UNDERSTANDING AND LITIGATING

SENTENCE PROPORTIONALITY

KEY POINTS

- Textual distinction and source of law matters
- History matters
- Legislative history matters
- Factual precision making a record matters
- Proportionality litigation cannot be boilerplate

CUT AND PASTE AT YOUR PREIL

EVERYONE'S

8TH AMENDMENT

- Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ARTICLE I, SECTION 16

- Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense.

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NOMENCLATURE

- Be proportional to
    - Proportional - a quantitative relationship summing to a fixed whole, exists outside of an active agent
- To proportion to
    - To proportionate - verb; to assess in relative value, requiring an active agent

LEX TALONIS

- If a man injures his neighbor, what he has done must be done to him: broken limb for broken limb, eye for eye, tooth for tooth. As the injury inflicted, so must be the injury suffered.

- Retributive, vengeful

- Talio - equivalent to; equal

LEX TALONIS

- Aristotle: Equality in punishment as foundation of moral justice
- Law of Alfred: For a wound in the head if both bones are pierced, 30 shillings shall be given to the injured man, If the outer bone [only] is pierced, 15 shillings shall be given…. If a wound an inch long is made under the hair, one shilling shall be paid …If an ear is cut off, 30 shillings shall be paid ….If one knocks out another's eye, he shall pay 66 shillings, 6 1/3pence …If the eye is still in the head but the injured man can see nothing with it, one-third of the payment shall be withheld ….

NORMAN CONQUEST

- Amercement - Literally “being at the mercy of” A “voluntary” sum paid to the king to escape his displeasure
- Arbitrary - No fixed sum, completely arbitrary on a case-by-case basis.
- Evolution: Decided by peers (jury); some maximum limits imagined and a relationship of penalty to severity.

MAGNA CARTA

- Chapter 14 (originally 20): A free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity, saving his livelihood; and a merchant likewise, saving his merchandise; in the same way a villein shall be amerced saving his wainage; if they fall into our mercy. And none of the aforesaid amercements shall be imposed except by the testimony of reputable men of the neighborhood.

MAGNA CARTA

- Writ de moderata misercordia.
- St. Albans Monastery - contesting amercement of 100 pounds
  - Fifthly, they had injured the liberty against the common charter,where it is said that free men should be amerced according to their offences, and their reputation saved, and the amercement of a hundred pounds, as is manifest to everybody, exceeded the just penalty of the offence.

EXTENSION TO PHYSICAL PUNISHMENT

- Circa 1400
- We do forbid that a person shall be condemned to death for a trifling offense. But for the correction of the multitude, extreme punishment shall be inflicted according to the nature and extent of the offense.

HODGES V. HUMKIN, MAYOR OF LISKERRET – 1615

- Here the speeches used by Hodges are very unseemly speeches, and unfit to be used by him to anyone, much less to such a person as the major was, being a person in authority and an Officer of the King; but yet, for such words thus used, the maior ought not to use a malicious kind of Imprisonment, in regard of the time of it, when the same was, being so long time after the offence as in August for an offense in June before; and also in regard of the manner of this Imprisonment, and of the place where, he being thrown into a Dungeon, and so to be there kept, without any Bed to lie on, or any bread or meat to eat, and for all these Causes, the Imprisonment was unlawful; Imprisonment ought always to be according to the quality of the offense, and so is the Statute of Magna Charta cap. 14 and of Marlbridge, cap. 1 secumdum magnitudiem, et qualitatem delicti the punishment ought to be, and correspondent to the same, the which is not here in this Case.

BLOODY ASSIZES

- Monmouth invasion force arrives in western England on June 11, 1685. He proclaimed himself King, and is ultimately defeated at the Battle of Sedgemoor. Monmouth is taken prisoner and executed. King appoints Chief Justice Jeffreys of the King's Bench to head a special commission to travel the western circuit and try the captured rebels.

BLOODY ASSIZES

Sentence for rebellion:

Broken on rack

Drawn to gallows

Hanged

Taken down while alive, disemboweled

Entrails and genitals burned

Re-hanged, or beheaded

Quartered

BLOODY ASSIZES

- Strong response to the abuses of the Bloody Assize, especially among the puritans and eventual transplants to the colonies

- 1689 English Bill of Rights seen as, in part, responding to Bloody Assizes. 10th Declaration: That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.

WILKERSON V UTAH (1859)

- Capital case arising out of Utah - death by firing squad
- Discussion of Assize tortures
- Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that emendment to the Constitution.

IN RE KEMMLER (1890)

- N.Y. capital case involving the electric chair

- The provision in reference to cruel and unusual punishments was taken from the well-known act of parliament of 1688, * * * This declaration of rights had reference to the acts of the executive and judicial departments of the goverment of England; but the language in question, as used in the constitution of the state of New York, was intended particularly to operate upon the legislature of the state, to whose control the punishment of crime was almost wholly confided. So that, if the punishment prescribed for an offense against the laws of the state were manifestly cruel and unusual as burning at the stake, crucifixion. breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition. And we think this equally true of the eight amendment, in its application to congress.

O'NEIL V. VERMONT (1892)

- New York liquor salesman. Convicted on 307 counts of selling liquor illegally in Vermont. Fined $20.00 for each offense along with $497.96 in prosecution expenses. Serve out the fine at $3.00 a day, over 54 years at hard labor. O'Neil argued that under the commerce clause, Vermont could not constitutionally make the sale of goods by a nonresident to residents a penal offense.

- Justice Fields writes a 29 page dissent. The first 25 pages are devoted to the federal question.

O'NEIL V. VERMONT (1892)

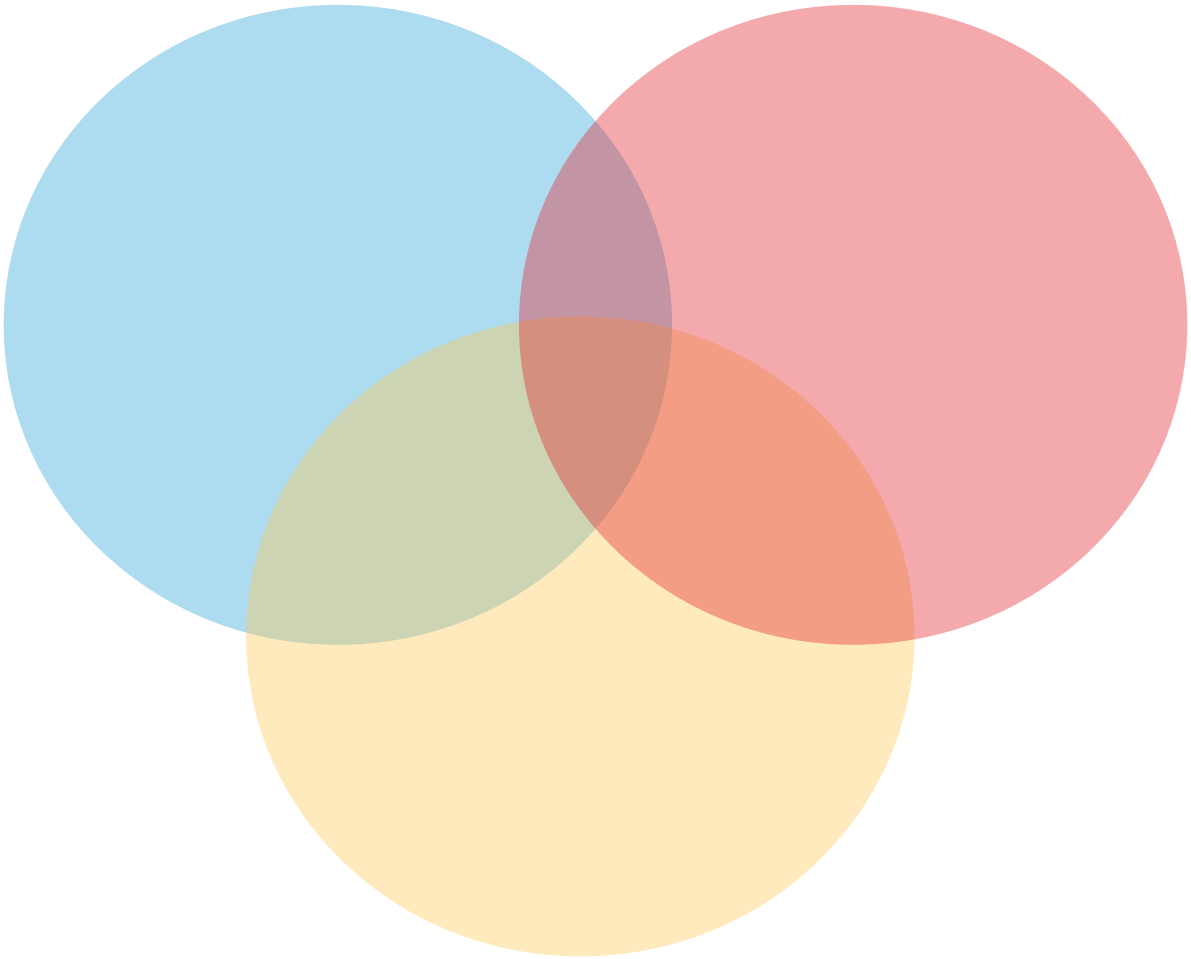
- That designation, it is true, is usually applied to punishments which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of limbs, and the like, which are attended with acute pain and suffering. Such punishments were at one time inflicted in England, but they were rendered impossible by the declaration of rights, adopted by parliament on the successful termination of the revolution of 1688, and subsequently confirmed in the bill of rights. It was there declared that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. From that period this doctrine has been the established law of England, intended as a perpetual security against the oppression of the subject from any of those causes. It is embodied in the eighth amendment to the constitution of the United States, and in the constitutions of several of the states, though Mr. Justice Story states in his Commentaries on the Constitution 'that the provision would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct.' Section 1903. The inhibition is directed, not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.

WEEMS V. UNITED STATES (1910)

- Case arising out of the Philippines

- Defendant a "duly appointed, qualified, and acting disbursing officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands,' did, as such, 'corruptly, and with intent then and there to deceive and defraud the United States government of the Philippine Islands and its officials, falsify a public and official document, namely, a cash book of the captain of the port of Manilla, Philippine Islands, and the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands,' kept by him as disbursing officer of that bureau.

WEEMS V. UNITED STATES (1910)



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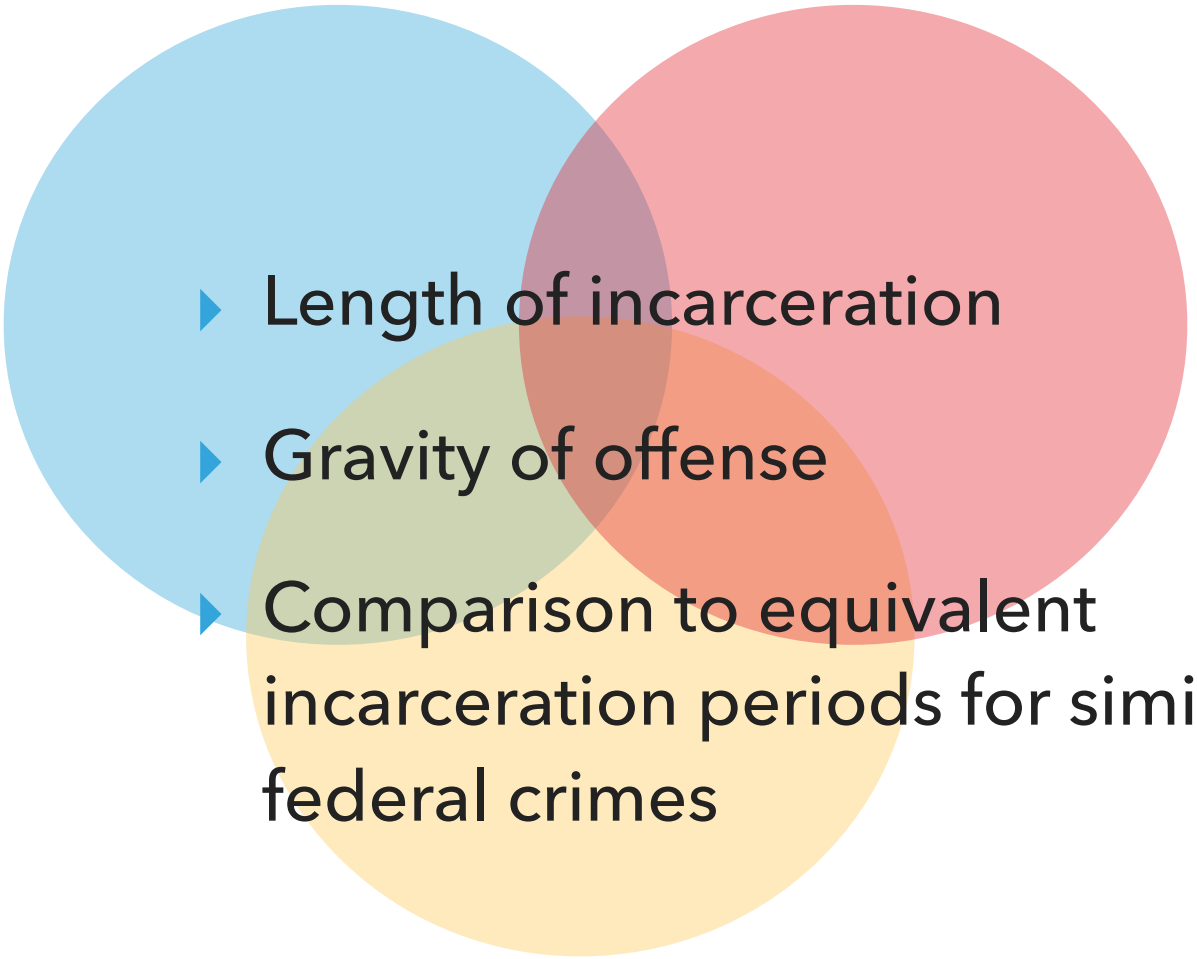

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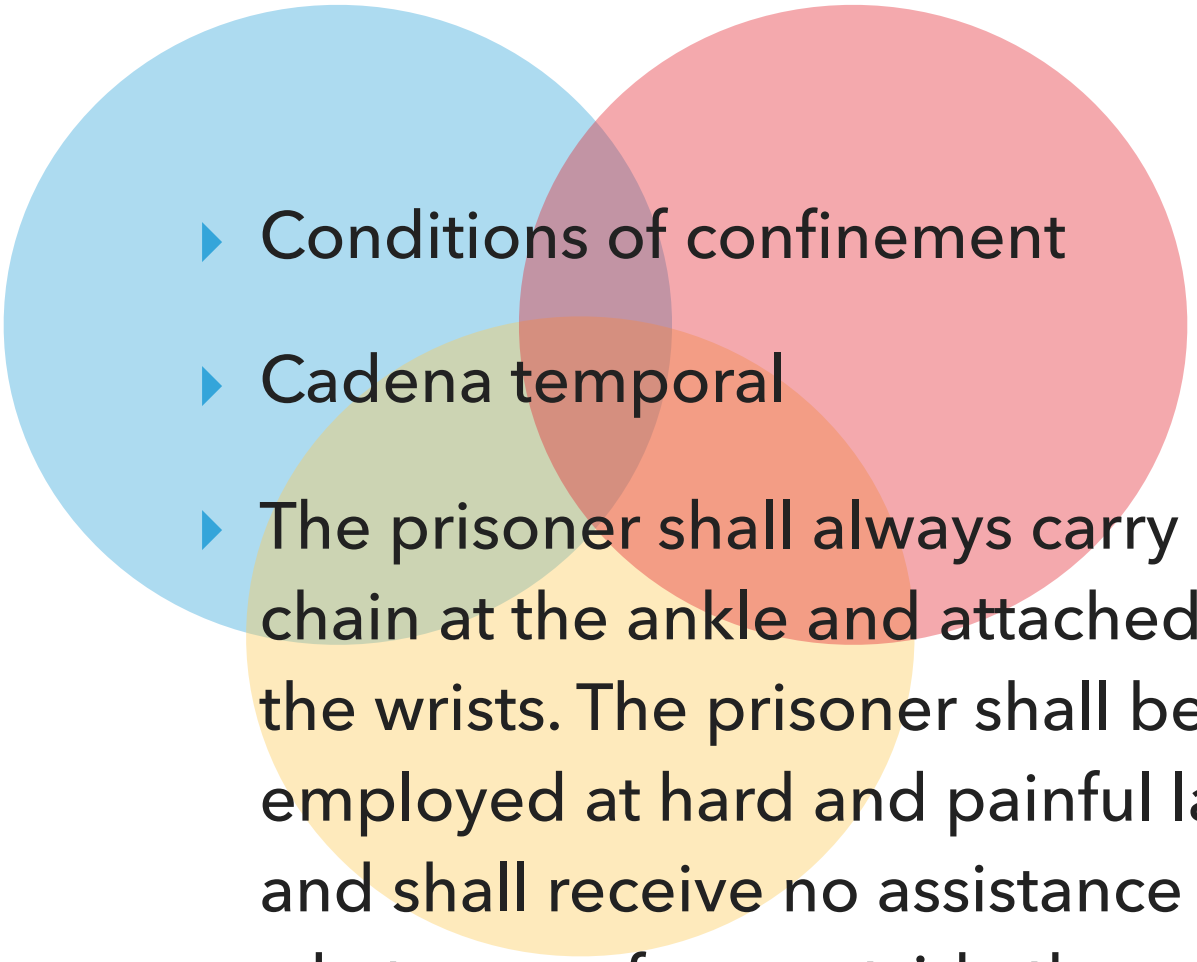
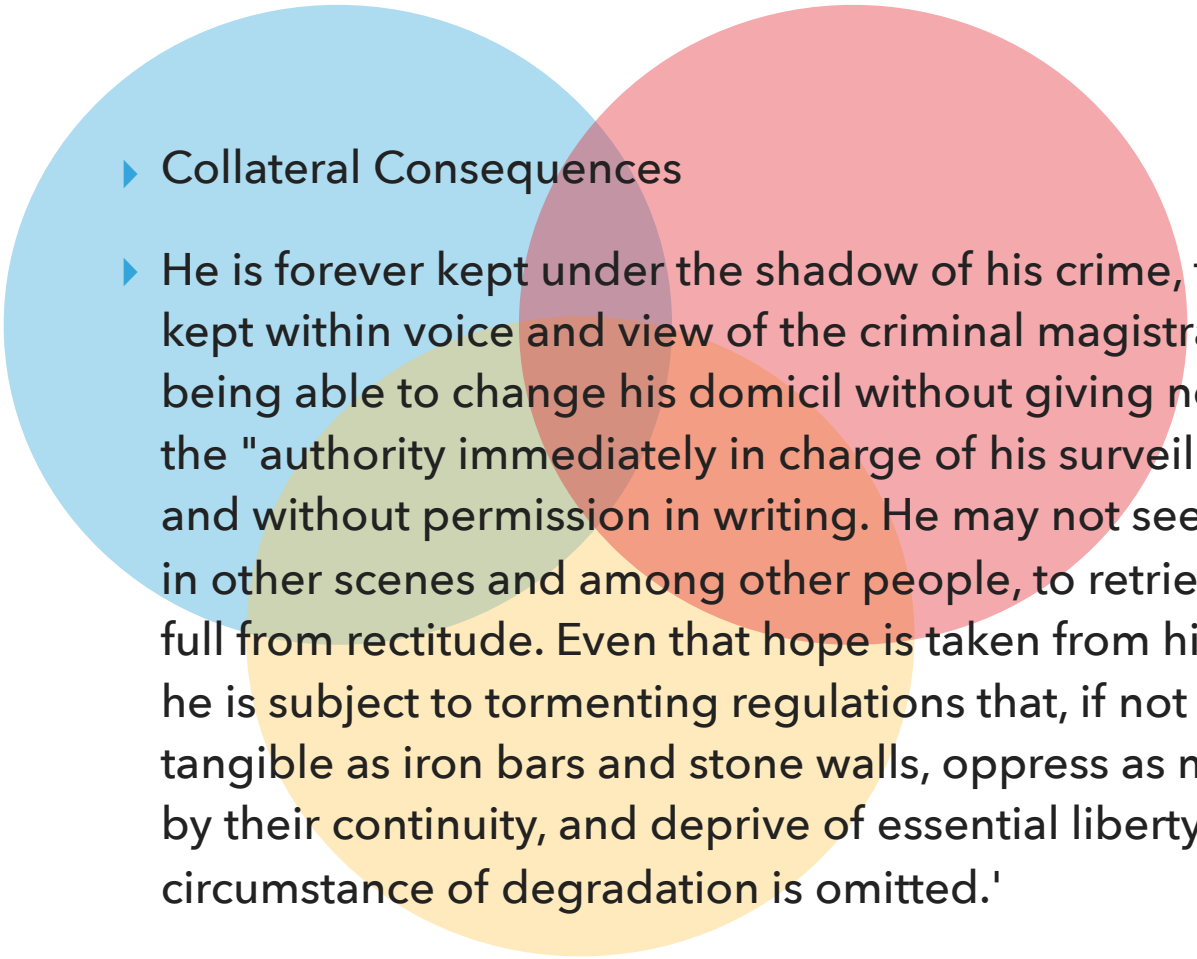


- Conditions of confinement
- Cadena temporal
- The prisoner shall always carry a chain at the ankle and attached to the wrists. The prisoner shall be employed at hard and painful labor and shall receive no assistance whatsoever from outside the prison.

WEEMS V. UNITED STATES (1910)



- Collateral Consequences
- He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicil without giving notice to the "authority immediately in charge of his surveillance," and without permission in writing. He may not seek, even in other scenes and among other people, to retrieve in full from rectitude. Even that hope is taken from him and he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty. No circumstance of degradation is omitted.'

RACE

POWER

PRIVLEGE

SUSTAR V COUNTY COURT OF MARION COUNTY (1921)

- That the said P. Sustar, on the 30th day of June, 1921, in the county of Marion, state of Oregon, then and there being, did then and there wrongfully and unlawfully possess intoxicating liquor, to wit, two quarts of moonshine whisky * * * contrary to the statutes in such case made and provided and against the peace and dignity of the state of Oregon.
- Petitioner entered a plea of guilty to this charge, and was sentenced by the court to pay a fine of $500 and to serve six months in the county jail.

SUSTAR V COUNTY COURT OF MARION COUNTY (1921)

That part of section 16 of the Oregon Bill of Rights referred to herein contains three prohibitions and one command:
(1) “Excessive bail shall not be required.”
(2) “Nor excessive fines imposed.”
(3) “Cruel and unusual punishment shall not be inflicted.”
(4) “All penalties shall be proportioned to the offense.”

In the case of *Weems v. United States*, 217 U. S. 349, 367, 30 Sup. Ct. 544, 549 (54 L. Ed. 793, 19 Ann. Cas. 705) the Supreme Court of the United States declared that:

“It is a precept of justice that punishment for crime should be graduated and proportioned to the offense.”

In order to justify the court in declaring punishment cruel and unusual with refence to its duration, the punishment must be so proportioned to the offense committed as to shock the moral sense of all reasonable men as to what is right and proper under the circumstances. *Weems v. U. S.*, supra.

SUSTAR V COUNTY COURT OF MARION COUNTY (1921)

The following punishments for illegal sales of liquor have been held not to be cruel and unusual, or excessive, within the meaning of constitutional provisions such as section 16, art. 1, Oregon Constitution:

"A fine of $300 and one year's confinement for violation of local option law has been held not excessive." Ex parte Swann, 96 Mo. 44, 9 S. W. 10.

"A fine of $1,000 and costs, though the accused believed in good faith the law was unconstitutional and discontinued his business when the law was declared valid." State v. Baker, 74 Iowa, 760, 38 N. W. 380.

"In Georgia, a fine of $500 for a single sale to a minor." McCollum v. State, 119 Ga. 308, 46 S. E. 413, 100 Am. St. Rep. 171.

"A fine of $200 upon each of 16 counts in an indictment for selling without a license." Fletcher v. Commonwealth, 106 Va. 850, 56 S. E. 149.

"Or the full penalty upon each count, even though the penalty imposed be imprisonment fixed successively to commence at the expiration of the next preceding sentence." Bolun v. People, 73 Ill. 488; Mullinix v. People, 76 Ill. 211; Lovelace v. State (Tex. Cr. App.) 49 S. W. 601; Briffitt v. State, 58 Wis. 39, 16 N. W. 39, 46 Am. Rep. 621.

"A fine and costs amounting to $4,000, which would cause imprisonment for about 12 years for nonpayment thereof, where defendant had willfully violated two conditional pardons for offense." Ex parte Brady, 70 Ark. 376, 68 S. W. 34.

JENSEN V GLADDEN (1962)

- Involved recidivist sentencing scheme for sexual offenses.

- The view is held by some that sex offensers tend to progress from minor to major crimes. And there is a belief that all sex offenders tend to be recidivists. It is not unlikely that the legislature in enacting ORS 167.050 had these or similar considerations in mind and although the views noted above are criticized as not being founded upon fact,3 we cannot say that there was not a reasonable basis for the enactment of the punishment provision in ORS 167.050. It is the province of the legislature to establish the penalties for the violation of the various criminal statutes and if the penalties are founded upon an arguably rational basis we have no authority to hold that they are invalid.

SOLEM V HELM (1983)

- The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence.

  * * * * HISTORY * * * *

  When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights,[10] they also adopted the English principle of proportionality.

HARMELIN V MICHIGAN (1991)

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  * * * * HISTORY * * * *

  When the Framers of the Eighth Amendment adopted the language of the English Bill of Rights,[10] they also adopted the English principle of proportionality.

HARMELIN V MICHIGAN (1991)

- In sum, we think it most unlikely that the English Cruel and Unusual Punishments Clause was meant to forbid “disproportionate” punishments. There is even less likelihood that proportionality of punishment was one of the traditional “rights and privileges of Englishmen” apart from the Declaration of Rights, which happened to be included in the Eighth Amendment. Indeed, even those scholars who believe the principle to have been included within the Declaration of Rights do not contend that such a prohibition was reflected in English practice—nor could they.

- We conclude from this examination that *Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee.

HARMELIN V MICHIGAN (1991)

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STATE V ISOM (1992)

- Challenge to imposition of death penalty for murder in commission of escape
- Defendant's view, that a person in the process of escaping is more dangerous than a defendant who already has escaped, is simply defendant's opinion. The problem for defendant is that the legislature apparently had a different opinion, *i.e.,* it believed that murders intentionally committed by escapees, whether during or after the escape, pose a considerable threat to the safety and peace of mind of the general populace. The legislature has chosen to subject all such persons to the maximum potential penalty. Defendant's opinion makes sense, but so does that which we attribute to the legislature. There was a rational basis for the legislature to conclude that both classes of escapees are dangerous.

STATE V ROGERS (1992)

- The standard for determining whether punishment is cruel and unusual is whether "the punishment [is] so proportioned to the offense committed as to shock the moral sense of all reasonable men as to what is right and proper under the circumstances." *Sustar v. County Court of Marion County,* 101 Or. 657, 665, 201 P. 445 (1921) (citing *Weems v. United States,* 217 U.S. 349, 367, 30 S.Ct. 544, 549, 54 L.Ed. 793 (1910), for the Eighth Amendment standard and adopting that standard for purposes of Article I, section 16, of the Oregon Constitution)

STATE V WHEELER (2007)

A jury convicted defendant of 18 criminal charges, including sexual abuse, sodomy, and using a child in a display of sexually explicit conduct, based on conduct involving three boys between the ages of nine and 15. Defendant previously had been convicted of two felony sex crimes. Based on the convictions in this case and defendant's prior convictions, and acting pursuant to a recidivism statute for felony sex offenders, ORS 137.719(1),1 the trial court imposed a sentence of life imprisonment without possibility of parole on each of the 18 charges, with the sentences to run consecutively. Defendant appealed, arguing that the sentences were disproportionate to the offenses of which he was convicted. The Court of Appeals affirmed without opinion. State v. Wheeler, 209 Or.App. 379, 148 P.3d 925 (2006). We allowed defendant's petition for review and now affirm.

STATE V WHEELER (2007)

Obviously, the framers of the Oregon Constitution borrowed the two sentences of Article I, section 16, with which we are concerned here, from the Indiana Constitution of 1851. The framers combined the cruel and unusual punishment provision and the proportionality provision—each of which appears in a short, separate sentence in the Indiana Constitution–into a single sentence, connected by the conjunction "but." * * * [W]hen the drafters of the Oregon Constitution combined the two provisions with the word "but" in Article I, section 16, they did not intend the proportionality provision to be an exception or qualification to the bar on cruel and unusual punishments. * * * In other words, the prohibition on cruel and unusual punishment and the requirement of proportionality appear to be independent constitutional commands, joined in one sentence because they both concern appropriate punishment for crimes.

STATE V WHEELER (2007)

We make two observations about the proportionality test that this court has used since 1921, *viz.,* whether the penalty "shocks the moral sense of all reasonable people as to what is right and proper under the circumstances." First, we do not think the court intended the test literally–that is, that a penalty for a particular crime would meet the proportionality requirement if a single "reasonable person" could be found whose moral sense was not "shocked" by that penalty. Rather, we read the court's words as attempting to articulate a standard that would find a penalty to be disproportionately severe for a particular offense only in rare circumstances. Second, and relatedly, we view this court's consideration of whether the legislature's imposition of a particular penalty (or range of penalties) for an offense had a "reasonable" or "an arguably rational basis" (*Jensen*) or a "rational basis" (*Isom*) as an effort to apply the *Sustar* test, rather than as establishing an alternative test. Put differently, in those cases, the court did not abandon the "moral shock" test–indeed, both quoted that test–but rather looked to the legislative enactment of the particular penalties at issue as an external source of law to assist in determining whether those penalties would shock the moral sense of reasonable people.

STATE V WHEELER (2007)

- That which lacks reason or a rational basis shocks the conscience.
- shall be proportioned - the actor must act, and must do so motivated by reason and rationality.

STATE V RODRIGUEZ/BUCK (2009)

- List of non-exclusive factors

- (1) a comparison of the severity of the penalty and the gravity of the crime; (2) a comparison of the penalties imposed for other, related crimes; and (3) the criminal history of the defendant.

STATE V RODRIGUEZ/BUCK (2009)

- The amount of time the offender must spend incarcerated for the conviction is the "primary determinant" of how severe the penalty is. The offense is not limited to the description of the prohibited conduct in the statute but includes consideration of the range of conduct prohibited by the statute as well as the circumstances of the defendant's specific offense, and then placing the defendant's conduct on the range of prohibited conduct.

STATE V RODRIGUEZ/BUCK (2009)

- “a court may consider, among other things, the specific circumstances and facts of the defendant’s conduct that come within the statutory definition of the offense, as well as other case-specific factors, such as characteristics of the defendant and the victim, the harm to the victim, and the relationship between the defendant and the victim.”

STATE V ALTHOUSE (2007)

- Recidivist sentencing scheme

- "Habitual criminal [statutes] are based upon the belief that the criminal, as well as the crime, is a material factor to be considered in fixing the sentence. If the criminal is a menace to the community, his sentence should be aimed at offering the most protection to the community, regardless of the relative innocuousness of the particular crime for which he is now convicted."

STATE V ALTHOUSE (2007)

- "[T]his is a case in which defendant, over a 30-year period, has been convicted of sexual abuse and sodomy of his own and other people's children, as well as public indecency. And many of the charged and uncharged instances in which defendant has engaged in public indecency during that 30-year period have been directed at or related to children. Indeed, defendant's most recent conviction for public indecency occurred approximately 150 feet from a middle school, and the woman who reported his behavior to the police told the officer that there were children walking in the area."

STATE V CAREY-MARTIN (2018)

- Serial offender statute

- ORS 137.690, the statute that enacted Ballot Measure 73, imposes a mandatory minimum term of 25 years for a person who has been convicted of more than one "major felony sex crime."1 Included among the sex crimes defined as "major felony sex crime[s]" is the crime of using a child in a display of sexually explicit conduct, ORS 163.670.2 Defendant was sentenced under Ballot Measure 73 for 10 convictions for conduct that occurred over a period of about a year and a half while he was a teenager, some of it while he was underage, and which involved requesting and receiving, by text messaging, nude images of girls who were two to four years younger than he was. Put succinctly, defendant engaged in what is commonly known as "sexting."

STATE V CAREY-MARTIN – CONCURRENCE (2018)

- In this case, therefore, before we can appropriately delve into the characteristics of this defendant, or the circumstances of these crimes, and place those within the context of ı as-applied a *Rodriguez/Buck /Althouse/Ryan* framework, we must first look to the history of the statutes at play, and ask whether the legislature engaged in its constitutionally obligated duty ffense, under Article I, section 16, to proportion the sentences it stics enacts.lefendant and the victim." *Rodriguez/Buck*, 347 Or. at 62, 217 P.3d 659. In doing so, the court is considering the characteristics of *this* defendant against the *hypothetical* defendant that motivated the legislative action.

SPECIAL CATEGORIES PER 8TH AM.

- Youth

  Roper, Graham, Miller

- Intellectual Disability

  Atkins

STATE V LINK (2019)

- And, finally, any sentence that is among the "[s]tate's most severe" is procedurally limited. Such a "severe" sentence cannot be imposed on a juvenile "as though they were not children." *Miller*, 567 U.S. at 474, 132 S.Ct. 2455. That is, such a sentence cannot be imposed without
- the sentencer being afforded the ability to consider youth. "An [s] are offender's age is relevant to the Eighth Amendment, and criminal procedure laws that fail to take defendants' youthfulness into account at all [are] flawed." *Graham*, 560 U.S. at 76, 130 S.Ct. 2011. In other words, Eighth Amendment proportionality imposes a positive duty—a requirement upon the sentencer before imposing a severe sentence—to consider the lessened culpability of a juvenile offender and the lesser "likelihood that a juvenile offender forever will be a danger to society." *Montgomery v. Louisiana*, —— U.S. ——, 136 S.Ct. 718, 733, 193 L.Ed.2d 599 (2016) (internal quotation marks omitted). Only [illegible], through the consideration of youth is a constitutionally proportionate sentence assured.", 560 U.S. at 73, 130 S.Ct. 2011 (internal quotation marks omitted).

STATE V LINK (2019)

- In that vein, we conclude that the threshold question in considering whether the principles of *Roper*, *Graham*, and *Miller* apply at juvenile sentencing is this: Does the case involve the imposition of the state's *most severe penalties* against a juvenile defendant? When the sentence sought to be imposed on a juvenile is among the state's most severe, then procedurally, the imposition of that sentence cannot proceed as if the juvenile were not a child, even if the sentence otherwise might be substantively permissible. And, when the sentence is among the most severe, the secondary question becomes whether the statutory sentencing scheme for a juvenile offender fulfills the constitutional duty to fully consider youth in sentencing. In this case, answering both those questions requires us to consider the statutes that govern the imposition of an aggravated murder sentence on a juvenile in Oregon.

STATE V COOK (2019)

- In this case, the trial court found that defendant suffered from intellectual disability and considered that disability in relation to defendant's criminal culpability. However, the court specifically found that it could *not* consider the "the fact that [defendant] may be victimized in prison" as a result of that intellectual disability. Thus, this case presents a question going to the heart of what it means to consider intellectual disability in a proportionality challenge. If a trial court expressly finds that it cannot consider an intellectually disabled defendant's increased vulnerability within prison, has it truly "consider[ed] an offender's intellectual disability in comparing the gravity of the offense and the *severity of a mandatory prison sentence?*" *Ryan*, 361 at 620-21 (emphasis added). To put an even finer point on it, in considering intellectual disability in the context of the "severity" of a sentence, is a court limited to merely the quantitative severity of a sentence, *i.e.*, the length of incarceration, or is a court permitted to consider the qualitative nature of a sentence's severity as applied to an intellectually disabled defendant?