly improve the proportionality of sentences. For instance, a legislature might save money by codifying further mitigating factors to be considered in sentencing. If the Act does mitigate any disproportionate sentences,²⁹ it mitigates them only indirectly and incompletely, by releasing offenders on parole earlier. Though a far less onerous form of state supervision than imprisonment, parole’s restrictions nevertheless carry the potential penalty of reincarceration.

III

Connecticut’s Act Concerning Prison Overcrowding, and the wave of laws of which it is a part, illustrate the political and economic reasons why fiscal limits are an inadequate substitute for proportionality review. Put simply, trimming small amounts of time from many offenders’ time served or reducing administrative inefficiencies enables legislators to save money without exposing themselves to the political cost of reconsidering sentences for individual crimes. The result is that these broad-based but shallow reductions affect the proportionality of penalties only for those crimes whose sentences are short in the first place. A reduction of a few months changes only negligibly the proportionality of sentences measured in years or decades. Such shallow cuts are the result of at least three factors influencing legislatures.

First, the legislative budget cycle imposes fiscal disincentives to cut long prison sentences. Making small reductions in the sentences for the most common crimes or easing the parole-granting process for all offenders translates into substantial and calculable gains in the short term—the relevant period for legislators under pressure in a fiscal crisis.³⁰ The need

28. § 26, 2004 Conn. Acts at 999. Parole violations without underlying criminal charges account for thirteen percent of the prison population. CONN. DEP’T OF CORR., ANNUAL REPORT 2002-2003, at 2 (2003), available at <http://www.ct.gov/doc/lib/doc/PDF/PDFReport/annualreport2003.pdf>.

29. A review of the proportionality of sentences in Connecticut is beyond the scope of this Comment. Connecticut is arguably less likely than other states to mete out disproportionate prison sentences. See Lawlor, *supra* note 27, at 13-14 (citing, inter alia, Connecticut’s lack of elected judges or law enforcement officials and its extensive system of alternatives to incarceration as reasons the state was amenable to granting judges limited discretion in nonviolent drug cases). The Connecticut Act is nevertheless typical. See *supra* note 17.

30. See, e.g., CAMPBELL, *supra* note 4, at 7-8 (quoting an Iowa legislator saying that “[e]ven shortening a term two, three, or four months is going to have a pretty significant impact over at

for immediate fiscal returns thus greatly diminishes the present value of long-term savings to be gleaned from larger cuts in longer sentences.³¹ It also renders less attractive measures like increasing the mitigating factors that a judge might consider in sentencing; while such a measure would link reductions in incarceration to the culpability of offenders, it would yield less predictable savings and would not effect an immediate release of prisoners. We see these preferences borne out in legislation across the country. In 2003, for instance, at least thirteen states either instituted “back-end sentence adjustments” to shorten inmates’ time served or, like Alabama, bolstered their parole-granting administration “with the goal of expediting the release of . . . low-level felony offenders.”³²

Second, the high political cost of reducing criminal penalties deters legislators from reducing prison sentences in general and makes reducing the sentences for some crimes almost impossible. According to the chair of Connecticut’s House Judiciary Committee, the Act’s relatively easy passage³³ was possible only because of strict budgetary constraints and because the Act completely eschewed changing the sentences for individual crimes; the sentences for violent crimes, in particular, are “untouchable.”³⁴ Indeed, a group of victims’ rights advocates supported the Act on the ground that releasing low-level drug offenders freed resources for incarcerating perpetrators of violent crimes.³⁵

Third, a related force acting on legislators is the fear of a recidivism scandal. The impact of Willie Horton on the 1988 presidential race looms large,³⁶ and fear predisposes legislators to release only those offenders

least a couple of year period”); Andy Furillo, *Early End to Parole Seen as Cost Savings*, SACRAMENTO BEE, Dec. 13, 2004, at A1 (reporting California’s short-term fiscal needs and the possible savings from an early-release measure).

31. See WOOL & STEMEN, *supra* note 4, at 6-7 (citing the fear that “promised cost savings from reducing sentences are either illusory or will only be realized too far in the future” as a common concern among legislators who considered but did not pass reductions in sentences for individual crimes). As one might expect according to this analysis, the most recent reduction in notoriously long sentences—the reduction of some penalties under New York’s draconian Rockefeller drug laws in December 2004—was, according to some observers, the result primarily of advocacy by sentencing reform proponents rather than of fiscal need. See Michael Cooper, *New York Votes To Reduce Drug Sentences*, N.Y. TIMES, Dec. 8, 2004, at A1 (discussing the long battle over the changes in the legislature and not mentioning budgetary considerations).

32. WOOL & STEMEN, *supra* note 4, at 5.

33. A commentator noted that “the ‘prison overcrowding’ bill sailed through the General Assembly this session, with bipartisan good cheer and support. . . . [P]risons are more expensive than tuition at Harvard; and there is no more room in the inn.” Laurence D. Cohen, Op-Ed, *Too Many Prisoners Today, Too Much Crime Tomorrow*, CONN. L. TRIB., May 17, 2004, at 23.

34. Telephone Interview with Michael P. Lawlor, Connecticut State Representative (Nov. 16, 2004).

35. *Id.*; see also CAMPBELL, *supra* note 4, at 11. For a discussion of the role played by victims and their advocates in the criminal justice system, see Markus Dirk Dubber, *The Victim in American Penal Law: A Systematic Overview*, 3 BUFF. CRIM. L. REV. 3, 30-31 (1999) (describing the “remarkably successful” victims’ rights movement but questioning how much “symbolic reforms” like constitutional amendments and victims’ bills of rights can accomplish).

36. See STEVE TAKESIAN, WILLIE HORTON: TRUE CRIME AND ITS INFLUENCE ON A

whose recidivism poses the least risk of inspiring popular backlash.³⁷ The reductions produced by such risk calculations might indeed correct disproportionate sentences if the short sentences of less “risky” offenders are nevertheless disproportionately long. But insofar as such risk analyses simply gauge how politically savory a particular reduction will be—or how large the political backlash might be—they are the product of the very influences that produce disproportionately long sentences in the first place³⁸ and will tend to perpetuate disproportionality.

This Comment has argued that the misguided economic speculation in footnote nine of *Harmelin* cannot support Justice Scalia’s interpretation of the Eighth Amendment. Due to financial efficiency and political expediency, fiscal checks will not prevent lengthy disproportionate sentences. The importance of this observation lies in Scalia’s complete repudiation of proportionality review, despite conflicting historical evidence. The scant legislative history does not clearly reveal the Founders’ intent in phrasing the Eighth Amendment as they did. What is clear, however, is that we cannot rely on Scalia’s incorrect rationalization as a reason not to worry about the “intensely undesirable” prospect of disproportionate punishments.

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PRESIDENTIAL ELECTION (2002).

37. See CAMPBELL, *supra* note 4, at 8 (reporting state legislators’ fear of backlash).

38. In *Ewing v. California*, for instance, where a divided Court upheld California’s three-strikes law as not “grossly disproportionate,” Justice O’Connor discussed how the murder of twelve-year-old Polly Klaas “galvanized support” for Proposition 184, which enacted the three-strikes law and was “the fastest qualifying initiative in California history.” 538 U.S. 11, 14-15, 30 (2003). Justice Breyer and three other dissenters argued at length that the statute violates the Eighth Amendment. *Id.* at 35-62 (Breyer, J., dissenting); see also VINCENT SCHIRALDI ET AL., JUSTICE POLICY INST., THREE STRIKES AND YOU’RE OUT: AN EXAMINATION OF THE IMPACT OF 3-STRIKE LAWS 10 YEARS AFTER THEIR ENACTMENT (2004), available at <http://www.justicepolicy.org/downloads/JPIOUTOFSTEPREPORTFNL.pdf> (arguing that California’s is a uniquely harsh three-strikes law). In 2004, California voters defeated Proposition 66, which would have required that the second and third triggering strikes be serious or violent crimes, despite the fact that the proposition’s ballot summary stated that it would produce “[n]et state savings of potentially several tens of millions dollars initially, increasing to several hundred million dollars annually.” OFFICIAL VOTER INFORMATION GUIDE: CALIFORNIA GENERAL ELECTION: NOVEMBER 2, 2004, at 44 (2004), available at <http://www.voterguide.ss.ca.gov/english.pdf>. A month after the election, in another attempt to cut costs, California’s Board of Corrections began considering a policy change of the broad and shallow sort, shortening parole for “parolees convicted of less-serious, nonviolent crimes who have been trouble-free for a full year.” Furillo, *supra* note 30.