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Indecent Standards: The Case of U.S. versus Weldon Angelos

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> *"[W]hether or not a punishment is cruel and unusual depends, not on whether its mere mention 'shocks the conscience and sense of justice of the people,' but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable."*
>
> - *Justice Thurgood Marshall in* Furman v. Georgia[1]
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> *"While the sentence appears to be cruel, unjust and irrational, in our system of separated powers Congress makes the final decisions as to appropriate criminal penalties."*
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> - *Judge Paul Cassell in* United States v. Angelos[2]

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1. 408 U.S. 238, 361 (1972).
2. 345 F. Supp. 2d 1227, 1230 (D. Utah 2004).

I. INTRODUCTION

In today's highly punitive culture, perhaps Weldon Angelos' fifty-five-year sentence does not seem unusual. He's a 25-year-old man who was convicted in December 2003 of selling marijuana, possessing firearms while drug dealing, and money laundering.[3] The facts proven at trial are that on three occasions in June and July, 2002, Angelos sold eight one-ounce bags of marijuana for $350 each to a government informant.[4] The purchaser testified that a firearm was visible during two of these drug sales.[5] Police seized another gun from Angelos' home five months later pursuant to a warrant.[6] At no time was he accused of using or threatening to use these weapons.[7]

If Angelos had been charged and convicted in a state court in Utah rather than a federal court in Utah, his sentence would most likely have been between four and seven years.[8] His sentence also would have been much less if he had accepted the prosecutor's pre-trial offer of fifteen years in exchange for a guilty plea. At the time of the plea offer Angelos faced only one mandatory gun charge. Initially, he refused the offer, but then tried, unsuccessfully, to reopen plea discussions after the prosecutor informed him of the additional firearms indictments that he had secured arising from the same set of facts. Angelos went to trial, was convicted, and, on November 16, 2004, Judge Paul Cassell imposed the mandatory sentence of fifty-five years. This was the least severe sentence the judge could have rendered under the federal firearms enhancement statute, 18 U.S.C. § 924(c).[9] With

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3. *Id.* at 1231.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 1258.
8. *See id.* at 1243, 1259; Pamela Manson, *Utah Federal Judge Takes Closer Look at Stiff Minimum Mandatory Terms*, THE SALT LAKE TRIBUNE, Sept. 15, 2004, at A1.
9. *See* 18 U.S.C. § 924(c) (2000). "Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm . . . shall, in addition to the punishment provided for such crime of violence or drug trafficking crime," be sentenced to imprisonment for five years. *Id.* § 924(c)(1)(A). If the firearm is a "short-barreled rifle, short-

no opportunity for parole, this is essentially a life sentence. If he survives, Weldon Angelos will be eighty years old when he is released.

What's so special about this case? There are many equally long sentences imposed daily in federal and state courts throughout the United States.[10] However, even in these harsh times it is unusual for a first offender, convicted of a crime not involving violence or the threat of violence, to receive a life sentence. The sentence in *Angelos* is an anomaly, and Judge Cassell's response to having to impose the sentence makes it special. He balked at doing what seemed to him outrageous and unfair and set this case on an unusual procedural journey. He called this sentencing his most difficult moment as a judge,[11] but he did more than express his pain and frustration. Judge Cassell reached out to the jury, the legal community and beyond in an effort to resolve the conflict between his sense of justice and the law. In the end he did as many others who are equally disturbed by the straightjacket of federal sentencing have done: he

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barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. *Id.* § 924(c)(1)(B). In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty-five years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to life imprisonment without release. *Id.* § 924(c)(1)(C). Notwithstanding any other provision of law, the court shall not place on probation any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. *Id.* § 924 (c)(1)(D). "For purposes of this subsection, the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." 18 U.S.C. § 924(c)(2). "For purposes of this subsection the term 'crime of violence' means an offense that is a felony and (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." *Id.* § 924(c)(3).

10. *See generally* David M. Zlotnick, *Shouting into the Wind: District Court Judges and Federal Sentencing Policy*, 9 ROGER WILLIAMS U. L. REV. 645 (2004).

11. *Angelos,* 345 F. Supp. 2d at 1261.

sentenced Angelos to the mandatory minimum of fifty-five years in prison.[12]

The Tenth Circuit affirmed Weldon Angelos' sentence.[13] That Court did not seize the opportunity presented by Judge Cassell to expand Eighth Amendment discourse.[14] Furthermore it rejected Judge Cassell's interpretation of *Harmelin v. Michigan* and his findings under the *Harmelin* standard.[15] Weldon Angelos was not re-sentenced to a term proportionate to his crimes.[16]

This case has broader import, however, than the attempt to

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12. *See* Interview by PBS Frontline with Judge Robert Sweet, FRONTLINE (n.d.), http://www.pbs.org/wgbh/pages/frontline/shows/snitch/procon/sweet.html (last visited Jan. 16, 2006). Some judges have quit the bench because they could no longer abide by the sentencing laws. Examples include: Judge Lawrence Irving, as reported by Allen Abrahamson, *U.S. Judge to Quit; Cites Sentencing Guidelines*, L.A. TIMES, Sept. 27, 1990, at A3; Judge Paul Magnuson, as reported by Lucy Quinlivan, *Chief Judge Leaving Best Job in World*, ST. PAUL PIONEER PRESS, June 18, 2001, at A1; Judge John S. Martin, as reported by Seth Stern, *Federal Judges Rebel Over Limits to Sentencing Power*, CHRISTIAN SCIENCE MONITOR, Jul. 8, 2003 at Op. 2.

13. United States v. Angelos, 433 F.3d 738, 754 (10th Cir. 2006).

14. *See id.* at 738-54.

15. *See id.* The *Harmelin* standard was set forth in *Harmelin v. Michigan*. 501 U.S. 957 (1991). The *Harmelin* Court held that a life sentence without the possibility of parole for possession of a large quantity of cocaine was not a violation of the Eighth Amendment. *Id.* at 961, 994. Justice Kennedy relied on the gross proportionality test articulated in *Solem v. Helm*, which asserted that "as a matter of principle . . . a criminal sentence must be proportionate to the crime for which the defendant has been convicted." 463 U.S. 277, 290 (1983) (cited by *Harmelin*, 501 U.S. at 1004-05). *Harmelin's* threshold test consists of line-drawing regarding the seriousness of a crime and the culpability of the offender. *Harmelin*, 501 U.S. at 976. Judge Cassell found this an easy test for Angelos: 1) the lack of violence or force in Angelos's crimes despite his carrying a gun, 2) the fact that he sold marijuana, a drug which despite its illegality is not generally associated with violence or serious bodily harm, and 3) Angelos's lack of a criminal record. *Angelos*, 345 F. Supp. 2d at 1257-58. As noted above, the Supreme Court has said that most of those serving sentences will not survive the threshold test of gross disproportionality. *Harmelin,* 501 U.S at 960. The Court gave scant guidance when it said, for example, that a life sentence for a parking meter violation is grossly disproportionate. Rummel v. Estelle, 445 U.S. 263, 274 n.11 (1980). Before *Harmelin*, the Supreme Court's modern Eighth Amendment test was articulated in *Solem*. 463 U.S. at 277.

16. See *infra* text accompanying note 138 for a brief description of the Tenth Circuit's decision on appeal, which occurred just prior to publication. Notwithstanding the Tenth Circuit's decision, the analysis and commentary set forth by this article remain useful should Weldon Angelos undertake another appeal, and remain useful to other defendants similarly situated to Angelos.

right the wrong done to Weldon Angelos. Judge Cassell's ambitious approach to the restrictions of mandatory sentences shows that judges can generate valuable data on evolving standards of decency and thereby give content to the Eighth Amendment. Judge Cassell's actions may augur a new wave of judicial decision-writing in which judges record their observations about evolving sentencing norms and in so doing expand the post-*Booker* sentencing discussion to include mandatory minimums.[17]

II. PRE-SENTENCE INQUIRY

At the time of Angelos' trial, Judge Cassell had been on the bench approximately two-and-a-half years. Prior to his appointment to the District Court he was a law professor at the University of Utah College of Law,[18] where he accumulated an extensive scholarly record.[19] He also spent a number of years prosecuting cases in the Justice Department after having spent two terms working as a law clerk to Supreme Court Justice Warren Burger and then D.C. Circuit Court of Appeals Judge Antonin Scalia.[20] Cassell has a reputation for being scholarly, conservative and practical.[21]

During the period between verdict and sentencing in Angelos, Judge Cassell did two unusual things. First, he ordered the parties to submit briefs on the application and constitutionality of the particular mandatory minimum sentencing laws.[22] This move

17. United States v. Booker, 543 U.S. 220, 226-27 (2005) (finding that the Guidelines unconstitutionally invaded the province of the jury by permitting judges to find sentencing enhancement facts by a preponderance of the evidence and making the Guidelines mandatory).

18. Biography of Paul G. Cassell, U.S. DEPT OF JUSTICE OFFICE OF LEGAL POLICY, Feb. 20, 2004 (last updated), http://www.usdoj.gov/olp/cassellbio.htm (last visited Jan. 16, 2006).

19. *See, e.g.*, Paul G. Cassell, *The Paths Not Taken: The Supreme Court's Failures in Dickerson*, 99 MICH. L. REV. 898 (2001); Paul G. Cassell, *Too Severe?: A Defense of the Federal Sentencing Guidelines* (And a Critique of Federal Mandatory Minimums), 56 STAN. L. REV. 1017 (2004).

20. Biography of Paul G. Cassell, *supra* note 18; Resume of Paul G. Cassell, U.S. DEPT. OF JUSTICE OFFICE OF LEGAL POLICY, Feb. 20, 2004 (last updated), http://www.usdoj.gov/olp/cassellresume.htm (last visited Jan. 16, 2006).

21. *See* Support of Paul G. Cassell, U.S. DEPT OF JUSTICE OFFICE OF LEGAL POLICY, Feb. 20, 2004 (last updated), http://www.usdoj.gov/olp/cassell support.htm (last visited Jan. 16, 2006).

22. *See* 18 U.S.C. § 924(c); Order Directing Briefing on Application and

was unexpected as there appeared to be little sentencing leeway under the federal law. The issues flagged by the Court for briefing can be summarized as follows:

1. Is there a conflict between the general sentencing provision, 18 U.S.C. § 3553(a) that prescribes sentences that are not greater than necessary to insure justice, deterrence and public protection, and mandatory, consecutive sentences under 18 U.S.C. § 924(c), and if so how should it be resolved?[23]

2. Are the mandatory minimum sentences in this case violative of the Eighth Amendment's prohibition against cruel and unusual punishment, taking into consideration *Harmelin v. Michigan's* holding that the Eighth Amendment forbids sentences that are grossly disproportionate to the crime,[24] and *Ewing v. California's* reiteration of the *Harmelin* test in the context of California's three-strikes law?[25]

3. Are the mandatory minimums violative of the prohibition against irrational classifications under the Fourteenth Amendment's Equal Protection Clause based on what others in the same Guidelines category (I) would receive?[26] Judge Cassell listed a number of examples:

a. Angelos will serve a prison term of at least 738 months.[27]

b. A major drug kingpin whose drug distribution causes death or serious bodily injury will serve a term of no more than 293 months.[28]

c. An aircraft hijacker will serve no more than 293 months, and fewer months will be served by a racist assaulter, a terrorist who detonates a bomb, a spy, a second degree murderer, a kidnapper, someone who assaults with intent to kill and inflicts permanent or life threatening injuries, a rapist, a child

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Constitutionality of Mandatory Minimum Sentences at 10, United States v. Angelos, 345 F. Supp. 2d 1227 (D. Utah 2004) (02-CR-708) [hereinafter Order Directing Briefing].

23. Order Directing Briefing, *supra* note 22, at 2-3.

24. Harmelin v. Michigan, 501 U.S. 957, 1001 (1991).

25. Order Directing Briefing, *supra* note 22, at 3-5; Ewing v. California, 538 U.S. 11, 30 (2003) (upholding twenty-five years to life sentence under CAL. PENAL CODE § 667(b) (West 1999)).

26. Order Directing Briefing, *supra* note 22, at 5.

27. *Id.* This is a combined sentence of 660 months for the firearms charges and 78 months (6.5 years) for the marijuana sales.

28. *Id.*

pornographer, and a saboteur.[29]

Judge Cassell also asked whether it should matter that Angelos would receive a much shorter sentence if he were being sentenced in any of the fifty states.[30]

Cassell's other unusual pre-sentencing move was to send former *Angelos* trial jurors a questionnaire entitled "Juror Questionnaire Regarding Weldon Angelos Sentencing."[31] He said "[T]he sentencing of Mr. Angelos is scheduled for March 26, 2004, at 2:30 in my court. I am trying to gather as much information as possible in order to determine the appropriate sentence in the matter. It occurred to me that you had heard all of the evidence in the case and might have informed views on the subject."[32] He assured them that any response was purely voluntary, promised anonymity, and stated that the poll would be valuable as a reflection of the informed thoughts of the people of Utah on the seriousness of the crime and possible penalties.[33] Nine of the twelve former jurors responded to the questionnaire expressing divergent views about the appropriate sentence, with the average suggested term of years between fifteen and eighteen years.[34]

III. FORMER JUDGES AND PROSECUTORS WEIGH IN

Judge Cassell was soon to receive even more information for the upcoming sentencing of Weldon Angelos. Former federal judge John Martin led an amicus campaign on behalf of Weldon Angelos.[35] Twenty-nine former federal judges and prosecutors

29. *Id.* at 5-9.

30. *Id.* at 9.

31. Juror Questionnaire Regarding Weldon Angelos Sentencing, United States v. Angelos, 345 F. Supp. 2d 1227 (D. Utah 2004) (02-CR-708) (on file with author) [hereinafter Juror Questionaire].

32. *Id.* Judge Cassell asked the jurors to write down a term of years that they personally believed Angelos deserved to serve. *Id.* To assist them, he explained that due to truth in sentencing law, Angelos would serve the entire sentence. *Id.* Additionally, he informed them that Angelos had no adult criminal record and one minor juvenile adjudication. *Id.*

33. *Id.*

34. The results of Judge Cassell's questionnaire asking jurors' opinions about Angelos's deserved sentence were as follows: 5, 5-7, 10, 10, 15, 15, 15-20, 32, and 50. *See* Letter from Judge Cassell to Attorneys Lund and Mooney (Feb. 7, 2005) (on file with author).

35. Brief of Amici Curiae Addressing the Constitutionality of Mandatory Minimum Sentences Under Federal Law, United States v. Angelos, 345 F.

signed the amicus brief asking Judge Cassell to find, among other things, that the mandatory minimum sentence of fifty-five years was cruel and unusual punishment.[36]

Amici did not argue that mandatory sentencing is a *per se* violation of the Eighth Amendment. Rather, they argued, the fifty-five year sentence was both grossly disproportionate to Mr. Angelos' crimes and contrary to society's evolving standards of decency.[37] The amicus analysis relied on the Supreme Court's recognition that there is a proportionality requirement for non-capital as well as for capital offenses consisting of a three-part test that courts must conduct. [38] The test requires a defendant to pass a threshold that measures the sentence against the seriousness of the crime and the culpability of the defendant.[39] If successful, and it has been stated on several occasions that only rarely will a defendant be so fortunate,[40] the court conducts inter- and intra-jurisdictional sentence comparisons. [41] *Amici* argued that Angelos met *Harmelin's* threshold test because he had no prior adult criminal record, and the conduct for which he was convicted

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Supp. 2d 1227 (D. Utah 2004) (No. 02-CR-708) [hereinafter Brief of Amici Curiae].

36. The signatories of this amicus brief included former Attorney General Nicholas Katzenbach, former Third Circuit Chief Judge John Gibbons, former District Judge John Martin, attorneys Harry Rimm and Jeffrey Sklaroff, and former U.S. Attorney Robert J. Cleary. *Id.*

37. *Id.* at 4. In addition to the Eighth Amendment claim, the authors argued that the mandatory sentence violated due process, the separation of powers doctrine, and the Sixth Amendment because under this system the prosecutors were allowed to pick the charges, make offers of leniency, further increase the charges after the offer was refused and stack the sentences. *Id.* at 15, 18-19, 24. This meant that Angelos could get what is effectively a life sentence for conduct that was much less serious than many crimes of violence which carried lighter sentences.

38. Ewing v. California, 538 U.S. 11, 20, 22 (2003); Harmelin v. Michigan, 501 U.S. 957, 997, 1004 (1991) (Kennedy, J., concurring and acknowledging that *Solem v. Helm* considered three factors to determine disproportionality).

39. *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring and citing *Solem v. Helm* for threshold requirement).

40. *Ewing*, 538 U.S. at 21, 30; *Harmelin*, 501 U.S. at 960, 963, 1001, 1005.

41. *Ewing*, 538 U.S. at 36 (Breyer, J., dissenting but agreeing that the sentence at issue should be compared to other sentences if the claim satisfies the threshold requirement); *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring).

involved neither the use nor the threat of violence.[42] In measuring the seriousness of Angelos' crimes, *Amici* considered the jury's assessment, the ABA standards on punishment,[43] and the Kennedy Commission recommendation urging federal and state repeal of mandatory minimum sentences.[44]

Amici also urged the Court, when looking at crime severity, to consider that the drug sold here was marijuana, not cocaine, a drug which has associated harms that influenced the Court in *Harmelin*.[45] This case stands alone, they argued, in its severity and its injustice. *Amici* urged Judge Cassell to do both the just and legally correct thing and decline to sentence Angelos to the mandatory term because it violated the Eighth Amendment and because the prosecutor misapplied 28 U.S.C. § 924(c).[46]

III. SENTENCING

On November 16, 2004, Judge Cassell sentenced Weldon Angelos to fifty-five years on the three firearms charges – the mandatory sentence – and one day on all charges related to the three marijuana sales.[47] The one-day sentence was permissible because these charges were covered under the U.S. Sentencing Guidelines which, since *Booker*,[48] were no longer mandatory.[49] The

42. Brief of Amici Curiae, *supra* note 35, at 9-10.

43. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: SENTENCING 18-2.4, 18-3.21(b) (3d ed. 1994). "A legislature should not prescribe a minimum term of total confinement for any offense." *Id.* at 18-3.21(b). The authors state 1) that sentences should be rationally related to the gravity of the underlying offense, 2) sentences should be no more severe than necessary to achieve their purpose, *id.* at 18-2.4 cmt., and 3) a minimum mandatory punishment generally should not be the equivalent of a life sentence, *id.* at 18-3.21(b) cmt.

44. *See* ABA Justice Kennedy Commission Reports with Recommendation to the ABA House of Delegates (A.B.A. 2004) (reports and recommendations to the House of Delegates regarding criminal punishment). Justice Kennedy's speech several years ago urging repeal of mandatory sentences based on their unjust application throughout the criminal justice system led to the formation of the ABA Kennedy Commission which issued a number of recommendations to lessen the harshness of current sentencing. *Id.* at 1, 3-4. Among these is the recommendation to abolish mandatory minimum sentencing and return sentencing discretion to judges. *Id.* at iii.

45. Brief of Amici Curiae, *supra* note 35, at 9.

46. *Id.* at 2.

47. *Angelos*, 345 F. Supp. 2d at 1263.

48. United States v. Booker, 125 S. Ct. 738, 743 (2005).

49. *Angelos*, 345 F. Supp. 2d at 1260 (citing United States v. Croxford, 324 F. Supp. 2d 1230, 1248 (D. Utah 2004)).

judge acknowledged that were it not for the fifty-five-year (638 months) mandatory sentence he would have given Angelos a sentence of 97-121 months (8-10 years) for his drug and firearms charges.[50]

Judge Cassell's sixty-five page opinion is remarkable in its legal and factual detail. He addressed two constitutional claims: first that the § 924(c) charges created irrational classifications under the Equal Protection Clause, and, second, that a fifty-five-year minimum mandatory sentence was excessive punishment under the Eighth Amendment.[51] He harshly criticized the prosecutor's choice to stack the firearms charges in one prosecution of § 924(c), stating that Congress had originally intended this to be a standard recidivist provision, requiring a conviction before a second enhanced sentence can be given.[52]

A. *Equal Protection Claim*[53]

The gist of the equal protection argument is that sentencing Angelos under § 924(c) to what amounts to a life sentence is irrational as applied to him, because it leads to unjust and undeserved punishment and creates irrational distinctions between offenses and offenders. The court agreed that, in light of the U.S. Sentencing Guidelines, the jury's opinion, the probation officer's assessment of the probable sentence under Utah state laws, the laws of the fifty states, and the practice of other federal jurisdictions, § 924(c) resulted in an irrational sentence for Weldon Angelos.[54] Judge Cassell then examined whether § 924(c) created irrational classifications between offenses and offenders.

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50. *Id.* at 1241.

51. *Id.* at 1243-52, 1256-59.

52. *Id.* at 1234.

53. Judge Cassell's opinion and Angelos's brief address the Equal Protection arguments with as much vigor as they do the Eighth Amendment arguments. For purposes of this paper I have chosen to focus on the Eighth Amendment mainly because the strength of the Equal Protection argument lies in its characterization of the § 924(c) sentence as unjust and irrational punishment when compared to other offenses. This argument involves line drawing regarding punishment severity in much the same way as does the proportionality based argument. *See id.* at 1243-1248; *See also* Brief of Appellant Weldon Angelos at 43, United States v. Angelos, 433 F.3d 738, 2006 WL 41211 (10th Cir. Jan. 9, 2006) (No. 04-4282) [hereinafter Brief of Appellant Angelos].

54. *Angelos*, 345 F. Supp. 2d at 1241-43.

While Angelos' likely maximum sentence was 738 months, a major drug kingpin who killed someone could get 293 months, an aircraft hijacker could receive 293 months, one who rapes a child could receive 135 months; a second degree murderer could receive 168 months, and a marijuana dealer who shoots an innocent person during a drug transaction could receive 146 months.[55]

The government argued that the mere fact of Angelos' possession of a gun indicated that the threat of violence was present.[56] The court agreed but asked whether it was rational to punish a person who *might* shoot someone with a gun he carried far more harshly than the person who actually does shoot or harm someone.[57]

The government conceded that some of the offenses cited by the Court were indeed more serious that those committed by Mr. Angelos but argued that it was wrong to compare Angelos' three gun offenses with only one other serious crime.[58] The Court countered by comparing Angelos' sentence with the same list of crimes, times three.[59] This meant that Angelos' sentence would be longer than that of any three-time criminal "[w]ith the sole exception of a marijuana dealer who shoots three people."[60] His sentence, however, would be longer than that of a marijuana dealer who shoots two people.[61] As appellate counsel for Angelos concluded, "the difference between Mr. Angelos' sentence and those for exceptionally violent federal offenders is both stark and disturbing."[62]

The Court also discussed whether the statute was irrational because it failed to distinguish between first offenders and recidivists.[63] However, this failure to distinguish was upheld in *Deal v. United States* which found that the phrase "subsequent

55. *Id.* at 1245 (table 1 Comparison of Mr. Angelos' Sentence with Federal Sentences for Other Crimes). These comparisons troubled Judge Cassell prompting one of his pre-sentence queries to counsel.

56. This discussion mirrors concerns raised by Judge Cassell in the pre-sentence period. *See* Order Directing Briefing, *supra* note 22.

57. *Angelos*, 345 F. Supp. 2d at 1258.

58. *Id.* at 1246.

59. *Id.*

60. *Id.*

61. *Id.*

62. Brief of Appellant Angelos, *supra* note 53, at 27.

63. *Angelos,* 345 F. Supp. 2d at 1234.

conviction" allowed a defendant to be given the enhanced punishment for a second conviction (or more) resulting from offenses tried together.[64] The court said there was no requirement that the second or subsequent crime happened after the first conviction.[65] This so-called "count-stacking" has been sharply criticized by lawyers, academics and members of the U.S. Sentencing Commission.[66] Judge Cassell opined that the deterrence rationale generally given for recidivist statutes is not served by a statute that permits multiple consecutive sentences without offering an opportunity to the guilty party to be deterred.[67]

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64. Deal v. United States, 508 U.S. 129, 135 (1993). *Deal* raised an ambiguity in the statute rather than a specific Eighth Amendment challenge to § 924(c). *Id.* at 131. What is unusual about this statute is that it permits the sentences for multiple events to be stacked as consecutive sentences in a single prosecution. In *Deal* multiple robberies occurring on separate days were tried in one proceeding. *Id.* at 130. The Supreme Court said there was no requirement that enhancements be charged at separate judicial proceedings. *Id.* at 137. The Court found no ambiguity, saying there was no requirement that the previous sentence be final before another offense could be charged. *Id.* at 132, 135. The Court did not, however, consider facts such as are present in Angelos, that is, whether stacking charges that resulted in multiple twenty-five-year sentences for a first offender violated the Eighth Amendment.

65. *Id.* at 135.

66. *See* John R. Steer, Member and Vice Chair of the U.S. Sentencing Commission, Statement Before the ABA Justice Kennedy Commission (Nov. 13, 2003). "[C]onsider the effects if prosecutors pursued every possible count of 18 U.S.C. § 924(c) . . . . The statute provides for minimum consecutive sentence enhancements of 25 years to life for the second and subsequent convictions under the statute, even if all the counts are charged, convicted, and sentenced at the same time. Pursuing multiple § 924(c) charges at the same time has been called 'count stacking' and has resulted in sentences of life imprisonment (or aggregate sentences for a term of years far exceeding life expectancy) for some offenders with little or no criminal history." *Id.*

67. Judge Cassell, in his sentencing opinion, states that "[l]ast year in *Ewing v. California*, the Supreme Court upheld a twenty-five to life sentence under California's three-strikes law. While defendant Ewing's third offense was merely stealing $399 worth of golf equipment, the controlling opinion noted that the policy of the law was to 'incapacitat[e] and deter[] repeat offenders who threaten the public safety. The law was designed 'to ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses.'" In the end, the Court concluded that Ewing's sentence was justified 'by his own long, serious criminal record [including] numerous misdemeanor and felony offenses . . . nine separate terms of incarceration . . . and crimes [committed] while on probation or parole.'" *Angelos*, 345 F. Supp.

Judge Cassell strongly criticized other aspects of the government's handling of this case. He criticized the practice of seeking superseding indictments after the defendant refused to accept an offered plea bargain.[68] He found flaws in the government's rationale for charging Angelos with a mandatory fifty-five-year penalty after it had offered him a deal for fifteen years, noting that Angelos became neither more dangerous nor more blameworthy during the negotiation process.[69] He also pointed out that seeking such a harsh sentence was clearly the prosecutor's choice and not one dictated by the Department of Justice.[70] Nevertheless, the court reluctantly stated that since the punishment is up to Congress, it survives rational basis scrutiny. "While it imposes unjust punishment and creates irrational classifications, there is a 'plausible reason' for Congress' action."[71]

B. *Eighth Amendment Claim*

The court was nearly persuaded by the Eighth Amendment argument. Judge Cassell found the mandatory sentence grossly disproportionate to that deserved based on typical factors used by courts to determine the seriousness of a crime and the culpability of its perpetrator: his lack of prior record, his failure to use or threaten violence in committing his crimes, the nature of the crimes, and the U.S. Sentencing Guidelines sentence for these crimes (which would be applicable – as advisory only – if there

2d. at 1249 (quoting *Ewing,* 538 U.S. at 15, 30 (quoting CAL. PENAL CODE § 667(b) (West 2005)).

68. *Angelos*, 345 F. Supp. 2d at 1254.

69. *Id.* at 1254-56.

70. In support of this he cites the "Ashcroft memo" which demanded that prosecutors seek higher sentences with greater consistency. *Id.* at 1253. Yet even under these stringent Justice Department guidelines the Angelos prosecution stands out as being unduly harsh inasmuch as the memo was directed to crimes of violence, not drug crimes, especially where no weapon was used or threatened.

71. *Id.* at 1256. Query whether the "any plausible reason" test would allow any punishment whatsoever, since, of course, one can always come up with a plausible reason. If this is truly the test, what role does the court play as guardian of the Constitution? Appellate counsel makes this point, criticizing Judge Cassell's "undue deference to an irrational legislative scheme that implicates the judicial branch's core duty of criminal sentencing and entails incomparable consequences for the individual defendant." Brief of Appellant Angelos, *supra* note 53, at 8.

were no mandatory minimum sentence).[72] The court then considered the remaining two steps in the *Harmelin* test: comparison to penalties for other offenses in the court's jurisdiction, and comparisons to sentences for the same crimes in other jurisdictions. The court concluded that "[h]aving analyzed the three *Harmelin* factors, [it] believes that they lead to the conclusion that Mr. Angelos' sentence violates the Eighth Amendment."[73]

Why, then, after all this careful parsing of the law and facts, and after concluding repeatedly that this punishment was cruel, extremely unusual, undeserved and irrational, does the Court refuse to find this sentence unconstitutional? The court got stuck on a 1983 Supreme Court case, *Hutto v. Davis*,[74] that, while not specifically overruled, has dubious viability today.[75] The Court reasoned that if a pair of twenty-year consecutive sentences for possessing nine ounces of marijuana was not cruel and unusual, as *Hutto* held, then neither was the mandatory sentence for Angelos.[76] Indeed several justices referred to it recently as still part of Eighth Amendment doctrine.[77] Still, the decision to rely on *Hutto* was a surprise. Perhaps, as a relatively recent judicial appointee, Judge Cassell felt obliged to defer to the Tenth Circuit for a clarification of *Hutto*'s relevance to Eighth Amendment doctrine. Or perhaps Judge Cassell simply was unable to choose the morally clear path when faced with a clear conflict between justice and the law.

Cassell's unusual post-sentencing actions show just how strongly he felt about Angelos' case. After sentencing Angelos to fifty-five years in prison, he stated that he "fe[lt] ethically obligated to bring this injustice to the attention of those who are

72. *Id.* at 1257-58.

73. *Id.* at 1259.

74. Hutto v. Davis, 454 U.S. 370, 375 (1982) (Powell, J., concurring and citing majority holding that two consecutive twenty-year sentences for marijuana possession did not violate the Eighth Amendment).

75. Judge Cassell himself notes that *Hutto* has been narrowed by *Solem v. Helm* and later Eighth Amendment cases, but has not been overruled. *Angelos*, 345 F. Supp. 2d. at 1259.

76. *Id.* at 1259-60.

77. Harmelin v. Michigan, 501 U.S. 957, 997-98 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

in a position to do something about it."[78] In support of this, he noted that "this is one of those rare cases where the system has malfunctioned."[79] He sought relief for Angelos by communicating his recommendation for executive clemency to the President through the office of the Pardon Attorney.[80] He asked the President to commute the sentence to no more than eighteen years, which was the average recommendation of the jurors.[81] By his actions, Judge Cassell conveyed the message that under any theory of punishment, fifty-five years for Angelos was excessive punishment.

Cassell also directed a plea to Congress to correct the injustice of count-stacking by "repealing this feature and making section 924(c) a true recidivist statute of the three-strikes-and-you're out variety."[82] Enhancements would then apply only to defendants who have been previously convicted of a serious offense, rather than to first offenders like Angelos.

Angelos v. United States was argued in the Tenth Circuit on November 14, 2005. An amicus brief filed on Angelos' behalf raising the Eighth Amendment claim, signed by 163 individuals,[83] reads like a "who's who" in criminal justice. Its signatories include retired federal judges, former United States Attorneys and Attorneys General, and other former high ranking United States Department of Justice officials.[84] They offer the Court of Appeals arguments bolstered by hundreds of years of collective sentencing

78. *Angelos*, 345 F. Supp. 2d at 1261.

79. *Id.*

80. *Id.* at 1261-62.

81. *Id.* at 1262. Judge Cassell could hardly have expected President Bush to exercise his pardon power in Angelos's favor as this president has granted clemency far less often than his predecessors. A recent Washington Post editorial notes this dismal record of granting very few pardons and only granting those with no political risk. *See The Forgotten Power*, WASH. POST, Jan. 3, 2006.

82. *Angelos*, 345 F. Supp. 2d at 1263.

83. Brief for Greenberg Traurig, LLP, et al., as Amici Curiae Supporting Defendant-Appellant, United States v. Angelos, 433 F.3d 738, 2006 WL 41211 (10th Cir. Jan. 9, 2006) (No. 04-4282) [hereinafter Brief for Greenberg Traurig].

84. For example, signatories include former attorneys general Griffin Bell, Janet Reno, Benjamin Civiletti, former U.S. attorneys Wayne Budd, Zachary Carter, Jim Carrigan, Veronica Coleman-Davis, Robert DelTufo, Roscoe Howard, Donald Stern, and federal judges Patricia Wald, and William Sessions, totaling 163 former federal officials. *Id.* at 1-15.

expertise. They point out the paucity of cases where anyone received such a severe sentence for a comparable crime, lending support to the claim that the sentence violates society's evolving standards of decency. They also look to factors relied on by the Court, that is, the *Angelos* jury's sentencing recommendation, the results of the *Harmelin* test, the actions of state legislatures in reducing the punishment for marijuana possession,[85] the ABA report urging repeal of mandatory minimum sentences due to unfairness and excessive severity, and the opinions of sentencing experts.[86] These are indicia of evolving standards that should be part of a nationwide law of punishment.

VI. THE EIGHTH AMENDMENT AND EVOLVING STANDARDS OF DECENCY

The Eighth Amendment exists against a backdrop of both its own sparse doctrinal history and Congress' reaction to the turbulent drug scares of the 1980's. The standard articulated in *Rummel v. Estelle* is whether the sentence is "grossly disproportionate to the severity of the crime."[87] There, the Court noted that "[o]utside the context of capital punishment, successful challenges to the proportionality of sentences have been extremely rare."[88] This has certainly been the case. However, it is important to point out that when *Rummel* set this standard and asserted the rarity of successful challenges, Congress had not yet enacted the Federal Sentencing Guidelines nor had it begun its biennial upward ratchet of all drug-related sentences, created hundreds of new crimes, or established enhancement provisions and habitual offender statutes. A court in 1980 could not have predicted what was to become a revolution both in the severity of federal

85. Amici note that shortly after the Davis decision the Virginia legislature reduced the maximum penalty for his offenses from forty to ten years and governor Robb granted him a pardon so that he could not serve more than twenty years in prison. *Id.* at 22. The defendant in Harmelin also benefited from a change of heart by Michigan's legislature which amended the statute by raising the quantity of drugs necessary for a life sentence and by adding the possibility of parole. MICH. COMP. LAWS ANN. §333.7403 (2001). Life sentences for drug charges have been enacted in periods of passion, often after little time for debate. This is precisely the kind of legislation where courts can most aptly use their power of superintendence.

86. *See* Brief for Greenberg Traurig, *supra* note 83, at 22; *Angelos*, 345 F. Supp. 2d at 1248-49.

87. Rummel v. Estelle, 445 U.S. 263, 271 (1980).

88. *Id.* at 272.

sentencing and the reduction of judicial sentencing power. Moreover, to say that successful challenges to term of year sentences will be rare is not to say that they will never occur.

In *Weems v. U.S.*, the Supreme Court asserted that the Eighth Amendment "may be . . . progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[89] Justice Stevens reminded us more recently that the Eighth Amendment was not "frozen when it was originally drafted."[90] Rather, the excessiveness of a sentence is judged by standards of decency that currently prevail and not those that prevailed when the Bill of Rights was written.[91] The logical question which follows is where the Court should look to discover today's enlightened public opinion. According to recurring pronouncements on the subject, proportionality review must be guided by the following factors: "'the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that proportionality review be guided by objective factors.'"[92] While these items offer some guidance, we must look further for an answer, because legislatures are political entities and, therefore, their actions do not tell a complete story.[93] In capital cases, courts have looked to juries for evolving standards on whether particular classes of defendants may be executed.[94] However, the actions of juries may not be helpful in our inquiry because juries generally do not decide sentences.[95] Surely courts are not constrained in

89. Weems v. United States, 217 U.S. 349, 378 (1910).

90. Roper v. Simmons, 125 S. Ct. 1183, 1205, 543 U.S. 551 (2005) (Stevens, J., concurring).

91. Atkins v. Virginia, 536 U.S. 304, 311 (2002).

92. Ewing v. California, 538 U.S. 11, 23 (2003) (quoting Justice Kennedy's concurrence in *Harmelin v. Michigan*).

93. State legislatures are closer to the pulse of the people than Congress and therefore would seem to be a better measure of evolving standards of decency. Federalism principles argue for more weight being given to state legislatures than to Congress on Eighth Amendment issues. Courts may need to be more deferential to state laws than to congressional acts. This argues for the federal courts to conduct a searching inquiry to determine evolving standards of decency so as to correctly apply the Eighth Amendment. *See* Harmelin v. Michigan, 501 U.S. 957, 998-99, 1001 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

94. *See, e.g., Roper,* 125 S. Ct. at 1190; *Atkins,* 536 U.S. at 323 (Rehnquist, J., dissenting).

95. Six states and the U.S. military have jury sentencing.

their search for acquired meaning of the Eighth Amendment by the political branches of government.[96] Courts are likely to be well aware of the political intensity surrounding the presence of drugs in society and, more importantly, are likely to be cognizant of the lag between the ebb and flow of informed public opinion and legislative action.

It is fair to say that today's social and political climate is different, and less harsh toward crime and punishment, than that of the previous two decades. Public opinion has softened with the knowledge that extraordinarily long prison sentences for so many people have exacted unwarranted financial and human costs.[97]

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96. Former Chief Justice Rehnquist commented that "mandatory minimums. . .are frequently the result of floor amendments to demonstrate emphatically that legislators want to 'get tough on crime.' Just as frequently, they do not involve any careful consideration of the effect they might have on the sentencing guidelines as a whole. . .they frustrate the careful calibration of sentences. . .which the guidelines were intended to accomplish." David Kopel, *Policy Analysis: Prison Blues: How America's Foolish Sentencing Policies Endanger Public Safety*, Cato Policy Analysis No. 208, CATO INSTITUTE, May 17, 1994, http://www.cato.org/pubs/pas/pa-208.html.

97. There is increasing media attention to the tragic human costs of long prison sentences. *See* Adam Liptak, *Locked Away Forever After Crimes as Teenagers,* N.Y TIMES, Oct. 3, 2005 at A1, 16; Adam Liptak, *To More Inmates, Life Term Means Dying Behind Bars,* N.Y TIMES, Oct. 2, 2005, at A1, 28. But, despite a lessening in the number of executions, criminologist Franklin Zimring predicts that current imprisonment rates will persist "as far as the eye can see." Franklin Zimring, Speech at the Fourteenth World Congress of Criminology at the University of Pennsylvania (Aug. 8, 2005). Studies increasingly find racial bias in sentencing policies. *See, e.g.,*TUSHAR KANSAL, THE SENTENCING PROJECT, RACIAL DISPARITY IN SENTENCING: A REVIEW OF THE LITERATURE (Marc Mauer ed., Jan. 2005); Mike Billington, *Analysis Points to Bias in Sentencing*, THE NEWS JOURNAL, July, 22, 2005. Judges bound by mandatory sentencing laws increasingly express reservations about fairness and equality in sentencing. Justice Anthony Kennedy, Speech at the ABA Annual Meeting in San Francisco (2003); *See also* People v. Carmony, 26 Cal. Rptr. 3d 365, 379-80 (2005) (citing *In re Grant*, 18 Cal. 3d 1, 10-11 (1976) (The California Supreme Court struck down a sentence of ten years to life for a sale of marijuana where the defendant had two prior drug offenses. "In so doing, the court thought it 'particularly significant that [the] provisions for recidivist narcotics offenders penalize broad ranges of conduct and widely differing types of offenders without distinction, requiring substantial enhanced mandatory prison terms because of prior offenses regardless of their temporal remoteness, lack of relevance to the new offense, or relative gravity.' The court concluded that the enhanced penalties for repeated violations are suspect to the extent they limit the sentencing authority's ability to recognize gradations of culpability.")); U.S. SENTENCING COMMISSION, FIFTEEN YEARS OF GUIDELINES SENTENCING: AN ASSESSMENT OF

Judge Cassell and counsel for Angelos recounted examples of these changes: the jury's straw vote on an appropriate sentence, Justice Kennedy's comments to the ABA against mandatory sentencing, and the ABA's own report calling for repeal of mandatory minimum sentencing laws.[98] There are additional signs of change. More than a dozen states have passed reforms scaling back mandatory minimum sentences, expanding drug treatment as an option over incarceration, and offering alternatives to incarceration for low level offenders.[99] Public and private actors are rethinking punishment and expanding the inventory of evolving standards.[100] Consider the following:

HOW WELL THE FEDERAL CRIMINAL JUSTICE SYSTEM IS ACHIEVING THE GOALS OF SENTENCING REFORM 138 (2004), *available at* http://nicic.org/Misc/URLShell.aspx?SRC=Catalog&REFF=http://nicic.org/Library/020121&ID=020121&TYPE=HTML&URL=http://www.ussc.gov/15_year/15year.htm (noting the "steady accretion of guideline enhancements," that "Congress frequently has directed the Commission to add aggravating adjustments to a wide variety of guidelines," and that "political pressure to respond to public concerns over high publicity crimes could result in frequent revision of the guidelines without a sound policy basis").

98. *Angelos,* 345 F. Supp. 2d at 1262; Brief of Appellant Angelos, *supra* note 53, at 14-15 (citing ABA Justice Kennedy Commission Report, *supra* note 44).

99. *See* Cheryl W. Thompson, *Incarceration Policies Eased, 2 Reports Say*, WASH. POST, Feb. 7, 2002, at A2. States are either reducing or removing mandatory penalties due to budget constraints. *See, e.g.*, JAMES AUSTIN & TONY FABELO, THE JFA INSTITUTE, THE DIMINISHING RETURNS OF INCREASED INCARCERATION, A BLUEPRINT TO IMPROVE PUBLIC SAFETY AND REDUCE COSTS (2004); Alexander Marks, *More States Roll Back Mandatory Drug Sentences*, CHRISTIAN SCI. MONITOR, Dec. 10, 2004; *see also* VINCENT SCHIRALDI, JASON COLBURNE, & ERIC LOTKE, THE JUSTICE POLICY INSTITUTE, THREE STIKES AND YOU'RE OUT (2004) ("[M]ore than half of all states have changed sentencing laws, abolished mandatory sentences, or reformed parole policies to ease crowding and reduce their incarceration rates." States that are downsizing their penal policies show no rise in crime); Todd R. Clear, *Backfire: When Incarceration Increases Crime*, OKLA. CRIM. JUST. RES. CONSORTIUM J. (Aug. 1996); *Connecticut Lawmakers Urge Shorter Prison Stays*, CONNECTICUT NOW, June 27, 2003 (Public opinion increasingly favors treatment for non violent drug offenders); Dina Temple-Raston, *Red Hook Target Misdemeanors*, NEW YORK SUN, Sept. 21, 2004.

100. *See* THE BOSTON FOUNDATION, RETHINKING JUSTICE IN MASSACHUSETTS: PUBLIC ATTITUDES TOWARD CRIME AND PUNISHMENT (2005). "Massachusetts residents overwhelmingly oppose mandatory minimum sentencing." *Id.* at 14. Currently there are proposals to limit mandatory sentencing before the Massachusetts legislature. William J. Leahy, Chief Counsel for Committee for Public Counsel Services, Testimony Concerning Sentencing Reform (May 21, 2003) (denouncing mandatory sentencing as "a

1. A recent study shows no connection between mandatory sentencing and the reduction of crime;[101]

2. Violent crime declined in the 1990's, partly due to a greatly reduced crack market.[102] As stated above and elsewhere, the crack epidemic is what triggered both the widespread fear of violence and mandatory sentencing;[103]

3. Numerous opinion polls in recent years show a fall-off in support for long prison sentences and new interest in a balanced approach that focuses on prevention, rehabilitation, and other remedies. [104]

4. The U.S. Sentencing Commission has expressed concern about sentence equality and inordinate prosecutorial control of sentencing.[105]

5. Academics and criminal justice professionals around the world are calling for reform of sentencing for non-violent drug offenses;[106]

6. The Supreme Court's recent sentencing cases have generated calls for reconsideration of federal sentencing, including mandatory minimums;[107]

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public policy nightmare: ineffective at preserving the public safety, and recklessly wasteful as fiscal policy").

101. Raymond Bonner & Ford Fessenden, *States With No Death Penalty Share Lower Homicide Rates*, N.Y. TIMES, Sept. 22, 2000, at A1.

102. Fox Butterfield, *Decline of Violent Crimes Is Linked to Crack Market*, N.Y. TIMES, Dec. 28, 1998, at A18 (citing Bureau of Justice Statistics report released Dec. 27, 1998).

103. *Id.*

104. Peter D. Hart Research Associates, Inc., THE OPEN SOCIETY INSTITUTE, CHANGING PUBLIC ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM 19 (2002); *See* The Sentencing Project, Crime, Punishment and Public Opinion: A Summary of Recent Studies and Their Implications for Sentencing Policy (2001), *available at* http://www.sentencingproject.org /pdfs/1005.pdf (noting that the public is generally misinformed on crime and crime policy, that public opinion is more complex than policymakers assume and that the public embraces alternative sentencing options when offered.).

105. *See* U.S. SENTENCING COMMISSION, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS (2002); *See also* Laurie P. Cohen, *In Federal Cases, Big Gap in Rewards for Cooperation*, WASH. POST, Nov. 29, 2004, at A1, A9.

106. *See, e.g.*, Alvin J. Bronstein, Director Emeritus ACLU National Prison Project, *Incarceration as a Failed Policy*, CORRECTIONS TODAY 6 (August 2005); JUDITH GREENE & TIMOTHY ROCHE, THE JUSTICE POLICY INSTITUTE, CUTTING CORRECTLY IN MARYLAND (2003); JUDITH GREENE & VINCENT SCHIRALDI, THE JUSTICE POLICY INSTITUTE, CUTTING CORRECTLY: NEW POLICIES FOR TIMES OF FISCAL CRISIS (2002).

107. *See, e.g.*, Letter from James Finckenauer, President, The Academy of

7. The Supreme Court's recent rulings reflect changing social norms on executing juveniles and the mentally ill;[108]

8. Referenda and legislation in at least nine states have allowed the medical use of marijuana for treatment of certain serious illnesses; [109]

9. There is increasing evidence of the dehumanization that occurs during long prison stays where mental illness and brutality are rampant;[110]

10. Former federal judges and prosecutors are actively criticizing federal sentencing policy; the fact that so many signed on as *amici* in this case, and on numerous other cases around the country, serves to signal that nationwide punishment norms are becoming less punitive;[111]

11. States have responded to escalating prison costs by adopting alternatives, such as requiring fiscal planning for each

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Criminal Justice Sciences, et. al., to Hon. Patrick Leahy, Ranking Member, Senate Committee on the Judiciary and Hon. John Conyers, Jr., Ranking Member, House of Representatives Committee on the Judiciary, Pursuing Meaningful Sentencing Reform (Jan. 12, 2005) (calling for thorough evaluation of federal sentencing policy including the Federal Sentencing Guidelines and mandatory minimum sentences).

108. *See* Roper v. Simmons, 125 S. Ct. 1183 (2005); Atkins v. Virginia, 536 U.S. 304 (2002); *But see* recent jury decision that Atkins was not retarded and is therefore suitable for execution. Maria Glod, *Va. Killer Isn't Retarded, Jury Says; Execution Set: Case Prompted Supreme Court Ruling*, WASH. POST, Aug. 6, 2005, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/08/05/AR2005080501306.html.

109. The states noted are Alaska, California, Colorado, Hawaii, Maine, Nevada, Oregon, Vermont and Washington. Gonzales v. Raich, 125 S. Ct. 2195, 2198 (2005). Angelos's attorneys argues this in support of his getting over Harmelin's threshold crime severity requirement, pointing out that marijuana has been decriminalized in a number of states and is a minor citation offense in others. Brief of Appellant Angelos, *supra* note 53, at 24.

110. *See* Commission on Safety and Abuse in America's Prisons, Mission Statement, www.prisoncommission.org/mission.asp. "Our goal for this Commission is to spark and inform broad public dialogue on safety and abuse in America's prisons and the consequences for prisoners, corrections officers, and all of American society." *Id.* (quoting Nicholas de B. Katzenbach). "In one year alone, there were 34,355 assaults by state and federal prisoners against other inmates, and 51 prisoners died as a result of those violent actions." Commission on Safety and Abuse in America's Prisons, Frequently Asked Questions About the Commission, http://www.prisoncommission.org/faq.asp (citing the Bureau of Justice Statistics) (last visited on Jan. 21, 2006).

111. *See supra* text accompanying note 84.

proposed increase in sentencing.[112] Other states are increasing the use of parole.[113]

Implicit in Judge Cassell's repeated characterization of Angelos' sentence as unfair, unjust, irrational, cruel and unusual is his acceptance of the concepts of desert, decency and dignity that the Supreme Court has said are at the core of the Eighth Amendment in *Weems* and *Trop.* Judge Cassell began his proportionality analysis by applying *Harmelin's* threshold test. First he looked to the nature of the crime and its relation to the punishment imposed.[114] He stated that:

> [i]n weighing the gravity of the offenses, the court should consider the offenses of conviction and the defendant's criminal history, as well as the 'harm caused or threatened to the victim or society, and the culpability of the offender.' Simply put, 'disproportionality analysis measures the relationship between the nature and number of offenses committed and the severity of the punishment inflicted upon the offender.'[115]

The judge found the sentence-triggering conduct of possessing a barely visible handgun while selling small amounts of marijuana to be modest.[116] The same was true for the guns found in Angelos' home.[117] His description of the crimes as modest took into account the fact that Angelos engaged in no force or violence and he did not injure, or threaten to injure, anyone.[118] All of these facts directly relate to society's interest in punishing Angelos.[119]

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112. *See e.g.* North Carolina's 'fiscal notes' policy. Ben Trachtenberg, *State Sentencing Policy and New Prison Admission,* 38 U. MICH. J. L. REF. 479, 506-12 (2005).

113. *See* Robert Moran, *Drop in N.J.'s Prison Population Defies Trend,* THE PHIL. INQ., May 11, 2005 (after years of hard-line policies on lawbreakers, New Jersey is following a more measured, reasonable course.); *See also Minnesota Sentencing Commission Report Says State Could Save $30 Million per year with Treatment Not Prison,* Jan. 23, 2004, http://stopthedrugwar.org/chronicle/321/minnesota.shtml. Visit www.msgc.state.mn.us to read the Minnesota Sentencing Guidelines Commission Special Report on Drug Offender Sentencing.

114. United States v. Angelos, 345 F. Supp. 2d 1227, 1257 (D. Utah 2004).

115. *Id.* (citing Solem v. Helm, 463 U.S. 277, 292-94 (1983)).

116. *Id.* at 1258.

117. *Id.*

118. *Id.*

119. *Id.*

The Court found that Angelos easily satisfied *Harmelin*'s other two steps in the proportionality analysis: comparisons to penalties for other offenses and comparisons to other jurisdictions.[120]

It is hard to find a case that so clearly calls to mind the admonitions of *Weems*. There, as in *Angelos*, the Court was concerned about the relatively minor nature of the crimes, the length of the minimum term, and the fact that the enhancements were so much more severe than the possible punishment for the primary crimes.[121] Angelos' mandatory penalty for the first gun possession was five years. His mandatory penalty for the other two gun charges was fifty years. Unlike defendants in other cases decided by the Supreme Court under enhanced penalty statutes,[122] Angelos had no opportunity to be deterred from criminal conduct by previous convictions. He had no prior convictions. He went from a clean record to a virtual life sentence based less on his crimes than on the method of his arrest and prosecution. Congress could not have intended such a harsh result from an enhancement law.[123] Of course, no one penalogical theory need be adopted by Congress.[124] However, even the harshest state recidivist laws have either deterrence or incapacitation as their goals. Neither makes sense here.

Judge Cassell went against his own findings in part because he believed he had to defer to Congress. It is worth noting, however, that he did not face the same federalism issues that confronted the Supreme Court in all the major Eighth Amendment cases, because the statute at issue in *Angelos* is not a state law. The presumption of constitutionality may be narrower when legislation appears on its face to be within the first ten

120. *Id.* at 1258-59.

121. Weems v. United States, 217 U.S. 349, 380-81 (1910).

122. *See* Ewing v. California, 538 U.S. 11, 29-30 (1979). In its most recent pronouncement on the Eighth Amendment the Court noted that it was reasonable to give harsher punishment to one "who by repeated criminal acts [has] shown that [he is] simply incapable of conforming to the norms of society as established by its criminal law." *Id.* at 29.

123. Justice Stevens makes this point in his dissent in *Deal v. United States*, saying that "it is absurd to think that Congress intended to treat such a defendant as a repeat offender, subject to penalty enhancement. . . ." 508 U.S. 129, 138 (1993).

124. Harmelin v. Michigan, 501 U.S. 957, 999 (1991).

amendments to the Constitution.[125] Furthermore, it is within the Court's purview to consider that § 924(c) was enacted during an intensely political era marked by the war on drugs.[126] Also, in a 1998 case, *United States v. Bajakajian*, brought under the Eighth Amendment's Excessive Fines Clause, the Supreme Court held that forfeiture of more than $350,000 was extraordinarily harsh and grossly disproportionate to the offense in question.[127] There the Supreme Court recognized the difficulty of arriving at a precise punishment with so little guidance on "how disproportional a punitive forfeiture must be to the gravity of an offense in order to be 'excessive.' Excessive means surpassing the usual, the proper, or a normal measure of proportion."[128] The Supreme Court found little guidance in either the text of the Eighth Amendment or Constitutional history, noting that the prohibition against excessive fines was a response to British abuses.[129] *This is no less true for the prohibition against excessive punishment.*[130] The Supreme Court turns for its answer to the Eighth Amendment standard enunciated in *Solem v. Helm*, comparing the amount of the forfeiture (which the Court said was clearly punitive) to the gravity of the defendant's crime.[131] The Court also considered, as did Judge Cassell in *Angelos,* what the punishment would be under the U.S. Sentencing Guidelines *in order* to confirm the defendant's minimal level of culpability.[132] Additionally, the Supreme Court considered the harm the defendant caused to the victim and society and found that "[the fine sought by the government bore] no articulable correlation to any injury suffered by the Government."[133] There is no persuasive

125. Brief of Appellant Angelos, *supra* note 53, at 57 (citing United States v. Carolene Products, 304 U.S. 144, 153 n.4 (1938)).

126. *See* United States v. Perry, 389 F. Supp. 2d 278 (D.R.I. 2005).

127. 524 U.S. 321, 324 (1998).

128. *Id.* at 335

129. *Id.*

130. *See id.* at 336-37.

131. *Id.* at 331-32, 334.

132. *Id.* at 338; *see* United States v. Angelos, 345 F. Supp. 2d 1227, 1232 (D. Utah 2004).

133. *Bajakajian,* 524 U.S. at 339-40. The Court's analysis under the *Solem/Harmelin* threshold test is strongly reminiscent of that done by Judge Cassell in Angelos. In an effort to demonstrate the gross disproportionality of the fine, the Court says "It is impossible to conclude. . .that the harm respondent caused is anywhere near 30 times greater than that caused by a

reason why the courts cannot apply the same kind of gross disproportionality analysis to term of years sentences that it applied to fines in *Bajakajian*. The draconian federal sentencing scheme at issue here, either as written or as applied by the government, has not been subjected to Eighth Amendment scrutiny by the Supreme Court. Applying the federal sentencing scheme to Weldon Angelos for these charges was distinctly cruel and unusual.[134]

Judge Cassell opened the door to renewed consideration of evolving standards by gathering information from jurors. He cited changing norms and drew support from many sources, yet, despite acknowledged changes, he bowed to dubious precedent and rejected the Eighth Amendment challenge.[135]

VII. CONCLUSION

When determinate sentencing eliminated the trial judge's face-to-face calculation of deserved punishment, it stunted Eighth Amendment doctrine. No longer did the trial judge ensure Constitutional fidelity and act as a gatekeeper against unjust punishment. Judge Cassell's frustration with his lack of power to do justice was palpable. He said not once, but many times, that the sentence was cruel and unjust, and unusual, to the extent that

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hypothetical drug dealer who willfully fails to report taking $12,000 out of the country in order to purchase drugs." *Id.* at 339.

134. Judge Cassell and commentators are critical of the amount of discretion possessed by federal prosecutors on whether to 'go federal' in a case where there is equivalent state law and on what charges to press. This is particularly salient in cases involving drugs. *See* Angelos, 345 F. Supp. 2d at 1253; *see generally* Michael Edmund O'Neill, *When Prosecutors Don't: Trends in Federal Prosecutorial Declinations*, 79 NOTRE DAME L.REV. 221 (2003). Counsel and the Court raise one of the most criticized standards of decency points regarding the circumstances of the Angelos arrest. The trap was set over time, perhaps to ensure his eligibility for a life sentence. The informant didn't report the guns until at least the second set of interviews with his police employers, and the third gun was seized months after the drug sales. The prosecutor's offer of fifteen years for a guilty plea at least suggests that he didn't think Angelos deserved to be imprisoned forever. His refusal to reopen plea negotiations after getting new complaints added to the overall picture of indecency presented by this case. Federal prosecutors have nearly total control over sentencing, a fact that has generated criticism even in Congress. *See, e.g., Angelos*, 345 F. Supp. 2d at 1253, Brief of Amici Curiae, *supra* note 35, at 22.

135. Brief of Appellant Angelos, *supra* note 53, at 36.

neither counsel nor the Court found anything like it anywhere in the country.

Courts generally struggle with defining excessive punishment because it appears to be easily manipulated or, even worse, conflated with the personal predilections of judges. Obvious doctrinal gaps appear when one seeks to define *Harmelin*'s threshold test and tries to determine the point at which evolving standards of decency demand less punishment.[136] The Supreme Court has said that evolving standards should be measured as much as possible by objective factors. As discussed in Part VI, one can see that such factors are observable, measurable and ready to be incorporated into Eighth Amendment doctrine. Judge Cassell, counsel for Angelos and distinguished *Amici* argue that standards of decency have evolved to the point where this sentence is unduly harsh.[137] Laws that may have been just when enacted, are recognized now as too costly. Times change and standards change with them. It is time to clarify the contours of the Eighth Amendment. The Court has begun this with excessive fines in *Bajakajian*.

The Tenth Circuit could have provided relief to Angelos in a number of ways.[138] It could have reversed the lower court by

136. *See* Lockyer v. Andrade, 538 U.S. 63, 64 (2003). This was the companion case to *Ewing*, upholding California's three-strike law. *Id.* at 77.

137. Counsel and the Court raise one of the most criticized standards of decency points regarding the circumstances of the Angelos arrest. The trap was set over time, perhaps to ensure his eligibility for a life sentence, the informant didn't report the guns until at least the second set of interviews with his police employers, and the third gun was seized months after the drug sales. *See, e.g., Angelos,* 345 F. Supp. 2d at 1231-32, 1254. The prosecutor's offer of fifteen years for a guilty plea at least suggests that he didn't think Angelos deserved to be imprisoned forever. His refusal to reopen plea negotiations after getting new complaints added to the overall picture of indecency presented by this case. Federal prosecutors have nearly total control over sentencing, a fact that has generated criticism even in Congress.

138. As this article was being prepared for publication, the United States Court of Appeals for the Tenth Circuit handed down its opinion in United States v. Angelos. 433 F.3d 738 (10th Cir. 2006). The panel of three judges affirmed both the convictions and the sentence. Despite affirming the sentence, the Court took pains to review the Eighth Amendment issue de novo, and in doing so took issue with Judge Cassell's proportionality analysis as well as his characterization of Angelos's crimes. The Court disputed Judge Cassell's calling this an extraordinary case and did not find the sentence to be grossly disproportionate to the crimes. The Court credited § 924(c) as accurately reflecting Congress' concern with the dangers that flowed from the

declaring that *Hutto* is no longer useful in Eighth Amendment analysis while at the same time accepting the Tenth Circuit's previous *Harmelin* findings. It could have avoided addressing the constitutional questions by deciding that Congress never intended that 18 U.S.C. § 924(c) be charged consecutively against a first offender in a simple non-violent drug case such as this one, thereby distinguishing these facts from those in *Deal.*[139] Alternatively, the Court could have decided that consecutive sentences of fifty-five years in a single prosecution under 28 U.S.C. § 924(c) violate the Eighth Amendment's prohibition against cruel and unusual punishment, an issue that the Court did not reach in *Deal.* Notably, Angelos is precisely the kind of claimant the Supreme Court has said deserves special protection. As stated by counsel, "it is hard to conceive of a more 'discrete and insular minority' than drug offenders like Weldon Angelos; not only are they effectively unrepresented and their interests totally ignored in the legislative process, but such individuals can be disenfranchised after conviction and often serve as political scapegoats for all that ails society."[140]

A life sentence for Weldon Angelos shocks the conscience of the community and offends our deepest notions of human dignity. The Tenth Circuit should have acted to uphold the deep respect for human dignity that is at the heart of the Eighth Amendment. This case presents a perfect opportunity for the Supreme Court to correct both a tragic injustice to Weldon Angelos and a void in Eighth Amendment doctrine.

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combination of drugs and guns. The Court recognized the continuing viability of *Hutto v. Davis*, and concluded that "the Supreme Court has never held that a sentence to a specific term of years, even if it might turn out to be more than the reasonable life expectancy of the defendant, constitutes cruel and unusual punishment." *Id.* at 753 (citing United States v. Beverly, 369 F.3d 516, 537 (6th Cir. 2003)). Defendant's options are to ask for a rehearing before the full bench of the Tenth Circuit or to appeal directly to the U.S. Supreme Court. The analysis and commentary set forth in this paper would be equally applicable should either of these circumstances occur.

139. Brief of Appellant Angelos, *supra* note 53, at 59-65 (see discussion of rules of lenity and statutory construction).

140. *Id.* at 58. This is particularly important given the highly politicized atmosphere that produced these drug laws.