

**“NO FELLOW IN AMERICAN LEGISLATION”:
WEEMS v. UNITED STATES AND THE DOCTRINE OF
PROPORTIONALITY**

Margaret Raymond^{*†}

INTRODUCTION

Over the past twenty-five years, the Supreme Court has repeatedly addressed claims that particular carceral punishments violate the Eighth Amendment.¹ The Court’s repeated attempts to address this issue lack both clarity and finality, making inevitable endless rounds of proportionality talk. The Court itself seems curiously resigned to its own muddled inconsistency,² routinely disparaging the clarity and precision of its prior precedent in the area.³

* Professor of Law, University of Iowa College of Law.

† Thanks to Mark Sidel, Peggie Smith, and members of the Junior Faculty Colloquium at the University of Iowa for helpful comments on earlier drafts of this article. Thanks also to Joseph A. Schwartz at the National Archives for his gracious and expert assistance, to the Obermann Center for Advanced Studies for research support, and to Michelle Hurley, Amy Sanders, Charles Simmons, Michael Thieme, and Justin McCarty for able research assistance.

1. Its most recent foray, in 2003, was a challenge to a three-strikes sentence under California’s recidivist statute. *Ewing v. California*, 538 U.S. 11, 14 (2003). In *Ewing*, the Court addressed when, if ever, a sentence for a term of years is constitutionally disproportionate under the Eighth Amendment’s prohibition against “cruel and unusual punishments.” *Id.* at 30–31. The Court also decided another case, *Lockyer v. Andrade*, which addressed a similar issue arising on habeas review. *Lockyer v. Andrade*, 538 U.S. 63, 70 (2003). *Ewing* and *Andrade* are discussed *infra* notes 82–98 and accompanying text.

2. In *Andrade* the Court termed the area a “thicket of Eighth Amendment jurisprudence,” noting that “our precedents in this area have not been a model of clarity” and that it had “not established a clear or consistent path for courts to follow. . . . A gross disproportionality principle is applicable to sentences for terms of years. Our cases exhibit a lack of clarity regarding what factors may indicate gross disproportionality.” *Andrade*, 538 U.S. at 72 (citations omitted). Rarely does the Court, even as it decides a case, display such despair about the prospects for clarity or consistency in its own jurisprudence. For a discussion of the case by Mr. Andrade’s lawyer, see Erwin Chemerinsky, *Cruel and Unusual: The Story of Leandro Andrade*, 52 *DRAKE L. REV.* 1 (2003).

3. *Andrade*, 538 U.S. at 72. This was bad news for Mr. Andrade, whose claim under the Antiterrorism and Effective Death Penalty Act (AEDPA) depended upon the ruling of the state court upholding his sentence being “a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” Antiterrorism and Effective Death Penalty Act of 1996 § 104, 28 U.S.C. § 2254(d)(1) (2000). One might hesitate to characterize the Court’s assessment of the clarity of its own precedent as entirely objective, fueled as it was by the knowledge that a determination that its precedent was unclear would make it easy to decide that AEDPA prohibited the Ninth Circuit from revisiting the state court’s decision. *Andrade*, 538 U.S. at 71, 73. “Given the lack of clarity of our precedents . . . we cannot say that the state court’s affirmation of two sentences of 25 years to life in prison was contrary to our clearly established precedent.” *Id.* at 74 n.1 (citations omitted). The Court’s disavowal of the clarity and comprehensibility of its own precedents, however, is a common feature of its proportionality cases. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 996, 998 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (“[O]ur proportionality decisions have not been clear or consistent in all respects. . . . Though our decisions

Whether the proportionality doctrine applies to carceral sentences has dogged constitutional jurisprudence.⁴ Judges and scholars have debated whether the Eighth Amendment prohibition on cruel and unusual punishments imposes any constraints on the duration, rather than the nature, of a sentence, and whether judges may legitimately assess the relative severity of crimes committed and sentences imposed.⁵ Legislatures continue to authorize increasingly lengthy sentences of imprisonment; whether there are any meaningful constitutional constraints on the duration of such sentences remains a critical issue. While the questions proliferate, the answers remain muddled.

Why has it proven so difficult for the Court to achieve a definitive resolution of this critically important question? The problems with the proportionality doctrine can be traced to the first Supreme Court case to articulate the doctrine: *Weems v. United States*, decided in 1910.⁶

There are two systemic difficulties in articulating and applying a rule about the proportionality of carceral punishments. First, since sentences are authorized by legislatures, any legal doctrine that permits them to be overturned must take account of the need to respect the politically accountable branches of government, acknowledge the concerns of federalism, and recognize the importance of differing local needs and concerns. Second, the use of constitutional authority to subject these

recognize a proportionality principle, its precise contours are unclear.”). This suggests the Court’s doubt about its own clarity is not simply a convenient way to avoid the issue in habeas cases.

4. The principle of proportionality is recognized in the context of the death penalty, but, because “death is different,” the Court has resisted the notion that the existence of a proportionality principle in the death penalty cases has any significance in the area of carceral punishments. See, e.g., *Rummel v. Estelle*, 445 U.S. 263, 272 (1980) (“Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel.”).

5. There is a scholarly debate, reflected in the case law, about whether the Eighth Amendment was intended by the Framers to prohibit disproportionate punishments, or only barbarous ones. Representative discussions of the debate include: Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative To What?*, 89 MINN. L. REV. 571 (2005); Anthony Granucci, “Nor Cruel and Unusual Punishments Inflicted:” *The Original Meaning*, 57 CAL. L. REV. 839 (1969); Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41 (2000); Joshua R. Pater, Note, *Struck Out Looking: Continued Confusion in Eighth Amendment Proportionality Review After Ewing v. California*, 123 S. Ct. 1179 (2003), 27 HARV. J.L. & PUB. POL’Y 399 (2003); Deborah A. Schwartz & Jay Wishingrad, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 BUFF. L. REV. 783 (1975); Kenneth A. Sprenger, Note, *Pass the Discretion Please—The Supreme Court Defers to State Legislatures in Interpreting What Is Left of the Eighth Amendment’s Proportionality Principle*, 58 ARK. L. REV. 425 (2005).

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

legislative determinations to judicial scrutiny runs the risk of looking like purely subjective exercises of judicial fiat. The *how much is too much* question is fraught with subjectivity; any proportionality rule will be legitimate only if the rule is governed by articulable and reproducible objective standards. The Court's struggle with Eighth Amendment review of carceral sentences raises these concerns and never adequately answers them.

The reason for this is *Weems*, the first case in which the United States Supreme Court applied proportionality review to strike down a sentence of imprisonment.⁷ The nature of the *Weems* case enabled the Court to sidestep concerns of legislative primacy, judicial objectivity, and consistency. The concerns, however, subsided for that case only, producing a principle that has proved much harder to apply than it was to create. The *Weems* case arose out of the American experience in the Philippines; the Supreme Court there applied constitutional principles to the Philippine penal code.⁸

Weems, an American working as a disbursing officer in the Philippines, was charged under the Philippine Penal Code with falsifying record entries.⁹ This falsification allegedly covered up a scheme in which *Weems* had converted to his own use funds he was supposed to pay out to local employees.¹⁰ At trial, *Weems* was found guilty and sentenced to fifteen years of "*cadena temporal*," a fine and costs, and certain significant accessory consequences.¹¹ The Supreme Court overturned this conviction,

7. *Id.* at 381–82. To do so, the Court articulated an oft-quoted principle of flexible constitutional interpretation that has been the subject of much focus, commentary, and criticism:

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions.

Id. at 373. "The clause of the Constitution . . . may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Id.* at 378.

8. *Id.* at 357, 367. The bases for the application of quasi-constitutional principles to the Philippines were sections 5 and 10 of the Philippine Bill of July 1, 1902, which included a prohibition on the infliction of cruel and unusual punishments, and provided for review of decisions of the Supreme Court of the Philippine Islands in the Supreme Court of the United States. The Philippine Bill of July 1, 1902, ch. 1369, 32 Stat. 691, available at <http://www.chanrobles.com/philippinebillof1902.htm>; see *infra* notes 160–162 and accompanying text.

9. *Weems*, 217 U.S. at 357.

10. See *United States v. Weems*, 7 PHIL. REP. 241, 242–43 (S.C., Dec. 29, 1906) (discussing the circumstantial evidence that *Weems* converted the funds for his own use).

11. *Weems*, 217 U.S. at 358. "[T]hose sentenced to *cadena temporal* . . . shall labor for the benefit of the state. They shall always carry a chain at the ankle, hanging from the wrists; they shall be employed at hard and painful labor, and shall receive no assistance whatsoever from without the

finding the punishment cruel and unusual.¹²

The opinion of the Court in *Weems* reflects its perception of the Philippine punishment as foreign, bizarre, and unduly harsh.¹³ Because the Court in *Weems* believed itself to be applying the proportionality principle to a disrespected, *foreign* system, it could condemn the punishment applied there without having to justify its incursion on the sovereignty of the lawmaker.¹⁴ The Court's purported astonishment at what it perceived to be the severity of the punishment being applied to an American largely substituted for the articulation of an objective standard to be applied to such claims.¹⁵ *Weems* accordingly recognized the doctrine of proportionality,¹⁶ but suggested little in the way of principle that would enable courts to apply that doctrine to more familiar punishments imposed by domestic legislatures. Its nondeferential and subjective review laid the groundwork for the Court's subsequent struggle with the doctrine of proportionality.

This article begins by demonstrating the Court's persistent difficulty in articulating and applying a coherent proportionality doctrine. It then turns to a discussion of *Weems*, and shows how attitudes towards the Philippines facilitated the Court's disregard of the need for legislative deference and for standards-based decision making. The article concludes that this ghost of historical precedent continues to affect the Court's persistent failure to articulate a coherent proportionality doctrine. The article ends with some reflections on the appropriate scope of the existing doctrine of proportionality.

I. THE PROBLEM WITH PROPORTIONALITY

To understand why applying the proportionality doctrine to carceral sentences is a problem, one need only briefly review the confused history of proportionality law in the Supreme Court. In twenty-five years, the Court has rejected the principle,¹⁷ overruled itself and recognized the principle,¹⁸

institution." *Id.* at 364 (quoting Arts. 105, 106 Penal Code of Spain (1870)). The accessory consequences included the obligation to report his domicile and not change it without permission, and "perpetual absolute disqualification," which included "deprivation of office, even though it be held by popular election, the deprivation of the right to vote or to be elected to public office, the disqualification to acquire honors, etc., and the loss of retirement pay." *Id.* at 364-65.

12. *Id.* at 381-82.

13. *Id.* at 366-67.

14. *See id.* (stating that the Philippine punishment has no American equivalent and if it did, such punishment would be in violation of the Eighth Amendment).

15. *Id.* at 380-81.

16. *Id.*

17. *See Rummel v. Estelle*, 445 U.S. 263, 275-76, 281 (1980) (rejecting the principle as applied to the specific facts of the case).

and reformulated the previously recognized principle.¹⁹ Nor, as the following discussion indicates, is there any likely end in sight.

A. *No Proportionality Review of Carceral Sentences: Rummel v. Estelle*

In 1980, the Court decided *Rummel v. Estelle*, the first contemporary case in which the Court considered a claim that a carceral sentence violated the Eighth Amendment.²⁰ For a series of small-time property offenses,²¹ Rummel was sentenced to life in prison under the Texas recidivist statute with the possibility—though no guarantee—of parole after he had served twelve years of his sentence.²² Rummel claimed that his life sentence was “so disproportionate to the crimes he had committed as to constitute cruel and unusual punishment.”²³ The Court rejected Rummel’s claim, concluding that proportionality claims based solely on the duration of a carceral punishment were simply not cognizable; the length of carceral sentences was left fully to the discretion of the legislatures.²⁴ “[O]ne could argue without fear of contradiction by any decision of this Court,” Justice Rehnquist wrote, “that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.”²⁵ While this statement reflected some caution (what might he have meant, for example, by an offense “classifiable” as a felony?), the opinion indicated that in the ordinary course no constitutional principle constrained legislative discretion in the setting of carceral sentences.²⁶

18. See *Solem v. Helm*, 463 U.S. 277, 303 & n.32 (1983) (finding Helm’s sentence disproportionate to his crime, but noting, notwithstanding Chief Justice Burger’s strenuous dissent to the contrary, that the holding was not inconsistent with *Rummel*).

19. *Harmelin v. Michigan*, 501 U.S. 957 (1991).

20. *Rummel*, 445 U.S. at 265. Some interest in taking a proportionality case was reflected in, for example, *Carmona v. Ward*, in which the Court declined to review claims by two petitioners that a sentence of from six years to life for possession of an ounce of a substance containing cocaine violated the constitutional prohibition against cruel and unusual punishment. *Carmona v. Ward*, 439 U.S. 1091 (1979) (Marshall, J., dissenting). Citing *Weems*, Justice Marshall argued that “this Court has long recognized that the Eighth Amendment embodies a . . . prohibition against disproportionate punishment.” *Id.* at 1094. Justice Powell joined Justice Marshall in his dissent from denial of certiorari. *Id.* at 1091.

21. Rummel’s offenses were a 1964 credit card fraud for \$80, a 1969 forgery of a check for \$28.36, and a 1973 offense of obtaining \$120.75 by false pretenses. *Rummel*, 445 U.S. at 265–66.

22. *Id.* at 266–67.

23. *Id.* at 267.

24. *Id.* at 275–76, 281.

25. *Id.* at 274.

26. *Id.* at 275–76.

Dissenting, Justice Powell voiced the clear view that in some extreme situations, the courts must have the authority to overturn carceral sentences.²⁷ This was the “overtime parking” hypothetical: what if a legislature chose to impose a mandatory life sentence for a parking violation?²⁸ “A statute that levied a mandatory life sentence for overtime parking,” Justice Powell wrote, “might well deter vehicular lawlessness, but it would offend our felt sense of justice.”²⁹ Even the majority acknowledged that some kind of proportionality principle might be necessary to respond to such an extreme situation.³⁰

The Court’s restrained view of the proportionality principle reflected two concerns. The first concern was the need to defer to legislative decision making. It was the province of the legislature to define and punish crimes; second-guessing legislative decisions as to the severity of punishment would reflect inadequate respect for the legislature’s authority.³¹ The second concern was that any proportionality analysis would inevitably be driven by the subjective views of the individual justices applying it, without objective standards to legitimate judicial intervention.³² Rummel’s attempts to offer objective criteria to support the conclusion that his sentence was too severe—because his crimes were not violent, or because he stole only small amounts of money—were unavailing.³³ The Court viewed the assessment of those factors as “properly within the province of legislatures, not courts.”³⁴ His attempt to compare the severity of his treatment to the sentences available in other jurisdictions for the same conduct was likewise unconvincing, because nothing compelled different jurisdictions to treat such offenders similarly.³⁵ “Absent a constitutionally imposed uniformity inimical to traditional notions of federalism,” the Court wrote, “some State will always bear the distinction of treating particular offenders more

27. *Id.* at 307 (Powell, J., dissenting).

28. *Id.* at 288.

29. *Id.*

30. *Id.* at 274 n.11 (majority opinion). “This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent, if a legislature made overtime parking a felony punishable by life imprisonment.” *Id.*

31. *Id.* at 275. The Court commented on the need to avoid “a more extensive intrusion into the basic line-drawing process that is pre-eminently the province of the legislature when it makes an act criminal.” *Id.*

32. *Id.* The Court tried to distinguish *Weems* here, noting that while it was possible to “differentiate in an objective fashion between the highly unusual *cadena temporal* and more traditional forms of imprisonment imposed under the Anglo-Saxon system,” other proportionality judgments would inevitably invoke the subjective views of the judges applying them. *Id.*

33. *Id.*

34. *Id.* at 275–76.

35. *Id.* at 282.

severely than any other State.”³⁶

The dissent in *Rummel*, by contrast, argued that the Eighth Amendment prohibited grossly disproportionate punishments, even if legislatively authorized.³⁷ While the dissent acknowledged the need to avoid “constitutionalizing the personal predil[e]ctions of federal judges,” it contended confidently that “certain objective factors” could provide an objective basis on which to analyze the proportionality issue.³⁸ “Among these are (i) the nature of the offense . . . ; (ii) the sentence imposed for . . . the same crime in other jurisdictions . . . ; and (iii) the sentence imposed upon other criminals in the same jurisdiction”³⁹ It criticized the majority’s admission that it might have to recognize the proportionality principle in the overtime parking hypothetical: “The Court concedes, as it must, that a mandatory life sentence may be constitutionally disproportionate to the severity of an offense. Yet its opinion suggests no basis in principle for distinguishing between permissible and grossly disproportionate life imprisonment.”⁴⁰

Two other factors complicated the decision in *Rummel*. First *Rummel* was sentenced as a recidivist, complicating the perhaps simpler question of whether life imprisonment was a constitutionally cognizable punishment for the theft of approximately \$120.⁴¹ The second was the availability of parole.⁴² That being said, one might have thought that, however contentious, the 5–4 decision in *Rummel* had settled the matter of the constitutional propriety of proportionality review of carceral sentences.⁴³

B. *Disproportionality Overturns a Carceral Sentence: Solem v. Helm*

Quite the contrary appeared to be the case three years later in *Solem v. Helm*.⁴⁴ Helm, a recidivist offender, received life imprisonment without possibility of parole for “uttering a ‘no account’ check for \$100,” following

36. *Id.*

37. *Id.* at 288 (Powell, J., dissenting).

38. *Id.* at 295.

39. *Id.* (citations omitted).

40. *Id.* at 307 n.25.

41. *Id.* at 266 (majority opinion).

42. *Id.* at 267.

43. This would have been confirmed by *Hutto v. Davis*, a per curiam opinion reversing a ruling of the Fourth Circuit that a sentence of forty years and a fine of twenty thousand dollars for the crimes of possession of less than nine ounces of marijuana with intent to distribute and distribution of marijuana was cruel and unusual punishment. *Hutto v. Davis*, 454 U.S. 370, 370–72 (1982) (per curiam). The Court’s terse conclusion was that the Court of Appeals had “failed to heed” *Rummel*. *Id.* at 372.

44. *Solem v. Helm*, 463 U.S. 277 (1983).

six prior felonies.⁴⁵ Writing for the majority, Justice Powell, the author of the dissent in *Rummel*, overturned Helm's sentence as disproportionate and therefore cruel and unusual in violation of the Eighth Amendment.⁴⁶

Helm constituted a resounding affirmation of the only recently rejected proportionality principle.⁴⁷ In an embarrassing show of wordplay, the Court rejected the clear statement in *Rummel* that the duration of carceral sentences would, except in the extraordinary case, be a matter of legislative prerogative.⁴⁸ While reviewing courts should defer substantially to legislative authority, all terms of carceral punishment, under the *Helm* approach, were subject to proportionality review.⁴⁹

Of what should that review consist? Cognizant of the critique that proportionality review was inherently subjective, the Court articulated three "objective criteria" to be considered in assessing whether a sentence was proportionate.⁵⁰ The Court should look to "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions."⁵¹ The Court proceeded to argue that these standards could be consistently and objectively applied.⁵² Severity could be assessed on the basis of "generally accepted criteria,"⁵³ that nonviolent crimes are less serious than violent ones, that larger crimes (e.g.,

45. *Id.* at 279, 281–82. The prior felonies were three third-degree burglaries, one offense of obtaining money under false pretenses, one offense of grand larceny, and a "third-offense" of Driving While Intoxicated. *Id.* at 279–80. There was some difference of opinion about whether these felonies could fairly be classified as nonviolent. Compare *id.* at 280 (noting that "[t]he record contain[ed] no details about the circumstances" of obtaining money under false pretense, grand larceny, and driving while intoxicated "except that they were all nonviolent" crimes), with *id.* at 315–16 (Burger, C.J., dissenting) (indicating that four of Helm's felonies could not "fairly be characterized as 'nonviolent'" and that burglaries coupled with the third offense of driving while intoxicated "posed real risk of serious harm to others").

46. *Id.* at 303 (majority opinion).

47. *Id.* at 284. The Eighth Amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." *Id.*

48. *Id.* at 288 n.14. According to the Court in *Helm*, the statement in *Rummel* that "one could argue without fear of contradiction by any decision of this Court that for crimes . . . punishable by significant terms of imprisonment in a state penitentiary, the length of sentence actually imposed is purely a matter of legislative prerogative," stated only a possible argument, not one the *Rummel* Court actually made. *Id.* (quoting *Rummel v. Estelle*, 445 U.S. 263, 274 (1980) (emphasis omitted)). "The Court," Justice Powell wrote, "did not adopt the standard proposed, but merely recognized that the argument was possible." *Id.* The dissent in *Helm* strenuously rejected this interpretation, arguing that "the *Rummel* Court was not merely summarizing an argument, as the Court suggests, but was stating affirmatively the rule of law laid down." *Id.* at 307 (Burger, C.J., dissenting).

49. *Id.* at 290 (majority opinion).

50. *Id.* at 292.

51. *Id.*

52. *Id.* at 292–94.

53. *Id.* at 294.

stealing more money) are more serious than smaller crimes, and “that negligent conduct is less serious than intentional conduct.”⁵⁴ While the Court recognized that “a State is justified in punishing a recidivist more severely than it punishes a first offender,”⁵⁵ it still required that a court, in applying proportionality review, “focus on the principal felony—the felony that triggers the life sentence.”⁵⁶ Conducting what have since been termed “intra-jurisdictional” and “inter-jurisdictional” analyses, the Court concluded that Helm was punished more severely than criminals committing far more serious crimes.⁵⁷

The dissent, needless to say, was unconvinced that the *Helm* decision was so clearly distinguishable from *Rummel*. The majority, it charged, “blithely discards any concept of *stare decisis*, trespasses gravely on the authority of the states, and distorts the concept of proportionality of punishment.”⁵⁸ According to the dissent, the key flaw was the subjectivity of the majority’s approach.⁵⁹ As had the majority in *Rummel*, the dissent rejected the notion that courts could objectively assess either the severity of crimes or the relative punishments for different crimes in the same jurisdiction.⁶⁰ As for the inter-jurisdictional analysis, the dissent maintained that it “trample[s] on fundamental concepts of federalism,” interfering with the states’ prerogatives to assess the severity of crimes and punish them accordingly.⁶¹ The absence of a “neutral principle of adjudication” rendered the Court’s decision illegitimate and irreproducible.⁶² Again, the core themes—legislative autonomy and the need for objectivity—dominated the discourse, but did not dictate the result.

54. *Id.* at 292–93. The dissent found the claim of objectivity for these factors unconvincing: “Today’s conclusion by five Justices that they are able to say that one offense has less ‘gravity’ than another is nothing other than a bald substitution of individual subjective moral values for those of the legislature.” *Id.* at 314 (Burger, C.J., dissenting).

55. *Id.* at 296 (majority opinion).

56. *Id.* at 296 n.21.

57. *Id.* at 299. The Court concluded that Helm would only have been eligible to receive such a harsh sentence in one other state, but that that state had never actually imposed such a sentence. *Id.* at 299–300.

58. *Id.* at 304 (Burger, C.J., dissenting).

59. *Id.* at 314.

60. *Id.* at 309–10.

61. *Id.* at 309.

62. *Id.* at 314–15 (quoting *Rummel v. Estelle*, 568 F.2d 1193, 1201–02 (5th Cir. 1978) (Thomberry, J., dissenting)).

C. *Recognizing a Narrow Proportionality Principle: Harmelin v. Michigan*

It took the Court eight years to revisit the issue of proportionality in carceral sentences. In *Harmelin v. Michigan*, the Court contemplated the application of the Eighth Amendment to a life sentence without possibility of parole for a single-offense possession of 672 grams of cocaine.⁶³ This time, the Court could not even muster a majority opinion.⁶⁴

The Court, once again, was divided on the notion of whether a court could ever properly apply proportionality review to a carceral sentence. Justice Scalia, joined by Chief Justice Rehnquist, was of the opinion that it could not.⁶⁵ In light of the Court's recent decision in *Solem v. Helm*, rejecting the proportionality principle outright was difficult: the opinion harkened back to *Rummel* and required some energetic word parsing, hairsplitting, and recharacterization of the critical overtime parking footnote.⁶⁶ Justice Scalia's characterization of *Helm* as a sport, "scarcely the expression of clear and well accepted constitutional law," and "simply wrong,"⁶⁷ mustered only two votes.⁶⁸ His view that the Cruel and Unusual Punishment Clause should properly be understood as a historical matter to apply to illegal or unauthorized punishments, not to disproportionate ones, did not command a majority.⁶⁹

Again, the concern expressed by Justice Scalia was the absence of clear, objective guidelines for applying a principle of proportionality and the fear that "the proportionality principle becomes an invitation to imposition of subjective values."⁷⁰ Justice Scalia rejected the notion that proportionality was necessary to address even the overtime parking possibility.⁷¹ Instead,

63. *Harmelin v. Michigan*, 501 U.S. 957, 961 (1991).

64. "Justice Scalia announced the judgment of the Court and delivered the opinion of the Court with respect to Part IV," which denied Harmelin's claim that he was entitled to individualized consideration of his sentence. *Id.* at 961, 995. Only Chief Justice Rehnquist joined Justice Scalia's opinion regarding proportionality review. *Id.* at 961. Justice Kennedy wrote a concurring opinion that Justices O'Connor and Souter joined. *Id.* at 996. Justice White wrote a dissenting opinion in which Justices Blackmun and Stevens joined. *Id.* at 1009. Justice Stevens, joined by Justice Blackmun, wrote a dissenting opinion. *Id.* at 1028. Justice Marshall dissented separately. *Id.* at 1027.

65. *Id.* at 965 (Scalia, J., concurring in the judgement).

66. *Id.* at 964–65. On whether *Rummel* had said that legislative authority on the duration of carceral sentences was inherently limitless, Justice Scalia argued that the Court in *Helm* erred in arguing that the critical words of the *Rummel* opinion were "one could argue"; "[o]f course *Rummel* had not said merely 'one could argue,' but 'one could argue without fear of contradiction by any decision of this Court.'" *Id.* at 965. See *supra* Part I.A for a discussion of *Helm* and its departure from *Rummel*.

67. *Harmelin*, 501 U.S. at 965 (Scalia, J., concurring in the judgment).

68. *Id.* at 961.

69. See *id.* at 961, 966, 969, 973 (arguing that the Cruel and Unusual Punishment Clause of the English Declaration of Rights referred to illegal or unauthorized rather than disproportionate sentences).

70. *Id.* at 985–90.

71. *Id.* at 986 n.11.

he confidently left such concerns to the political process.⁷²

Justice Kennedy's opinion for three justices recognized a "narrow proportionality principle."⁷³ In Justice Kennedy's view, the Eighth Amendment forbade only sentences "'grossly disproportionate' to the crime."⁷⁴ The interjurisdictional and intrajurisdictional analyses conducted in *Solem v. Helm* were only appropriate "to validate an initial judgment" of gross disproportionality.⁷⁵

This analysis turned, again, on the need for legislative primacy and the concern that judicial interventions be governed and constrained by objective factors.⁷⁶ "[T]he fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is 'properly within the province of legislatures, not courts.'"⁷⁷ Kennedy's view "that the Eighth Amendment does not mandate adoption of any one penological theory" supported his conclusion that the legislature's determinations ought to be controlling in most circumstances.⁷⁸ Finding objective factors, wrote Justice Kennedy, was easier in the context of noncarceral sentences, and made successful challenges to carceral sentences difficult but not

72. *Id.* at 985–86. "This is not to say that there are no absolutes; one can imagine extreme examples that no rational person, in no time or place, could accept. But for the same reason these examples are easy to decide, they are certain never to occur." *Id.* With regard to overtime parking, Justice Scalia noted it unlikely

that the horrible example imagined would ever in fact occur, unless, of course, overtime parking should one day become an arguably major threat to the common good, and the need to deter it arguably critical—at which time the Members of this Court would probably disagree as to whether the punishment really is 'disproportionate,' even as they disagree regarding the punishment for possession of cocaine today.

Id. at 986 n.11.

73. *Id.* at 996–97 (Kennedy, J., concurring).

74. *Id.* at 1001 (citing *Solem v. Helm*, 463 U.S. 277, 288, 303 (1983)). Justice White, in dissent, challenged the objectivity of such an approach as relying on "the 'subjective views of individual Justices.'" *Id.* at 1020 (White, J., dissenting) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion)). He also posited that the rule should not simply address the propriety of the sentence as applied to the particular wrongdoer, but should consider whether the offense in the abstract merited the punishment meted out. *See id.* at 1022 ("To justify such a harsh mandatory penalty as that imposed here, however, the offense should be one which will *always* warrant that punishment.").

75. *Id.* at 1005 (Kennedy, J., concurring).

76. *Id.* at 998–1000. "[F]ederal courts should be informed by "'objective factors to the maximum possible extent.'" *Id.* at 1000 (quoting *Rummel v. Estelle*, 445 U.S. 263, 274–75 (1980)).

77. *Id.* at 998 (quoting *Rummel*, 445 U.S. at 275–76).

78. *Id.* at 999 ("The federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation."). Justice Scalia viewed the notion of proportionality as requiring the adoption of a retributive model of sentencing: "In fact, it becomes difficult even to speak intelligently of 'proportionality,' once deterrence and rehabilitation are given significant weight. Proportionality is inherently a retributive concept, and perfect proportionality is the talionic law." *Id.* at 989 (Scalia, J., concurring in the judgment).

impossible.⁷⁹ Under Justice Kennedy's approach, his conclusion that Harmelin's offense—possession of a large quantity of cocaine—was “grave” ended the analysis.⁸⁰ Justice White's dissenting opinion recognized the proportionality principle and argued for a straightforward application of *Helm* to Harmelin's case.⁸¹

The Court has not come any closer to a definitive resolution of these questions in its recent offerings.

D. Disagreement Again: *Ewing v. California*

The Court's most recent pronouncements on the proportionality principle came during the October 2002 term.⁸² Gary Ewing walked out of the pro shop at the El Segundo Golf Course with three golf clubs, each priced at \$399, stuffed into his pants leg.⁸³ Ewing had a long history of comparatively minor criminal offenses and convictions for three counts of residential burglary and a first-degree robbery.⁸⁴ Ewing was charged under

79. *Id.* at 1000–01 (Kennedy, J., concurring). “[O]utside the context of [noncarceral sentences such as] capital punishment, successful challenges to the proportionality of particular [carceral] sentences [are] exceedingly rare.” *Id.* at 1001 (quoting *Helm*, 463 U.S. at 289–90 (emphasis omitted) (last alteration in original)).

80. *Id.* at 1001–04.

81. *Id.* at 1012, 1016–17 (White, J., dissenting). Justice Marshall agreed with Justice White in pertinent part, providing seven votes for the recognition of at least a limited proportionality principle. *Id.* at 1027–28 (Marshall, J., dissenting).

82. *Ewing v. California*, 538 U.S. 11 (2003). In addition to *Ewing*, the Court also decided *Lockyer v. Andrade*, a case arising on federal habeas review. *Lockyer v. Andrade*, 538 U.S. 63, 70 (2003). Because of the posture of the case, the issue was not whether the sentence Andrade received—two consecutive sentences of twenty-five years to life in prison for two separate third-strike petty thefts of videotapes—was disproportionate. *Id.* at 66. Instead, the question was whether, under AEDPA, the decision of the California Court of Appeals upholding Andrade's sentence was “contrary to, or involved an unreasonable application of,” the Court's clearly established precedent under 28 U.S.C. § 2254(d)(1). *Id.* at 71 (“[W]e do not reach the question whether the state court erred and instead focus solely on whether § 2254(d) forecloses habeas relief on Andrade's Eighth Amendment claim.”).

83. *Ewing*, 538 U.S. at 17–18. At oral argument for this case, the Court exhibited bemusement that Ewing could walk with golf clubs in his pants. See Transcript of Oral Argument at 28–29, *Ewing*, 538 U.S. 11 (No. 01-6978) (“QUESTION: I'm curious about one thing. Was he really a very tall man, or were these irons rather than wood? (Laughter.) MR. DENVER: Your Honor, to tell you the truth, I have no idea how he could have done that. It seems to me a miracle that he could have -- actually got out the door, but he apparently did. He's not a very tall man, as I recall. QUESTION: It is a good thing that walking is not an essential part of golf, because otherwise walking with those -- MR. DENVER: I think -- QUESTION: -- golf clubs in his pants would have been very difficult. (Laughter.)”).

84. *Ewing*, 538 U.S. at 18–19. As the Supreme Court outlined a nine-year period of his history, he had two convictions for theft, one conviction for petty theft with a prior, one conviction for grand theft auto that was reduced to a misdemeanor and then dismissed, one conviction for battery, one conviction for burglary, one conviction for possession of drug paraphernalia, one conviction for appropriating lost property, and one conviction of unlawfully possessing a firearm and trespassing. *Id.* at 18. He was sentenced to nine years imprisonment on the robbery and burglary and was paroled six years later. *Id.* at

California's three-strikes statute, the prosecutor alleging that he had been convicted previously of four serious or violent felonies.⁸⁵ Under the three-strikes law, he was sentenced to twenty-five years to life; under the California statute, he would serve a minimum term of twenty-five years.⁸⁶ Ewing claimed in the Supreme Court that the Eighth Amendment prohibited his sentence as cruel and unusual.⁸⁷

The Court, once again, offered a fractured and unsatisfying resolution of the proportionality issue. Justice O'Connor, writing for herself, the Chief Justice, and Justice Kennedy, indicated that the appropriate analysis was the Kennedy concurrence in *Harmelin*.⁸⁸ After an extensive discussion of the California legislature's interest in punishing recidivists, Justice O'Connor concluded that the "gravity of Ewing's offense," taking into account "not only his current felony, but also his long history of felony recidivism," was significant.⁸⁹ Accordingly, his sentence was "not 'the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.'"⁹⁰ Justices Thomas and Scalia, each concurring separately, reiterated that the proportionality principle was "incapable of judicial application"⁹¹ and could not "intelligently" be applied.⁹² Justice Thomas expressly affirmed Justice Scalia's view that "the Cruel and Unusual Punishments Clause of the Eighth Amendment contains no proportionality principle."⁹³ It is these five votes whose agreement, such as it is, provided a majority for the proposition that Ewing's sentence was not constitutionally disproportionate. The dissenters, Justices Breyer, Stevens, Souter, and Ginsburg, applied the analysis from *Harmelin* to reach a different result and concluded that *Ewing* was the "rare" case in which a sentence was grossly disproportionate to the crime.⁹⁴ Justice

19.

85. *Id.*

86. *Id.* at 16, 20.

87. *Id.* at 28.

88. *Id.* at 14, 23–24.

89. *Id.* at 24–29.

90. *Id.* at 30 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring)).

91. *Id.* at 32 (Thomas, J., concurring in the judgment).

92. *Id.* at 31 (Scalia, J., concurring in the judgment).

93. *Id.* at 32 (Thomas, J., concurring in the judgment).

94. *Id.* at 32, 36–37 (Breyer, J., dissenting). Justice Breyer's opinion first compared Ewing's situation with that of *Rummel* and *Helm* in the two prior recidivist cases considered by the Court. *Id.* at 37. He concluded that the three relevant characteristics are "the length of the prison term in real time, . . . the sentence-triggering criminal conduct, . . . and . . . the offender's criminal history." *Id.* Comparing Ewing's situation with *Rummel*'s and *Helm*'s, Justice Breyer concluded that since Ewing's case fell between them, his claim for "gross disproportionality" had to be recognized; Justice Breyer then turned to a comparative analysis. *Id.* at 37, 39–40, 42.

Breyer suggested that gross disproportionality can be identified “in a fairly objective way—at the outer bounds of sentencing.”⁹⁵

Again, the Court wrestled with the same two concerns in trying to fashion a coherent proportionality jurisprudence: the need for adequate deference to legislative decisions about punishment and the need for objective factors to govern proportionality review of carceral sentences.⁹⁶ The overtime parking conundrum reared its head yet again,⁹⁷ reflecting the Court’s persistent reluctance to tie its hands in the event state legislatures go too far.⁹⁸

95. *Id.* at 52–53.

96. *Id.* at 17, 24.

97. *Id.* at 35 (Stevens, J., dissenting). The overtime parking hypothetical threads its way through the Court’s recent case law on the issue of proportionality in non-capital sentencing. *See, e.g., id.* (“It is this broad proportionality principle that would preclude reliance on any of the justifications for punishment to support, for example, a life sentence for overtime parking.”); *Solem v. Helm*, 463 U.S. 277, 310 n.2, 311 n.3 (1983) (Burger, C.J., dissenting) (“Although *Rummel* . . . conceded that ‘a proportionality principle [might] come into play . . . if a legislature made overtime parking a felony punishable by life imprisonment,’ the majority has not suggested that respondent’s crimes are comparable to overtime parking. . . . Both *Rummel* and *Hutto v. Davis*, leave open the possibility that in extraordinary cases—such as a life sentence for overtime parking—it might be permissible for a court to decide whether the sentence is grossly disproportionate to the crime. I agree that the Cruel and Unusual Punishments Clause might apply to those rare cases where reasonable men cannot differ as to the inappropriateness of a punishment. In all other cases, we should defer to the legislature’s line-drawing.” (citations omitted) (second and third alterations in original)); *Hutto v. Davis*, 454 U.S. 370, 374 n.3 (1982) (per curiam) (“We noted in *Rummel* that there could be situations in which the proportionality principle would come into play, such as ‘if a legislature made overtime parking a felony punishable by life imprisonment.’” (quoting *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980))); *Hutto*, 454 U.S. at 383 n.1 (Brennan, J., dissenting) (“That there should be any doubt as to the continued validity of the proportionality principle is particularly incomprehensible in view of the *Rummel* Court’s reliance on the proportionality principle in a footnote, where the Court, responding to the fanciful hypothetical of the dissent, stated that this principle would bar a legislature from making ‘overtime parking a felony punishable by life imprisonment.’” (quoting *Rummel*, 445 U.S. at 274 n.11)). The most convoluted attempt to parse *Rummel*’s overtime parking footnote was in Justice Scalia’s opinion in *Harmelin v. Michigan*, in which he argued that the Court in *Hutto* had misstated the impact of the overtime parking footnote in *Rummel*:

The content of that footnote [in *Rummel*] was imperceptibly (but, in the event, ominously) expanded [in *Hutto v. Davis*]: *Rummel*’s ‘not [saying] that a proportionality principle would not come into play’ in the fanciful parking example . . . became ‘not[ing] . . . that there could be situations in which the proportionality principle *would* come into play, *such as*’ the fanciful parking example This combination of expanded text plus expanded footnote permitted the inference that gross disproportionality was an example of the ‘exceedingly rare’ situations in which Eighth Amendment challenges ‘should be’ successful.

Harmelin v. Michigan, 501 U.S. 957, 963 (1991) (third, fifth, and sixth alterations in original) (internal citations omitted).

98. This issue was raised by Justice Breyer in oral argument in the *Andrade* case: “I agree on the merits that we can’t convert this Court into a sentencing commission, but it’s also true, I guess, that there must be some way of deciding when a State has gone too far.” Transcript of Oral Argument at 8,

The Court's repeated attempts to articulate and apply a coherent proportionality doctrine are unimpressive. While a conclusion that the Eighth Amendment contains no proportionality guarantee at all is capable of consistent application, the Court's unwillingness to irrevocably cede authority to review legislative—or perhaps prosecutorial—bad decisions seems likely to persist.⁹⁹ At the same time, the need to assure an objective and reproducible basis for such decisions, if they are to be made, ensures an ongoing disagreement. Proponents of proportionality review acknowledge the need to support proportionality decisions as something other than the subjective desires of individual justices and routinely claim that courts can objectively and dispassionately apply their standards and tests.¹⁰⁰ Opponents of proportionality review ridicule the “objectivity” of the tests that matter and the relevance of those that do not.¹⁰¹ The grossly disproportionate standard adopted in *Ewing* seems likely to produce

Lockyer v. Andrade, 538 U.S. 63 (2003) (No. 01–1127). Justice Breyer agreed with counsel's assertion that subjectivity in the process should belong to the legislature, but noted, “still there has to be a way of deciding when they go too far.” *Id.* at 9. One member of the Court also referred to “jay-walking” as an alternate hypothetical of legislative overreaching. *Id.* at 20.

99. Justice Scalia has suggested that judicial oversight is unnecessary because political constraints alone will assure that situations such as the overtime parking hypothetical can never occur. *Harmelin*, 501 U.S. at 985–86 (Scalia, J., concurring in the judgment); *supra* note 72 and accompanying text. He has indicated, moreover, that the Excessive Fines Clause might logically provide more oversight authority than the Cruel and Unusual Punishments Clause; the Framers might legitimately have imposed more constraints on the fining authority than on the sentencing authority because carceral sentencing costs money, while fines benefit the state. *Harmelin*, 501 U.S. at 978 n.9 (Scalia, J., concurring in the judgment).

One might question the efficacy of the expense of carceral sentencing as a viable political constraint on legislatures. There is a time lag between the (comparatively popular) imposition of stringent sentences on law violators and the (considerably less popular) arrival of the bill for the long-term cost of such sentences. Legislators might cheerfully impose draconian sentencing to assure political popularity, leaving accountability to a later generation of legislators. Current trends to revisit mandatory sentencing schemes in light of their cost proves this point. *See, e.g.*, Fox Butterfield, *With Longer Sentences, Cost of Fighting Crime is Higher*, N.Y. TIMES, May 3, 2004, at A18 (noting that “[i]n the last year, more than half the states took legislative steps to modify tough sentencing laws they passed in the 1990’s”). Moreover, some constituents might perceive the desire for security as so significant as to outweigh concerns about cost. Political constraints on imposing life imprisonment for overtime parking may less likely relate to cost than the view that overtime parking is not really criminal at all because law-abiding citizens (or perhaps even legislators) are likely to engage in it. Margaret Raymond, *Penumbra Crimes*, 39 AM. CRIM. L. REV. 1395, 1395 (2002).

100. *Harmelin*, 501 U.S. at 1015 (White, J., dissenting).

101. *See, e.g., id.* at 986 (Scalia, J., concurring in judgment) (“For that real-world enterprise, the standards [of proportionality review] seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values.”); *see also Rummel*, 445 U.S. at 275–76 (“But to recognize that the State of Texas could have imprisoned Rummel for life if he had stolen \$5,000, \$50,000, or \$500,000, rather than the \$120.75 that a jury convicted him of stealing, is virtually to concede that the lines to be drawn are indeed ‘subjective,’ and therefore properly within the province of legislatures, not courts.”).

inconsistent conclusions and results, opening the door yet again to challenges to its objectivity.¹⁰² While standards comparing sentences for the same crime in different jurisdictions can be objectively applied,¹⁰³ they are of limited utility in a federalist system;¹⁰⁴ standards that require the comparison of dissimilar offenses or punishments inevitably require some values-based assessment of comparability, which includes a subjective component.¹⁰⁵ Lower courts still have little guidance about how to decide these complex and critical cases, which reflect profoundly on our criminal justice system.

How did we find ourselves here, and why has it been so difficult to achieve a permanent resolution of this issue? The forgotten clue to this morass is *Weems v. United States*, the first case to recognize the proportionality principle.¹⁰⁶ In *Weems*, the United States Supreme Court found itself reviewing the application of the Philippine Penal Code to an American in the Philippines.¹⁰⁷ Its approach, in light of its view of Philippine justice, paid less deference than one might expect to the existing sentencing scheme and less attention to the subjectivity of its ruling than it might otherwise.¹⁰⁸ Since *Weems* arose under circumstances that minimized the significance of the critical concerns that recur in the proportionality cases, it opened the door to the Court's persistent difficulties with proportionality review.¹⁰⁹

102. *Ewing*, 538 U.S. at 30–31.

103. *Solem v. Helm*, 463 U.S. 277 at 290–92 (1983).

104. Differences in those sentences might legitimately reflect different legislative assessments of the severity of the problem rather than disproportionality on the part of the harsher legislature. See *Harmelin*, 501 U.S. at 989 (Scalia, J., concurring in the judgment) (noting that one state may criminalize an activity that another state actually rewards).

105. See *id.* at 988–89 (“One cannot compare the sentences imposed by the jurisdiction for ‘similarly grave’ offenses if there is no objective standard of gravity. Judges will be comparing what *they* consider comparable. . . . When it happens that two offenses judicially determined to be ‘similarly grave’ receive significantly *dissimilar* penalties, what follows is not that the harsher penalty is unconstitutional, but merely that the legislature does not share the judges’ view that the offenses are similarly grave.”).

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

107. *Id.* at 357–58, 363–64.

108. See *id.* at 377 (stating that this is a foreign law from an alien source).

109. There is much scholarly discussion of the *Weems* case. See Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 53 (2000) (indicating that “due to the unusual nature of *cadena temporal* punishment, the Court was reluctant or unable to distill a coherent proportionality principle from *Weems* and, thus, limited the holding to the facts of the case”); Charles Walter Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 J. CRIM. L. & CRIMINOLOGY 378, 385 (1980) (“[T]he *Weems* case never became the foundation for a developed eighth amendment proportionality doctrine”).

II. THE WEEMS CASE

A. *The Facts of the Case*

Weems arose during the American occupation of the Philippine Islands.¹¹⁰ The case—and many others—arose out of the chaos and the consequent opportunities for fraud, embezzlement, and theft that were created by the decentralized disbursement system prevalent at the beginning of that occupation.¹¹¹

The defendant, Paul A. Weems, was an acting disbursing officer of the Bureau of Coast Guard and Transportation of the Philippine Islands.¹¹² As disbursing officer, Weems was responsible for going to area lighthouses and paying the long-time Philippine workers their monthly wages.¹¹³ He would receive an advance from the insular treasury of the funds necessary to make those payments and was obliged to account for the money once he had spent it.¹¹⁴ Weems went to the lighthouses of Capul and Malabrigo, on or about

110. *United States v. Weems*, 7 PHIL. REP. 241, 242 (S.C., Dec. 29, 1906); Donald M. Seekins, *Ch. 1: Historical Setting*, in PHILIPPINES: A COUNTRY STUDY 1, 27 (Ronald E. Dolan ed., 1993).

111. *See infra* notes 232–35 and accompanying text.

112. *Weems*, 7 PHIL. REP. at 242, 244. The confusion inherent in colonialism was reflected in the complaint that referred to Weems as the “disbursing officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands.” *Weems*, 217 U.S. at 359 (quoting Complaint, *Weems*, 217 U.S. 349 (No. 20)).

113. BUREAU OF INSULAR AFFAIRS, WAR DEP’T, FOURTH ANNUAL REPORT OF THE PHILIPPINE COMMISSION 1903 pt. 3, at 183 (1904) [hereinafter BIA, FOURTH ANN. REP.]; *see Weems*, 7 PHIL. REP. at 242 (explaining Weems’s actions on June 22, 1904). “All of the light keepers throughout the islands are Filipinos. A large percentage are old or middle-aged men who have spent their lives in the light-house service.” BIA, FOURTH ANN. REP., *supra*, pt. 3, at 183.

The recitation of undisputed facts that is part of the opinion of the trial court in another case, *Stuart v. United States*, explains how the disbursements system worked. *Stuart v. United States*, 207 U.S. 598 (1907).

[T]he accused, in his official capacity as disbursing officer of the customs-house of Iloilo, had under his custody and in his possession the public funds appropriated by the insular government for the expenses and improvements and other matters incident thereto . . . [;] all money paid out for the said expenses, improvements, and other matters covered by these appropriations were to be paid out by the accused on vouchers, which vouchers had to be approved by the collector of customs of the port of Iloilo, and it was the duty of said disbursing officer to attach these vouchers, such as pay rolls, general-expense vouchers, &c., to his monthly abstract of disbursements, of which they then became a part. This abstract of disbursements, with the account current of disbursements, it was the duty of the disbursing officer to make out and forward to the auditor of the Philippine Islands, the whole being an official statement of the amount of public funds expended by the disbursing officer for that month . . .

Extracts from Transcript of Record at 4–5, *Stuart*, 207 U.S. 598 (No. 133) [hereinafter *Stuart* Transcript].

114. *United States of America, Philippine Islands: In the Court of First Instance for Manila*,

June 22, 1904, but did not pay the workers in full.¹¹⁵ Nonetheless, Weems made entries in the cashbook dated June 22, 1904, indicating that he had made the payroll disbursements at the two lighthouses on those dates.¹¹⁶ Though the facts suggested embezzlement, Weems was charged only with falsifying a public record.¹¹⁷

Sentence at 6, *Weems*, 217 U.S. 349 (No. 1913) [hereinafter *Weems Transcript*]. The cashbook was “destined for the making of official entries in the same, by which the Disbursing Officer must show how the sums in hands for distribution among the several divisions or lighthouses of the Bureau of Coast Guard and Transportation have been used.” *Id.* at 7. There were two records filed with the Supreme Court in this case. The first omitted reference to the arraignment and plea of Weems to the charge; after the court issued a writ of certiorari, the government “fil[ed] a more perfect record of the proceedings of the court below.” Reply Brief on Behalf of the United States at 2, *Weems*, 217 U.S. 349 (No. 1913).

115. *Weems*, 7 PHIL. REP. at 242. The allegation was that Weems had made an entry in the cashbook on June 22, 1904, indicating that he had made payroll expenditures for April and May corresponding to voucher numbers 29 and 30 in the amount of PHP 204 for Capul and PHP 408 for Malabrigo, when he had not disbursed those funds. *Id.*

116. *Id.*

117. *Id.* at 241–42. This was quite a fall for Weems, who had previously been singled out for praise for his advancement to the post of disbursing officer:

It has been observed with some pride that the insular government has, to a certain extent, utilized the disbursing office as a preparatory school of instruction for disbursing clerks, inasmuch as this office claims the honor of having trained and furnished to the insular government two of its most capable and efficient disbursing officers, viz. Mr. A.J. Robertson . . . and Mr. Paul A. Weems . . . both of whom were formerly clerks in this office.

BIA, FOURTH ANN. REP., *supra* note 113, pt. 1, at 567. The next Report of the Commission included a report submitted by Mr. Weems in his role as disbursing officer. BUREAU OF INSULAR AFFAIRS, WAR DEP’T, FIFTH ANNUAL REPORT OF THE PHILIPPINE COMMISSION 1904 pt. 3, at 186–88 (1905) [hereinafter BIA, FIFTH ANN. REP.].

The charges at issue in the Supreme Court case were not Weems’s first experience with the criminal justice system, however. He was apparently discharged from his civil service job on a suspicion of participation in a train robbery. Bureau of Insular Affairs, War Dep’t, Record Card of Paul A. Weems (Sept. 28, 1904) (record available at Rec. of the Bureau of Insular Affairs, Rec. Group 350, Nat’l Archives Building, College Park, Md.) [hereinafter *Weems’s Record*] [Documents from the Bureau of Insular Affairs collection at the National Archives are hereinafter referred to as BIA Records]. Weems denied participation in the robbery. *Id.* It nonetheless appears to have been the initial basis for his discharge from the civil service. See Bureau of Insular Affairs, War Dep’t, Officers and Employees, Not Including Filipinos, Separated for Cause From the Philippine Civil Service, During the Period March 1, 1904, to June 30, 1905, Inclusive, at 6 (record available at BIA Records, *supra*, General Classified Files 1898–1914, No. 13285–3) (noting Weems was “[a]rrested in connection with [the] robbery of [a] mail car”). A letter written to Weems at his request by the Director of the Civil Service in 1913 notes that he was removed from his position as disbursing officer on August 5, 1904, “on the ground that you were under arrest under suspicious circumstances which had destroyed the confidence in you of the Chief of the Bureau and would warrant your removal.” Letter from B. Falconer, Dir. Civil Serv., to Paul A. Weems (Nov. 28, 1913) (letter available at BIA Records, *supra*, General Classified Files 1898–1914, No. 11428). Weems was ultimately charged with conspiracy and aiding and abetting the crime of forcibly taking mail from a moving train. *United States v. Capurro*, 7 PHIL. REP. 24, 28–30 (S.C., Nov. 24, 1906). He allegedly provided means of escape for the principal and helped him to evade capture. *Id.* at 30. The principal defendant was acquitted of the offense. *Id.* Capurro was ultimately charged with another offense arising out of these facts, but no further reference to Weems appears. *Id.* at 30–31.

Weems admitted that he had made the entries in the book and had not made the payments.¹¹⁸ He claimed that when he went to the lighthouse stations to pay the employees, he found that he did not have enough cash to pay them.¹¹⁹ They agreed that he could pay them the following month, or that they would claim the funds from him the next time they came to Manila.¹²⁰ Since he was committed to pay them, he considered the agreement, in effect, payment, which justified the notation that he had made the payments.¹²¹ At trial, the two chief-lighthouse keepers denied there was such an agreement and testified that when Weems told them that he did not have enough money to pay them, there was nothing else they could do but accept the partial payment Weems offered them.¹²² The prosecution also offered evidence that the defendant had sent telegrams to friends in the United States asking for one thousand dollars “to save him from imprisonment and disgrace,” and “that[] after criminal proceedings were instituted against him, the accused attempted to make surreptitious payments of the unpaid balance due on the said pay rolls for the month of May, 1904.”¹²³ Weems was convicted of the offense and sentenced to “fifteen years of Cadena, together with the accessories of section 56 of the Penal Code.”¹²⁴ The Supreme Court of the Philippine Islands affirmed, concluding that “no credence can be given the highly improbable story of the accused.”¹²⁵

As described by the Supreme Court of the United States, the sentence was not mere imprisonment.¹²⁶ In addition, Weems was to suffer certain accessory penalties: civil interdiction;¹²⁷ perpetual, absolute disqualification;¹²⁸ and subjection to surveillance during life.¹²⁹

118. *Weems*, 7 PHIL. REP. at 242.

119. *Id.*

120. *Id.* at 242–43.

121. *Id.* at 243.

122. *Id.*

123. *Id.*

124. *United States v. Weems*, 217 U.S. 349, 358 (1910).

125. *Weems*, 7 PHIL. REP. at 243, 247.

126. *Weems*, 217 U.S. at 364; *see supra* note 11 and accompanying text.

127. *Weems*, 217 U.S. at 364. The Penal Code defined civil interdiction to “deprive the person punished as long as he suffers it, of the rights of parental authority, . . . participation in the family council, marital authority, . . . the administration of property, and the right to dispose of his own property by acts *inter vivos*.” *Id.* (quoting Art. 42 Penal Code of Spain (1870)).

128. *Id.*; *see supra* note 11.

129. *Weems*, 217 U.S. at 364. Subjection to surveillance imposed three obligations:

1. That of fixing his domicil[e] and giving notice thereof to the authority immediately in charge of his surveillance, not being allowed to change it without the knowledge and permission of said authority in writing.
2. To observe the rules of inspection prescribed.

Weems's initial claims of error were uninspiring and the Supreme Court of the Philippine Islands rejected them in short order.¹³⁰ Weems then sought review in the United States Supreme Court.¹³¹ There, he claimed for the first time that "[t]he punishment of fifteen years' imprisonment was . . . cruel and unusual."¹³² While the United States Constitution did not apply, Congress granted by statute most of the Constitution's protections to the Philippines, including the protection against the infliction of cruel and unusual punishments.¹³³ This made Weems's claim, for all intents and purposes, a claim that his sentence was unconstitutionally severe.

Weems's argument was something of an uphill claim. First, the error had not been preserved below.¹³⁴ At no time before seeking Supreme Court review did Weems assert that the punishment he received was cruel or unusual. Moreover, the Court rejected a similar claim only a few years prior in *Paraiso v. United States*, commenting tersely that it would not consider

3. To adopt some trade, art, industry, or profession, should he not have known means of subsistence of his own.

Id. Ironically, after the case was decided, the Governor-General of the Philippine Islands indicated that these sentences were not, in fact, proceeding as described; "[c]hains and surveillance," he wrote, "are obsolete in practice." Cablegram from Forbes, Governor-General, Philippines, to Jacob M. Dickinson, Sec'y of War (Aug. 30, 1910) (cablegram available at BIA Records, *supra* note 117, General Classified Files 1898–1914, No. 11428–8).

130. *Weems*, 7 PHIL. REP. at 243–47. First, Weems claimed that the charging document accused him of falsifying a cashbook as an officer of the "Bureau of Coast Guard and Transportation of the United States Government in the Philippine Islands," when no such bureau existed. *Id.* at 243–44. The Bureau of Coast Guard and Transportation was a bureau of the Philippine Government. *Id.* at 244. He also claimed that he was not a "public official" within the meaning of the pertinent statute, Article 300 of the Penal Code, and that the cashbook in question was not a "public document." *Id.*

131. *Weems*, 217 U.S. at 357.

132. *Id.* at 359. In view of how the case has been interpreted, it is interesting to note that Weems, in his assignment of error, objected solely to the duration of his imprisonment rather than the other conditions of his punishment. *Id.*; see *infra* notes 256–58.

133. *Weems*, 217 U.S. at 367; The Philippine Bill of July 1, 1902, ch. 1369, 32 Stat. 691, available at <http://www.chanrobles.com/philippinebillof1902.htm>.

134. *Weems*, 217 U.S. at 362. Then as now, the Supreme Court required that errors claimed before the Court had to be set forth in an assignment of errors filed with the clerk of the court below; failing to preserve error properly would result in disregard of such error, though the court preserved its right to "notice a plain error not assigned." *Id.* at 358 n.1. Rule 35, referred to by the Court, provided as follows:

Rule 35. Assignments of Errors. 1. Where an appeal or a writ of error is taken from a District Court or a Circuit Court direct to this court . . . the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. . . . Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

Id. at 358 n.1 (quoting SUP. CT. R. 35, 210 U.S. 441 (1907) (repealed 1911)).

errors not assigned.¹³⁵ Weems, however, offered an impassioned argument in favor of addressing the error though it had not been raised below: “If Weems had been sentenced to death by torture would he be turned out of this court after he had duly perfected an appeal because neither he nor his counsel had objected below to such punishment as cruel and unusual?”¹³⁶

Notwithstanding the procedural barriers to considering the issue, which had seemed significant in *Paraiso*, the Court took up the issue of whether Weems’s punishment was cruel and unusual.¹³⁷ Moreover, it reacted viscerally to the punishment Weems received and vigorously attacked its propriety.¹³⁸ Justice McKenna began his argument by stating, “[i]t must be confessed that . . . the sentence in this case, excite[s] wonder in minds accustomed to a more considerate adaptation of punishment to the degree of crime.”¹³⁹ Insisting that the sentence fit not the particular facts of the offense but the offense in the abstract,¹⁴⁰ the Court articulated, again with

135. *Paraiso v. United States*, 207 U.S. 368, 369, 372 (1907). The Court in *Weems* mentioned the *Paraiso* case, noting only, “[i]t may be that we were not sufficiently impressed with the importance of those contentions or saw in the circumstances of the case no reason to exercise our right of review under Rule 35.” *Weems*, 217 U.S. at 362.

136. Supplemental Brief on Behalf of the Plaintiff in Error at 4, *Weems*, 217 U.S. 349 (No. 20).

137. *Weems*, 217 U.S. at 358–59; *Paraiso*, 207 U.S. at 372. The case was decided by six Justices, and the majority opinion was signed by only four. *Weems*, 217 U.S. at 357 n.1. The opinion begins with a rather grim explanation of how this came to pass:

This case was argued before seven justices, Mr. Justice Moody being absent on account of sickness and Mr. Justice Lurton not then having taken his seat. Mr. Justice Brewer died before the opinion was delivered. Mr. Justice McKenna delivered the opinion of the court, the Chief Justice, Mr. Justice Harlan and Mr. Justice Day concurring with him. Mr. Justice White delivered a dissenting opinion . . . , Mr. Justice Holmes concurring with him.

Id. (citation omitted).

138. *Weems*, 217 U.S. at 377. The insular government had been forewarned of this possible reaction. After the *Paraiso* case and another case from the Philippines had been argued before the Supreme Court, the Attorney General wrote to the Secretary of War advising that the Supreme Court was concerned about the length of sentences for falsifying documents. Letter from Charles J. Bonaparte, Att’y Gen., to Sec’y of War at 1–2 (Dec. 24, 1907) (letter available at BIA Records, *supra* note 117, General Classified Files 1898–1914, No. 6903–12). “In these cases,” he wrote, “the Government has had to contend with the very evident reluctance of the Supreme Court to enforce judgments as severe for the offen[s]es committed as were imposed.” *Id.* at 2. He went on to suggest that the Court’s view “would be likely to result in a reversal” in a weak case, and suggested “the propriety of recommending to the Philippine Commission such changes in the law in this regard as may more nearly conform to existing ideas in the United States as to the amount of punishment proper to be inflicted in criminal cases.” *Id.* A response indicated that a revision of the criminal code had been proposed but had been objected to by Filipino lawyers. Letter from Robert Shaw Oliver, Ass’t Sec’y of War to Charles J. Bonaparte, Att’y Gen. at 1–2 (Jan. 7, 1908) (letter available at BIA Records, *supra* note 117, General Classified Files 1898–1914, No. 6903–12). The difficulties with the Penal Code revision are discussed further *infra* Part II.B.4.

139. *Weems*, 217 U.S. at 365.

140. *See id.* at 366 (“Let us confine [our description] to the minimum degree of the law, for it is with the law that we are most concerned.”). The opinion reflected some astonishment that the offense

some outrage, a “graphic description of Weems’[s] sentence and of the law under which it was imposed.”¹⁴¹

Its minimum degree is confinement in a penal institution for twelve years and one day, a chain at the ankle and wrist of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family council. These parts of his penalty endure for the term of imprisonment. From other parts there is no intermission. His prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. 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[e] 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 his fall 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

required nothing more than the falsification of a document: “One may be an offender against it, as we have seen, though he gain nothing and injure nobody.” *Id.* at 365. “The minimum term of imprisonment is twelve years, and that, therefore, must be imposed for ‘perverting the truth’ in a single item of a public record, though there be no one injured, though there be no fraud or purpose of it, no gain or desire of it.” *Id.* The Court’s insistence that the elements of the offense be considered in the abstract made the case more sympathetic than it might otherwise have been; the facts reflected a scheme of fraud, which included injury to others, and proof of the scheme was presented to the trial court. *See supra* notes 110–117 and accompanying text. The approach of considering the offense in the abstract, rather than addressing the particulars of the defendant’s conduct, came in for criticism by the dissent:

[I]t is to be conceded that this natural conflict between the sense of commiseration and the commands of duty is augmented when the nature of the crime defined by the Philippine law and the punishment which that law prescribes is only abstractly considered, since the impression is at once produced that the legislative authority has been severely exerted. I say only abstractly considered, because the first impression produced by the merely abstract view of the subject is met by the admonition that the duty of defining and punishing crime has never in any civilized country been exerted upon mere abstract considerations of the inherent nature of the crime punished[;] . . . [instead, such a review must consider] the tendency at a particular time to commit certain crimes, of the difficulty of repressing the same, and of how far it is necessary to impose stern remedies to prevent the commission of such crimes. And, of course, as these considerations involved the necessity for a familiarity with local conditions in the Philippine Islands which I do not possess, such want of knowledge at once additionally admonishes me of the wrong to arise from forming a judgment upon insufficient data or without a knowledge of the subject-matter upon which the judgment is to be exerted.

Weems, 217 U.S. at 384 (White, J., dissenting).

141. *Weems*, 217 U.S. at 366 (majority opinion).

deprive of essential liberty. . . . It may be that even the cruelty of pain is not omitted. He must bear a chain night and day. He is condemned to painful as well as hard labor. What painful labor may mean we have no exact measure. It must be something more than hard labor. It may be hard labor pressed to the point of pain.¹⁴²

This sentence seemed almost unbearably severe and unfamiliar, and seemed to the Court to reflect an unjust imposition by the polity on ordinary citizens.¹⁴³ “Such penalties for such offenses,” Justice McKenna concluded, “amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense.”¹⁴⁴ Noting that “[w]hat constitutes a cruel and unusual punishment has not been exactly decided,”¹⁴⁵ the Court, after discussing what might have been the purpose of the Framers in including the Clause, spent considerable time advancing an expansive construction of constitutional provisions,¹⁴⁶ which would permit the flexible interpretation of those provisions over time.¹⁴⁷

Ultimately, the Court concluded that both the severity and peculiarity of the punishment Weems had received made it disproportionate:

It has no fellow in American legislation. Let us remember that it has come to us from a government of a different form and genius from ours. It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the bill of rights, both on account of their degree and kind. And they would have those bad attributes even if they were found in a

142. *Id.* The dissent challenged this interpretation:

I yet cannot agree with the conclusion reached in this case that because of the mere term of imprisonment it is within the rule. True, the imprisonment is at hard and painful labor. But certainly the mere qualification of painful in addition to hard cannot be the basis upon which it is now decided that the legislative discretion was abused, since to understand the meaning of the term requires a knowledge of the discipline prevailing in the prisons in the Philippine Islands.

Id. at 411 (White, J., dissenting). The dissent concluded that it must be the accessory punishments that rendered Weems’s punishment cruel and unusual but argued that they were easily severable. *Id.* at 412.

143. *Id.* at 366–67 (majority opinion).

144. *Id.*

145. *Id.* at 368.

146. *Id.* at 373–75.

147. “The clause of the Constitution in the opinion of the learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.” *Id.* at 378.

Federal enactment and not taken from an alien source.¹⁴⁸

The Court paid lip service to the legislature's power both to define crimes and to establish punishments and recognized that the judiciary should not lightly interfere with legislative determinations.¹⁴⁹ Its argument on that score was ultimately circular: legislatures had the constitutional power to impose punishments unless the punishments were unconstitutional.¹⁵⁰ The fact that the sentence reflected some legislative judgment as to the severity of the offense was ultimately inclement.

What made the punishment in this case so astonishing? The Court considered that more serious crimes (including degrees of homicide, inciting rebellion, robbery, and larceny) were punished less severely, and under the

148. *Id.* at 377. It is hard to recognize the uniquely evil quality of this sentence in light of the Court's reference to *Aldridge v. Commonwealth*, in which the defendant challenged a statute which punished "free negroes and mulattoes for grand larceny" by condemning the defendant to be sold as a slave and to suffer thirty-nine lashes on his bare back. *Id.* at 378; *Aldridge v. Commonwealth*, 4 Va. (2 Va. Cas.) 447, 447-49 (1824). The court reacted to Aldridge's claim that being subjected to thirty-nine lashes and sold into slavery for the larceny of \$150 was unconstitutional, by finding that the State's Bill of Rights did not "apply to our slave population . . . [and] that the free blacks and mulattoes were also not comprehended in it." *Id.* at 449.

149. *Weems*, 217 U.S. at 378-79.

[T]here is a certain subordination of the judiciary to the legislature. The function of the legislature is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety. . . . We have expressed these elementary truths to avoid the misapprehension that we do not recognize to the fullest the wide range of power that the legislature possesses to adapt its penal laws to conditions as they may exist and punish the crimes of men according to their forms and frequency.

Id. at 379.

150. *Id.* at 378.

We disclaim the right to assert a judgment against that of the legislature . . . or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such case not our discretion but our legal duty, strictly defined and imperative in its direction, is invoked. Then the legislative power is brought to the judgment of a power superior to it

Id. This aspect of the case provoked the dissent's concern that the Court's ruling would curtail Congress's power to "define and punish crime." *Id.* at 385 (White, J., dissenting). The dissent interpreted the majority's ruling as "imposing upon Congress the duty of proportioning punishment according to the nature of the crime, and casts upon the judiciary the duty of determining whether punishments have been properly apportioned in a particular statute, and if not to decline to enforce it."

Id. By applying the provision not just to extraordinary modes of punishment, but to traditional ones, it:

[E]ndows the courts with the right to supervise the exercise of legislative discretion as to the adequacy of punishment, even although resort is had only to authorized kinds of punishment, thereby endowing the courts with the power to refuse to enforce laws punishing crime if in the judicial judgment the legislative branch of the government has prescribed a too severe punishment.

Id. at 387.

penal laws of the United States an offense comparable to Weems's would not be punishable by more than two years of imprisonment.¹⁵¹ While the Court purported to defer to the lawmakers' judgments, it clearly second-guessed them, arguing that the crime was less severe but the sentence under the applicable penal code was more severe than that for the crimes of forgery or counterfeiting the obligations or securities of the United States or the Philippine Islands.¹⁵² The Court rejected the notion that this simply reflected "different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice."¹⁵³ While the Court discussed the entire punishment, including the accessory penalties, it focused on the duration and nature of the *cadena temporal*, noting that "even if the minimum penalty of *cadena temporal* had been imposed, it would have been repugnant to the bill of rights."¹⁵⁴

The *Weems* opinion reflected the same concerns that inform the contemporary proportionality cases, but paid little attention to them. The government articulated the argument that the Constitution provided no proportionality review and that concerns about the severity of punishment were for the legislature, not the courts: "If the punishment in this case seems excessive compared with the offense, it is for the Philippine legislative

151. *Id.* at 380 (majority opinion). This approach, too, was soundly rejected by Justice White's dissent:

[T]he performance of the duty of apportionment must be discharged by taking into view the standards, whether lenient or severe, existing in other and distinct jurisdictions, and that a failure to do so authorizes the courts to consider such standards in their discretion and judge of the validity of the law accordingly. . . . [I]n testing the validity of the punishment affixed by the law here in question, [the Court] proceeds to measure it not alone by the Philippine legislation, but by the provisions of several acts of Congress punishing crime and in substance declares such Congressional laws to be a proper standard, and in effect holds that the greater proportionate punishment inflicted by the Philippine law over the more lenient punishments prescribed in the laws of Congress establishes that the Philippine law is repugnant to the Eighth Amendment.

Id. at 386 (White, J., dissenting).

152. *Id.* at 379–81 (majority opinion). These were punishable by a fine of not more than ten-thousand pesos and imprisonment of not more than fifteen years. *Id.* at 380–81.

In other words, the highest punishment possible for a crime which may cause the loss of many thousand of dollars, and to prevent which the duty of the State should be as eager as to prevent the perversion of truth in a public document, is not greater than that which may be imposed for falsifying a single item of a public account.

Id.

153. *Id.* at 381.

154. *Id.* at 363–66, 382.

power or for Congress to change the law.”¹⁵⁵ This argument, however, did not prevail.¹⁵⁶

B. No Fellow in American Legislation: A Foreign Law as Cruel and Unusual Punishment

1. Understanding the Philippines Arrangement

How did cases from the Philippines come to be reviewable before the United States Supreme Court? The United States acquired the Philippines under a treaty between the United States and Spain, ratified on April 11, 1899.¹⁵⁷ Initially, the islands were under military rule.¹⁵⁸ On June 11, 1901, the Philippine Commission passed an act which established courts for the islands.¹⁵⁹ On July 1, 1902, Congress passed The Philippine Bill, which incorporated by statute those constitutional guarantees that were to be available in the Philippines.¹⁶⁰ This included a prohibition on the infliction of cruel and unusual punishments.¹⁶¹ The statute further provided for review of decisions of the Supreme Court of the Philippine Islands in the Supreme Court of the United States.¹⁶² The United States Supreme Court held that these statutory guarantees would be interpreted exactly like their constitutional counterparts,¹⁶³ making the ruling in *Weems* a binding

155. Reply Brief on Behalf of the United States at 13, *Weems*, 217 U.S. 349 (No. 20).

156. *Weems*, 217 U.S. at 378–79, 382.

157. Treaty of Peace Between the United States of America and the Kingdom of Spain, art. III, Dec. 10, 1898, 30 Stat. 1754; *Kepner v. United States*, 195 U.S. 100, 111 (1904).

158. *Kepner*, 195 U.S. at 111.

159. An Act Providing for the Organization of Courts in the Philippine Islands, Act No. 136, § 2 (1901); *Kepner*, 195 U.S. at 114.

160. The Philippine Bill of July 1, 1902, ch. 1369, § 5, 32 Stat. 691 (1902), available at <http://www.chanrobles.com/philippinebillof1902.htm>.

161. *Id.*

162. *Id.* § 10.

That the Supreme Court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the supreme court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby in which the Constitution or any statute, treaty, title, right, or privilege of the United States is involved . . . and such final judgments or decrees may and can be reviewed, revised, reversed, modified, or affirmed by said Supreme Court of the United States on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the Circuit Courts of the United States.

Id.

163. *Serra v. Mortiga*, 204 U.S. 470, 474 (1907) (citing *Kepner*, 195 U.S. at 121–22). “[G]uarantees which Congress has extended to the Philippine Islands are to be interpreted as meaning

interpretation of the Eighth Amendment.

2. Why Was the Case Decided?

The United States Supreme Court's interest in *Weems's* case was somewhat puzzling. Prior to *Weems*, the Court showed a distinct lack of sympathy to cases in which individuals sought relief from their carceral punishments based on claims that they were cruel and unusual.¹⁶⁴ Claims that state criminal sentences violated the Cruel and Unusual Punishment Clause were for a considerable time barred by the Court's view that the Eighth Amendment applied only to the national government.¹⁶⁵ But

what the like provisions meant at the time when Congress made them applicable to the Philippine Islands." *Id.* (citing *Kepner*, 195 U.S. at 121–22). This proposition was reiterated in *Weems*: "[T]he provision of the Philippine bill of rights, prohibiting the infliction of cruel and unusual punishment, was taken from the Constitution of the United States and must have the same meaning." *Weems v. United States*, 217 U.S. 349, 367 (1910).

164. *E.g.*, *Pervear v. Massachusetts*, 72 U.S. (5 Wall.) 475, 479–80 (1866). In some circumstances, this attitude seemed justified. For example, in *Pervear v. Commonwealth of Massachusetts*, the litigant who claimed that a fine of fifty dollars and confinement at hard labor for three months for the offense of unlicensed selling of liquor was cruel and unusual received extremely short shrift. *Id.* at 480. In addition to its conclusion that the Eighth Amendment "does not apply to State but to National legislation," the Court went on to offer its commentary on the legitimacy of the punishment: "We perceive nothing excessive, or cruel, or unusual in this. The object of the law was to protect the community against the manifold evils of intemperance." *Id.* at 479–80.

165. *E.g.*, *O'Neil v. Vermont*, 144 U.S. 323, 332 (1892). That explains the Court's response to John O'Neil, a New York liquor dealer. *Id.* at 327. O'Neil filled a series of orders from customers in Vermont, some of which arrived with a jug attached. *Id.* He was charged with violating a Vermont statute that prohibited selling intoxicating liquor without authority. *Id.* at 325 (citing An Act to Prevent Traffic in Intoxicating Liquors for the Purpose of Drinking, No. 24, § 1, 1852 Vt. Acts & Resolves 19, 20). O'Neil was sentenced to pay a fine of \$6140 and \$497.96 in court costs; if he failed to pay that fine by the appointed time, he would be confined at hard labor for 19,914 days under Vermont law, which provided three days of imprisonment for each dollar of an unpaid fine. *Id.* at 330–31. The total sentence amounted to over fifty-four years. *Id.* at 339 (Field, J., dissenting). The Supreme Court never addressed the idea that O'Neil could have averted the lengthy sentence by the payment of the fine; perhaps the fine was so exorbitant that he could not have done so. Before the Supreme Court of Vermont, O'Neil claimed that he was being subjected to cruel and unusual punishment. *Id.* at 331 (majority opinion) (citing *State v. O'Neil*, 58 Vt. 140, 165, 2 A. 586, 593 (1886)). The court responded unsympathetically, with the view that O'Neil had subjected himself to a long sentence by committing a great number of criminal offenses:

The punishment imposed by statute for the offen[s]e with which the respondent, O'Neil, is charged, cannot be said to be excessive or oppressive. If he has subjected himself to a severe penalty, it is simply because he has committed *a great many* such offen[s]es. It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary, on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life.

Id. at 331 (quoting *O'Neil*, 58 Vt. at 165, 2 A. at 593). The U.S. Supreme Court determined that it had no jurisdiction over the case. *Id.* at 335. It had no authority to decide issues of Vermont constitutional law, and, the court opined, "it has always been ruled that the [Eighth] Amendment to the Constitution of the United States does not apply to the States." *Id.* at 331–32.

comparable cases from the Philippines, not subject to those constraints on the application of the Eighth Amendment, similarly got little attention.

The Court had the opportunity to decide a case very similar to *Weems*, involving a Filipino official, not long before in *Paraiso v. United States*.¹⁶⁶ José Paraiso was the municipal treasurer of Lumbang and also acted as deputy provincial treasurer.¹⁶⁷ In 1904, he was charged with falsifying a document.¹⁶⁸ The claim was that Paraiso had charged some of the local residents an excessive poll tax, collected the tax, and then altered the tax certificates, erasing the true amount paid and adding a lesser figure, so that he could pocket the difference without detection.¹⁶⁹ He then submitted his abstracts of collections, ratifying them as correct; it was this ratification, including the alterations to the stubs, that was the alleged falsification of a public document.¹⁷⁰

The defalcations at issue, like *Weems*'s, were apparently not large.¹⁷¹ The complaint listed two specific alterations: in one, Paraiso was alleged to have altered a six-dollar receipt to make it a two-dollar receipt; in another, a

166. *Paraiso v. United States*, 207 U.S. 368, 371 n.1 (1907).

167. Transcript of Record at 4–5, *Paraiso*, 207 U.S. 368 (No. 23) [hereinafter *Paraiso* Transcript].

168. *Id.* at 4.

169. *Id.* at 4–5.

That at different times during the year 1904, in his capacity as municipal treasurer of the town of Lumbang, Laguna, he issued registration tax certificates to the following persons . . . [thirty-eight persons and their registration tax certificate numbers were listed]; upon which said certificates there appear to have been entered and collected by the accused larger amounts than those shown on their corresponding stubs after he had settled his accounts with the provincial treasurer; and that the said stubs, or most of them, contain erasures, changes and alterations . . .

Paraiso, 207 U.S. at 371 n.1.

170. *Paraiso* Transcript, *supra* note 167, at 8.

171. One problem with interpreting these documents is the relatively free way in which currencies are interchanged. The version of the complaint provided to the Supreme Court in the Transcript of Record refers to the prices of the tax registration certificate in dollars. *Id.* at 2. The opinion of the trial court, however, refers to “\$4 Philippines currency,” *id.* at 5, and the Philippine Supreme Court’s opinion says these amounts are in “pesos.” *United States v. Paraiso*, 5 PHIL. REP. 149, 151 (S.C., Oct. 20, 1905); *Paraiso* Transcript, *supra* note 167, at 16. Paraiso’s brief makes this clear, arguing that “the practical measure of his offense lay in defrauding the Government out of \$6 . . . This \$6 was in Philippine currency (Trial Court’s Decision, R., 8), or \$3 in our American money . . .” Brief for Plaintiff in Error at 16, *Paraiso*, 207 U.S. 368 (No. 23). “The sentence is even more obnoxious and cruel in its imposition of imprisonment for fourteen years eight months and one day for what in effect is the alleged unlawful appropriation of less than 400 pesetas, or \$200, expressed in American money.” *Id.* at 19. The problem may be in part one of translation. See *Paraiso* Transcript, *supra* note 167, at 21 (certifying that the record is a “complete transcript in English” of the proceeding). Identical requests to translate the transcript appeared in *Weems* and in *Stuart*. *Weems* Transcript, *supra* note 114, at 19; *Stuart* Transcript, *supra* note 113, at 25.

four-dollar receipt was altered to a two-dollar receipt.¹⁷² Notwithstanding numerous allegations of wrongdoing, the Philippine Supreme Court concluded that the complaint charged Paraiso with a single crime of falsification.¹⁷³ For this, Paraiso was sentenced to “fourteen years eight months and one day of imprisonment,” the accessory penalties of Article 56 of the Penal Code, and “a fine of 5,001 pesetas.”¹⁷⁴ The Solicitor General’s initial brief in the *Weems* case described the sentences received by Weems and Paraiso as “substantially the same”¹⁷⁵ and Weems’s crime as more serious.¹⁷⁶ Paraiso, like Weems, was not a particularly sympathetic character; evidence was offered at trial that “the accused had admitted [to the provincial treasurer] that he had in fact issued certificates for an amount different than that appearing on the stubs, and asked him to protect him, promising that he would not do it again.”¹⁷⁷

Like Weems, Paraiso never raised the claim that the punishment was cruel and unusual before the Supreme Court of the Philippine Islands. Indeed, when the time came for his case to be argued, no one showed up.¹⁷⁸ In the United States Supreme Court, Paraiso claimed that “the sentence inflicted a cruel and unusual punishment, by reason of the amount of the fine and the length of the term of imprisonment.”¹⁷⁹ In his written submission to the Court, Paraiso argued that the sentence was disproportionate because it was equivalent to the sentence affirmed against another defendant in the Philippines for second-degree murder:

172. *Paraiso* Transcript, *supra* note 167, at 2.

173. *Paraiso*, 5 PHIL. REP. at 150.

174. *Id.*

175. Brief for the United States at 10, *Weems v. United States*, 217 U.S. 349 (1910) (No. 20).

176. *Id.* at 11. Weems’s crime “was much more serious than that of Paraiso. . . . [T]he nature and consequences of what Weems did were more injurious to the State and the community than Paraiso’s acts.” *Id.*

177. *Paraiso*, 5 PHIL. REP. at 152.

178. *Paraiso* Transcript, *supra* note 167, at 14 (“[T]he hearing was announced of case No. 2284, the *United States v. José Paraiso*, for falsification. No counsel appeared on behalf of either side, and the case was considered as submitted, and taken under advisement.”). Counsel sought rehearing of the case after Paraiso lost but did not challenge the severity of the punishment in his motion for rehearing. *Id.* at 20–21. The motion was denied. *Id.* at 21.

It is no surprise that the cases of Weems and Paraiso seem to have been handled in much the same way, at least at first, as both had the same lawyer. *United States v. Weems*, 7 PHIL. REP. 241, 241 (S.C., Dec. 29, 1906); *Paraiso*, 5 PHIL. REP. at 150. W.A. Kincaid represented Paraiso in the Philippine courts and filed his initial petition for writ of error in the U.S. Supreme Court. *Id.*; *Paraiso* Transcript, *supra* note 167, at 25–26. Once before the Court, Aldis B. Browne and Alexander Britton represented Paraiso. *Paraiso v. United States*, 207 U.S. 368, 369 (1907). A. S. Worthington represented Weems in the U.S. Supreme Court. *Weems*, 217 U.S. at 351.

179. *Paraiso*, 207 U.S. at 369.

Can it possibly be said that the crime for which this plaintiff in error was convicted, namely . . . the falsification of a record to his gain in the possible maximum sum of \$200, justifies a sentence of imprisonment for the exact term imposed . . . for “the crime of homicide . . .”?

How can imprisonment for such an extended period, for such an offense, be ranked, in respect of term, with punishment for the crime of homicide or murder without violating in the plainest way the prohibition of the Philippine Bill of Rights against cruel and unusual punishment?¹⁸⁰

Though Paraiso made comparative arguments similar to those raised by Weems and used similar rhetorical flourishes,¹⁸¹ Justice Holmes made short work of the defendant’s claims. The claim that his sentence was cruel and unusual was argued, “although not assigned as error,” and the Court did “not feel called upon to consider errors not assigned.”¹⁸²

Weems succeeded in obtaining relief from the Court where Paraiso did not. One difference, of course, was that he was an American.¹⁸³ Paraiso’s status as a noncitizen was made clear by one of his written submissions to the Court.¹⁸⁴ Weems’s counsel, by contrast, was eager to notify the Court

180. Reply to Motion to Dismiss or Affirm at 6, *Paraiso*, 207 U.S. 368 (No. 23) (citations omitted). Paraiso also argued that the concepts of justice prevailing in the mainland had to be extended to the Philippines as well. *Id.*

We respectfully submit that the language of the prohibition cannot be confined only to the *form* of punishment. In carrying our free institutions to the Philippines, how can such injustice be recognized, when upon the mainland such duration of punishment for the offense of which this plaintiff in error has been convicted could never be so ranked with punishment for the crime of homicide?

Id.

181. He argued that federal statutes imposed much smaller penalties for comparable crimes, discussing offenses of forgery of different varieties and of embezzlement, concluding that “such offenses committed against the United States Government upon the mainland are visited with far less punishment, and . . . this sentence far outruns in time the *maximum* imposed for the gravest offenses in respect of forgery and embezzlement.” Brief for Plaintiff in Error at 23, *Paraiso*, 207 U.S. 368 (No. 23). Paraiso’s brief concluded: “The sentence, then, is nearly fifteen years’ confinement; perpetual absolute disqualification; police surveillance during life and a fine of 5,001 pesetas, or over twelve times the amount appropriated. And all for an offense which resulted in the Government’s alleged maximum loss of \$200 revenue!” *Id.* at 24.

182. *Paraiso*, 207 U.S. at 369, 372.

183. Supplemental Brief on Behalf of the Plaintiff in Error at 14, *Weems v. United States*, 217 U.S. 349 (1910) (No. 20).

184. See Reply to Motion to Dismiss or Affirm at 7, *Paraiso*, 207 U.S. 368 (No. 23) (“Assuredly no cases can be here presented overshadowing in importance the liberty of human beings, who while they may not be citizens of the United States, yet live under our flag and are hence all the more entitled to full protection in respect of the inalienable rights of life, liberty, and property which the fathers enjoyed long before written Constitutions were framed, and which beneficent [sic] provisions have been bestowed upon the inhabitants of our antipodean possessions by express enactment.”).

that Weems was an American: “He cannot even come back to the United States, where he was born and reared, unless some now unknown and undesignated official chooses to give him that liberty.”¹⁸⁵

Moreover, Weems’s argument was decidedly weak, much of it based on the policy claim that disproportionate sentencing was simply unwise.¹⁸⁶ The government did not view Weems’s arguments—that comparable federal offenses provided for lesser degrees of punishment,¹⁸⁷ or that, even in the Philippines, this was an extraordinarily severe sentence for the conduct committed¹⁸⁸—as having much merit. The government’s supplemental brief, filed after the argument in the case,¹⁸⁹ devoted only three of its twenty

185. Supplemental Brief on Behalf of the Plaintiff in Error at 14, *Weems*, 217 U.S. 349 (No. 20). Counsel in other cases sought to do the same. See, e.g., Brief for the Plaintiff in Error at 9, *Carrington v. United States*, 208 U.S. 1 (1908) (No. 223) (“Major Carrington, being a citizen of the United States and having his legal domicile in the United States . . .”).

186. Weems’s supplemental brief argued that sentencing Weems—who, counsel repeatedly argued, had committed no fraud—would not be reformative:

There is certainly a great difference in the character of the offense between the hardened villain who waylays and robs his victim . . . and the young man of previously good character, who has been guilty of some act which barely makes him criminally liable. In the one case the full punishment allowed by law, perhaps would not be too severe, . . . while in the other, if the law will permit a punishment other than by imprisonment in the penitentiary and the consequent infamy, it might, and probably would, have the effect thereafter to make him a law-abiding citizen. In no case should the sentence exceed the bounds of just punishment. But little reformation may be expected from a prisoner smarting under a disproportionate and unjust sentence.

Supplemental Brief on Behalf of the Plaintiff in Error at 16–17, *Weems*, 217 U.S. 349 (No. 20) (quoting SAMUEL MAXWELL, *A PRACTICAL TREATISE ON CRIMINAL PROCEDURE* 661 (Chicago, Callaghan and Co. 1887)).

187. *Id.* at 23. Weems argued that Section 86 of 35 Stat. 1088 defined a comparable offense to that committed by Weems, but permitted a punishment of no more than two years and a fine of no more than double the amount embezzled. *Id.* at 22 (citing Act of Mar. 4, 1909, ch. 321, § 86, 35 Stat. 1088 (1909) (codifying, revising, and amending the penal laws of the United States)). That statute provided:

Whoever, being an officer, clerk, agent, employee, or other person charged with the payment of any appropriation made by Congress, shall pay to any clerk or other employee of the United States a sum less than that provided by law, and require such employee to receipt or give a voucher for an amount greater than that actually paid to and received by him, is guilty of embezzlement, and shall be fined in double the amount so withheld from any employee of the Government and imprisoned not more than two years.

§ 86, 35 Stat. at 1105.

188. Supplemental Brief on Behalf of the Plaintiff in Error at 23–24, *Weems*, 217 U.S. 349 (No. 20). Weems’s brief noted that embezzlement of public funds would be punished as severely as Weems had been punished only if the embezzlement exceeded 125,000 pesetas. *Id.*

189. This case was argued on November 30, 1909, and the Government’s supplemental brief was filed on December 6. *Id.*; Supplemental Brief on Behalf of the United States, *Weems*, 217 U.S. 349 (No. 20). Most of the brief was devoted to the question, unaddressed by the Supreme Court in its opinion, whether Weems’s presence was required at the trial. *Id.* at 2.

pages to addressing these arguments.¹⁹⁰ There was, moreover, an alternative to an expansive proportionality decision; in other Philippine cases, the Solicitor General suggested the exercise of the clemency power to provide relief from a draconian sentence.¹⁹¹

There had, however, been public criticism of the sentences required by the Philippine Penal Code. A brief article in the *American Law Review* in 1908, submitted, according to the editor, by W. F. Norris, a judge on the Court of First Instance of Manila, had criticized the Philippine penal law and its harsh application to an individual who became “somewhat involved in his accounts.”¹⁹²

Weems’s status as an American subjected to Philippine justice made the decision possible. What caused it to be resolved as it was?

3. The View from the Empire: Attitudes Towards the Philippines

What caused the Court to reject the sanction imposed on Paul Weems? The imposition of a foreign and bizarre sentence on an American was key. The Court’s opinion clearly reflected a view of the sanction as alien.¹⁹³ The punishment “has no fellow in American legislation,” coming instead “from a

190. Supplemental Brief on Behalf of the United States at 2, *Weems*, 217 U.S. 349 (No. 20). The government relied on *Paraiso v. United States*, noting that the Court there had both declined to consider a matter not assigned as error and had stated “that we find nothing in the errors assigned.” *Id.* at 18. Its only substantive argument was that “the prohibition of cruel and unusual punishment has no application to a punishment which only exceeds in degree such punishment as is usually inflicted in other jurisdictions for the same or like offense.” *Id.* at 19. The government concluded: “Is it not clear that the punishment provided for by the law is one within the legislative discretion, and that it presents a question which should be dealt with by the Philippine Commission and not by the courts?” *Id.* at 20.

191. *E.g.*, Supplemental Statement by the United States for the Information of the Court as to Certain Matters of Fact Referred to at the Argument at 5, *Carrington v. United States*, 208 U.S. 1 (1908) (No. 223). Analogizing to *Paraiso*, the Solicitor General suggested in *Carrington* that “the executive should commute these heavy sentences required by the Philippine law to a reasonable period commensurate with the essential offense according to American ideas.” *Id.* The view that clemency was an appropriate vehicle to reduce the harshness of these sentences was also expressed by the Attorney General, Charles Bonaparte, who wrote with regard to *Paraiso*:

I also feel it my duty to withhold the sending down of the mandate of the Supreme Court in the *Paraiso* case until an opportunity may be afforded to counsel for the plaintiff in error to submit to the President in his behalf a petition for executive clemency, so that the imprisonment under the sentence may be reduced to a reasonable punishment for his offen[s]e.

Letter from Charles J. Bonaparte, Att’y Gen., to Sec’y of War (Dec. 24, 1907) (letter available at BIA Records, *supra* note 117, General Classified Files 1898–1914, No. 6903–12).

192. W. A. Chester, *Notes of Current Topics: Criminal Procedure in the Philippines*, 42 AM. L. REV. 112, 116, 122 (1908) (stating the views of W. F. Norris). A “William Norris” was appointed a judge in the Court of First Instance of Manila in 1902. THE PHIL. JUDICIARY FOUND., THE HISTORY OF THE PHILIPPINE JUDICIARY 322 (1998) [hereinafter PHILIPPINE JUDICIARY].

193. *Weems*, 217 U.S. at 377.

government of a different form and genius from ours.”¹⁹⁴ It comes “from an alien source,” the Court went on, whose penalties “amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths.”¹⁹⁵ The Court critiqued not only the nature of the punishments, but also their provenance; the punishment’s source was “unrestrained power” rather than “that which is exercised under the spirit of constitutional limitations formed to establish justice.”¹⁹⁶

Not only was the source foreign, it was from the Philippines. The Court’s opinion reflected the contemporary culture’s diminished view of Philippine law and society.¹⁹⁷ The prevailing view was that cruelty was culturally relative and should be assessed by a cultural yardstick.¹⁹⁸ That

194. *Id.*

195. *Id.* at 366–67, 377.

196. *Id.* at 381.

197. Such a view was urged on the Court in other cases involving Americans who ran afoul of Philippine criminal laws. In *Carrington v. United States*, another case in which an American claimed that the imposition of punishment under the Philippine Penal Code was cruel and unusual, the defendant argued that harsh punishment was appropriate for Filipinos, but not for Carrington. Brief for the Plaintiff in Error at 1–2, 12, *Carrington v. United States*, 208 U.S. 1 (1908) (No. 223). “What is a cruel and unusual punishment to an American soldier, a graduate of West Point—to a man born and bred under humane and gentle associations—would not offend a Filipino as being at all in violation of humanity and decency.” *Id.* at 12.

Carrington’s case provided another opportunity for the Supreme Court to familiarize itself with the perceived severity of Philippine justice. While a member of the United States Army, assigned to command the Provisional Battalion of the Philippine Scouts, Carrington proposed that he and his scouts participate in the Louisiana Purchase Exposition, to take place in St. Louis. Transcript of Record at 2, *Carrington*, 208 U.S. 1 (No. 223). Carrington allegedly submitted a fraudulent expense voucher, claiming that he had spent PHP 770 on lumber for the exhibition when he did not actually make that purchase. *Id.* at 3. This was taken as a credit against the \$3000, or PHP 7000, in advanced funds he received to complete the project and transport the families of the scouts to St. Louis. *Id.* at 8–10. Major Carrington was charged with falsification of a public document by a public official. *Id.* at 4. He was sentenced to a total “of fourteen years eight months and one day of ‘cadena temporal,’” and claimed the punishment to be cruel and unusual. *Id.* at 15–16, 29. The Supreme Court did not need to reach the Eighth Amendment claim; it concluded that as an officer of the U.S. Army, Major Carrington was not a “public official” within the meaning of the Philippine Penal Code and therefore the section in question did not reach his conduct. *Carrington v. United States*, 208 U.S. 1, 7 (1908). It was noted that he had been subjected to court-martial. Brief for the Plaintiff in Error at 16, *Carrington*, 208 U.S. 1 (No. 223).

198. See Brief for the Plaintiff in Error at 12–13, *Carrington*, 208 U.S. 1 (No. 223) (“What is *cruel* punishment? That which is abhor[r]ent to the enlightened moral sense of civilized man. Torture, by gradual mutilation, as practiced by our Indians, on their prisoners. *Peine forte et dure*, to make a man plead or answer. What may be ‘cruel’ in one age or among one people may not be so in another age or among other people. A punishment may, perhaps, be deemed cruel and unusual if from its nature it would be intolerable to one class of people, but comparatively indifferent to others; for example, the punishment of cutting off the hair of a Chinaman.” (citing FRANCIS WHARTON, A TREATISE ON CRIMINAL PLEADING AND PRACTICE § 920 (Philidelphia, Kay & Brother, 8th ed. 1880))). Carrington argued that his punishment was unusual because “[s]uch a punishment, for such an offense, is not to be found in the code of criminal laws of any civilized people.” *Id.* at 13. Counsel noted that “[i]t appears to

yardstick allowed little play for the humanity or judgment of the Filipinos, who were described by contemporary texts in stereotypic and unflattering terms.¹⁹⁹

Likely supporting the Court's casual attitude towards the legislative judgment in *Weems* was the general view that the Filipinos were uneducated, unsophisticated,²⁰⁰ unambitious,²⁰¹ and incapable of self-government.²⁰² This was the kindest perception reflected in the writing of the day; other views were that some denizens of the Philippines were violent, criminal,²⁰³ or evil.²⁰⁴ These views of course were necessary to

be unusual even in the Philippines." *Id.*

199. *See, e.g.*, JAMES W. BUEL & MARCUS J. WRIGHT, *OUR LATE WARS; SPAIN AND OUR NEW POSSESSIONS* 270, 272 (1900) (describing the history of the Spanish conquest of the Philippines, the islands' natives as "savages," "kindly and hospitable, but . . . consummate thieves," having "an extremely rude kind of religion" and "no idea of a spiritual existence"). The contemporary description of the predominant native group, the Tagals, was that they were "largely influenced by their ancient superstitions." *Id.* at 274.

200. *See, e.g.*, Anna Northend Benjamin, *Some Filipino Characteristics*, 68 *OUTLOOK* 1003, 1003 (1901) ("Let the American also remember that he goes to the Filipino out of a great world, a complex sphere of action, of which the 'little brown man' is ignorant. We are inspired by the knowledge of a thousand things of which he has no cognizance."). The condescension is obvious in the conclusion to this article: "In the Filipino 'pickaninnies' lies the promise of the future. They are responsive and quick to learn, these little brown boys and girls; and we are justified in a great hope for the Filipino race if it is bred in a kindly atmosphere of sincerity, progress, and plain speaking." *Id.* at 1008.

201. *See, e.g.*, CHARLES MORRIS, *OUR ISLAND EMPIRE* 417 (1904) ("[The Filipino Native] has the faults of the half-civilized,—improvidence and shiftlessness, and the indolence that seems characteristic of all tropical peoples . . .").

202. *See, e.g.*, OSCAR KING DAVIS, *OUR CONQUESTS IN THE PACIFIC* 225, 256–57 (New York, Frederick A. Stokes Co. 1899) (asserting that even "[t]wo hundred years of free government by Americans, with free schools and all that that implies, will not fit these people for citizenship as we know and understand it," because "[o]nly a few of them have reached such a stage of intellectual advancement as to be able to comprehend any of the problems of government or of responsibility"); *Freedom Far off for the Filipinos*, *N.Y. TIMES*, Jan. 27, 1908, at 3 (reporting Secretary of War Taft's view that "at least a generation must pass before full freedom can be granted" to the Philippines, and quoting Taft as stating that Congress's policy was "the education of the masses of the people and the leading them out of the dense ignorance in which they are now, with a view to enabling them intelligently to exercise the force of public opinion without which a popular self-government is impossible"); William H. Taft, *Civil Government in the Philippines*, 71 *OUTLOOK* 305, 315 (1902) ("[T]here is not the slightest probability that the Christian Filipinos will be ready for self-government in any period short of two generations. Not ten per cent. [sic] of the people speak Spanish, and the remaining ninety per cent. [sic] or more are densely ignorant, superstitious, and subject to imposition of all sorts."). While this perception to some was based in part on the absence of educational opportunities in the Philippines, others viewed these disabilities as innate character traits. *See* Benjamin, *supra* note 200, at 1006 (concluding that "the native is, in spite of his outward appearance of inert lethargy, often aroused to excitement and anger, and that he shows an absolute disregard of the rights of others—an entire lack of that public spirit which is the foundation-stone of citizenship"); Alleyne Ireland, *American Administration in the Philippine Islands*, 78 *OUTLOOK* 1082, 1087 (1904) (concluding that the Filipinos would be "happiest" governed by a "non-tropical" nation).

203. *See* Benjamin, *supra* note 200, at 1005 ("A native will serve a master satisfactorily for years, and then suddenly abscond, or commit some such hideous crime as conniving with a brigand band

sustaining American colonial policy; the failure to grant the Philippines self-government was “premised on the belief that the Filipinos were not ready to govern themselves.”²⁰⁵ These views of the Philippines—and of its system of justice—may explain the Court’s virulent rejection of its criminal sanction.²⁰⁶

To the extent that decision makers understood the Spanish source of the Philippine penal law, it would not have improved their opinions of the justice of the enactment. The Spanish, with whom the Americans had only recently been at war,²⁰⁷ were widely perceived as brutal,²⁰⁸ stupid,²⁰⁹

to murder the family and pillage the house.’ I am glad to think that these extreme cases of the cropping out of Malay treachery are rare; but such things have happened, and may happen again.”).

204. See *id.* at 1006 (“[T]he native acts very often with little regard to his Christian training. I myself have seen indisputable evidence of the torture of American prisoners, and their mutilation after death; but the more enlightened Filipinos are opposed to such acts, and it is due to their constantly restraining efforts that more atrocities have not been perpetrated.”).

205. PHILIPPINE JUDICIARY, *supra* note 192, at 281; RICHARD E. WELCH, JR., RESPONSE TO IMPERIALISM: THE UNITED STATES AND THE PHILIPPINE-AMERICAN WAR, 1899–1902, at 18 (1979). Elihu Root, then Secretary of War, characterized the “great mass of the [Philippine] people” as “‘but little advanced from pure savagery,’ childlike in their ‘lack of reflection, disregard of consequences, fearlessness of death, thoughtless cruelty, and unquestioning dependence upon a superior.’” PETER W. STANLEY, A NATION IN THE MAKING: THE PHILIPPINES AND THE UNITED STATES, 1899–1921, at 60–61 (1974) (quoting 1 PHILIP C. JESSUP, ELIHU ROOT 343 (1938)). William Howard Taft, president of the Philippine Commission, wrote in 1900:

The great mass of them are superstitious and ignorant The idea that these people can govern themselves is . . . illfounded They are cruel to animals and cruel to their fellows when occasion arises. They need the training of fifty or a hundred years before they shall even realize what Anglo-Saxon liberty is.

STANLEY, *supra*, at 64–65 (quoting Taft to E.B. McCagg, Apr. 16, 1900) (internal quotations omitted). Other Americans expressed similar views. One former member of the Philippine Commission critical of this view noted that public statements evincing a negative assessment of the capacity of the Filipinos “to put it mildly, bear a certain tinge of imperialism.” W. Morgan Shuster, *Shall the Filipinos Have a Fourth of July?: Altruism Versus Profit*, 87 CENTURY MAG. 422, 424 (1914). Schuster went on to argue that public opinion was largely formed by persons dedicated to sustaining the government’s policy of controlling the Philippines. *Id.* Schuster served as a member of the Philippine Commission from 1906 to 1909. Rodney J. Sullivan, *Exemplar of Americanism: The Philippine Career of Dean C. Worcester*, at 96 (Univ. of Mich. Ctr. for S. & Se. Asian Studies, Mich. Papers on S. & Se. Asia No. 36, 1991).

206. Taft, *supra* note 202, at 308 (“An impartial administration of justice is what has been most lacking in Philippine civilization . . .”). Governor Taft noted that judges in the American colonial administration were both American and Filipino (including four Americans and three Filipinos on the Supreme Court) and noted “[a]s much care as possible has been used in the selection of the judges, and I feel confident that we have inaugurated a system in which justice will be done, and the inestimable benefit will be conferred upon the people of showing them what justice is.” *Id.*

207. Seekins, *supra* note 110, at 22.

208. See DAVIS, *supra* note 202, at 244 (“We have all heard so much of the Spanish cruelty that [an officer inspecting a Spanish prison] expected to find a horde of half-starved-filthy, abject wretches, crowded into dark damp, foul, ill-smelling holes and subjected to all manner of desperate treatment and torture, surrounded by armed assassins called guards, eager to shoot them down for the first suspicion of an infraction of the rules.”). As it turned out, “to the credit of the Spaniards, it was not so.” *Id.* While the conditions in the prison were not as dreadful as anticipated, the writer went on to note that upon

incompetent,²¹⁰ and corrupt²¹¹ as colonial administrators.²¹² While this approach justified the Americans stepping in to assume the mantle of Philippine colonial authority, it did not reflect any respect for the source of the penal code.²¹³ The opinion in *Weems* refers explicitly to the Spanish

investigation of the roll of prisoners, the officer:

came across the iniquity of Spanish institutions. It stirs an angry feeling in the blood of an American and provokes a wish that after all Dewey's guns had been turned loose on the cruel Spaniards to know such things as went on in the make-believe courts of Manila. . . . The Spaniards talk and boast of a proud old civili[z]ation. But a civili[z]ation which makes war on women and which sentences men to jail for life on mere suspicion is no civili[z]ation

Id. at 247; see also MORRIS, *supra* note 201, at 402 (describing public executions of prisoners, "a new and popular entertainment . . . which one would think even Spaniards could not enjoy, though they are said to have been keenly entertained. . . . The helpless captives were lined up in numbers on the sea-wall and shot down by soldiers of their own race, at the command of Spanish officers, and seemingly to the high enjoyment of crowds of Spanish spectators, who flocked to the scene as to a spectacle.").

209. See DAVIS, *supra* note 202, at 225–26 (noting that the Spanish, "with cheerful imbecility," had damaged Manila's water supply). This extends to pure slur, one publication noting that:

Most of the Spanish inhabitants of Manila live in the old city; in fact, no one but a Spaniard could be content to live in these narrow, dirty haunts of squalor and filth, where all is somber, damp, gloomy and pestilential. But it probably reminds the Spaniards of their abodes in 'dear old Castile,' and they loll in the sun and roll their cigarettes in drowsy indifference all day long.

PICTURESQUE CUBA, PORTO RICO, HAWAII AND THE PHILIPPINES 109 (A. M. Curch ed., Springfield, Ohio, Mast, Crowell & Kirkpatrick 1898) [hereinafter PICTURESQUE CUBA].

210. See DAVIS, *supra* note 202, at 226 (commenting that the American authorities on arriving in Manila "endure and accomplish in a way that surprises the poor devils [the Filipinos], who are familiar only with Spanish incompetence and procrastination."); PICTURESQUE CUBA, *supra* note 209, at 120 ("With the islands freed from the retarding, even retrograding, misgovernment of Spain, and the establishment of a kindly and progressive form of government and civilizing influences, they will become one of the world's great centers of wealth."); *Philippine Types and Characteristics*, 19 AM. MONTHLY REV. REVIEWS 302, 304 (1899) ("The only thing that the United States can learn from a study of Spanish administrative methods is what to avoid.").

211. See DAVIS, *supra* note 202, at 255 ("It has been the policy of the Spanish to prevent development. Robbery and personal gain were the only objects of the Spanish officials."). "It seems impossible to credit a Spanish official with any sort of honesty." *Id.* at 301. Immorality too was alleged. See PICTURESQUE CUBA, *supra* note 209, at 112 ("The Spaniard also practi[c]es polygamy, but he despises his mongrel children, and when he departs for Spain they are left to provide for themselves as best they can.").

212. See PICTURESQUE CUBA, *supra* note 209, at 108 ("[T]he Spaniards, in spite of the smallness of their numbers, controlled the government, and with the aid of the church managed to keep the islands in a state of subservient ignorance."). "Under the rule of Spain it is the same old story of a country rich in nature's gifts being retarded in development by misgovernment. Like other places subject to Spanish domination enormous taxes and imports were levied on merchants . . . to enrich the officials of church and state." *Id.* at 119.

213. Taft, interestingly, represented that he had few concerns about the legal system in place in the Philippines:

The old Spanish criminal code was continued by General Otis, with necessary modifications, as well as the criminal code of practice. A new code of practice and of crimes has now been prepared by General Wright, and only awaits enactment when the three lawyers of the Commission can meet together again. The

source of the penal law.²¹⁴ The press also viewed the need to invalidate unjust and archaic Spanish law as a basis for the *Weems* decision.²¹⁵ As one article noted, “[h]umanity asserted itself yesterday in the Supreme Court of the United States when the tribunal struck down one of the old Spanish measures of punishment in the Philippines”²¹⁶ These views of the inadequacy and injustice of the Philippine system enabled the Court to sidestep any idea of deference to legislative decision making.

Nor was the inherent subjectivity of the Court’s decision a matter of concern. The need to assure objective and reproducible standards for proportionality decisions assumes that there will inevitably be disagreement among decision makers about where to draw the necessary lines. The majority’s assumption in *Weems* was that any right-minded person would recognize the punishment as the product of “unrestrained power” with “no fellow in American legislation,” which would “amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths.”²¹⁷ This certainty about the universal unacceptability of the punishment was particularly curious in light of the fact that two of the six justices deciding the case did not agree with the decision.²¹⁸

4. Ironies and Limitations

There was no little irony in the *Weems* decision. First, the law that it rejected as incomprehensibly foreign had, in fact, been left in place by the Philippine Commission,²¹⁹ the governing body imposed by the

Commission, under its instructions, has not attempted to change the substantive law of the islands so far as it affects the correlative rights and duties of individuals. It is the civil law, and does not differ very materially from the Code Napoleon. It is a good system of law, and there is no reason to change it.

Taft, *supra* note 202, at 310.

214. The Court refers to the code section which convicted Weems as being “found in § 1 of chapter IV of the Penal Code of Spain.” *Weems v. United States*, 217 U.S. 349, 363 (1910).

215. *E.g., Court for Humanity: Declares Against Cruel Punishments in Philippines*, WASH. D.C. STAR, May 3, 1910, at 7.

216. *Id.*

217. *Weems*, 217 U.S. at 366–67, 377, 381.

218. *Id.* at 357 n.1.

219. While it was true that the Philippine penal law had its origins in the Spanish penal law, it had been left in place by the American Philippine Commission. *Id.* at 363, 368; *see infra* notes 220–223 and accompanying text. The Court’s view seemed to be based upon the fact that Congress approved the existing Penal Code without paying much attention to it:

The instructions of the President and the act of Congress found in nominal existence in the islands the Penal Code of Spain, its continuance having been declared by military order. It may be there was not and could not be a careful consideration of its provisions and a determination to what extent they accorded

Americans.²²⁰ The Commission, put in place by President McKinley, possessed legislative authority over the Philippines.²²¹ Modification of the penal law of the Philippines was a distinctly low priority for the Commission, which repeatedly considered, but never enacted, reforms to it,²²² regularly citing the pressure of more urgent business as its excuse.²²³ When the United States Attorney General recommended to the Secretary of War that the Philippine Commission revise the law in view of the United States Supreme Court's skepticism about the severe sentences being meted

with or were repugnant to the "great principles of liberty and law" which had been "made the basis of our governmental system."

Weems, 217 U.S. at 368.

220. The Philippine Bill of July 1, 1902, ch. 1369, § 1, 32 Stat. 691 (1902), available at <http://www.chanrobles.com/philippinebillof1902.htm>.

221. *Id.* § 1.

222. A proposed project to revise the penal law seems to have foundered. Mentioned for the first time in the Philippine Commission's 1901 report was a plan to prepare a new criminal code. The project was comparatively modest; the Commission noted that the code was based largely on the Spanish system, and proposed a revision that "only makes such changes as are deemed necessary to fit it to modern views of criminal law and to the new political relations of the people of the islands." BUREAU OF INSULAR AFFAIRS, WAR DEP'T, REPORT OF THE UNITED STATES PHILIPPINE COMMISSION TO THE SECRETARY OF WAR FOR THE PERIOD FROM DECEMBER 1, 1900, TO OCTOBER 15, 1901 pt. 1, at 90 (1901) [hereinafter BIA, FIRST ANN. REP.]. The 1902 Commission report indicated that the new code had been prepared. BIA, WAR DEP'T, THIRD ANNUAL REPORT OF THE PHILIPPINE COMMISSION 1902 pt. 2, at 697 (1903) [hereinafter BIA, THIRD ANN. REP.]. Further comment was reserved for the next Commission report. *Id.* However, a year later the new code still had not been enacted, due to objections by local Filipino lawyers. BIA, FOURTH ANN. REP., *supra* note 113, pt. 3, at 277. This did not mean that there were no revisions to the penal law; one was a vagrancy statute, passed to address the problem of "dissolute, drunken, and lawless Americans" in the islands, coupled with a provision permitting suspended sentences on the vagrancy charge for culprits who left the islands for at least ten years. *Id.* pt. 1, at 37.

Because the draft code had met opposition from local lawyers, the Commission appears to have scaled down the ambition of its proposals. Its intent, at that point, was a revision that would:

adhere so far as may be practicable to the existing code, eliminating all those provisions of that code which pertain to the sovereignty of Spain and to the union of church and state, and to the rigid restriction of discretion on the part of judges, to the right of private individuals to control and compromise criminal prosecutions.

Id. pt. 3, at 277. Ultimately a commission was appointed, including prominent Filipinos and Americans, to resolve these issues and prepare a "suitable code of criminal law." BIA, FIFTH ANN. REP., *supra* note 117, pt. 3, at 356. It was under discussion in 1904, but there was apparently "not time" to attend to the matter. BUREAU OF INSULAR AFFAIRS, WAR DEP'T, SIXTH ANNUAL REPORT OF THE PHILIPPINE COMMISSION 1905 pt. 1, at 116, pt. 4, at 9 (1906) [hereinafter BIA, SIXTH ANN. REP.]. The following year, with just one lawyer on the commission and with pertinent personnel on long leaves, the commission decided not to act further on the code revisions. BUREAU OF INSULAR AFFAIRS, WAR DEP'T, SEVENTH ANNUAL REPORT OF THE PHILIPPINE COMMISSION 1906 pt. 3, at 6-7 (1907). No further references to major revisions of the penal code appear, and it was left largely untouched until 1930. PHILIPPINE JUDICIARY, *supra* note 192, at 320.

223. BIA, FOURTH ANN. REP., *supra* note 113, pt. 3, at 277 ("The new criminal code . . . has not yet been enacted [by the Commission], owing to the press of other business . . ."); BIA, SIXTH ANN. REP., *supra* note 222, pt. 4, at 9 ("[T]here was not time, with the press of other duties, to complete the consideration . . .") BIA, THIRD ANN. REP., *supra* note 222, pt. 2, at 697 ("[I]t has not yet been practicable for the Commission to act upon it, owing to the pressure of other work.").

out for falsification of public documents in the Philippines,²²⁴ a somewhat testy reply indicated the difficulty of changing the law.²²⁵ Far from reflecting the need for immediate modification of unjust laws, President McKinley's initial letter to the Commission noted the importance of permitting the Philippines to proceed in its own way.²²⁶ "[T]he commission should bear in mind," he wrote:

that the government which they are establishing is designed not for our satisfaction or for the expression of our theoretical views, but for the happiness, peace, and prosperity of the people of the Philippine Islands, and the measures adopted should be made to conform to their customs, their habits, and even their prejudices, to the fullest extent consistent with the accomplishment of the indispensable requisites of just and effective government.²²⁷

He advised little change in the law.²²⁸

So one irony was that the foreign, bizarre, and incomprehensible legal scheme of which Weems complained of had, in fact, been effectively ratified by the American Philippine Commission. Another was that the judges applying this law were, for the most part, Americans.²²⁹ At the time Weems's case was decided by the Supreme Court of the Philippine Islands,

224. Letter from Charles J. Bonaparte, Att'y Gen., to Sec'y of War at 2 (Dec. 24, 1907) (letter available at BIA Records, *supra* note 117, General Classified Files 1898–1914, No. 6903–12).

225. Letter from Robert Shaw Oliver, Ass't Sec'y of War, to Charles J. Bonaparte, Att'y Gen. at 2 (Jan. 7, 1908) (letter available at BIA Records, *supra* note 117, General Classified Files 1898–1914, No. 6903–12). The letter noted:

In reply you are respectfully informed that the importance of a new criminal code . . . for the Philippine Islands is realized . . . and as early as 1902 a code, which was drawn largely on the lines of American law, had been prepared by General Wright, then a member of the Commission, for enactment into law.

When the proposed code came up for public discussion, however, it was found that Filipino lawyers objected to many sections of it. The matter drifted along in this manner until it was finally decided to leave it for the determination of the Philippine Assembly

I have referred your letter to the Governor General of the Philippine Islands so that those who may have to do with the subject may have the benefit of the views expressed therein.

Id. at 1–2.

226. William McKinley, Instructions to the Second Philippine Commission (Apr. 7, 1900), in ANNUAL REPORTS OF THE WAR DEPARTMENT FOR THE FISCAL YEAR ENDED JUNE 30, 1901, at 8 (1901).

227. *Id.*

228. *See id.* at 10 ("The main body of the laws which regulate the rights and obligations of the people should be maintained with as little interference as possible. Changes made should be mainly in procedure and in the criminal laws to secure speedy and impartial trials, and at the same time effective administration and respect for individual rights.").

229. PHILIPPINE JUDICIARY, *supra* note 192, at 310.

a majority of its members were Americans, including the justice who authored the opinion.²³⁰ While the judge who heard Weems's case in the trial court was Filipino, a majority of the judges on the court of first instance were also Americans.²³¹ Thus any notion that principles of Anglo-American justice were foreign to the judges deciding the case was quite simply fiction.

Moreover, the Philippine law responded to a genuine local concern. Fraud and embezzlement were commonplace for Americans in the civil service of the insular government.²³² Allegations in a number of cases from the Philippines suggest that the situation surrounding the expenditure of funds by the insular government was nothing short of chaotic.²³³ A number of such crimes are noted in various sources.²³⁴ The dishonesty of the

230. The members of the court were Carson, Arellano, Torres, Mapa, Johnson, Willard, and Tracey. *United States v. Weems*, 7 PHIL. REP. 241, 241, 247 (S.C., Dec. 29, 1906). This proportion, with four Americans and three Filipinos, persisted until 1920. PHILIPPINE JUDICIARY, *supra* note 192, at 310, 337.

231. *Weems* Transcript, *supra* note 114, at 8; PHILIPPINE JUDICIARY, *supra* note 192, at 310.

232. BIA, FOURTH ANN. REP., *supra* note 113, pt. 1, at 64. The 1903 Report of the Philippine Commission reported the Commission's distress at "numerous defalcations of Americans charged with the official duty of collecting and disbursing money." *Id.* It listed twenty civil servants, many of them Americans, who had committed such offenses and described the details of their defalcations or embezzlements. *Id.* at 66, 68–70. Two of these were, like Weems, disbursing officers; six were provincial treasurers or deputy treasurers. *Id.* at 68–69. The defalcations ranged from less than a hundred to tens of thousands of dollars, in several different types of currency. *Id.* at 66–70.

233. *E.g., id.* 65–70. The defense in one case offered testimony that the paperwork offered by disbursement officers was often a work of fiction.

The defense have offered the testimony of some witnesses in this case to show that a practice had been followed by various accountable officers wherein the statements contained in the vouchers and pay rolls were more or less untrue, and that such a practice had been countenanced by superior officers, and that the accused, having been a clerk under the military government, was cognizant of this, and, while believing it irregular, yet felt justified under the circumstances in this case in preparing this false voucher on account of the practice followed, of which he had knowledge, knowing that such things had been done before by other accountable officers and no notice taken of it, and that conditions being in a more or less unsettled state at that time, accountable officers were not, or should not be, held to so strict a performance of their duties as at the present time . . ."

Stuart Transcript, *supra* note 113, at 310. The court did not reject the factual premise, merely the notion that it offered the defendant an excuse. *Id.* at 310–11.

There was nothing in any military order, civil government circular, official letter, or in law or regulation, which at that time permitted the accused to insert false statements in a public document, and it can be no excuse to him that other accountable officers in the military department of the government—or even in the civil—had followed this irregular practice. . . . And equally true is it that the committing of a punishable offense by one who goes unpunished is no legal excuse or justification for the committing of that crime by another.

Id. at 311.

234. *E.g., BIA*, FOURTH ANN. REP., *supra* note 113, pt. 1, at 65–70. Noted one contemporary chronicler, "even worse were our first experiments with the Americans we appointed as provincial treasurers, because we felt that we could not yet be sufficiently sure of native honesty. Of the entire

Americans was particularly troubling in view of the American insistence that only Americans should be appointed to “positions of pecuniary trust.”²³⁵

The probable impact on the Filipinos, “who had been advised that Americans would be honest where others had not been so careful in accounting for public money,”²³⁶ was likely to be significant. In Weems’s case it was the Filipino lighthouse employees who were damaged by Weems’s conduct.²³⁷ The Commission blamed the high rate of criminal dishonesty among American employees of the insular government on “the anxious desire to make so long a trip result successfully in a pecuniary advantage,” and on the tendency, in the absence of “ordinary, rational, and healthful amusements,” to turn to “enjoyments like those of gambling and licentious association with native women.”²³⁸ This “means of spending money in excess of the legitimate salaries,” the Commission wrote sagaciously,²³⁹ “soon leads on to an appropriation of the public funds.”²⁴⁰

thirty-four, one half became embezzlers!” FREDERICK CHAMBERLIN, *THE PHILIPPINE PROBLEM* 1898–1913, at 174–75 (1913). Ironically, Chamberlin went on to note, “[t]he only satisfaction to be derived from the incident was that we sent every one of these criminals to Bilibid prison in Manila with sentences of twenty-five years.” *Id.* at 175. As Chamberlin was a vocal opponent of the anti-imperialist movement in the United States, his criticisms of the occupation may perhaps merit some credence. See WELCH, *supra* note 205, at 54 (noting Chamberlin’s belief that “disloyal citizens in America” incited Filipino insurrection). Cases which made their way from the Philippines to the U.S. Supreme Court reflected that falsification of documents and manipulation of the reimbursement system appeared to be rampant. See, e.g., *Carrington v. United States*, 208 U.S. 1, 4 (1908) (charging a military disbursing officer with falsifying documents).

235. BIA, *FOURTH ANN. REP.*, *supra* note 113, pt. 1, at 64.

236. *Id.*

237. See *United States v. Weems*, 7 PHIL. REP. 241, 242–43 (S.C., Dec. 29, 1906) (explaining that the lighthouse workers accepted partial payments from Weems because they had no other choice).

238. BIA, *FOURTH ANN. REP.*, *supra* note 113, pt. 1, at 65 (quoting BIA, *FIRST ANN. REP.*, *supra* note 222).

239. *Id.* Those salaries were higher than comparable salaries in the United States. Taft, *supra* note 202, at 317. “The expenses of the government are increased by the necessity for the employment of many Americans and for paying them adequate compensation. To secure good work in the Philippines from Americans higher salaries must be paid than in the United States.” *Id.* They were also higher than those paid to Filipino workers in the civil service. See BUREAU OF INSULAR AFFAIRS, WAR DEP’T, *NINTH ANNUAL REPORT OF THE PHILIPPINE COMMISSION TO THE SECRETARY OF WAR* 1908 pt. 1, at 56 (1909) (showing that Filipinos in the civil service earned less than Americans in the civil service in the period of 1903–1908). Nonetheless, the pay and prospects for Americans in the insular service are described negatively in JAMES H. BLOUNT, *THE AMERICAN OCCUPATION OF THE PHILIPPINES* 1898–1912, at 587–94 (1913). For additional discussion of American civil servant salaries in the Philippines, see CHARLES J. MITCHELL, *HOW WE RUN OUR COLONIAL CIVIL SERVICE* 17–18 (1904), in which the author complains at length about the conditions of the American civil servant in the Philippines. This pamphlet suggests a connection between compensation levels and the turn to crime:

Men are to-day [sic] rotting in the Philippine jails for the misappropriation of Government funds—men whose pay did not exceed one hundred dollars a month; which amount A. W. Fergusson, Secretary to the Philippine Commission, has publicly stated . . . is the exact amount required to live decently in Manila.

The result could never be in doubt. If an employ[ee] so situated has any

While these local concerns were not mentioned by the U.S Supreme Court, they were addressed by the trial court in Weems's case²⁴¹ and were argued

demands upon him . . . there is but one avenue of escape for him from the quandary in which he has been placed by his employers. His only resort is to peculate from the Government funds entrusted to his care. Condign punishment is inflicted upon the hapless Americans who yielded to the temptation . . .

Id. at 17–18. Mitchell went on to contend that the severity of sentences was purposeful:

It is the policy of the Manila Government and the Courts there to make examples of all Americans caught peculating from Government funds. A man employed in the Department of Health during my stay was detected in this, and is now serving a twelve year sentence in Bilibid Prison, Manila. The object of imposing such abnormal sentences is to duly impress the natives with a sense of American justice.

Id. at 18.

240. BIA, FOURTH ANN. REP., *supra* note 113, pt. 1, at 65. The next year's Commission report indicated with pleasure "the marked decrease in the number of defalcations and embezzlements of public funds on the part of those intrusted with making collections and disbursements," praising "more frequent examinations" of records and "the application of the merit system in the selection of responsible officials." BIA, FIFTH ANN. REP., *supra* note 117, pt. 3, at 702. It nonetheless listed ten wrongdoers. *Id.* at 703–04. Discussion of individual defalcations then disappears from the Commission reports.

241. *Weems* Transcript, *supra* note 114, at 15–16. The trial court addressed the significance of the role of the disbursing officer, assuring, in an environment of rampant cheating, that local employees would be paid the salaries they were owed. *Id.*

We must make mention, however, of a particular circumstance which makes it necessary for paymasters or disbursing officers of the several Bureaus of the Government of the United States in these Islands, to be absolutely faithful in the performance of their duties, and that is, that the vouchers are required [sic] to be signed by public officials or employees of the Government receiving salary,—as was shown at the trial,—some days prior to the time they receive compensation for their work; and if one of these official paymasters or disbursing officers committed any falsification in his cashbooks or in other documents in which the exact date of payment should be entered by him, it might easily happen that an employee would never be paid his salary, because of those entries and the employee's signature on the payroll. . . . Cases of defraudation of the public moneys and of falsifications of public and official documents are being frequently committed by Government Officials, and for its due suppression it is necessary that the law be strictly applied.

Id. The *Weems* Court's failure to recognize these local concerns was commented upon by the dissent.

[T]he duty of defining and punishing crime has never in any civilized country been exerted upon mere abstract considerations of the inherent nature of the crime punished, but has always involved the most practical consideration of the tendency at a particular time to commit certain crimes, of the difficulty of repressing the same, and of how far it is necessary to impose stern remedies to prevent the commission of such crimes. And, of course, as these considerations involve the necessity for a familiarity with local conditions in the Philippine Islands which I do not possess, such want of knowledge at once additionally admonishes me of the wrong to arise from forming a judgment upon insufficient data or without a knowledge of the subject-matter upon which the judgment is to be exerted. Strength, indeed, is added to this last suggestion by the fact that no question concerning the subject was raised in the courts below or there considered, and, therefore, no opportunity was afforded those courts, presumably, at least, relatively familiar with the local conditions, to express their views as to the considerations which may have led to the prescribing of the punishment in question.

by the Solicitor General before the United States Supreme Court.²⁴²

Yet another irony of the *Weems* case is that it had no appreciable impact on the administration of justice in the Philippine Islands. The initial response of the insular government to the decision was horror at the profound impact that the decision would have on other cases involving violent crime²⁴³ and, perhaps, resentment at the cultural presumptions of the United States Supreme Court.²⁴⁴ The Department of Justice hastened to assure the Secretary of War that the *Weems* case would have no application to violent crimes:

The court held that in view of the character of [Weems's] offense, the punishment provided was unusual and inhuman, but gave no intimation that such a punishment is unusual and inhuman should it be inflicted for assassination The effect of the decision was to nullify the particular statute upon which the information against Weems was based, and has no effect whatever upon statutes which relate to murder and the other offenses mentioned.²⁴⁵

Weems v. United States, 217 U.S. 349, 384–85 (1910) (White, J., dissenting).

242. Brief of the United States at 10, *Weems*, 217 U.S. 349 (No. 20) (“The judge in first instance very properly emphasized the nature of this offense as a matter of grave public concern under the old Spanish law, referring to a decision of the supreme court of Spain that ‘in an official or public document it is first endeavored to protect the interest of society by the most strict faithfulness on the part of the public official in the administration of the office entrusted to him; it being immaterial whether or not the falsification caused damage to a third party.’”).

243. Cablegram from Forbes, Governor-General, Philippines, to Jacob M. Dickinson, Sec’y of War (Aug. 30, 1910) (cablegram available at BIA Records, *supra* note 117, General Classified Files 1898–1914, No. 11428–8). The Governor-General, Forbes, cabled on learning of the decision to ask about a possible rehearing in the case, noting, “[d]ecision as to cruel punishment apparently releases 182 prisoners convicted of assassination, parricide, murder, robbery, abduction, arson, robbery with rape, et cetera, including one case of octuple murder, besides quashing cases pending to which this sentence is only one provided.” *Id.* Rehearing was impossible, the term of Court having ended. Memorandum from Paul Charlton, Law Officer, Bureau of Insular Affairs 1 (July 1, 1910) (memorandum available at BIA Records, *supra* note 117, General Classified Files 1898–1914, No. 11428-7).

244. A memo prepared by the Bureau of Justice for the Philippine Islands at the request of Justice Carson of the Supreme Court of the Philippine Islands criticized “the mistake which this high tribunal made in taking it for granted that prisoners in the Philippine Islands were cruelly and unjustly treated by means of chains and other punishment.” Memorandum for Mr. Justice Carson of the Supreme Court of the Philippine Islands Relative to the Effect of the *Weems* Decision of the United States Supreme Court on Pending Habeas Corpus Proceedings at 1, 6 (Nov. 21, 1910) (memorandum available at BIA Records, *supra* note 117, General Classified Files 1898–1914, No. 11428) [hereinafter Memorandum for Mr. Justice Carson]. The memo also noted: “It would not be heresy to say that probably no lawyer of the Philippine Islands agrees with this opinion.” *Id.* at 1.

245. Letter from J. A. Fowler, Acting Att’y Gen., to Jacob M. Dickinson, Sec’y of War 1–2 (Sept. 13, 1910) (letter available at BIA Records, *supra* note 117, General Classified Files 1898–1914, No. 11428-9). This confirms the contemporaneous perception, at least, that the opinion dealt with proportionality rather than the unusual nature of *cadena temporal*; the clear implication was that such a punishment, including all of its incidents, would have been utterly unobjectionable for a more serious crime.

The Supreme Court of the Philippines requested an opinion regarding the applicability of *Weems* from the Solicitor General of the Philippines.²⁴⁶ The conclusion, offered “with meekness of spirit and chastening of the heart,” and “more in the nature of suggestion than recommendation,”²⁴⁷ was that the *Weems* case “must be given effect in the particular case decided, but need not be followed by the Supreme Court of the Philippine Islands in any other case.”²⁴⁸

The Supreme Court of the Philippines promptly indicated its concurrence in this view, concluding that *Weems* did not strike down the penalty of *cadena temporal*²⁴⁹ but only struck down the penalty as applied to the offense *Weems* committed.²⁵⁰ The court rejected the *Weems* conclusions partly because, in its view, the United States Supreme Court “labored under a misapprehension of fact,” based on a perceived mistranslation of the Spanish penal code.²⁵¹ In addition, the court concluded, as the carrying of chains by convicts sentenced to *cadena temporal* had “fallen into disuse,” that aspect of the penalty could no longer be considered in evaluating whether the punishment was cruel and unusual.²⁵² Accordingly, the

246. Memorandum for Mr. Justice Carson, *supra* note 244, at 1.

247. *Id.*

248. *Id.* at 2 (emphasis omitted). The opinion went on: “I believe the Supreme Court [of the Philippines] would be warranted, under all the circumstances by per curiam decision and without discussion in refusing to issue writs of habeas corpus in all cases without exception growing out of the *Weems* decision.” *Id.* (emphasis omitted). “This procedure also might have the desired result of again bringing the question to the United States Supreme Court.” *Id.* (emphasis omitted). The memo concluded that, while “nearly two hundred prisoners [were] in Bilibid Prison under sentence[s] of *cadena temporal*,” that the Supreme Court should either grant no habeas corpus petitions for those prisoners or should grant them only “for those prisoners convicted of exactly the same offense as *Weems* and in no other cases.” *Id.* at 5–6 (emphasis omitted).

249. *United States v. Pico*, 18 PHIL. REP. 386, 389–90 (S.C., Feb. 11, 1911). The opinion reflects an interesting view of judicial responsibility. “Confronted as we are,” the court wrote:

with the knowledge that consequences so far-reaching and disastrous must result from a holding favorable to the contention of counsel on this motion, it is manifestly our duty rigidly to restrict the application of the doctrine laid down in the *Weems* case to cases wherein the *ratio decidendi* in that case is clearly applicable and to decline to be bound by inferences drawn from observations and comments contained in the opinion in that case which appear to be based upon a misapprehension of facts, or upon assumed facts which do not accord with the facts in the cases brought before us.

Id. at 390.

250. *Id.* Accordingly, the court rejected *Pico*’s claim that, under *Weems*, a sentence of *cadena temporal* was impermissible for the crime of first-degree murder. *Id.*

251. *Id.* at 391–93. The United States Supreme Court thought that the punishment called for “hard and painful labor,” while the Philippine Supreme Court thought “hard and laborious labor” a better translation. *Id.* The court also concluded that the nature of the chain employed in the Philippine prisons did not, contrary to the Supreme Court’s conclusion, result in the infliction of physical pain. *Id.* at 393–94.

252. *Id.* at 394. Accordingly, the court concluded, “those provisions of the Penal Code

Philippine court effectively disregarded *Weems* in all cases not involving convictions for exactly the same offense for which *Weems* had been convicted.²⁵³ Only in cases involving falsification of a public document did the court strike down any sentence.²⁵⁴

The ultimate irony is that the *Weems* decision affected the long-term development of proportionality doctrine more than it affected the imposition of punishment in the Philippines. The Court showed little concern that proportionality decisions could overrule legitimate, legislative decision making because it perceived the Philippine penal law as the discredited product of an unreliable government. Further, because the majority found the prospect of subjecting an American to a perceived harsh punishment so appalling, the concern that there might someday be disagreement about the appropriate severity of a punishment and about the objective standards to guide proportionality review had little force. Ultimately, the case, when understood in the context of its history, established a principle while utterly failing to define any satisfactory mechanisms for its continuing application.

5. Considering the Continuing Significance of *Weems*

Weems is continually cited as a significant proportionality case, the foundation of the doctrine of proportionality in carceral sentencing. It was cited in each of the cases discussed in Part I and continues to be cited as firm support for the proposition that the Eighth Amendment includes a long-recognized proportionality principle.²⁵⁵ The Court's interpretation of

prescribing the carrying of chains are not in force at this time and can not [sic] in any way affect the validity of the principal penalty of which they at one time formed a part." *Id.* at 395. "[W]e do not think," the court concluded:

that an obsolete provision of the Spanish Penal Code which is not now enforced and has not been enforced since the Islands were brought under the present sovereignty . . . should at this late day be given such vital force as to invalidate many of the most important provisions of existing law, and thus impose upon this court the duty of setting at liberty in this community hundreds of the vilest criminals and of proclaiming the immunity of all those who have heretofore been guilty of many of the gravest and most heinous offenses known to the law.

Id. at 396–97.

253. *E.g.*, *id.* at 396–98.

254. *See, e.g.*, *United States v. Pacheco*, 18 PHIL. REP. 399, 400–01 (S.C., Feb. 11, 1911) (reversing the conviction for falsification of a public document, because the Philippine penal code did not define any "lawful penalty" for such negligent conduct).

255. *See, e.g.*, *Ewing v. California*, 538 U.S. 11, 20 (2003) (citing *Weems* for the proposition that the Eighth Amendment "contains a 'narrow proportionality principle' that 'applies to noncapital sentences'" (citing *Weems v. United States*, 217 U.S. 349, 371 (1910)) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996–97 (1991) (Kennedy, J., concurring in part and concurring in the judgment)); *Harmelin*, 501 U.S. at 991 (Scalia, J., concurring) (acknowledging that "[o]ther portions of the [*Weems*] opinion . . . suggest that mere disproportionality, by itself, might make a punishment cruel and unusual"

(citing *Weems*, 217 U.S. at 366–67)); *id.* at 997 (Kennedy, J., concurring in part and concurring in the judgment) (citing *Weems* for the proposition that it was the first case which “interpreted the Eighth Amendment to prohibit ‘greatly disproportioned’ sentences” (citing *Weems*, 217 U.S. at 371)); *id.* at 1012 (White, J., dissenting) (“[T]here can be no doubt that prior decisions of this Court have construed these words to include a proportionality principle. . . . That the punishment imposed in *Weems* was also unknown to Anglo-American tradition . . . was just another reason to set aside the sentence and did not in the least detract from the holding with respect to proportionality, which . . . was the focus of the Court’s holding.” (citing *Weems*, 217 U.S. at 366–67, 371, 377)); *Solem v. Helm*, 463 U.S. 277, 286–87 (1983) (citing *Weems* for the proposition that “[t]he constitutional principle of proportionality has been recognized explicitly in this Court for almost a century,” and referring to *Weems* as “the leading case” (citing *Weems*, 217 U.S. at 367)); *Hutto v. Davis*, 454 U.S. 370, 377 (1982) (Powell, J., concurring in the judgment) (citing *Weems* for the proposition that there is a “proportionality principle long settled by our cases” (citing *Weems*, 217 U.S. at 367)); *id.* at 383 (Brennan, J., dissenting) (“*Rummel* acknowledged that prior decisions of this Court, [including *Weems*], recognized that the Eighth Amendment includes a principle of proportionality that requires the invalidation of a sentence that is ‘grossly disproportionate to the severity of the crime.’” (quoting *Rummel v. Estelle*, 445 U.S. 263, 271 (1980)); *Rummel*, 445 U.S. at 271–72 (citing *Weems* for the proposition that the Supreme Court has “on occasion stated that the Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime” (citing *Weems*, 217 U.S. at 367)); *see also* *Bullington v. Missouri*, 451 U.S. 430, 450 n.3 (1981) (Powell, J., dissenting) (“[A] sentence may be called ‘erroneous’ if it is grossly disproportionate to the severity of the crime committed. . . . [I]n that event, the sentence is ‘cruel and unusual’ in violation of the Eighth Amendment” (citing *Weems*, 217 U.S. at 371)); *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (citing *Weems* for the proposition that the “Eighth Amendment prohibits punishments which, although not physically barbarous, ‘involve the unnecessary and wanton infliction of pain,’ . . . or are grossly disproportionate to the severity of the crime” (citing *Coker v. Georgia*, 433 U.S. 584, 592 (1977); *Weems*, 217 U.S. at 367) (quoting *Gregg v. Georgia*, 428 U.S. 153, 173 (1976)); *Hutto v. Finney*, 437 U.S. 678, 685 (1978) (citing *Weems* for the proposition that the Eighth Amendment “prohibits penalties that are grossly disproportionate to the offense” (citing *Weems*, 217 U.S. at 367)); *Ingraham v. Wright*, 430 U.S. 651, 667 (1977) (citing *Weems* for the proposition that the Amendment “proscribes punishments grossly disproportionate to the severity of the crime” (citing *Gregg*, 428 U.S. at 173; *Weems*, 217 U.S. at 367)); *Estelle v. Gamble*, 429 U.S. 97, 103 n.7 (1976) (same).

Weems is cited with equal vigor in the death penalty cases, including, most recently, in *Roper v. Simmons*. *Roper v. Simmons*, 543 U.S. 551, 560 (2005); *see also* *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987) (citing *Weems* as identifying “a second principle inherent in the Eighth Amendment, ‘that punishment for crime should be graduated and proportioned to offense’” (quoting *Weems*, 217 U.S. at 367)); *Enmund v. Florida*, 458 U.S. 782, 788 (1982) (quoting *Weems* for the statement that “the Eighth Amendment is directed, in part, “against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.”” (quoting *Weems*, 217 U.S. at 371)); *Lockett v. Ohio*, 438 U.S. 586, 620 (1978) (Marshall, J., concurring in the judgment) (citing *Weems* for the proposition that there is a “principle of proportionality embodied in the Eighth Amendment’s prohibition [on cruel and unusual punishment]” (citing *Weems*, 217 U.S. at 367)); *Coker*, 433 U.S. at 592 (citing *Weems* for the proposition that the “Eighth Amendment bars not only those punishments that are ‘barbaric’ but also those that are ‘excessive’ in relation to the crime committed” (citing *Weems*, 217 U.S. at 367)); *Gregg*, 428 U.S. at 171 (plurality opinion) (citing *Weems* for proposition that “the Court has not confined the prohibition embodied in the Eighth Amendment to ‘barbarous’ methods” and that the Court did not rely on “the cruelty of pain” in *Weems*, instead “focus[ing] on the lack of proportion between the crime and the offense” (citing *Weems*, 217 U.S. at 366)); *Furman v. Georgia*, 408 U.S. 238, 325 (1972) (Marshall, J., concurring) (“*Weems* is a landmark case because it represents the first time that the Court invalidated a penalty prescribed by a legislature for a particular offense. The Court made it plain beyond any reasonable doubt that excessive punishments were as objectionable as those that were inherently cruel.”).

precisely what *Weems* stands for has been both opaque²⁵⁶ and malleable.²⁵⁷

256. Supreme Court Justices have from time to time suggested that it was solely the nature of the punishment in *Weems*, rather than the duration, that was the source of the Court's decision to overturn the sentence. See, e.g., *Harmelin*, 501 U.S. at 963 (Scalia, J., concurring) (noting that the basis of the *Weems* decision was that the punishment was "of a 'unique nature'" (citing *Weems*, 217 U.S. at 367)); *Helm*, 463 U.S. at 307 (Burger, C.J., dissenting) (reasoning that *Weems* "did not authorize courts to review sentences of imprisonment to determine whether they were 'proportional' to the crime," but turned instead on the unique facts of the punishment imposed in *Weems* (citing *Rummel*, 445 U.S. at 273, 288 n.14)); *Atiyeh v. Capps*, 449 U.S. 1312, 1316 (Rehnquist, Circuit Justice 1981) (citing *Weems* for the proposition that *cadena temporal* "exceed[s] the bounds permitted the States by the Eighth and Fourteenth Amendments to the United States Constitution" (citing *Weems*, 217 U.S. at 382)); *Powell v. Texas*, 392 U.S. 514, 531–32 (1968) (citing *Weems* for proposition that the Cruel and Unusual Punishment Clause of the Eighth Amendment "has always been considered, and properly so, to be directed at the method or kind of punishment imposed for the violation of criminal statutes" (citing *Trop v. Dulles*, 356 U.S. 86 (1958)); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947); *Weems*, 217 U.S. at 367)); see also Kathi A. Drew & R. K. Weaver, *Disproportionate or Excessive Punishments: Is There a Method for Successful Constitutional Challenges?*, 2 TEX. WESLEYAN L. REV. 1, 6 (1995) ("It was, thus, the manner of punishment and the conditions of confinement, not the length of imprisonment, which was held violative of the Eighth Amendment."). This argument was forcefully made to the Court in the *Weems* case itself; in the view of the Solicitor General, the Cruel and Unusual Punishment Clause referred to "mutilations and degradations, and not to length or duration of the punishment." Reply Brief on Behalf of the United States at 11, *Weems*, 217 U.S. 349 (No. 20). The Solicitor General argued that the Clause referred only to "punishments of torture . . . and all others in the same line of unnecessary cruelty." *Id.*

257. In other situations, however, the Court has suggested that both the duration and nature of the sentence contributed to the holding in *Weems*. See *Rummel*, 445 U.S. at 273 (indicating the Court wrestled with this dichotomy). While *Rummel* argued that "the length of *Weems*'[s] imprisonment was, by itself, a basis for the Court's decision," the Court concluded that *Weems* relied on both the duration and nature of his punishment, noting that the opinion "consistently referred jointly to the length of imprisonment and its 'accessories' or 'accompaniments.'" *Id.* Ultimately, the Court concluded that *Weems* could be applied only taking account of "its peculiar facts: the triviality of the charged offense, the impressive length of the minimum term of imprisonment, and the extraordinary nature of the 'accessories' included within the punishment of *cadena temporal*." *Id.* at 274. The dissent, as might be expected, rejected this interpretation, arguing that while "[t]he Court was attentive to the methods of the punishment . . . its conclusion did not rest solely upon the nature of punishment" but also "relied explicitly upon the relationship between the crime committed and the punishment imposed." *Id.* at 289–90 (Powell, J., dissenting).

There are additional comparable references to consider. See, e.g., *Carmona v. Ward*, 439 U.S. 1091, 1094 (1979) (Marshall, J., dissenting) ("Although the sentence [in *Weems*] was excessive not merely in its length but in its conditions—15 years of hard labor in chains, with lifetime surveillance after release—the duration of the imprisonment and subsequent supervision plainly contributed to the Court's conclusion that '[s]uch penalties for such offenses amaze those who . . . believe that . . . punishment for crime should be graduated and proportioned to offense.'" (first alteration added) (quoting *Weems*, 217 U.S. at 366–67)); *Furman*, 408 U.S. at 271–72 (Brennan, J., concurring) (noting that "the physical and mental suffering inherent in the punishment of *cadena temporal* . . . was an obvious basis for the Court's decision in *Weems v. United States* that the punishment was 'cruel and unusual,'" but that "[m]ore than the presence of pain . . . is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings" (citation omitted) (footnote omitted)); *id.* at 393–94 (Burger, J., dissenting) (stating that *Weems* "is generally regarded as holding that a punishment may be excessively cruel within the meaning of the Eighth Amendment because it is grossly out of proportion to the severity of the crime; [but that] some view the decision of the Court primarily as a reaction to the mode of the punishment itself"); *Trop*, 356 U.S. at 100 (plurality opinion) (noting that in *Weems*, "when the Court was confronted with a punishment of 12 years in irons at hard and painful labor imposed for the

The Court has been unclear as to whether it is a decision about the duration of punishment, about the nature of punishment, or about both.²⁵⁸

If the duration of the punishment was not the basis for the Court's rejection of it, it is hard to imagine what was. Hard labor was not foreign to American justice at the time; such labor—often in a chain gang—was commonplace in late nineteenth-century America.²⁵⁹ Nor was any sort of civil disqualification an extraordinary sanction.²⁶⁰ *Weems* is best understood

crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character" (citing *Weems*, 217 U.S. at 366–67)).

258. See, e.g., *Helm*, 463 U.S. at 289 (citing *Weems* for the proposition that "our prior cases have recognized explicitly that prison sentences are subject to proportionality analysis" (citing *Finney*, 437 U.S. at 685; *Weems*, 217 U.S. at 377)); see also *Atkins v. Virginia*, 536 U.S. 304, 311 & n.7 (2002) (contending that in *Weems*, the Court "held that a punishment of 12 years jailed in irons at hard and painful labor for the crime of falsifying records was excessive," and arguing that "we have read the text of the Amendment to prohibit all excessive punishments, as well as cruel and unusual punishments that may or may not be excessive"); *Tison v. Arizona*, 481 U.S. 137, 148 (1987) (quoting *Weems* for the proposition that the Eighth and Fourteenth Amendments proscribe "all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged" (quoting *Weems*, 217 U.S. at 371)); *Gregg*, 428 U.S. at 171 (plurality opinion) (citing *Weems* for the propositions that "the Court has not confined the prohibition embodied in the Eighth Amendment to 'barbarous' methods" and that the Court did not rely on "the cruelty of pain" in *Weems*, instead "focus[ing] on the lack of proportion between the crime and the offense" (quoting *Weems*, 217 U.S. at 366)); Schwartz & Wishingrad, *supra* note 5, at 785 (commenting on the dispute surrounding Eighth Amendment interpretation); cf. *Helm*, 463 U.S. at 307 (Burger, C.J., dissenting) (arguing that *Weems* turned on the "bizarre" penalty imposed there, and that its holding "cannot be wrenched from the facts" (quoting *Rummel*, 445 U.S. at 273)). The contemporaneous view in the press was that the case required "punishments to be proportionate to the offense." E.g., *Ruling Stirs Lawyers: Supreme Court Decision Makes New Era in Criminology*, WASH. POST, May 9, 1910, at 3. The Chicago Tribune headlined its story more sensationally. *Law Precedent Set Aside: Supreme Court Decision Amazes Men of Legal Profession*, CHI. DAILY TRIB., May 9, 1910, at 7.

259. See LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 157 (1993) (describing conditions of prisoners doing forced labor in nineteenth-century America). Friedman notes a death rate of eleven percent in certain labor camps in Virginia in 1881. *Id.* There is disagreement as to whether chain gangs violate the Eighth Amendment. Compare Wendy Imatani Peloso, *Les Miserables: Chain Gangs and the Cruel and Unusual Punishments Clause*, 70 S. CAL. L. REV. 1459, 1462, 1476–1510 (1997) (establishing a contemporary argument that chain gangs violate the Eighth Amendment), with McLamore v. South Carolina, 409 U.S. 934, 936 (1972) (Douglas, J., dissenting) (indicating the Supreme Court has not ruled on the issue as to whether chain gangs violate the Eighth Amendment), and Sander Jacobowitz, *Rattling Chains and Smashing Rocks: Testing the Boundaries of the Eighth Amendment*, 28 RUTGERS L.J. 519, 547 (1997) (concluding that chain gangs are "a constitutional form of punishment, well within the bounds of the Eighth Amendment's prohibitions").

260. See Kathleen Olivares et al., *The Collateral Consequences of a Felony Conviction: A National Study of State Legal Codes 10 Years Later*, 60 FED. PROBATION, Sept. 1996, at 10, 11 (cataloguing increases in extent of state restrictions on convicted felons); *The Collateral Consequences of a Criminal Conviction*, 23 VAND. L. REV. 929, 950 (1970) ("[I]n the United States civil disabilities continued to play a significant role in the treatment of criminals."); Howard Itzkowitz & Lauren Oldak, Note, *Restoring the Ex-Offender's Right to Vote: Background and Developments*, 11 AM. CRIM. L. REV. 721, 724–26 (1973) (indicating that the civil disqualifications of *Weems*'s punishment found their roots in the "civil death" tradition of the civil law, and that some such disqualifications were commonplace in the United States at the time, including felony disenfranchisement laws, which have their roots firmly in

as a significant precedent for the proposition that some sentences are simply too long to be constitutionally permissible.

Yet, ironically, it created a significant problem for the Supreme Court. While the circumstances of *Weems* made the “correct” outcome patently obvious to the Court, the limits to the principle it pioneered were considerably less evident. The Court did not seriously consider how to accommodate its conclusion with the need to defer to legislative decision making; it did not establish a principled basis on which to apply the ideals it articulated. Accordingly, it established a principle whose constraints the Court is still struggling to delineate.

Is it possible to conceptualize a proportionality principle that addresses these concerns? One possibility would be to defer to legislative decision making in the absence of a claim of an irregularity or discontinuity in the political process. Deference might be less important in this context. The Court in *Weems* might well have chosen this route, viewing the Penal Code as having been imposed by imperialist Spain and thereby lacking the democratic imprimatur of a legislatively imposed punishment.²⁶¹ In this context, a proportionality claim would need to be supported by an argument that the political process had failed to accommodate—in a systemic way—the needs and interests of pertinent actors.

While such an approach might explain *Weems*, it might prove too little—or too much—in the ordinary course. If such an analysis permitted proportionality review only in the context of untrustworthy political systems, the principle of proportionality review in *Weems* would be limited pretty much to the facts of that case. The courts are unlikely to be willing to make the requisite findings about state legislative systems. If, by contrast, this principle were construed more broadly—if proportionality review were available whenever the particular actors disadvantaged by a statutory enactment lacked full access to the political process—then one might argue that no legislative enactments imposing criminal sentences should receive any deference at all. It could be argued that the short-term political advantages of protecting the public from dangerous criminals causes political actors to systematically overvalue the public’s interest in lengthy

English law (quoting *Avery v. Everett*, 18 N.E. 148, 150 (1888)). The collateral consequences of conviction studied in the Olivares article include parental rights and divorce, the right to serve on a jury, and the right to hold public office as well as felony disenfranchisement. Olivares, *supra*, at 11–13. See generally George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. REV. 1895, 1895 (1999) (discussing disenfranchisement’s disproportionate impact on African Americans); *One Person, No Vote: The Laws of Felon Disenfranchisement*, 115 HARV. L. REV. 1939, 1939–49 (2002) (summarizing the law of disenfranchisement in various states).

261. The Court’s reluctance to comment on the antidemocratic characteristics of the American venture in the Philippines might have precluded this approach.

punishment; “getting tough on crime” might have a disproportionately compelling political message.²⁶² Of course, ultimately the public needs to support those political decisions about lengthy incarceration, which might cause legislative enthusiasm about such punishments to wane.

Moreover, the crusade to find “objective” bases for the application of the proportionality principle seems doomed to failure. The Court’s current approach, as adopted by the plurality in *Ewing*, utterly fails to offer objective and reproducible standards.²⁶³ First, the Court’s notion that a threshold determination of gross disproportionality is a necessary precondition to a more searching review of an imposed punishment²⁶⁴ is subject to no limiting principle; the question is merely whether the reviewing court has the sense of a grave injustice in the relationship between the crime and its punishment. Moreover, if the courts take seriously the proposition that the Constitution requires the adoption of no particular theory of punishment,²⁶⁵ the basis for making that threshold determination is unclear. While one might conclude that a punishment was grossly disproportionate to a crime because the perpetrator of such a crime simply did not deserve such a severe punishment, just deserts is only one of a range of possible theories on which the legislature might have based its decision regarding punishment. Should the legislature have decided that a deterrence rationale supported a relatively severe punishment for a minor but often-committed and annoying offense, the Court has suggested that legislative determination is not subject to constitutional second-guessing.

The obvious answer would be to conclude that the Eighth Amendment simply includes no enforceable proportionality principle and that proportionality choices must be entrusted irrevocably to legislative decision making. It is clear that the Court is simply unwilling to cede the possibility of proportionality review irrevocably to state legislatures. The threat of life sentences for overtime parking is plainly a circumstance the Court is unwilling to entrust to legislative good judgment.²⁶⁶

We might, therefore, need to recognize this as a circumstance in which the judicial power to address injustice must be recognized, even though the principles underlying that conclusion cannot be dispassionately and

262. *But see* Craig S. Lerner, *Legislators as the “American Criminal Class”: Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599, 604 (discussing how due to the expansion of criminal liability over the past thirty years, Congress has been “enhance[ing] procedural protections”).

263. *See Ewing v. California*, 538 U.S. 11, 21, 23–24 (2003) (providing guidance through precedent of when a sentence would be “cruel and unusual” under the Eighth Amendment).

264. *Id.*

265. *See supra* note 78 and accompanying text.

266. *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980).

objectively articulated.²⁶⁷ The legitimacy of such an approach ultimately turns on the judiciary's ability to exercise extreme restraint in the use of such a principle. This may explain existing proportionality doctrine better than the Court's own articulation of it.

One might argue that the Supreme Court's own judicial practice reflects agreement with this approach. Since *Weems*, the Supreme Court has overturned only one carceral punishment—that in *Solem v. Helm*—on the grounds of Eighth Amendment disproportionality.²⁶⁸ Restraint in application suggests that the sky is not falling; the proportionality principle, even if illegitimate, holds little threat for democratically established sentences.

CONCLUSION

Countless proportionality cases continue to wend their way through our judicial system. Severe sentencing schemes produce individual cases requiring judicial scrutiny to address whether the sentences imposed in those cases are constitutionally permissible under the Eighth Amendment. The Supreme Court's cases in this area have been hopelessly confused, unable either to accommodate effectively the need to give adequate deference to legislative determinations about offense severity and appropriate sentences, or to create rational and objectively reproducible approaches to sentencing review.

As we have seen, *Weems v. United States* launched this confusion. Because the Court viewed itself as responding to a foreign enactment, it was not compelled to address how it might reconcile the need for sentencing review with the need to accommodate legislative decision making. Because it viewed the sentence *Weems* received as viscerally horrifying, it did not need to articulate a principled basis for distinguishing that sentence from other, permissible ones that might be imposed. The enduring principle of proportionality thus survives without an adequate conceptual framework to limit and legitimize it.

267. Consider, for example, the "shocks the conscience" due process standard of *Rochin v. California*. *Rochin v. California*, 342 U.S. 165, 172 (1952).

268. *Solem v. Helm*, 463 U.S. 277, 303 (1983). While *Robinson v. California* held that a sentence of ninety days was "cruel and unusual punishment" in violation of the Fourteenth Amendment, the sentence was not overturned because of its length, but because of the constitutional impermissibility of punishing the status crime of being addicted to narcotics at all. *Robinson v. California*, 370 U.S. 660, 667 (1962) ("Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold.").