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Mapping Proportionality Review: Still a "Road to Nowhere"

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MAPPING PROPORTIONALITY REVIEW: STILL A "ROAD TO NOWHERE"*

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I. INTRODUCTION

With three decisions in its 2002–2003 Term, the United States Supreme Court made clear that there is a constitutional sound-wall between the two distinct roads it had previously paved for proportionality review of terms of imprisonment and of civil punitive damages for possible excessiveness.[1] These decisions resulted in essentially no proportionality review of terms of imprisonment but careful scrutiny of punitive damages awards. In *Ewing v. California*, the Court upheld against an Eighth Amendment proportionality challenge a life sentence with a possibility of parole in twenty-five years for the theft of $1,200 worth of golf clubs.[2] The Court upheld a similar sentence imposed pursuant to the same California statute on the grounds that the defendant failed to meet the standards for habeas corpus review in *Lockyer v. Andrade*.[3] While narrowing proportionality review, both substantively and procedurally, in these two criminal cases, the Court gave further traction to its vigilant review of punitive damages awards in *State Farm Mutual Automobile Insurance v. Campbell*.[4] This paper considers another trio of cases related to imposition of punishments decided during the 2006–2007 Term, again two criminal cases and one civil punitive damages case.

During its 2006–2007 Term, the Court continued its role as a federal tort reformer

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* *BMW of N.A. v. Gore*, 517 U.S. 559, 605 (1996) (Scalia & Thomas, JJ., dissenting).

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1. Several commentators have analyzed and criticized the Court's inconsistent approaches to proportionality review. *See e.g.* Erwin Chemerinsky, *The Constitution and Punishment*, 56 Stan. L. Rev. 1049 (2004) (comparing the Supreme Court's review of terms of imprisonment with that of punitive damages awards); Pamela S. Karlan, *"Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishments*, 88 Minn. L. Rev. 880 (2004); Youngjae Lee, *The Constitutional Right against Excessive Punishment*, 91 Va. L. Rev. 677 (2005) (comparing Supreme Court decisions deciding when the death penalty is disproportionate with cases considering the proportionality of terms of imprisonment); K.G. Jan Pillai, *Incongruent Disproportionality*, 29 Hastings Const. L.Q. 645 (2002) (comparing the meaning of proportionality under the Cruel and Unusual and Excessive Fines Clauses of the Eighth Amendment, as well as under the Due Process Clause of the Fourteenth Amendment and the Takings Clause under the Fifth Amendment); Rachel A. Van Cleave, *"Death is Different," Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages—Shifting Paradigms for Assessing Proportionality*, 12 S. Cal. Interdisc. L.J. 217, 222 n. 26 (2003) (comparing review of the four forms of punishment listed in the title and noting other scholarly works comparing review of two or three of these punishments).

2. 538 U.S. 11, 30 (2003).

3. 538 U.S. 63, 77 (2003).

4. 538 U.S. 408 (2003).

by vacating a $79.5 million punitive damages award against Philip Morris,[5] based on a mystifying nuance regarding the reprehensibility guidepost, discussed below in Part II. This Term did not involve Eighth Amendment challenges to terms of imprisonment. However, it produced opinions that continue the Court's *Apprendi v. New Jersey*[6] and *United States v. Booker*[7] line of cases concerning criminal sentencing schemes and the Sixth Amendment jury trial right. In *Cunningham v. California* the Court found California's determinate sentencing scheme constitutionally defective to the extent that it mandates a higher sentence based on factual findings made by a judge rather than by a jury.[8] The Court's analysis highlights the subtlety of a distinction made in its *Booker* remedy that rendered the Federal Sentencing Guidelines advisory rather than mandatory to cure the Sixth Amendment defect. Another part of the *Booker* remedy did away with de novo review of sentences and the Court opted instead for the more deferential standard of reasonableness. In the third case involving criminal punishments, *Rita v. United States*, the Court held that federal appellate courts *may* accord a presumption of reasonableness to sentences within the Guidelines range, even when the sentencing judge provided little explanation for the sentence.[9]

This article examines how a majority of the Supreme Court went out of its way to vacate a punitive damages award in *Philip Morris* and further reinforced the inconsistency with which it applies the principle of proportionality. When it comes to punitive damages awards, a majority of Justices continue to convey distrust of juries and of trial and appellate court judges who review these awards.[10] However, when it comes to terms of imprisonment, the Court has eschewed substantive review under the Eighth Amendment while insisting that the Sixth Amendment requires that all facts supporting an increase in a sentence be found by a jury, and insists upon a deferential review of terms of imprisonment imposed by federal courts, thus expressing much greater trust of juries and judges in the criminal context, perhaps. The Court's opinion in *Rita* raises the question of the extent to which the jury's verdict is, as a practical matter, relevant to the sentencing determination under the now advisory Federal Guidelines. Indeed, it seems that a common result of these cases is to reduce the role of the jury as to both punitive damages awards and as to federal sentencing. Despite this similarity, the Supreme Court continues to carefully scrutinize punitive damages awards, while prison sentences remain within the province of the United States Sentencing Commission and the sentencing judges, subject to a reasonableness standard on review.

First, this article summarizes the jurisprudence that has federalized punitive damages awards and explains what the *Philip Morris* decision has added to this analysis. Next, the article turns to a summary of how the Court's application of proportionality review of terms of imprisonment has resulted in only a theoretical possibility that the Court might find a prison term grossly disproportionate. To explain the significance of

5. *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007).
6. 530 U.S. 466 (2000).
7. 543 U.S. 220 (2005).
8. 127 S. Ct. 856 (2007).
9. 127 S. Ct. 2456 (2007).
10. Chemerinsky, *supra* n. 1, at 1069.

Cunningham and *Rita*, the third part of this article reviews the *Apprendi* and *Booker* line of cases. Finally, this article looks forward to cases currently pending before the Court that raise, yet again, questions of proportionality. Specifically, the *Exxon Valdez* case challenging the $2.5 billion in punitive damages imposed by the Ninth Circuit,[11] and *State v. Kennedy*, testing the constitutionality of a Louisiana law that allows a jury to impose the death penalty for the crime of aggravated rape when no death occurred.[12] While the two cases pending before the Court may give the Court an opportunity to resolve, or at least explain, the inconsistencies in its proportionality principle, something this author has previously called for,[13] it is more likely that the Court will continue its separate and distinct lines of analysis in reviewing the different forms of punishment.

II. PROPORTIONALITY REVIEW OF PUNITIVE DAMAGES AWARDS

A majority of Supreme Court Justices have only recently accepted the idea that the Constitution places limits on punitive damages awards. In 1989, the Court concluded that the Excessive Fines Clause of the Eighth Amendment does not impose a proportionality requirement on punitive damages awards.[14] The Court determined that the Eighth Amendment addresses only "direct actions initiated by government to inflict punishment" and not "punitive damages in cases between private parties."[15] In reaching this decision, the Court relied on a civil-criminal dichotomy that, like most dichotomies, greatly oversimplifies the value of such a distinction.[16] Indeed, only twelve years later, the Court described punitive damages awards as "quasi-criminal" punishments rather than factual findings to be made by a jury.[17] In 1991 and 1993, the Court changed its view on constitutional limits on punitive damages and relied on the Due Process Clause of the Fourteenth Amendment to create a constitutional line that punitive damages awards may not cross.[18] However, in both cases it examined, *Pacific Mutual Life Insurance Co. v. Haslip* and *TXO Production Corp. v. Alliance Resources Corp.*, the Court concluded that the punitive damages awards were not "grossly excessive."[19]

By contrast to the abundance of judicial attention given to the question of whether the Cruel and Unusual Punishment Clause of the Eighth Amendment includes a proportionality principle, the Court has provided little to no basis for its conclusion that the Due Process Clause caps punitive damages awards.[20] To the extent that the Court

11. 472 F.3d 600 (9th Cir. 2006), *modified*, 490 F.3d 1066 (9th Cir. 2007), *cert. granted, Exxon Ship. Co. v. Baker*, 128 S. Ct. 492 (2007).

12. 957 So. 2d 757, 779 (2007), *cert. granted, Kennedy v. La.*, 128 S. Ct. 829 (2008).

13. Van Cleave, *supra* n. 1, at 272–78.

14. *Browning-Ferris Indus. v. Kelco*, 492 U.S. 257 (1989).

15. *Id.* at 260.

16. *See* A. Benjamin Spencer, *Due Process and Punitive Damages: The Error of Federal Excessiveness Jurisprudence*, 79 S. Cal. L. Rev. 1085, 1135 (2006) (criticizing this analysis for violating canons of constitutional construction); Van Cleave, *supra* n. 1, at 246–48 (describing how the Court rejected this dichotomy in cases challenging forfeitures of property for unconstitutional excessiveness).

17. *Cooper Indus., Inc. v. Leatherman Tool Group*, 532 U.S. 424, 432 (2001) (quoting *P. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991)).

18. *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *P. Mut.*, 499 U.S. at 1.

19. *TXO Prod. Corp.*, 509 U.S. at 462; *P. Mut.*, 499 U.S. at 19.

20. For an excellent examination of the fundamental flaw in this line of cases, see Spencer, *supra* n. 16 (inspecting cases cited by Justices who have espoused the view that the Due Process Clause of the Constitution

has provided a constitutional basis for limiting punitive damages awards, former Justice O'Connor relied on the one case in which the Court found an imprisonment term unconstitutional in *Solem v. Helm*,[21] stating that:

> Judicial intervention in cases of excessive [punitive damages] awards also has the critical function of ensuring that another ancient and fundamental principle of justice is observed—that the punishment be proportionate to the offense. As we have observed, the requirement of proportionality is "deeply rooted and frequently repeated in common-law jurisprudence."[22]

The jurisprudential paths of constitutional proportionality crossed briefly when a majority of the Court was in the early stages of attempting to establish a constitutional toe-hold for a limit on punitive damages awards.[23] In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, the Court cited cases in which the Court found imposition of the death penalty unconstitutional,[24] a case ruling that a life sentence for writing a bad check was disproportionate even when committed by a repeat offender,[25] and a case finding the forfeiture of $357,144 grossly disproportional to the offense of failing to report bringing this amount of money into the country.[26] Remarkably, this string of citations in *Cooper Industries* did not include *Harmelin v. Michigan* which, only a decade earlier, had all but gutted proportionality review for terms of imprisonment.[27] In addition, *Harmelin* significantly altered the method for reviewing prison terms under the Eighth Amendment, relying on the need to defer to state legislatures' determinations of appropriate punishments.[28] By contrast, in *Cooper Industries*, the Court adopted a standard of de novo review of punitive damages awards,[29] thereby broadening judicial review for possible excessiveness. Subsequently, the Court continued to increase the scope of this review, both substantively and procedurally. In addition to providing for de novo review, the Court also required states to create post-verdict procedures to review punitive damages awards for possible excessiveness.[30]

As to substantive review of punitive damages awards, shortly after federalizing an excessiveness limit on punitive damages awards, the Court invalidated a punitive damages award of $2 million dollars in *BMW of North America, Inc. v. Gore*,[31] setting

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prohibits excessive punitive damages awards and concluding that these cases do not support this conclusion).

21. 463 U.S. 277 (1983).

22. *TXO Prod. Corp.*, 509 U.S. at 478 (O'Connor, White & Souter, JJ., concurring in parts II-B-2, II-C, III, and dissenting from part IV) (quoting *Solem*, 463 U.S. at 284). *See also* Van Cleave, *supra* n. 1, at 267–68 (quoting other dissenting opinions of Justice O'Connor in which she supports her assertion that Due Process protects civil defendants from excessive punitive damages awards by relying on criminal cases and principles).

23. *See* Pillai, *supra* n. 1, at 678–79, n. 209 (describing the Court's multiple citations in *Cooper Industries* to a "quintet" of cases, all but one of which involved criminal punishments struck by the Court as "grossly disproportionate" or "excessive").

24. 532 U.S. at 434 (citing *Enmund v. Fla.*, 458 U.S. 782, 801 (1982) (death penalty is excessive when the defendant had not actively participated in the killing); *Coker v. Ga.*, 433 U.S. 584, 592 (1977) (death penalty is grossly disproportionate to the crime of rape)).

25. *Id.* (citing *Solem*, 463 U.S. at 303).

26. *Id.* (citing *U.S. v. Bajakajian*, 524 U.S. 321, 324 (1998)).

27. *Harmelin v. Mich.*, 501 U.S. 957 (1991).

28. *Id.* at 994–96.

29. *Cooper Indus.*, 532 U.S. at 436.

30. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 434–35 (1994).

31. 517 U.S. 559 (1996).

out three guideposts for courts evaluating punitive damages awards.[32] These guideposts are the "reprehensibility of the [defendant's conduct]; the disparity between the harm or potential harm suffered by [the plaintiff] and [the] punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases."[33] The Court in *BMW* pointed out that reprehensibility is the "most important indicium of the reasonableness of a punitive damages award," yet, the Court accorded no deference to a jury's determination that $4 million in punitive damages were warranted and the reviewing court's conclusion that the evidence supported a finding of egregious conduct by the defendant.[34] Instead, the Court characterized BMW's conduct of selling a repainted car as if it were a new car, as a mere failure to disclose that resulted in "purely economic" harm.[35]

The Court expanded on the factors relevant to evaluating the reprehensibility of a defendant's conduct in *State Farm*, in which the Court struck down a punitive damages award of $145 million.[36] In *State Farm*, the Court stated that an evaluation of the defendant's reprehensibility should include consideration of

> whether . . . the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.[37]

The Court also made clear that state courts may not allow punitive damages awards that seek to punish a defendant's lawful conduct in other states. Furthermore, when a jury considers other conduct of the defendant to evaluate its egregiousness, such "conduct must have a nexus to the specific harm suffered by the plaintiff."[38]

The second guidepost has been dubbed the "ratio guidepost" since the focus of this has been on the ratio between the compensatory damages and the punitive damages.[39] In *BMW*, the jury awarded compensatory damages of $4,000 and punitive damages of $4 million, which the Alabama Supreme Court reduced to $2 million.[40] While the Court purported to eschew any bright line or mathematical formula for evaluating the

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32. At least one commentator speculated that the *BMW* decision might result in enhanced constitutional scrutiny of prison terms. Evan P. Schultz, *Crime and Punitives*, 25 Leg. Times 60 (Apr. 15, 2002) (discussing how the $4 million dollar award may aid California inmates).

33. *BMW*, 517 U.S. at 575.

34. *Id.* The Alabama Supreme Court reduced the jury award to $2 million because the court concluded that the jury had improperly calculated punitive damages based on similar sales by BMW that had occurred in states other than Alabama. *Id.* at 567 (citing *BMW of N.A. v. Gore*, 646 So. 2d 619, 629 (1994)).

35. *Id.* at 576.

36. 538 U.S. at 429.

37. *Id.* at 419.

38. *Id.* at 422.

39. *Id.* at 427. For criticism of this guidepost as having little to no relevance to the issue of appropriate punitive damages awards, see Spencer, *supra* n. 16, at 1098 (explaining that comparing the harm suffered to the punitive damages awarded is both subjective and subject to manipulation). For an analysis of how the ratio guidepost has proved problematic for plaintiffs in civil rights cases where the compensatory damages may be very small or nothing, see Caprice L. Roberts, *Ratios, (Ir)rationality & Civil Rights Punitive Awards*, 39 Akron L. Rev. 1019 (2006).

40. 517 U.S. at 565–67.

constitutionality of a punitive damages award, it nonetheless concluded that "[w]hen the ratio is a breathtaking 500 to 1, however, the award must surely 'raise a suspicious judicial eyebrow.'"[41] In *State Farm*, the Court moved closer to a bright line numerical formula when it stated that "[s]ingle-digit multipliers are more likely to comport with due process."[42] The Court further concluded that it had "no doubt that there is a presumption against an award that has a 145-to-1 ratio."[43]

The Court's third guidepost imposes a comparative analysis, something the Court specifically rejected when evaluating criminal prison terms in *Harmelin*, unless a reviewing court determines, as a threshold matter, that a term of imprisonment is "grossly disproportionate."[44] In *BMW*, however, the Court compared the $2 million punitive damages award to the maximum fine of $2,000 allowed under the state's Deceptive Trade Practices Act, and the possible civil penalties in other states that ranged from $50 for a first offense to the most severe penalty of $10,000.[45] In *State Farm*, the Court clarified that this guidepost is not intended to permit civil punitive damages awards to assess criminal penalties since these "can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof."[46] In any event, the Court concluded that the likely civil sanction which could be imposed under state law, $10,000, was "dwarfed by the $145 million punitive damages award."[47] The Court ultimately characterized the punitive damages award not only as not "reasonable nor proportionate to the wrong committed" but as "an irrational and arbitrary deprivation of the property of the defendant."[48]

Justice Ginsburg criticized the majority opinion in *State Farm* for not taking into account all of the facts related to the reprehensibility of the defendant's conduct and for transforming the guideposts into "marching orders."[49]

In the 2006–2007 Term, the Court continued its involvement in tort reform by signaling to lower courts that they must carefully guard against the possibility that juries might assess punitive damages contrary to the Constitution. In *Philip Morris*, a jury found that the defendant, the manufacturer of Marlboro cigarettes, was negligent and had engaged in deceit that led the decedent, Jesse Williams, to believe that smoking was safe.[50] As to the deceit claim, the jury awarded compensatory damages of $821,000 and punitive damages of $79.5 million.[51] Although the trial court reduced the punitive

41. *Id.* at 583 (quoting *TXO Prod. Corp.*, 509 U.S. at 481 (O'Connor, White & Souter, JJ., concurring in parts II-B-2, II-C, III, and dissenting from part IV)).

42. 538 U.S. at 425.

43. *Id.* at 426.

44. 501 U.S. at 1001 (upholding a life sentence without the possibility of parole for first-time drug possession offense, concluding that the sentence was not "grossly disproportionate"). *See infra* nn. 68–69 and accompanying text.

45. 517 U.S. at 584.

46. 538 U.S. at 428.

47. *Id.*

48. *Id.* at 429.

49. *Id.* at 439 (Ginsburg, J., dissenting).

50. 127 S. Ct. at 1060–61.

51. *Id.* at 1061.

damages award to $32 million, the Oregon Supreme Court reinstated the jury award.[52] The Supreme Court vacated this award based on a "nuanced"[53] distinction. The Court stated that in assessing reprehensibility, a jury may consider the effect of the defendant's conduct on others, but a jury cannot punish the defendant directly for such harm.[54] In *BMW* and *State Farm*, the Court listed as one of the factors relevant to the reprehensibility of the defendant's conduct whether "the tortious conduct evinced an indifference to or reckless disregard of the *health or safety of others*,"[55] yet *Philip Morris* attempts to distinguish this from directly punishing the defendant for harm suffered by others.[56] Justice Steven's characterization of this "nuance" is generous—it simply makes no sense at all. This distinction is even more elusive when one considers the specifics of what occurred at trial. The Oregon trial court did not tell the jury to calculate punitive damages in a manner that would punish Philip Morris directly for harm suffered by strangers to the litigation. Indeed, the majority appears to acknowledge this. Nonetheless, the Court concluded "that state courts cannot authorize procedures that create an unreasonable and unnecessary risk" that the jury may seek to punish the defendant for harm inflicted on others.[57] It is not clear what the trial court did to violate this principle, since the Court did not hold that the trial court should have given the jury instruction that Philip Morris requested.

In addition, the Court vacated the punitive damages award despite the fact that Philip Morris did not preserve its objections to the trial court's instruction to the jury, to statements by plaintiff's counsel, or to evidence introduced at trial.[58] As Justice Ginsburg pointed out, Philip Morris preserved its objection only to the trial court's refusal to give its proposed instruction, yet the majority did not evaluate the trial court's refusal to give this instruction.[59] Nor did the Court conclude that the instructions given by the trial court amounted to an incorrect statement of the law.[60] Rather, the Court noted that states must have procedures that guard against the risk that a jury might impose punitive damages to punish the defendant directly for harm suffered by strangers to the litigation.[61] Certainly, it is difficult to object to such a statement in the abstract, but when considered in the context of this case, it is not at all clear how trial courts are to implement this mandate.

Philip Morris thus demonstrates the lengths to which a majority of the Court will go in its continued effort to expand federal constitutional review of punitive damages awards—by invoking mystifying distinctions and by ignoring basic appellate procedural rules. While the Court did not evaluate the specific punitive damages award under the

52. *Id.*

53. *Id.* at 1067 (Stevens, J., dissenting, stating that "this nuance eludes [him]").

54. *Id.* at 1063 (citing *State Farm*, 538 U.S. at 424).

55. *State Farm*, 538 U.S. at 419 (emphasis added).

56. 127 S. Ct. at 1063–65.

57. *Id.* at 1065.

58. *Id.* at 1068 (Ginsburg, Scalia & Thomas, JJ., dissenting).

59. *Id.* at 1068–69.

60. The trial court instructed the jury that "punitive damages are awarded against a defendant to punish misconduct and to deter misconduct . . . [they] are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct." *Id.* at 1061.

61. *Philip Morris*, 127 S. Ct. at 1065.

BMW and *State Farm* factors, the procedural ruling in *Philip Morris* makes evident the degree of vigilance the Court wishes to see lower courts and state supreme courts exercise when reviewing punitive damages awards.

III. PROPORTIONALITY REVIEW OF TERMS OF IMPRISONMENT

By contrast to the substantive and procedural scrutiny to which the Supreme Court subjects punitive damages awards, the Court has severely curtailed review of terms of imprisonment for excessiveness. In *Solem*, the only case in which the Court has found a prison term in violation of the Eighth Amendment, the defendant was sentenced to life imprisonment with no possibility of parole for a seventh non-violent offense.[62] The Court set out an analysis for evaluating a criminal sentence for proportionality. First, a court should consider the seriousness of the offense as compared to the severity of the sentence.[63] This is not an entirely objective factor since the Court stated that this also includes an evaluation of the defendant's culpability.[64] The Court also considered two forms of comparative analysis. The first is an intra-jurisdictional comparison of "sentences imposed on other defendants in the same jurisdiction" compared to the sentence the defendant received.[65] This comparison considers the "gradation of punishment."[66] The second form of comparative analysis involves comparing the sentences imposed for similar offenses in other jurisdictions; an inter-jurisdictional analysis.[67]

In *Harmelin*, Justice Kennedy rendered the comparative analysis discretionary.[68] This opinion recognized that a proportionality principle applied to prison terms, but stated that a reviewing court should compare the gravity of the offense to the severity of the penalty and engage in the intra and inter-jurisdictional comparative analysis described in *Solem* "only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."[69] In effect, the crime must be so innocuous and the punishment so severe for the court to engage in the comparative analysis. As one commentator has described this threshold approach, "it invokes the image of taking a particular crime and a particular punishment and setting them against each other, without regard to how other crimes are punished."[70] Thus, Justice Kennedy rejected any comparative analysis of the prison term unless a court concluded that the sentence was "grossly disproportionate" in the abstract. The Court concluded that a life sentence for a first-time conviction for possession of a large amount of cocaine was not "grossly disproportionate" due to the seriousness of drug

62. 463 U.S. 277.
63. *Id.* at 290–91.
64. *Id.* at 291.
65. *Id.*
66. Van Cleave, *supra* n. 1, at 239.
67. *Solem*, 463 U.S. at 291.
68. 501 U.S. at 1004 (Kennedy, O'Conner & Souter, JJ., concurring in part and concurring in judgment); *see* Lee, *supra* n. 1, at 693 (describing the lack of a majority opinion in *Harmelin*, but stating that Justice Kennedy's opinion "came to assume the status of law").
69. *Harmelin*, 501 U.S. at 1005 (Kennedy, O'Conner & Souter, JJ., concurring in part and concurring in judgment).
70. Lee, *supra* n. 1, at 695–96.

offenses.[71]

Twelve years later, in *Ewing*, most of the Justices agreed with the framework for evaluating the proportionality of terms of imprisonment set out by Justice Kennedy in *Harmelin*, but they disagreed as to its application in this case. Applying this "threshold" inquiry of whether a prison term is "grossly disproportionate" in *Ewing*, the Court relied not on the seriousness of the offense, shoplifting three golf clubs, but on the seriousness of recidivism, to conclude that a life sentence with the possibility of parole in twenty-five years is not "grossly disproportionate" when imposed on a repeat offender of theft offenses.[72]

The lack of substantive proportionality review in these imprisonment cases is in stark contrast to the scrutiny with which the Court reviews punitive damages awards. While in *State Farm* and *BMW* the Court emphasized the fact that the harms involved were purely economic rather than physical, the Court in *Ewing* did not attach the same relevance to the fact that property theft rather than violent crime was involved.

The Court's inconsistency becomes even clearer once its approach to the death penalty is considered. In capital cases, the Court engages in a comparative analysis without first determining that a sentence of death is "grossly disproportionate" in the abstract. Although a detailed analysis of proportionality in capital offenses is beyond the scope of this paper, several commentators have criticized the Court for recognizing a proportionality principle as to all three methods of punishment (punitive damages, terms of imprisonment, and the death penalty), but giving teeth to this limitation only when the defendant might be deprived of life or money, but not when liberty is at stake.[73] The Court has continued these different approaches despite the fact that the proportionality principle stems from the Cruel and Unusual Clause of the Eighth Amendment for both the death penalty and for prison terms.

Most recently, in *Roper v. Simmons*,[74] Justice Kennedy, writing for the majority, began his analysis of whether the death penalty was disproportionate when imposed on a juvenile under the age of eighteen, with an inter-jurisdictional comparative analysis. While Justice Kennedy relied on language in death penalty cases that instructs courts to consider the extent to which there is a "national consensus"[75] as to imposition of the death penalty in particular circumstances, this analysis involves comparing the laws in other states. The *Roper* analysis is another example of the significance of comparative analysis in proportionality review, yet this form of analysis is relevant, according to *Harmelin* and *Ewing*, involving prison terms, only if a court first determines a prison term is "grossly disproportionate." While Justice Kennedy was the architect of the threshold approach in *Harmelin*, he has yet to explain why a comparative analysis is not

71. *Harmelin*, 501 U.S. at 994–96.

72. 538 U.S. at 28–31.

73. *See* Chemerinsky, *supra* n. 1; Lee, *supra* n. 1, at 695–99 (explaining why the jurisprudence in the areas of capital and noncapital cases is "messy and meaningless" because the Court inconsistently applies a comparative analysis, and asserting that the "lazy slogan that 'death is different' hardly amounts to a principled distinction"); Van Cleave, *supra* n. 1, at 272 (urging consistency).

74. 543 U.S. 551 (2005).

75. *Id.* at 562–63 (quoting *Stanford v. Ky.*, 492 U.S. 361, 370–71 (1989) (finding no national consensus prohibiting the execution of seventeen year old offenders)). *Roper* overruled *Stanford*. *Id.* at 574–75.

relevant to a review of prison sentences, other than to state that "[b]ecause the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force."[76] Yet, this does not explain why deference to a legislature's determination of the appropriate punishment is less warranted in this context. Rather, the nature of the punishment should be among the factors a court considers when evaluating a punishment for excessiveness, and not dictate the analytical method by which a court reviews such punishments.[77] Indeed, it is not at all clear why evaluation of a term of imprisonment for excessiveness should not also include such a comparative analysis. Instead, terms of imprisonment are the one form of punishment that, as a practical matter, is not subject to proportionality review. While the Court has left a sliver of an opening for the hypothetical life imprisonment sentence for a traffic violation,[78] it has made it clear that an Eighth Amendment challenge to a term of imprisonment is next to impossible.

IV. IS "REASONABLENESS" THE NEW PROPORTIONALITY PRINCIPLE? AND, WHERE IS THE JURY?

While the Court pursued a course of virtually gutting the Eighth Amendment of any proportionality principle as to terms of imprisonment, it began to vigorously enforce the Sixth Amendment right to a jury trial with its decision in *Apprendi v. New Jersey*.[79] In *Apprendi*, the Court held that the Sixth Amendment prohibited the State from imposing an enhanced sentence, exceeding the statutory maximum sentence allowed for possession of a firearm for an unlawful purpose, based on a judge's finding that the defendant "acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity."[80] The Court concluded that the Sixth Amendment requires that "any fact [other than that of a prior conviction] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[81]

In *Blakely v. Washington*,[82] the Court found that the constitutional standard set out in *Apprendi* was violated when state law allowed a judge to impose an "exceptional sentence" exceeding the statutory maximum when the judge found that the defendant had acted with "deliberate cruelty."[83] According to the Court, the aggravating fact leading to an increased sentence must be found by a jury.[84] Finding "no distinction of constitutional significance between the Federal Sentencing Guidelines and the

76. *Id.* at 568.

77. I have made this argument before. Van Cleave, *supra* n. 1, at 272–73. *But see* Richard S. Frase, *Excessive Prison Sentences, Pun Goals, and the Eighth Amendment: "Proportionality" Relative to What?* 89 Minn. L. Rev. 571, 631–32 (2005) (suggesting that courts could apply different levels of scrutiny to different categories of punishments, but also pointing out the disadvantages of such an approach).

78. *See Rummel v. Estelle*, 445 U.S. 263, 288 (1980) (Powell, Brennan, Marshall & Stevens, JJ., dissenting).

79. 530 U.S. 466 (2000).

80. *Id.* at 468–69 (quoting N.J. Stat. Ann. § 2C:44-3(e) (West Supp. 1999–2000)).

81. *Id.* at 490.

82. 542 U.S. 296 (2004).

83. *Id.* at 300 (quoting Wash. Rev. Code Ann. § 9.94A.390(2)(h)(iii) (West 2000)).

84. *Id.* at 301 (citing *Apprendi*, 530 U.S. at 490).

Washington procedures" at issue in *Blakely*,[85] in *Booker*, the Court held that the Federal Sentencing Guidelines violated the Sixth Amendment, to the extent that they mandated a sentence exceeding a base Guidelines range based on judicial fact-finding by a preponderance of the evidence, rather than jury fact-finding based on the standard of beyond a reasonable doubt.[86] The Court remedied this situation by rendering the Guidelines advisory, thus judges are no longer tied to sentencing ranges set out in the Guidelines. However, courts are to consider these ranges as well as the sentencing goals set out in the Sentencing Reform Act of 1984, which include: Consideration of "the nature and circumstances of the offense and the history and characteristics of the defendant."[87]

The Court's decision in *Cunningham*[88] sent shock waves through California's determinate sentencing law. Cunningham was convicted of continuous sexual abuse of a child under age fourteen. California law set out three possible sentences, six, twelve, and sixteen years. The law required the middle term of twelve years unless the judge determined that certain aggravating facts were present. The judge found six aggravating facts and sentenced Cunningham to sixteen years imprisonment.[89] The Court concluded that this sentencing scheme violated the *Apprendi* line of cases because it mandated a more severe sentence based on fact finding by a judge rather than a jury.[90] However, analogous to the nuanced distinction made by the Court in *Philip Morris* between directly punishing a defendant for harm suffered by strangers to the litigation, which is not permitted, and considering such harm to evaluate reprehensibility, which is permitted, the *Cunningham* majority highlights a subtle distinction made in *Booker*. The Court stated that, on the one hand, it has "never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range."[91] On the other hand, if the structure of a sentencing scheme is such that a more severe sentence can be imposed only when a judge *finds* certain *facts*, it violates the Sixth Amendment right to a jury trial. Therefore, if a sentencing scheme permits, but does not require, a more severe sentence based on aggravating facts, a judge who imposes a harsher sentence may do so pursuant to her exercise of discretion and no jury finding beyond a reasonable doubt is required.[92] Thus, the *Booker* remedy of treating the Federal Sentencing Guidelines as advisory rather than mandatory cures the Sixth Amendment structural defect because post-*Booker* a judge may impose a sentence outside the Guidelines range by considering both mitigating and aggravating facts and exercising her judicial discretion. It is not entirely clear how this subtle distinction is to operate. In

85. *Booker*, 543 U.S. at 233.

86. *Id.* at 243–44.

87. 18 U.S.C. § 3553(a)(1) (2006).

88. 127 S. Ct. 856.

89. *Id.* at 860–61.

90. *Id.* at 868.

91. *Id.* at 866 (quoting *Booker*, 543 U.S. at 233).

92. The California legislature responded to the Court's decision in *Cunningham* by amending the state's determinate sentencing law. This amendment makes the upper sentence the statutory maximum and allows the judge to choose the appropriate sentence pursuant to her discretion. Cal. Sen. 40, 2007–2008 Reg. Sess. ch. 3 (Mar. 30, 2007).

addition, in *Booker*, the Court concluded that a de novo standard of review no longer applied; rather, reviewing courts must now evaluate sentences under a standard of reasonableness to determine whether the sentencing judge abused her discretion.[93] Within this remedial component of the *Booker* decision, it seems that substantive review of terms of imprisonment has arguably reentered the realm of judicial consideration, but without a constitutional dimension.

During the 2006–2007 Term, the Court has acknowledged that the advisory nature of the Federal Sentencing Guidelines, post-*Booker*, provides judges with greater discretion to determine an appropriate sentence. In *Rita*, the defendant was convicted of making two false statements under oath to a grand jury.[94] The pre-sentence report recommended a base level 20 and criminal history category I, resulting in a sentence of thirty-three to forty-one months imprisonment.[95] Rita argued for a lower sentence based on his poor "[p]hysical condition, [his] vulnerability in prison [due to his prior involvement in criminal justice work,] and his military service."[96] The judge concluded that he was "unable to find that the [report's recommended] sentencing guidelines range . . . is an inappropriate guideline range" and that "it [was] appropriate to enter" a sentence at the bottom of the range, thirty-three months imprisonment.[97] The Supreme Court determined that a reviewing court may conclude that a sentence within the Guidelines range is presumptively reasonable. The Court justified allowing such a presumption because it "reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case."[98] As to the requirement that a sentencing judge state his reasons for a imposing a particular sentence, the Court stated that this does not require "a full opinion in every case."[99] While the Court acknowledged that the sentencing judge "might have said more"[100] to explain why he declined to impose a sentence that was lower than the Guidelines range, as Rita had requested, that facts indicate that the judge considered the evidence and the arguments, and this is sufficient.

For purposes of this paper, *Rita* is relevant for how the Court's conclusion that a jury must find any facts that justify a harsher sentence has led the Court back to the question of how to evaluate terms of imprisonment. *Booker* represents the apex of the Court's vigilant protection of the Sixth Amendment right to a jury trial, but the remedy cobbled by the Court may have severely limited the jury trial right articulated in the *Apprendi* and *Booker* line of cases and at the same time left defendants without

93. 543 U.S. at 261.

94. 127 S. Ct. at 2459.

95. *Id.* at 2461.

96. *Id.*

97. *Id.* at 2462. For a comparison of this sentence to that imposed on Lewis Libby, see Douglas A. Berman, *Looking at the* Libby *Case from a Sentencing Perspective*, 20 Fed. Senten. Rep. 1 (2007); Keith Heidmann, *Can I Get What Lewis Libby Got?* 20 Fed. Senten. Rep. 23 (2007).

98. *Rita*, 127 S. Ct. at 2463. *See also* Stephanos Bibas, Rita v. United States *Leaves More Questions Open Than It Answers*, 20 Fed. Senten. Rep. 28 (2007) (raising the question of how *Rita* figures into the Court's prior Sixth Amendment cases).

99. *Rita*, 127 S. Ct. at 2468.

100. *Id.* at 2469.

meaningful review of sentences imposed. As Justice Scalia stated, the Court's opinion does not explain "why, under the advisory Guidelines scheme, judge-found facts are *never* legally necessary to justify the sentence."[101] In other words, now that the Guidelines are advisory, how is a reviewing court to determine whether a sentence imposed is one that is based only on facts found by a jury, rather than a sentence the judge arrived at in the exercise of her discretion? After all, the crux of the *Apprendi* line of cases is that the Sixth Amendment requires that any punishment above the statutory range be based on facts found by a jury. As Justice Scalia points out, the majority of the Court seems to acknowledge that judges will issue sentences based on aggravating facts not found by a jury in violation of the Sixth Amendment. The *Booker* remedy attempted to preserve a large degree of uniformity in sentencing, and thus avoid a return to purely indeterminate sentencing. However, the risk was that sentencing courts would treat the Guidelines as mandatory, rather than advisory, as a practical matter and thus result in sentences that violate or threaten the jury right.[102] Justice Souter raised the concern that a presumption of reasonableness for within-Guidelines sentences will only exacerbate the risk that sentencing judges will apply the Guidelines in a way that is in fact mandatory.[103] He asks, "just what has been accomplished in real terms by all the judicial labor imposed by *Apprendi* and its associated cases[?]"[104] What indeed?

V. LOOKING FORWARD—PROPORTIONALITY IN THE 2007-2008 SUPREME COURT TERM

The Court turns to the question of proportionality again in the current term. On February 27, 2008, the Court heard oral arguments in the *In re: The Exxon Valdez* case in which Exxon appealed a punitive damages award of $2.5 billion, which is lower than the $5 billion imposed by the jury, and lower than the reduction made by the district court to $4.5 billion.[105] The litigation arose after the 1989 grounding of Exxon's oil tanker and spill of 11 million gallons of oil in Prince William Sound.[106] The punitive damages were based on the finding that

> Exxon knew [that Captain] Hazelwood was an alcoholic, knew that he had failed to maintain his treatment regimen and had resumed drinking, knew that he was going on board to command its supertankers after drinking, yet let him continue to command the *Exxon Valdez* through the icy and treacherous waters of Prince William Sound.[107]

On appeal, Exxon disputes the numerator used by the court to calculate the ratio between the punitive damages and the compensatory damages. Exxon also disputes the figure used by the district court to represent the harm that it caused.[108] The district court added the compensatory damages awarded in this case "to the actual judgments, settlements,

101. *Id.* at 2475 (Scalia & Thomas, JJ., concurring).
102. *Id.* at 2487 (Souter, J., dissenting).
103. *Id.*
104. *Rita*, 127 S. Ct. at 2488.
105. 472 F.3d 600 (9th Cir. 2006), *cert granted*, *Exxon Ship. Co. v Baker*, 128 S. Ct. 492 (2007).
106. Exxon Valdez Oil Spill Trustee Council, *History, Frequently Asked Questions about the Spill*, http://www.evostc.state.ak.us/History/FAQ.cfm (accessed Mar. 16, 2008).
107. *Exxon Valdez*, 472 F.3d at 613.
108. *Id.* at 618–23.

and other recoveries various plaintiffs obtained as a result of the spill,"[109] to arrive at a total of $513.1 million in actual harm caused by Exxon. Exxon argued that the court should subtract from the numerator money Exxon had paid out in the form of settlements, and other judgments.[110] The Ninth Circuit agreed that "'generally' prepayments should not be used as part of the calculation of harm" to encourage settlement before trial, but concluded that this is not a "mechanical arithmetic limit."[111] *Exxon Valdez* raises an issue that the Supreme Court has not focused on—how courts are to calculate the numerator to determine the ratio between the punitive damages award and the harm caused. Commentators have pointed out that the "ratio guidepost" is problematic precisely because its calculation depends on what is included in the numerator. For example, Justice Ginsburg explained that *TXO Production* can be characterized as upholding punitive damages "526 times greater than the actual damages awarded by the jury," but by recalculating the *compensatory* damages to include the "potential loss to the plaintiffs had the defendant succeeded in its illicit scheme, the Court could describe the relevant ratio in *TXO* as 10 to 1."[112] In *Haslip*, the Court described the ratio as "more than 4 times the amount of compensatory damages, [and as] more than 200 times [the plaintiff's] out-of-pocket expenses."[113] After *State Farm*, when a "[s]ingle-digit multiplier[ ] [is] more likely to comport with due process,"[114] how a court calculates the numerator is critical. *Exxon Valdez* provides the Court with an opportunity to clarify exactly what aspects of harm caused by the defendant are to be included in the numerator. Does this include potential harm as the court in *TXO* considered? Does this include dollar amounts that represent harm, but were paid out by the defendant in settlements and judgments arising from the same incident? Of course, the lower the dollar amount arrived at to represent the harm caused, along with the presumption for a single-digit multiplier, the lower the ultimate punitive damages award will be.

The issue of proportionality is also before the Court in the Louisiana case, *State v. Kennedy*.[115] This case raises the question of whether a state may impose the death penalty for an offense in which no death resulted, specifically for the rape of a child. Thirty years ago, the Court determined that the death penalty was disproportionate to the crime of rape of an adult woman.[116] The Court will have to decide as a categorical matter whether capital punishment is constitutional for the rape of a child when no death occurred. The Court has previously found violations of the Eighth Amendment as to other categories of offenses,[117] and as to categories of defendants.[118] The Court is likely

109. *Id.* at 619.

110. *Id.*

111. *Id.* at 620 (quoting *In re: the Exxon Valdez*, 270 F.3d 1215, 1244 (9th Cir. 2001)).

112. *State Farm*, 538 U.S. at 430 (Ginsburg, J., dissenting) (quoting *TXO Prod. Corp.*, 509 U.S. at 453); *id.* at n. 1.

113. 499 U.S. 1, 23 (1991).

114. 538 U.S. at 426.

115. 957 So. 2d 757 (La. 2007), *cert granted, Kennedy v. La.*, 128 S. Ct. 829 (2008).

116. *Coker*, 433 U.S. at 592.

117. *Enmund*, 458 U.S. 782 (Eighth Amendment violation when the death penalty is imposed on a defendant convicted of felony murder, but who had not killed, attempted to kill, or intended to kill).

118. *Roper*, 543 U.S. 551 (Eighth Amendment violation when the death penalty is imposed on a defendant

to follow the analysis used in *Roper* discussed above and begin with an inter-jurisdictional comparative analysis as part of its evaluation of a national consensus.

There does not seem to be any reason to think that the Court will deviate from its pattern of giving teeth to proportionality review of death penalty sentences and of punitive damages awards. Cases involving excessive terms of imprisonment continue to escape any proportionality review since the Court has determined that it is more important to defer to legislative determinations in that context. Indeed, if there is any shift in the jurisprudence of proportionality it is more likely to be in the form of greater deference to a state legislature's conclusion that the ultimate penalty is warranted even when the harm caused by the defendant has not involved death. Striking the punitive damages award in *Exxon Valdez*, while allowing the death penalty for child rape, would illustrate dramatically the need for the Court to explain the inconsistencies among its different paths of proportionality jurisprudence. However, it is unlikely that such an explanation will be forthcoming.

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who was under the age of eighteen when he committed the murder); *Atkins v. Va.*, 536 U.S. 304 (2002) (Eighth Amendment violation when the death penalty is imposed on a mentally retarded defendant).