Article

Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?

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In the recent California three strikes cases, the Supreme Court once again rejected strong proportionality limits on the duration of prison sentences under the Eighth Amendment Cruel and Unusual Punishment Clause. In *Ewing v. California*, a three-Justice plurality and four dissenters appeared to agree that the Eighth Amendment forbids prison sentences that are "grossly disproportionate," but disagreed as to the application

of that standard.[1] The plurality expressly (and the dissenters, implicitly) adopted the view, expressed by Justice Kennedy in his concurring opinion in *Harmelin v. Michigan*,[2] that the Eighth Amendment imposes only a "narrow" proportionality principle in noncapital cases. The Court therefore upheld the defendant's sentence of twenty-five-years-to-life in prison for the offense of stealing three golf clubs.[3]

In separate concurring opinions, Justices Scalia and Thomas maintained that the Eighth Amendment imposes no proportionality limits whatsoever.[4] Justice Scalia argued that the concept of Eighth Amendment proportionality accepted by the plurality and dissenters is unintelligible and inappropriate. It is unintelligible, he maintained, because proportionality "is inherently a concept tied to the penological goal of retribution."[5] Yet the plurality conceded that the Eighth Amendment "does not mandate adoption of any one penological theory,"[6] and thus agreed that courts must consider whether a given sentence might be justified by other purposes such as incapacitation and deterrence—purposes which, in Justice Scalia's view, have nothing to do with the concept of proportionality. Justice Scalia further argued that, in assessing punishments in light of such a wide range of purposes, "the plurality is not applying law but evaluating policy," which is not a proper role for the courts.[7] None of the other Justices responded in *Ewing* to Scalia's critique or explained what they meant by proportionality.[8] Indeed,

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1. Ewing v. California, 538 U.S. 11 (2003).

2. 501 U.S. 957, 996–97 (1991) (Kennedy, J., concurring). However, Justice Stevens, dissenting in *Ewing*, questioned whether the *Harmelin* analysis should apply to a recidivist case. 538 U.S. at 32 n.1 (Stevens, J., dissenting).

3. 538 U.S. at 20, 30–31.

4. *Id.* at 31 (Scalia, J., concurring); *id.* at 32 (Thomas, J., concurring). Justice Scalia, joined by Chief Justice Rehnquist, had expressed similar views in his plurality opinion in *Harmelin*. 501 U.S. at 965. However in *Ewing*, Chief Justice Rehnquist joined Justice O'Connor's plurality opinion, accepting limited proportionality review. 538 U.S. at 14, 22–24.

5. *Ewing*, 538 U.S. at 31 (Scalia, J., concurring).

6. *Id.* at 25 (quoting *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring)).

7. *Id.* at 32. In his opinion for the Court in *Harmelin*, Justice Scalia had argued that Eighth Amendment proportionality review is "an invitation to imposition of subjective values" involving judgments best left to the legislature. *Harmelin*, 501 U.S. at 986–89.

8. However, Justice Stevens did state that the Eighth Amendment "expresses a broad and basic proportionality principle that takes into account all of the justifications for penal sanctions." *Ewing*, 538 U.S. at 35 (Stevens, J., dissenting).

no clear definition of proportionality can be found in any of the Court's noncapital cases.[9]

The companion case to *Ewing*, *Lockyer v. Andrade*,[10] had even stronger facts: a sentence of fifty-years-to-life for two shoplifting incidents involving nine videotapes. The Court's affirmance of this extremely harsh punishment prompted the dissent to complain that "[i]f Andrade's sentence is not grossly disproportionate, the principle has no meaning."[11] However, *Andrade* provides even less guidance than *Ewing* does as to Eighth Amendment standards, since the Court did not rule directly on that issue.[12]

As a result of these holdings and diverse opinions, it remains very unclear when the Court will find a prison sentence unconstitutionally disproportionate, and on what precise grounds.[13] Does the narrow approach currently favored by a majority of the Justices preclude a finding of unconstitutionality even on the more extreme facts of *Andrade*? How should proportionality be defined, relative to nonretributive sentencing purposes? And if different proportionality standards apply to different sentencing purposes, are these standards disjunctive or conjunctive—must they all be exceeded, or just one of them, before a sentence will be found to violate the Eighth Amendment?

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9. The Court's proportionality analysis in capital cases is discussed *infra* notes 132–39 and accompanying text.

10. 538 U.S. 63 (2003).

11. *Id.* at 83 (Souter, J., dissenting).

12. The Court only indirectly considered Eighth Amendment requirements because of the limited scope of federal court review in habeas corpus cases. *Id.* at 71. For further discussion of *Andrade*, see *infra* notes 85–88 and accompanying text.

13. Lower courts were very unsure about Eighth Amendment limits in the wake of the *Harmelin* decision. *See* Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach To Cruel And Unusual Punishment*, 84 KY. L.J. 107, 161–62 (1995); Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 110–12 (1995); Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 698 (1998). This uncertainty appears to have continued unabated after *Ewing*. *See* Joshua R. Pater, *Struck Out Looking: Continued Confusion in Eighth Amendment Proportionality Review After* Ewing v. California, 27 HARV. J.L. & PUB. POL'Y 399, 413–15 (2003). Indeed, in holding that the California courts did not violate "clearly established" federal law (and thus, that they could not be overruled on federal habeas corpus, see discussion *supra* note 12), the Court stated: "our precedents in this area have not been a model of clarity. . . . [W]e have not established a clear or consistent path for courts to follow." *Andrade*, 538 U.S. at 72.

These issues extend far beyond the scope and application of the United States Constitution; they arise in the interpretation of state constitutional counterparts to the Eighth Amendment and other provisions applicable to sentencing, and in the formulation and application of subconstitutional sentencing law and policy by state and federal legislators, prosecutors, judges, and parole boards. In all of these contexts, how should proportionality values be defined and applied, particularly in relation to nonretributive sentencing goals?

Part of the problem is semantic. Anglo-American courts and scholars have usually (but as will be shown, not universally) applied the concept of proportionality only when discussing retributive sentencing principles. Moreover, the text of the Eighth Amendment contains no mention of either proportionality or specific penalties other than fines. But the text does expressly prohibit excessive fines as well as excessive bail, and the majority of the Justices now on the Court clearly believe that the Cruel and Unusual Punishment Clause prohibits excessive applications of capital punishment and imprisonment. In seeking to give more precise meaning to the Eighth Amendment and the limitations it places on retributive and nonretributive sentencing purposes, we must keep in mind that the fundamental and unifying concept is excessiveness, not "proportionality" in the traditional Anglo-American sense. However, because the Supreme Court has used the latter term when discussing Eighth Amendment limits on prison durations, and because the broader meaning of proportionality is already well established in some areas of law, the remainder of this Article will use the term "proportionality" to refer to limitations on nonretributive as well as retributive sentencing purposes.

This Article identifies several concepts of proportionality that are well established in U.S., foreign, and international law. A better understanding of these concepts shows that proportionality analysis is not limited to retributive theory. Nor is such analysis purely a matter of legislative, executive, or judicial policy. In a wide variety of contexts, the Supreme Court, lower courts in the United States, and high courts in other countries have recognized and applied one or more proportionality concepts in the course of constitutional adjudication. Moreover, these proportionality principles are independent and apply disjunctively; each provides a sufficient basis for a finding of unconstitutionality.

Part I of this Article briefly summarizes the facts and opinions in the six modern Supreme Court cases dealing with Eighth Amendment proportionality limits on the duration of prison sentences. These cases provide important legal background and factual context; however, readers who are already very familiar with these cases may wish to proceed directly to Part II, which is the conceptual heart of the Article. Part II clarifies the meaning of retributive proportionality, and introduces two nonretributive proportionality concepts. Specifically, a governmental action or other measure may be disproportionate in a utilitarian sense for two independent reasons: (1) because the measure's costs and burdens outweigh the likely benefits ("ends disproportionality"); or (2) because the measure is unnecessarily costly or burdensome when compared to alternative means of achieving the same benefits ("means disproportionality").

Part III of this Article shows how these three proportionality concepts have been recognized in a variety of American constitutional law doctrines. Part IV briefly notes the wide support for the same three proportionality concepts in foreign and international law. Part V examines several ways in which the three proportionality principles could be incorporated into current or alternative Eighth Amendment standards, and argues that the simplest approach is the best choice. The discussion then returns to the facts of the six cases summarized in Part I and examines how they might be decided under this approach. I argue that, with a better understanding of proportionality principles, some of the cases declining to find an Eighth Amendment violation might have been decided differently by the Supreme Court. Moreover, most of these cases can and should be decided differently under state constitutional counterparts to the Eighth Amendment because state courts are more politically accountable, and are not constrained by issues of federalism. The concluding section reflects on the uncertain past and brighter future of proportionality jurisprudence in the United States.

I. A SHORT HISTORY OF PRISON-DURATION PROPORTIONALITY IN THE SUPREME COURT

Since 1980, the Supreme Court has decided six cases in which the duration of a prison sentence was attacked on Eighth

Amendment grounds.[14] In only one of these cases did the Court rule in favor of the prisoner. All six cases were five-to-four decisions in form or substance (the concurring Justice in *Hutto v. Davis* agreed with the three dissenters, but felt bound by precedent[15]).

A. *RUMMEL V. ESTELLE*

In *Rummel v. Estelle*,[16] the Court upheld a life sentence, with parole eligibility after ten to twelve years,[17] under a Texas recidivist (three strikes) statute. Rummel's criminal record con-

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14. Prior to 1980 there had been no prison sentence proportionality decisions in the Court for over sixty years. *Weems v. United States* invalidated a multifaceted Philippine penalty as much for the unusual nature of its accessories (relative to common law traditions) as for its disproportionality. 217 U.S. 349, 365–66, 382 (1910). However, *Weems* did explicitly describe the belief that the Eighth Amendment requires punishments to be "graduated and proportioned to offense." *Id.* at 367. A few years later, two cases rejected attacks on prison terms without mentioning *Weems*. Badders v. United States, 240 U.S. 391 (1916); Graham v. West Virginia, 224 U.S. 616 (1912). In *Trop v. Dulles*, 356 U.S. 86 (1958), a four-Justice plurality applied Eighth Amendment proportionality limits to the penalty of divestment of citizenship, noting that "the words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id.* at 100–01. *Robinson v. California* found that a California statute making it a crime to be addicted to narcotics inflicted cruel and unusual punishment no matter how short the prison or jail term. 370 U.S. 660, 667–68 (1962). However, in *Powell v. Texas*, 392 U.S. 514 (1968), the Court upheld the conviction of an alcoholic for being found intoxicated in public, rejecting arguments that the defendant could not control his drinking and thus, in effect, was punished for being an alcoholic. *Powell* suggests that the constitutional defect in *Robinson* was punishment of mere "status," unaccompanied by any conduct. *See* Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 994 (1978); *see also* Malcolm E. Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838, 839–42 (1972) (describing capital and noncapital cases which have held that punishments can violate the Eighth Amendment either in their form or in their amount, according to at least three standards: "inhuman and barbarous" treatment, violation of the "dignity of man," or "unnecessary" to the achievement of legitimate penal goals).

15. Hutto v. Davis, 454 U.S. 370, 375 (1982) (per curiam) (Powell, J., concurring); *see also infra* notes 26–27 and accompanying text.

16. 445 U.S. 263 (1980).

17. Justice Rehnquist's opinion assumed that Rummel would be eligible for parole "in as little as 12 years." *Rummel*, 445 U.S. at 280. However, the lower court believed Rummel "might serve no more than 10 years." *Id.* at 293 (Powell, J., dissenting); *see* Rummel v. Estelle, 587 F.2d 651, 659 (5th Cir. 1978); *see also* Solem v. Helm, 463 U.S. 277, 302 (1983) ("Rummel could have been eligible for parole in as few as 10 years, and could have expected to become eligible, in the normal course of events, in only 12 years.").

sisted of three nonviolent property crimes. His most recent offense was obtaining money (about $121) by false pretenses. His two earlier convictions involved fraudulent use of a credit card and passing a forged check; the total property loss for all three crimes was $229. Justice Rehnquist's majority opinion noted that the Court's death penalty cases applying proportionality principles "are of limited assistance" in deciding a case like *Rummel,* "[b]ecause a sentence of death differs in kind from any sentence of imprisonment, no matter how long."[18] He concluded that "one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified as felonies, that is, as punishable by significant terms of imprisonment in the state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative."[19] Justice Rehnquist also stated (quoting from an earlier death penalty case) that Eighth Amendment decisions "should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent."[20] He concluded that any distinctions between prison terms of different durations "are indeed 'subjective,' and therefore properly within the province of legislatures, not courts."[21] Justice Powell, joined by Justices Brennan, Marshall, and Stevens, dissented (for reasons very similar to those Justice Powell cited in his majority opinion in *Solem v. Helm*, discussed *infra*).[22]

B. *HUTTO V. DAVIS*

In *Hutto v. Davis*, the defendant received a sentence of forty years and a $20,000 fine for possession with intent to distribute, and distribution of about nine ounces of marijuana.[23] The maximum sentence on each count was forty years; the jury had recommended twenty-year sentences, and the trial court apparently made the two terms consecutive because of Davis's record—he had previously been convicted of selling LSD, and the current offenses were committed while he was on bail pend-

18. *Rummel*, 445 U.S. at 272.

19. *Id.* at 274.

20. *Id.* at 274–75 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)).

21. *Id.* at 275–76.

22. *Id.* at 295 (Powell, J., concurring); Solem v. Helm, 463 U.S. 277 (1983); *see also infra* notes 34–41 and accompanying text.

23. Hutto v. Davis, 454 U.S. 370, 371 (1982) (per curiam).

ing appeal from the previous conviction.[24] In a per curiam opinion, the Court affirmed Davis's sentence, relying on *Rummel*.[25] Justice Powell objected to the sentence, but felt bound by *Rummel*.[26] Justices Brennan, Marshall, and Stevens dissented.[27]

C. *SOLEM V. HELM*

Solem v. Helm,[28] decided one year after *Hutto*, is the only case in which the Court has found that a lengthy prison term violated the Eighth Amendment. Helm received a sentence of life without possibility of parole under a South Dakota "four strikes" recidivist statute. Helm actually had six prior felony convictions—three for third-degree burglary, and one each for obtaining money under false pretenses, grand larceny, and felony (third offense) drunk driving. His seventh and most recent felony offense was issuing a no-account check for $100.[29]

Justice Powell's majority opinion in *Solem* traced the history of proportionality rules, beginning with Magna Carta provisions requiring fines to be graded according to offense seriousness. Powell concluded that the proportionality principle is well establisbed in Anglo-American law and in the Court's prior cases.[30] Nor, he maintained, does the history or language or the Eighth Amendment suggest any distinction between types of punishments—all of the Amendment's clauses (bail, fines, cruel and unusual punishments) forbid excessiveness, and "[i]t would be anomalous indeed" if fines and the death penalty were subject to proportionality analysis, but the "intermediate punishment of imprisonment" was not.[31] Powell did concede that death penalty cases are of limited value in assessing prison sentences, that reversals of such sentences on proportionality grounds will be "exceedingly rare,"[32] that reviewing courts should grant substantial deference to legislative judgments, and that proportionality review "should be guided by objective

24. Davis v. Davis, 585 F.2d 1226, 1233 (4th Cir. 1978), *overruled by Hutto*, 454 U.S. at 372. There was no indication in any of the Supreme Court or lower court opinions as to when Davis would have become eligible for parole.

25. *Hutto*, 454 U.S. at 374–75.

26. *Id.* at 375–81 (Powell, J., concurring).

27. *Id.* at 381–88 (Brennan, J., dissenting).

28. 463 U.S. 277 (1983).

29. *Id.* at 279–83.

30. *Id.* at 284–88.

31. *Id.* at 289.

32. *Id.* at 289–90 (citing Rummel v. Estelle, 445 U.S. 263, 272 (1980)).

factors."[33] Powell found three such factors in the Court's prior cases:

> First, we look to the gravity of the offense and the harshness of the penalty. . . .
>
> Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. . . .
>
> Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions.[34]

As to the first factor, Powell argued that courts are competent to objectively assess degrees both of offense gravity and of punishment severity, and that courts are required, in a variety of contexts, to draw similar lines along a continuum.[35] He suggested that offense gravity should be assessed in terms of the harm caused or threatened to victims and society, and the offender's culpability, including the defendant's degree of intent (mens rea) and motives.[36]

Applying these criteria, Powell noted first that Helm's conviction and prior offenses were all minor and nonviolent, and that his sentence was the most severe authorized by South Dakota at the time.[37] Powell conceded that states are justified in punishing recidivists more severely, but added in a footnote: "We must focus on the principal felony—the felony that triggers the life sentence—since Helm already has paid the penalty for each of his prior offenses."[38] In another note, Powell argued that Helm's life-without-parole sentence "is unlikely to advance the goals of our criminal justice system in any substantial way."[39] As for the second factor listed above, Powell argued that Helm had been treated as or more severely than many South Dakota criminals "who have committed far more serious crimes."[40] Under the third factor, Powell concluded that "Helm

33. *Id.* at 290–91.

34. *Id.* at 290–92. Similar factors had also been recognized by several lower courts. *See* Hart v. Coiner, 483 F.2d 136, 140–42 (4th Cir. 1973); People v. Lorentzen, 194 N.W.2d 827, 831–33 (Mich. 1972).

35. *Solem*, 463 U.S. at 292–95.

36. *Id.* at 293–94.

37. *Id.* at 296–97.

38. *Id.* at 296 n.21.

39. *Id.* at 297 n.22.

40. *Id.* at 299.

was treated more severely than he would have been in any other state."[41]

Chief Justice Burger dissented, joined by Justices White, Rehnquist, and O'Connor.[42] The dissenters noted that four of Helm's prior crimes (three burglaries and one drunk driving violation) carried a potential for violence; that the defendant in *Rummel* had fewer prior convictions than Helm, all of them truly nonviolent; and that proportionality review had never before been used to invalidate a prison sentence solely because of its duration.[43]

None of the opinions in *Solem* provides a clear definition of proportionality in either a capital or noncapital sentencing context.

D. *HARMELIN V. MICHIGAN*

In *Harmelin v. Michigan*, the Court upheld a mandatory sentence of life without parole that was imposed on a first-time offender convicted of possessing more than 650 grams of cocaine.[44] Harmelin contested both the severity of the sentence and its mandatory nature. Five Justices voted to uphold the sentence in two opinions written by Justices Scalia and Kennedy. Most of Justice Scalia's opinion for the Court was joined only by Chief Justice Rehnquist. Justice Scalia argued that *Solem* was wrongly decided—that the Eighth Amendment contains no proportionality guarantee, and that proportionality review is inherently subjective, is too narrowly tied to retributive punishment theory, involves judgments best left to the legislature, and is inconsistent with federalism.[45] Part IV of Justice Scalia's opinion, joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Souter, concluded that mandatory penalties, even severe ones, "may be cruel, but they are not unusual in the constitutional sense, having been employed in

41. *Id.* at 300.

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

43. Chief Justice Burger distinguished *Weems v. United States*, 217 U.S. 349 (1910), as involving a bizarre penalty, unknown to the common law. *Solem*, 463 U.S. at 306–07.

44. Harmelin v. Michigan, 501 U.S. 957, 996 (1991). This penalty was later struck down under the Michigan Constitution, see People v. Bullock, 485 N.W.2d 866, 877–78 (Mich. 1992), in part because the state constitution forbids cruel *or* (not *and*) unusual punishments. *Id.* at 872; *cf.* People v. Fluker, 498 N.W.2d 431, 431–32 (Mich. 1993) (noting that *Bullock* applies only to possession, not drug delivery offenses).

45. *Harmelin*, 501 U.S. at 961–94.

various forms throughout our Nation's history."[46] Justice Scalia distinguished the Court's cases requiring an individualized determination that capital punishment is appropriate, because "death is different."[47]

Justice Kennedy's concurring opinion, joined by Justices O'Connor and Souter, concluded that the Court's prior Eighth Amendment cases recognize a "narrow" proportionality principle,[48] based on five underlying assumptions: (1) fixing prison terms for specific crimes requires fundamental choices about sentencing purposes which are primarily for the legislature, not the courts;[49] (2) the Eighth Amendment "does not mandate . . . any one penological theory";[50] (3) "marked divergences" both in penal theories and in prison terms "are the inevitable, often beneficial, result of the federal structure";[51] (4) proportionality review should, as much as possible, be informed by "objective factors," the "most prominent" of which is "the objective line between capital punishment and imprisonment for a term of years" (because courts "lack clear objective standards to distinguish between sentences for different terms of years");[52] and therefore (5) "[t]he Eighth Amendment does not require strict proportionality between crime and sentence. Rather, [the Amendment] forbids only extreme sentences that are 'grossly disproportionate' to the crime."[53]

Justice Kennedy also announced a modified version of the three-factor *Solem* test: intra- and inter-jurisdictional comparative assessments (*Solem* factors two and three) "are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed [(*Solem* factor one)] leads to an inference of gross disproportionality."[54] Kennedy concluded that the latter standard was not met in Harmelin's case.[55] His crime was much more serious than Solem's $100 bad check. The 672 grams, or more than 1.5 pounds, of cocaine Harmelin possessed might produce as many as 65,000 doses,

46. *Id.* at 994–95.
47. *Id.* at 994 (reaffirming the same claim made in *Rommel*).
48. *Id.* at 997 (Kennedy, J., concurring).
49. *Id.* at 998.
50. *Id.* at 999.
51. *Id.*
52. *Id.* at 1000–01 (citation omitted).
53. *Id.* at 1001 (citation omitted).
54. *Id.* at 1005.
55. *Id.*

threatening "grave harm to society" in terms of the effects on users, crimes committed by users, and violent crimes committed "as part of the drug business or culture."[56] Therefore, Michigan legislators "could with reason conclude" that Harmelin's crime "is momentous enough to warrant the deterrence and retribution of a life sentence without parole."[57]

Justices White, Marshall, Blackmun, and Stevens dissented. Justice White's dissent, joined by Justices Blackmun and Stevens, argued that proportionality principles have long historical roots and have been read into all of the clauses of the Eighth Amendment; that the Cruel and Unusual Punishment Clause makes no distinction among types of punishments; that the *Solem* factors have worked well; that the second and third factors are actually more objective than the first, and strongly support a finding of disproportionality in Harmelin's case; and that Justice Kennedy's application of the first *Solem* factor is both too subjective and too narrow, focusing mainly on the harm threatened by this amount of drugs and not enough on critical culpability issues such as intent and motive.[58] Justice White also noted that Harmelin was never charged with or convicted of distribution, or even intent to distribute.[59]

Once again, none of the opinions in *Harmelin* provided a definition of proportionality. Justice Scalia seemed to think this concept is inherently tied to retributive sentencing goals, and that "it becomes difficult even to speak intelligently of 'proportionality' once deterrence and rehabilitation are given significant weight."[60] Justice Kennedy stated that all traditional punishment purposes are valid, including retribution, deterrence, incapacitation, and rehabilitation, since "the Eighth Amendment does not mandate any one penological theory."[61] One

56. *Id.* at 1002.

57. *Id.* at 1003.

58. *Id.* at 1009–27 (White, J., dissenting). Justice Marshall's separate dissent agreed with Justice White except as to some of the latter's statements about the death penalty. *Id.* at 1027 (Marshall, J., dissenting). Justice Stevens also wrote a dissent, objecting that mandatory sentences of death or life without parole conclusively presume the defendant is incorrigible so that society's interests in deterrence and retribution outweigh any considerations of rehabilitation; that such a presumption is irrational; and that Harmelin's sentence was as capricious, and therefore as cruel and unusual, as being struck by lightning. *Id.* at 1028–29 (Stevens, J., dissenting).

59. *Id.* at 1021–23.

60. *Id.* at 989.

61. *Id.* at 999.

reading of Kennedy's opinion would be that the Eighth Amendment is only violated if a sentence is "disproportionate" relative to *all* of the state's asserted punishment purposes. But, Justice Scalia would ask: what does it mean to say that a sentence is "disproportionate"—or even "excessive"—relative to nonretributive goals such as deterrence, incapacitation, and rehabilitation? This question will be addressed in Part II, *infra*.

E. *EWING V. CALIFORNIA*

The Court's two most recent prison duration cases implicating the Eighth Amendment involved lengthy sentences imposed under California's unusually severe three strikes law.[62] In the first case, *Ewing v. California*, the Court upheld a sentence of twenty-five-years-to-life for the theft of three golf clubs worth $399 each.[63] Ewing had incurred more than a dozen prior convictions in the previous twenty years for theft, burglary, robbery, battery, possessing a firearm, and possessing drug paraphernalia.[64] As in *Harmelin*, five Justices voted to uphold the sentence. Justice O'Connor's plurality opinion, joined by Chief Justice Rehnquist and Justice Kennedy, adopted the narrow proportionality principle articulated in Justice Kennedy's *Harmelin* concurrence—including each of Justice Kennedy's five underlying principles, as well as his further proviso that the second and third *Solem* factors need only be considered in rare cases where the first factor raises a "threshold" inference of gross disproportionality.[65]

Applying Justice Kennedy's approach, Justice O'Connor concluded that Ewing's sentence was not grossly disproportionate. Justice O'Connor noted that the purposes of the three strikes law are to deter repeat offenders and incapacitate those who have not been deterred, and she cited evidence suggesting that both goals had been furthered by the law.[66] In assessing the gravity of Ewing's conviction offense—stealing three golf

62. Offenders convicted of any felony, with two or more prior convictions for "serious" or "violent" crimes, receive a life sentence with parole eligibility after twenty-five years (or longer, in some cases). CAL. PENAL CODE §§ 667(e)(2)(A) (West 1999), 1170.12(c)(2)(A) (West 2004). Lesser, albeit still very severe, "two strikes" sentences apply to offenders with only one such prior conviction. *Id.* §§ 667(e)(1), 1170.12(c)(1).

63. 538 U.S. 11, 18, 30–31 (2003).

64. *Id.* at 18–19.

65. *See id.* at 23–24, 30.

66. *Id.* at 24–28, 30. For a critique of Justice O'Connor's evidence, see *infra* notes 306–07 and accompanying text.

clubs—Justice O'Connor argued that this was more serious than Helm's crime, and that it was constitutionally irrelevant that Ewing's theft offense could, under the trial court's discretion, be treated as a misdemeanor rather than a felony (such crimes are known as "wobblers" in California).[67] Justice O'Connor further argued that, to accord proper deference to the State's choice of punishment goals, the gravity of Ewing's "offense" should include his extensive prior record, not just his conviction offense.[68]

Justices Scalia and Thomas, concurring in separate opinions, each argued that *Solem*'s proportionality test is unworkable, and that no such requirement should be recognized under the Eighth Amendment.[69] Justice Scalia essentially repeated points from his *Harmelin* opinion—that the Eighth Amendment was only aimed at excluding certain modes of punishment; that the proportionality concept is inherently tied to retributive goals; that since the Court does not require states to adopt retribution or any other penological theory (and specifically approves California's adoption of deterrence and incapacitation), the concept of proportionality cannot be intelligently applied; and that if proportionality review means that "all punishment should reasonably pursue the multiple purposes of the criminal law," then the Court would not be "applying law but evaluating policy."[70]

Justices Stevens and Breyer wrote dissenting opinions, each joined by the other and by Justices Souter and Ginsburg. Justice Stevens argued that the Eighth Amendment sets proportionality limits for all forms of punishment.[71] He noted that such limits have also been applied to bail and to punitive damages awards (see discussion, *infra* Part III); that sentencing judges have long employed proportionality principles to guide their discretion; and that the Eighth Amendment "expresses a broad and basic proportionality principle that takes into account all of the justifications for penal sanctions."[72] Justice Stevens also questioned whether the *Harmelin* framework should

67. *See Ewing*, 538 U.S. at 28–29.
68. *Id.* at 29–30.
69. *Id.* at 31 (Scalia, J., concurring); *id.* at 32 (Thomas, J., concurring).
70. *Id.* at 32 (Scalia, J., concurring).
71. *Id.* at 32 (Stevens, J., dissenting).
72. *Id.* at 33–35.

govern Ewing's case, noting that the three-factor *Solem* test "specifically addressed recidivist sentencing."[73]

Justice Breyer assumed for purposes of his dissent that Justice Kennedy's *Harmelin* framework applied,[74] and further appeared to accept Justice O'Connor's view that prior record is relevant to the "gravity of the offense." However, Justice Breyer maintained that the focus ought to be on the conviction offense.[75] He also noted the absence of evidence that shoplifting is difficult to deter or that lengthy prison terms are necessary to deter this crime.[76] Taking all of this into account—Ewing's sentence,[77] his conviction offense, and his prior record—Justice Breyer concluded that Ewing's case was more similar to Helm's than to Rummel's, and that a "threshold" inference of gross disproportionality had been raised.[78]

Justice Breyer then turned to intra- and inter-jurisidictional comparisons (noting, as Justice White had, dissenting in *Harmelin*, that such comparisons make proportionality review more objective).[79] He concluded that these comparisons validated his threshold determination: "Outside the California's three strikes context, Ewing's recidivist sentence is virtually unique in its harshness for his offense of conviction, and by a considerable degree. . . ."[80] "[It is,] at a minimum, 2 to 3 times the length of sentences that other jurisdictions would impose in similar circumstances."[81] Nor could Justice Breyer find any important practical administrative justifications for the California statute, which might justify such harsh results. Finally, Justice Breyer questioned the need for the statute to sweep so broadly—the goal of the legislature is to deter and incapacitate felons who commit "serious" and "violent" crimes, in-

73. *Id.* at 33 n.1.

74. *Id.* at 36 (Breyer, J., dissenting).

75. *Id.* at 41 (citing Solem v. Helm, 463 U.S. 277, 296 n.21 (1983) and Witte v. United States, 515 U.S. 389, 402–03 (1995)) (suggesting that recidivists are punished only for the conviction offense, which is deemed to be aggravated by prior convictions).

76. *Id.* at 40.

77. In weighing the severity of Ewing's twenty-five-year minimum sentence, Justice Breyer noted that the defendant was thirty-eight years old, seriously ill, and "will likely die in prison." *Id.* at 39.

78. *Id.* at 37–40. Justice Breyer also argued that there is no point in having a "threshold" test unless it is easier to meet than the ultimate test. *Id.* at 42.

79. *Id.* at 42–47.

80. *Id.* at 47.

81. *Id.* at 52.

cluding many violent and drug crimes, but excluding all property crimes, no matter how high the loss.[82] But as illustrated by Ewing's case, the statute provided that any felony, including many property crimes that would not constitute first or second strikes, could qualify as a third strike.[83] Thus, Justice Breyer concluded, "Ewing's 25-year term amounts to overkill."[84]

F. *LOCKYER V. ANDRADE*

In a companion case to *Ewing*, *Lockyer v. Andrade*, the Court held that the Ninth Circuit Court of Appeals had erred in granting federal habeas corpus relief and overturning a California three strikes sentence.[85] On its facts, *Andrade* presented a much stronger basis for a finding of Eighth Amendment disproportionality. Andrade's fifty-year minimum sentence was twice as long as Ewing's, and his conviction offenses—shoplifting nine videotapes worth about $150 from two stores—were less serious.[86] These two counts of misdemeanor theft were charged as felonies because of Andrade's prior property crimes.[87] Andrade's prior record was also less serious. Unlike Ewing, Andrade had no prior violent or weapons convictions, and his current and prior property offenses were all driven by his need to buy heroin to feed his addiction.[88]

However, the Eighth Amendment holding in *Andrade* was blurred by its procedural context. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), a federal court may only grant habeas relief if the state court's decision is "contrary to, or involved an unreasonable application of, clearly established Federal law" as determined by the Supreme Court.[89] Thus, as explicitly noted in Justice O'Connor's majority opinion, the Court's decision upholding Andrade's sentence was not a ruling that his sentence complied with the Eighth Amendment.[90] The Court held only that habeas relief should not have been granted because the state appellate court's decision af-

82. *Id.* at 51.

83. *See* CAL. PENAL CODE. §§ 667(e)(2)(A) (West 1998), 1170.12(c)(2)(A) (West 2004).

84. *Ewing*, 538 U.S. at 52.

85. Lockyer v. Andrade, 538 U.S. 63, 67–70 (2003).

86. *See id.* at 66, 68.

87. *Id.* at 66–68.

88. *Id.* at 67.

89. 28 U.S.C. § 2254(d)(1) (2000).

90. *Andrade*, 538 U.S. at 71.

firming Andrade's sentence was not so erroneous as to meet the AEDPA review standard of unreasonableness.[91]

Justice Souter's dissenting opinion, joined by Justices Stevens, Ginsburg, and Breyer, argued that the state court's decision was not only erroneous but sufficiently unreasonable to justify habeas relief.[92] Justice Souter maintained that the lower court clearly erred in relying on *Rummel* rather than *Solem*, since *Harmelin* did not overrule *Solem* and, in Justice Souter's view, Andrade's case was indistinguishable from the facts of *Solem*, particularly if one views a fifty-year minimum sentence for a thirty-seven-year-old offender as equivalent to life without parole.[93] Justice Souter also found the state court decision unreasonable for a second reason: Andrade's sentence was irrational, even when measured against the State's asserted purposes. Citing the State's own briefs, Justice Souter maintained that the only serious justification for the three strikes law was incapacitation; furthermore, he argued, the statute represents a legislative finding that the danger posed by a three strikes offender requires a minimum sentence of twenty-five years.[94] Andrade received two consecutive twenty-five-year-to-life terms. In Justice Souter's view, it is irrational to assume that the defendant could "somehow become twice as dangerous to society when he stole the second handful of videotapes."[95]

These opinions, from *Rummel* to *Andrade*, form the basis of the Court's seemingly fractured jurisprudence in this area and set the stage for Part II's discussion of the implicit theoretical underpinnings of the Court's reasoning.

II. PROPORTIONALITY—RELATIVE TO WHAT?

The Supreme Court has never made clear what it means by proportionality in the context of prison sentences. Justice Scalia believes—and perhaps so does Justice Thomas—that this concept only has meaning in relation to retributive sentencing goals and that a proportionality requirement makes no sense if the Court is not going to require states to adopt a retributive theory.[96] The majority of the Justices agree that the

91. *See id.* at 73–77.
92. *Id.* at 77 (Souter, J., dissenting).
93. *Id.* at 78–79.
94. *Id.* at 79–83.
95. *Id.* at 82.
96. *See supra* notes 5–7, 45, 70 and accompanying text.

states are permitted to pursue nonretributive sentencing goals, and they also appear to believe that proportionality limits can be applied to such goals.[97] But the precise meaning of proportionality relative to nonretributive goals has not been discussed. Several scholars have agreed with Justice Scalia's assertion that proportionality only applies under a retributive theory of punishment.[98] Other scholars have recognized one or more nonretributive proportionality concepts which have been or could be recognized under the Eighth Amendment,[99] but have not offered a complete normative and descriptive account of these limiting principles.

This section of the Article seeks to provide such an account and to resolve Justice Scalia's theoretical conundrum. I begin

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97. *See supra* notes 6, 48, 66–68 and accompanying text.

98. King, *supra* note 13, at 192 (stating that "proportionality [of a forfeiture] can only be measured in relationship to the owner's culpability"); Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41, 62 (2000) (noting that utilitarian theorists such as Jeremy Bentham recognize a proportionality principle, but seemingly agreeing with Justice Scalia that "true" proportionality is incompatible with utilitarian theory); Allyn G. Heald, Comment, United States v. Gonzalez*: In Search of a Meaningful Proportionality Principle*, 58 BROOK. L. REV. 455, 455 n.2 (1992) (observing that the "proportionality principle is inherently a retributive concept").

99. *See, e.g.*, FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 190 (2001) (defining "functional or instrumental excessiveness" as punishment severity that "is more than is required" for crime-control purposes; and noting that another instrumental excessiveness argument is that "incremental [incapacitation] benefits are too small to matter"); Grossman, *supra* note 13, at 168 n.386 (asserting that penalties should be limited not only by retributive values but also by utilitarian principle of parsimony, which requires the use of the least restrictive or punitive alternative); Radin, *supra* note 14, at 1047–48 (stating that the Eighth Amendment recognizes both retributive and utilitarian limits); Richard G. Singer, *Sending Men to Prison: Constitutional Aspects of the Burden of Proof and the Doctrine of the Least Drastic Alternative as Applied to Sentencing Determinations*, 58 CORNELL L. REV. 51, 55, 72–89 (1972) (arguing that the imposition of a prison sentence violates due process unless the state proves that no less severe sanction would serve relevant sentencing purposes); Wheeler, *supra* note 14, at 847–73 (discussing and applying Jeremy Bentham's utilitarian proportionality principles); Margaret R. Gibbs, Note, *Eighth Amendment—Narrow Proportionality Requirement Preserves Deference to Legislative Judgment*, 82 J. CRIM. L. & CRIMINOLOGY 955, 976 (1992) (seeming to recognize the utilitarian "means" proportionality concept discussed *infra*: punishments should be held invalid if "significantly less severe punishments could serve the same goal"); Bruce W. Gilchrist, Note, *Disproportionality in Sentences of Imprisonment*, 79 COLUM. L. REV. 1119, 1121–24 (1979) (assuming that proportionality is inherently a retributive concept, but noting that Supreme Court death penalty cases recognize the utilitarian concept of "necessity" as a further limiting principle).

by clarifying what is meant by retributive proportionality, noting two very different versions of retributive theory, only one of which is appropriate for Eighth Amendment analysis. I then discuss nonretributive sentencing theories and identify two independent proportionality concepts that apply to such theories.

A. RETRIBUTIVE PROPORTIONALITY

Although the Court has mentioned retributive sentencing goals in numerous Eighth Amendment cases, especially those involving capital punishment, it has never discussed this topic in detail, and has rarely made any reference to the voluminous literature on retributive punishment theory. Several essential points from that literature[100] are relevant here.

First, retributive, or "just deserts," theory considers only the defendant's past actions, not his or her probable future conduct or the effects that the punishment might have on crime rates or otherwise. Second, retribution examines the actor's degree of blameworthiness for his or her past actions, focusing on the offense being sentenced. Some retributive scholars believe that the current offense is the only relevant consideration and that any prior convictions are irrelevant; other scholars accept that prior crimes modestly increase an offender's blameworthiness.[101] Third, the degree of blameworthiness of an offense is generally assessed according to two kinds of elements: the nature and seriousness of the harm caused or threatened by the crime; and the offender's degree of culpability in committing the crime, in particular, his or her degree of intent (mens rea), motives, role in the offense, and mental illness or other diminished capacity.

Finally, there are two very different theories about the role that retributive values should play in sentencing. These two approaches have sometimes been referred to as "defining" and "limiting" retributivism.[102] According to the first theory, principles of just deserts should define the degree of punishment se-

100. *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 16–18 (3d ed. 2001); JOEL FEINBERG, DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY (1970); MICHAEL MOORE, PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW (1997); PAUL H. ROBINSON & JOHN M. DARLEY, JUSTICE, LIABILITY, AND BLAME: COMMUNITY VIEWS AND THE CRIMINAL LAW (1995); ANDREW VON HIRSCH, CENSURE AND SANCTIONS (1993).

101. For further discussion of this point, see *infra* note 284 and accompanying text.

102. NORVAL MORRIS, MADNESS AND THE CRIMINAL LAW 182–87, 196–202 (1982).

verity as precisely as possible; offenders should receive their just deserts, no more and no less. This theory, as elaborated by writers such as Andrew von Hirsch, permits crime control, budgetary, or other nonretributive values to affect both the overall scale of punishment severity (absolute amounts, as determined by the most and least severe penalties) and the choice among penalties deemed to be equal in severity, but it insists on fairly strict "ordinal" proportionality in the relative severity of penalties imposed on different offenders.[103] Since defining retributivism leaves little room for the operation of nonretributive values and goals, it is clearly too narrow an approach for Eighth Amendment purposes—the Court has made it very clear that states are free to pursue a variety of sentencing goals.

The other theory, limiting retributivism, allows all traditional punishment purposes to play a role but places retributive outer limits both on who may be punished (only those who are blameworthy), and how hard they may be punished (within a range of penalties which would be widely viewed as neither unfairly severe or unduly lenient). This theory, most often associated with the writings of Norval Morris,[104] places particular emphasis on avoiding unfairly severe penalties.[105] As revealed

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103. *See generally* VON HIRSCH, *supra* note 100, at 45.

104. Morris's theory is described and critiqued in Richard S. Frase, *Limiting Retributivism*, *in* THE FUTURE OF IMPRISONMENT 83 (Michael Tonry ed., 2004) [hereinafter Frase, *Limiting Retributivism*]. *See also* Richard S. Frase, *Sentencing Principles in Theory and Practice*, 22 CRIME & JUST.: REV. RES. 363 (1997) [hereinafter Frase, *Sentencing Principles*] (comparing Morris's theory to the hybrid approach that has evolved under the Minnesota Sentencing Guidelines); Grossman, *supra* note 13, at 168–72 (arguing that Eighth Amendment proportionality should be construed in accordance with Morris's theory); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA L. REV. (forthcoming 2005) (arguing that the Eighth Amendment should recognize retributivism as a "side constraint" on punishment severity). The American Law Institute has recently adopted Morris's limiting retributive theory as the theoretical framework for the revised Model Penal Code sentencing provisions. *See* MODEL PENAL CODE § 1.02(2)(a) (Preliminary Draft No. 3, 2004); *id.* cmt. at 8.

105. K.G. Armstrong writes:

> Justice gives . . . the *right* to punish offenders up to some limit, but one is not necessarily and invariably *obliged* to punish to the limit of justice. . . . For a variety of reasons (amongst them the hope of reforming the criminal) the appropriate authority may choose to punish a man less than it is entitled to, but it is never just to punish a man more than he deserves.

K.G. Armstrong, *The Retributivist Hits Back*, *in* THE PHILOSOPHY OF PUNISHMENT 138, 155 (H.B. Acton ed., 1969); *see also* H.L.A. HART, *Postscript: Responsibility and Retribution*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 210, 236–37 (1968) ("[M]any self-styled retributiv-

in the cases discussed in Part III, limiting retributivism appears to be the approach that the Supreme Court has applied when it has invoked retributive principles. This approach, emphasizing limits on excessive measures, is consistent with both the text of the Eighth Amendment and the role of constitutional guarantees—as protectors of human rights and bulwarks against unfairness and abuse of governmental power.

B. NONRETRIBUTIVE PROPORTIONALITY

Nonretributive, or utilitarian, purposes of punishment focus on the future—what effect will the proposed sentence have on the offender, on other would-be offenders, and/or on society, and at what cost?[106] The traditional nonretributive purposes include deterrence, incapacitation, and rehabilitation of an individual offender, because he is thought likely to commit further crimes, and general deterrence of other would-be violators both through fear of receiving similar punishment and by the educative or norm-reinforcing effects that penalties have on views about the relative harmfulness and wrongfulness of different crimes.[107]

What does it mean to say that a sentence is disproportionate, or excessive, relative to these nonretributive goals? As discussed below, utilitarian philosophy, as well as many legal rules in the United States and abroad, suggests two kinds of disproportionality of a governmental action or other measure. First, a measure may be disproportionate to the ends being pursued ("ends disproportionality"), when the measure's costs and burdens, or added costs and burdens, outweigh the likely benefits, or added benefits. Second, a measure may be disproportionate when compared to other, less costly or burdensome means of achieving the same goals ("means disproportionality").[108] Thus, under these two independent criteria, measures

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ists treat appropriateness to the crime as setting a *maximum* within which penalties [are chosen on crime-control grounds]."). *See generally* Frase, *Limiting Retributivism*, *supra* note 104, at 92–94 (citing numerous authors and model codes that emphasize strict desert limits on maximum sanction severity, with looser requirements of minimum severity).

106. *See generally* DRESSLER, *supra* note 100, at 14–15.

107. Kent Greenawalt, *Punishment*, *in* 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1282, 1286–88 (Joshua Dressler ed., 2d ed. 2001).

108. There are several other constitutional limits on "excessive" measures which do not raise issues of proportionality in any of the senses described in the text. A measure (e.g., torture) can be deemed excessive and unacceptable for any crime—regardless of just deserts, crime-control benefits, and lack of

are disproportionate if their costs or burdens outweigh their likely benefits or if they are unnecessarily costly or burdensome when compared to effective alternative measures.

1. Ends Proportionality

Ends proportionality reflects basic utilitarian, cost-benefit principles. The eighteenth century philosopher Cesare Beccaria argued in favor of penalties proportional to the seriousness of the offense, as measured by the harm done to society.[109] In the early nineteenth century, Jeremy Bentham made several specific utilitarian arguments in favor of punishments proportional to the seriousness of the offense. From the point of view of public resource allocation, "the greater an offence is, the greater reason there is to hazard a severe punishment for the chance of preventing it."[110] Similarly, from the point of view of the suffering imposed on the offender, Bentham argued that "the evil of the punishment [should not exceed] the evil of the offence."[111] Bentham also noted the marginal deterrent value of making penalties proportionate to offense severity: offenders should "have a motive to stop at the lesser" crime.[112]

As will be shown in Parts III and IV below, the utilitarian ends proportionality principle described above is defined and applied differently in varying legal contexts. For present pur-

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effective alternative means—if it violates certain absolute values such as the requirement of humane treatment. *See* ZIMRING ET AL., *supra* note 99, at 189; Radin, *supra* note 14, at 992–93; Dirk van Zyl Smit & Andrew Ashworth, *Disproportionate Sentences as Human Rights Violations*, 67 MOD. L. REV. 541, 544 (2004). A measure might also be considered excessive if it has no demonstrable value whatsoever. *See infra* notes 133–34, 251–52 and accompanying text (discussing the "rational basis" test as a component of U.S. death penalty and European proportionality standards).

109. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 62–66 (Henry Paolucci trans., Bobbs-Merrill Co. 1963) (1764).

110. JEREMY BENTHAM, THE THEORY OF LEGISLATION 326 (C.K. Ogden ed., Richard Hildreth trans., Kegan Paul, Trench, Trubner & Co. 1931) (1864) (emphasis omitted).

111. *Id.* at 323; *see also* H.L.A. HART, *Punishment and the Elimination of Responsibility*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW, *supra* note 104, at 158, 173 n.20.

112. BENTHAM, *supra* note 110, at 326 (emphasis omitted); *see also* BECCARIA, *supra* note 109, at 63 ("If an equal punishment be ordained for two crimes that do not equally injure society, men will not be any more deterred from committing the greater crime, if they find a greater advantage associated with it."); ANDREW VON HIRSCH ET AL., CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH 41–43 (1999) (discussing the marginal deterrent benefits of penalties proportioned to harms associated with different crimes).

poses, one of the most important distinctions has to do with which kinds of costs and burdens of a government measure are weighed against the expected benefits. In most contexts, the public costs of a measure are very important elements in the proportionality balance. Including publicly- as well as privately-borne costs and burdens, measures should not cost more than the benefits they are expected to produce. But when defining a defendant's constitutional right not to be subjected to an excessive sentence, the crime-control benefits of the sentence should probably be weighed only against the burdens which the sentence imposes on the defendant. It is fundamentally unfair to impose such burdens if they greatly outweigh the expected public benefits. As a matter of sound public policy it is also unwise—but probably not fundamentally unfair to the defendant—to impose a sentence that costs taxpayers more than the expected benefits are worth. Of course, in all forms of ends proportionality balancing there is often a need to compare fundamentally incommensurate quantities, such as the burden on the defendant of lengthy imprisonment, or the public costs of such sentences, versus sometimes intangible crime-control benefits. But as shown below, these difficulties have not prevented the Supreme Court, lower courts, and foreign courts from employing many ends proportionality principles which require rough balancing of qualitatively different costs and benefits such as the costs and benefits of forced medication of inmates or of additional procedural safeguards.

The sentencing-rights ends proportionality principle has important elements in common with retributive proportionality—in particular, both principles require proportionality relative to offense severity and measure the latter from the defendant's, not a public, perspective. But the two theories operate quite differently. First, retributive theory considers the harm caused or threatened by the defendant's past crimes, and considers it just to punish in proportion to that harm. Utilitarian theory also argues for punishment in proportion to past harm, but only when this will prevent future similar crimes by this offender, through deterrence, incapacitation, and/or rehabilitation, or prevent such crimes by others, through general deterrence and norm reinforcement. Moreover, utilitarian theory might consider not only the harm associated with a particular act similar to the defendant's, but also the aggregate harm caused by all such actions and the difficulty of detecting and

deterring such actions.[113] Second, retributive theory punishes in direct proportion not just to the actual or threatened harms associated with the offender's prior crime(s) but also to his culpability (intent, motive, role in the offense, diminished capacity, etc.). For utilitarians, such culpability factors are only relevant to the extent that they are related to the likely future benefits of punishment (e.g., the dangerousness and deterrability of this offender or others). Finally, retributive theory disregards not only crime-control benefits but also the collateral consequences of imposing punishment because proportionate sanctions are deemed inherently valuable in themselves. Utilitarian theory considers not only the actual crime-control or other benefits produced by sanctions but also, as an offset against those benefits, any undesirable collateral consequences of the sanction.[114] One such consequence would be "reverse deterrence" (for instance, if a severe three strikes law encourages felons to kill arresting officers or potential witnesses). Other undesirable consequences of penalties that are grossly or frequently disproportionate to the conviction offense would be an undermining of the public's sense of the relative gravity of different crimes and public loss of respect for, and willingness to obey and cooperate with, criminal justice authorities.[115]

2. Means Proportionality

This principle recognizes basic utilitarian efficiency values: among equally effective means to achieve a given end, those that are less costly or burdensome should be preferred. In the punishment context, Norval Morris calls this the principle of parsimony.[116] Jeremy Bentham argued that "punishment itself is an evil and should be used as sparingly as possible"; a measure should not be used if "the same end may be obtained by means more mild."[117] Even earlier, Cesare Beccaria argued that punishment must not only be proportionate to the crime but

113. Wheeler, *supra* note 14, at 851–52.

114. Radin, *supra* note 14, at 1055–56.

115. H.L.A. HART, *Prolegomenon to the Principles of Punishment*, *in* PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW, *supra* note 104, at 1, 25 ("[If] the relative severity of penalties diverges sharply from this rough scale [of proportionality], there is a risk of either confusing common morality or flouting it and bringing the law into contempt."). *See generally* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997).

116. NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 59–60, 75, 78 (1974).

117. BENTHAM, *supra* note 110, at 323; *see id. at* 322–24.

also "necessary, the least possible in the circumstances."[118] Numerous modern authors and model code drafters have endorsed this principle in some form,[119] and unnecessarily-excessive-means arguments can be found in numerous Supreme Court opinions, including some involving lengthy prison terms.[120] As with the ends proportionality principle, means proportionality is defined and applied differently in varying legal contexts. In defining constitutional protections against excessively severe sentences, comparisons of the relative burdens of proposed and alternative sentences should probably be viewed only from the defendant's perspective—he may complain that an alternative penalty would be just as effective and much less burdensome to him, but not that such an option would be much less costly to taxpayers. It should also be noted that the means proportionality principle can be applied strictly (requiring the government to chose the *least* burdensome alternative), or more loosely—requiring, for example, that the government need only choose another alternative if it is "significantly less burdensome."[121]

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118. BECCARIA, *supra* note 109, at 99.

119. *See, e.g.*, MORRIS, *supra* note 116, at 59–62; ZIMRING ET AL., *supra* note 99, at 190; Radin, *supra* note 14, at 1043–56; Singer, *supra* note 99, at 56, 72–89; Michael Tonry, *Parsimony and Desert in Sentencing*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY 198, 199, 201–04 (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1998). The Model Penal Code and all three editions of the American Bar Association sentencing standards explicitly or implicitly recognized the principle of parsimony. Frase, *Limiting Retributivism*, *supra* note 104, at 94–95. The principle is also endorsed in the proposed revisions of the Model Penal Code sentencing provisions. MODEL PENAL CODE § 1.02(2)(a)(iii) (Preliminary Draft No. 3, 2004); *id.* cmt. at 11–12.

120. *See, e.g.*, Lockyer v. Andrade, 538 U.S. 63, 79–83 (2003) (Souter, J., dissenting) (stating that there was no reason to believe that, because defendant shoplifted twice, an additional twenty-five-year sentence was necessary to achieve crime-control purposes); Ewing v. California, 538 U.S. 11, 40 (2003) (Breyer, J., dissenting) (finding that the prosecution did not show that a severe three strikes law was necessary to deter the defendant's crime); Rummel v. Estelle, 445 U.S. 263, 302 (1980) (Powell, J., dissenting) (stating that there was no showing that a life sentence was necessary to deter others or incapacitate a violent offender). See *infra* Part III for a discussion of numerous examples of means proportionality principles applied in other areas of the Supreme Court's jurisprudence.

121. Roy G. Spece, Jr., *Justifying Invigorated Scrutiny and the Least Restrictive Alternative as a Superior Form of Intermediate Review: Civil Commitment and the Right to Treatment as a Case Study*, 21 ARIZ. L. REV. 1049, 1054–56 (1979).

3. The Ends and Means Proportionality Principles in Action

A good example of the operation of these two utilitarian proportionality concepts is found in the criminal law requirements for a valid claim of self defense.[122] Each of these requirements is independent—a violation of either one results in denial of a complete defense. Ends proportionality in self defense requires that the defensive force used must not be excessive relative to the threatened harm—you cannot kill an attacker to avoid receiving a minor battery, even if killing is the only effective available means of prevention.[123] Means proportionality in self defense (usually referred to as the necessity principle) requires that the defensive means not be unnecessarily harmful—you cannot kill to avoid being killed, even if killing is effective and proportional to the threat, if that threat could also be avoided by nondeadly means (for instance, by the use of superior strength).[124]

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122. Similarly, under the defense of necessity, ends proportionality is required in that the actor must choose what reasonably appears to be the lesser evil (the harm caused by his criminal act cannot be equal to or greater than the harm sought to be avoided). MODEL PENAL CODE § 3.02 (Proposed Official Draft 1962). Means proportionality is also required, in that the action must be reasonably believed to be necessary (no noncriminal act or less serious criminal act would suffice to avoid the tbreatened harm). *Id.*

The Supreme Court's Fourth Amendment jurisprudence places similar ends and means proportionality limits on police use of force to arrest or temporarily seize a suspect. *See infra* notes 201–05 and accompanying text.

123. DRESSLER, *supra* note 100, at 49, 222.

124. *Id.* at 222. However, many jurisdictions decline to require a nonaggressor to "retreat" (or limit the duty to retreat in ways unrelated to necessity), thus rejecting the strictest version of means proportionality. *Id.* at 226–29.

Means proportionality, in the form of a requirement to impose the "least restrictive alternative," is also well established in statutes and cases governing juvenile court dispositions, *see, e.g.*, State *ex rel.* R.S. v. Trent, 289 S.E.2d 166 (W. Va. 1982), and regulating the use of involuntary civil commitment, *see, e.g.*, State v. Krol, 344 A.2d 289, 300–01 (N.J. 1975). *See generally*, Spece, *supra* note 121, at 1052–54. Elements of means proportionality analysis can also be found in several cases involving alleged excessive force by prison guards. *See, e.g.*, Hope v. Pelzer, 536 U.S. 730, 738 (2002) (reviewing allegations that long after any safety concerns had abated, prison guards subjected an inmate to unnecessary pain and discomfort, prolonged thirst, damaging exposure to sun, taunting, and humiliation). Means proportionality (the principle of "parsimony"), as well as limiting retributive proportionality, are formally recognized under the Minnesota sentencing guidelines. *See generally* Frase, *Limiting Retributivism*, *supra* note 104, at 98–104; Frase, *Sentencing Principles*, *supra* note 104, at 388–408.

III. EXAMPLES OF THE THREE PROPORTIONALITY PRINCIPLES IN AMERICAN CONSTITUTIONAL LAW

The proportionality principles outlined above—limiting retributive proportionality, utilitarian "ends" proportionality, and utilitarian "means" proportionality—are well-established components of many American constitutional law doctrines, both within and outside the criminal justice context. Several of these doctrines recognize two of these proportionality principles, which operate as independent limitations on intrusive state measures—a violation of either principle results in a finding of unconstitutionality. Sometimes courts have explicitly used the language of proportionality, usually without specifying which of the three principles identified in this Article is being applied.[125] In other cases, courts have clearly invoked a version of one or both of the utilitarian proportionality principles, without mentioning proportionality as such.[126]

But why should proportionality principles explicitly or implicitly recognized in very different fields of law be considered relevant when defining Eighth Amendment limits on prison sentences? Are not all legal doctrines context specific? When the context changes, should not the doctrines also change? These are legitimate and important objections, to which several answers may be given.

Some of the doctrines discussed below involve criminal and quasi-criminal penalties (capital punishment, fines and forfeitures, punitive damages) or procedural penalties (exclusionary rules) which raise proportionality issues that are at least analogous, if not directly comparable, to those posed by lengthy prison terms. Of course, each punishment context has unique features, but often the distinctions cut in both directions.[127] The Supreme Court sometimes emphasizes these contextual differences, but it also sometimes disregards them. For example, the Court has stated many times that death penalty law has limited application in nondeath cases;[128] yet the Court has cited prison duration principles in death penalty cases,[129] and it re-

125. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507, 520, 533 (1997); *see also infra* notes 229–31 and accompanying text.

126. *See, e.g.*, Sell v. United States, 539 U.S. 166, 181 (2003); *see also infra* notes 179–81 and accompanying text.

127. *See infra* notes 175–76 and accompanying text (discussing whether punitive damages merit stricter constitutional scrutiny than prison sentences).

128. *See, e.g.*, Rummel v. Estelle, 445 U.S. 263, 272 (1980).

129. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 312 (2002). The Court has

cently rejected "death-is-different" arguments in a decision declining to apply a new death penalty ruling retroactively.[130] Finally, the differences between these various contexts cannot easily explain the pattern of the Court's decisions—seeming to recognize meaningful proportionality constraints in all punishment contexts *other than* that of prison duration.[131]

A second broad group of proportionality doctrines examined below involves governmental measures that are not intended as punishment but which, like criminal sentences, do infringe on or deny important substantive or procedural rights (such as bail, forced medication, administrative due process, petty offense procedures, police powers under the Fourth Amendment, and First Amendment and Equal Protection strict scrutiny rules). A third group of proportionality doctrines has nothing to do with individual rights (such as limits on congressional power under Section 5 of the Fourteenth Amendment and Dormant Commerce Clause limits on state powers). As to both of these groups, it is again noteworthy that the Supreme Court seems quite willing to recognize and apply proportionality principles in contexts *other than* criminal punishment. Many of these principles are endorsed by Justices Scalia and Thomas, who oppose placing any Eighth Amendment proportionality limits on prison durations.

All of the proportionality doctrines discussed below, even those in the third group, provide useful perspectives on ways of defining proportionality limits for prison sentences. These doctrines demonstrate that proportionality principles can be and often have been applied to government measures seeking to achieve nonretributive goals. Moreover, all of these proportionality principles, both retributive and nonretributive, are deemed sufficiently fundamental to have been recognized as a matter of federal constitutional law. Finally, the number and diversity of these examples suggests that the core, underlying proportionality principles are valid and widely accepted. Of course, as was noted above, these principles have been, and

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also cited prison duration cases in forfeiture and punitive damages cases. *See infra* notes 141, 163 and accompanying text.

130. Schriro v. Summerlin, 124 S. Ct. 2519, 2529–31 (2004) (Breyer, J., dissenting).

131. *See generally* Rachel A. Van Cleave, *"Death is Different," Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages—Shifting Constitutional Paradigms for Assessing Proportionality*, 12 S. CAL. INTERDISC. L.J. 217 (2003).

should be, defined and applied differently in varying legal contexts.

A. EIGHTH AMENDMENT

1. Capital Punishment

The Court has stated that the death penalty:

> is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground.[132]

The second standard could reflect either limiting retributive or utilitarian ends (burden versus benefit) proportionality, but the Court's cases seem to focus almost entirely on the former.[133]

The first standard above is also ambiguous—it might only stand for the minimum constitutional requirement of a rational

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132. Coker v. Georgia, 433 U.S. 584, 592 (1977) (holding that the death penalty is grossly disproportionate to the crime of raping an adult woman); *see also Atkins*, 536 U.S. at 318–21 (recognizing retribution and deterrence of capital crimes as two recognized purposes served by the death penalty; neither justifies execution of mentally retarded offenders); Enmund v. Florida, 458 U.S. 782, 798–801 (1982) (stating that retribution and deterrence are not served by executing a felony murder accomplice who acted as the getaway driver and did not kill, intend to kill, or contemplate that lethal force would be used by his robbery accomplices); Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion) ("[T]he inquiry into 'excessiveness' has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime.") (citations omitted).

133. *See, e.g.*, *Atkins*, 536 U.S. at 319 (finding that a mentally retarded offender's lesser culpability does not merit the death penalty); Thompson v. Oklahoma, 487 U.S. 815, 822–23, 834–37 (1988) (finding that a fifteen-year-old offender's reduced culpability precluded the death penalty); *Enmund*, 458 U.S. at 800–01 (finding that the death penalty for felony murder accomplice was excessive in retributive terms, relative to the defendant's intent and role in the offense); Lockett v. Ohio, 438 U.S. 586, 608 (1978) (holding Ohio's statute unconstitutional because it did not permit jury directly to consider potential mitigating factors such as lack of intent to kill, minor role in the offense, or age); *Coker*, 433 U.S. at 598 ("[I]n terms of moral depravity and of the injury to the person and to the public, [rape of an adult woman] does not compare with murder."); Radin, *supra* note 14, at 1056 ("[A] punishment is excessive and unconstitutional . . . if it inflicts more pain than the individual deserves."); *see also* Thomas E. Baker & Fletcher N. Baldwin, Jr., *Eighth Amendment Challenges to the Length of a Criminal Sentence: Following the Supreme Court "From Precedent to Precedent,"* 27 ARIZ. L. REV. 25, 26 (1985); Gilchrist, *supra* note 99, at 1123–24.

basis for state action.[134] In the United States, this would not usually be thought of as a question of proportionality, although it is in Europe.[135] Alternatively, the second standard could implicitly incorporate a means proportionality concept. On this view, the death penalty is excessive relative to the next-most-severe alternative penalty, life without parole, if the former adds no measurable deterrent or other social benefits.[136] This interpretation finds support in the Court's decisions invalidating the death penalty for felony accomplices,[137] offenders under sixteen years of age at the time of the crime,[138] and the mentally retarded.[139] In each of these cases the Court doubted that the group of offenders at issue was deterrable at all, but the question might also be posed in terms of whether the threat of

134. Gilchrist, *supra* note 99, at 1147. Actions which fail the rational basis test might be seen as excessive, and therefore disproportionate, in the sense that they impose totally useless costs or burdens.

135. *See infra* notes 251–52 and accompanying text.

136. *See* Furman v. Georgia, 408 U.S. 238, 300–02 (1972) (Brennan, J., concurring) (arguing that capital punishment is unconstitutional because it is not a more effective deterrent than life imprisonment); *id.* at 331–32, 342–59 (Marshall, J., concurring) (arguing that life imprisonment adequately achieves all of the legitimate purposes supposedly served by the death penalty); Michael Herz, *Nearest to Legitimacy: Justice White and Strict Rational Basis Scrutiny*, 74 U. COLO. L. REV. 1329, 1352 (2003) ("[W]hat matters in determining whether capital punishment for a particular offense is 'needless' is the incremental deterrent effect of capital punishment as opposed to lengthy, or life-long, imprisonment."); Radin, *supra* note 14, at 1056 ("[A] punishment is excessive and unconstitutional if it inflicts suffering to which no net social gain is attributable."); *id.* at 1062 (arguing that the proper level of scrutiny for death sentences is "something approaching compelling state interest/least restrictive alternative analysis"); Gibbs, *supra* note 99, at 976 ("If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, then this would also contribute to a conclusion of disproportionality.") (citations omitted).

137. *Enmund*, 458 U.S. at 798–800; *see also Lockett*, 438 U.S. at 624–28 (White, J., concurring).

138. *Thompson*, 487 U.S. at 837–38.

139. *Atkins v. Virginia*, 536 U.S. 304, 319–20 (2002), held that the increased severity of executing mentally retarded offenders is unlikely to deter such offenders (who do not calculate) or nonretarded offenders (who would themselves still be eligible for death). In earlier cases several Justices opined that "we cannot 'invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology.'" Gregg v. Georgia, 428 U.S. 153, 182–83 (1976) (plurality opinion) (citing *Furman*, 408 U.S. at 451 (Powell, J., dissenting)). However, the later cases cited above (*Enmund*, *Thompson*, and *Atkins*) seem to implicitly adopt a "less-would-do-just-as-well" approach, at least for certain less deterrable offenders. Several Justices have taken this view of the death penalty generally. *See supra* note 136 (discussing the concurring opinions of Justices Brennan and Marshall in *Furman*).

a lesser penalty would likely provide whatever minimal deterrence these offenders would experience from the threat of receiving the death penalty.

2. Excessive Fines and Forfeitures

Several limitations on fine amounts are found in the Magna Carta (1215),[140] and excessive fines are expressly forbidden by the Eighth Amendment. Curiously, the Supreme Court had no occasion to interpret the Excessive Fines Clause until the 1990s, and then did so only in cases involving criminal and civil forfeitures.[141] In *United States v. Bajakajian*, the Court found that an *in personam* criminal forfeiture of $357,144 in cash, which the defendant had apparently acquired legally but failed to report before attempting to take it out of the country, violated the Excessive Fines Clause.[142] Justice Thomas's opinion for the Court stressed the technical nature of the defendant's crime and the minimal harm to the government. Thomas applied a standard of gross disproportionality to the gravity of the offense, citing *Solem v. Helm* (but not *Harmelin*), and said that offense gravity for these purposes should be measured by harm and culpability.[143] These criteria correspond to the two traditional elements of blameworthiness, suggesting a grounding in limiting retributive proportionality.[144]

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140. MAGNA CARTA, Ch. 20, 21, *reprinted in* 1 THE STATUTES AT LARGE: FROM MAGNA CHARTA TO THE 14TH YEAR OF K. EDWARD III (Danby Pickering ed., 1762) (stating that fines should be graded according to offense seriousness, and also should not deprive the offender of his livelihood).

141. In Alexander v. United States, 509 U.S. 544, 558–59 (1993), the Court recognized that *in personam* criminal forfeiture of the defendant's entire business might constitute an excessive fine before remanding for determination of that issue. In *Austin v. United States*, involving the *in rem* civil forfeiture of the defendant's mobile home and auto body shop after he pled guilty to distributing cocaine, the Court remanded for determination of an excessive fines issue after noting that "a civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment" and is thus subject to the Excessive Fines Clause. 509 U.S. 602, 609–10, 622–23 (1993) (quoting United States v. Halper, 490 U.S. 435, 448 (1989)).

142. 524 U.S. 321, 334–40 (1998).

143. *Id.* at 336–37.

144. Barry L. Johnson, *Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeitures After* United States v. Bajakajian, 2000 U. ILL. L. REV. 461, 492–98; Pamela S. Karlan, *"Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 901 (2004); Van Cleave, *supra* note 131, at 263–64.

However, since forfeitures serve deterrent as well as retributive purposes,[145] it is necessary to also apply a standard of utilitarian "excessiveness." One commentator has suggested that some forfeitures impose burdens out of proportion to the law enforcement benefits achieved (ends disproportionality), and are also excessive in their unnecessary severity and over-inclusiveness (means disproportionality).[146]

3. Excessive Bail

The Supreme Court has had little occasion to interpret the meaning of "excessiveness" under the Eighth Amendment Excessive Bail Clause. In *Stack v. Boyle*,[147] the Court stated that the purpose of bail is to assure the presence of the accused at trial and other hearings; "[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "'excessive' under the Eighth Amendment."[148] This language implies a form of means proportionality—if a lower bail amount would suffice, any higher bail is excessive.

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145. *Austin*, 509 U.S. at 618 (quoting Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 686 (1974)).

146. Susan R. Klein, *The Discriminatory Application of Substantive Due Process: A Tale of Two Vehicles*, 1997 U. ILL. L. REV. 453, 482.

147. 342 U.S. 1 (1951).

148. *Id.* at 5. *But see* United States v. Salerno, 481 U.S. 739, 754 (1987) (holding that the Eighth Amendment does not require setting of bail, nor does it limit permissible governmental interests to the prevention of flight). The Amendment merely requires that the "conditions of release or detention not be 'excessive' in light of the perceived evil." *Id.* The state's legitimate interests may include prevention of further crime and/or threats to witnesses, as well as prevention of flight.

Salerno also held that pretrial detention to prevent further crimes would violate substantive due process if it constituted "punishment," either as a matter of express legislative intent or because the detention appears excessive in relation to all nonpunitive ("regulatory") purposes which could rationally be served by such detention. *Id.* at 747. This language might suggest ends and/or means proportionality limits; preventive detention cannot be more onerous than the crimes it prevents, nor more onerous than necessary to prevent those crimes. However, the point of the due process standard may not be excessiveness itself, but rather the impermissible punitive purposes which can be inferred from such excess. Some scholars have suggested that a similar desire "to flush out illicit actual motivations" underlies the "narrowly-tailored" requirement of strict scrutiny analysis. *See, e.g.*, Herz, *supra* note 136, at 1348–49 (quoting JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 146 (1980)). In any case, the absence of express or implied punitive motives may mean that (limiting) retributive limits are inapplicable to bail and preventive detention decisions.

Some state statutes, codes, and case law, and pretrial detention rules in other countries, apply an offense-based criterion as one factor and/or as an absolute upper limit on the amount of bail (e.g., some multiple of the maximum fine for the most serious offense charged).[149] This approach appears to reflect limiting retributive and/or utilitarian ends proportionality—the expense and hardship of high bail are not justified by the defendant's alleged blameworthiness and/or the states' interest in the prosecution. A good test case under the offense-based approach would be a minor shoplifter or check forger with a high risk of flight—such an offender may flee unless bail is set very high (hence, no means proportionality problem), but the burdens of high bail or pretrial detention may outweigh the offender's deserved sentence and/or the value to society of obtaining a conviction.

4. Long Prison Sentences

To complete this review of Eighth Amendment proportionality principles it is useful to consider which kinds of proportionality are implicit in the Supreme Court's proposed standards for assessing claims of excessiveness in prison sentences, that is, the three factors spelled out in *Solem v. Helm*[150] and at least partially reaffirmed in *Harmelin* and *Ewing*. In assessing the gravity of the defendant's crime in relation to the sentence (the first factor), the Court in *Solem* appeared to focus on retributive elements, i.e., the harm caused by the offense, and the defendant's culpability (intent and motive).[151] But if, as the *Ewing* plurality opinion asserts, the defendant's prior convictions are also relevant to the "gravity" of his offense, and the state's goals of deterrence and incapacitation of recidivists are also relevant, then even the first *Solem* factor must include ends and/or means proportionality assessments.[152]

149. *See, e.g.*, MINN. STAT. § 629.471 (2000) (setting maximum bail in misdemeanor and gross misdemeanor cases at double the highest fine authorized for that offense; for selected offenses, the maxima are four times or six times the highest fine); *Ex parte* Thomas, 815 So. 2d 592, 595 (Ala. Crim. App. 2001) (per curiam) (applying a "rough-rule-of-thumb" whereby bail equals $1000 times the maximum sentence (in years) the accused could face for the charged crimes). For a discussion of German proportionality limits on custodial arrest and pretrial detention, see *infra* notes 250–53 and accompanying text.

150. 463 U.S. 277 (1983). For a description of these factors, see *supra* notes 34–36 and accompanying text.

151. 463 U.S. at 292.

152. *See* Ewing v. California, 538 U.S. 11, 28–31 (2003).

As for the second *Solem* factor, comparing sentences for other crimes in the same state, both retributive and utilitarian ends proportionality may be relevant. If much more serious crimes often receive the same or lower penalties, this implies that the defendant has received punishment in excess of his deserts, and/or sentence burdens unjustified by the social harms prevented.[153] Under the third *Solem* factor, comparing sentences imposed for the same crime in other states, all three forms of proportionality may be relevant. If similar offenders in other states receive much less severe penalties, this implies retributive disproportionality (sentences in the home state exceed desert), and/or ends disproportionality (sentence burdens are not justified by social harms), and/or means disproportionality (lower penalties would likely be adequate in the home state).

The Supreme Court's *Solem* factors are not the only standards courts have used to provide objective factors to structure proportionality review of lengthy prison sentences. For example, the Illinois courts have developed a different three-pronged approach under the proportionate penalties clause of the state constitution. Article I, Section 11 of the Illinois Constitution declares that "[a]ll penalties shall be determined . . . according to the seriousness of the offense."[154] The Illinois Supreme Court has held that a penalty violates this provision if any of the following tests is met:

> (1) if the penalty "is a cruel or degrading punishment not known to the common law, or is a degrading punishment which had become obsolete in the State prior to the adoption of its constitution, or is so wholly disproportioned to the offense committed as to shock the moral sense of the community";[155]
>
> (2) if offenses with similar legislative purposes are compared and "conduct that creates a less serious threat to the public health and safety is punished more harshly";[156]

153. Means disproportionality would not be implied, since the minimum degree of adequate punishment to achieve utilitarian crime-control purposes is not necessarily correlated with crime seriousness.

154. ILL. CONST. art. I., § 11.

155. People v. Miller, 781 N.E.2d 300, 307–09 (Ill. 2002) (citation omitted) (invalidating a life-without-parole sentence given to a fifteen-year-old who became a murder accomplice just before the shooting, noting that "this case presents the least culpable offender imaginable").

156. People v. Davis, 687 N.E.2d 24, 28–29 (Ill. 1997) (citation omitted) (invalidating a penalty for failure to have a firearm owner's card that was greater than penalty for unlawfully using such a firearm).

> (3) if the offense has a higher penalty than another offense with identical substantive elements.[157]

None of these tests bears a close resemblance to any of the *Solem* factors as currently interpreted by the U.S. Supreme Court. As explained below, the first and second tests are narrower than the first and second *Solem* factors, and none of the Illinois tests involve comparisons to penalties in other jurisdictions (the third *Solem* factor). However, each of the Illinois tests appears to incorporate one or more of the three proportionality principles identified in this Article. The final clause of the first Illinois test appears to be based on a limiting retributive theory—crime-control goals and the offender's prior record are not mentioned, only the offender's current offense. The ultimate standard, "so wholly disproportionate . . . as to shock the moral sense of the community," suggests a criterion based on blameworthiness and the Illinois Supreme Court has emphasized offender culpability when interpreting this standard.[158]

The second Illinois test involves a more limited form of intrajurisdictional comparison than the second *Solem* factor—only offenses reflecting similar legislative purposes are compared, and the relative severity of crimes is tied explicitly to social harms. The focus on harm suggests a theory of utilitarian ends proportionality (which, unlike retributive proportionality, does not give substantial weight to offender culpability[159]). The third Illinois test (invalidating different penalties for identical crimes) may be based more on notions of due process (lack of rational basis and/or concerns about abuse of prosecutorial discretion) than on proportionality, but this test could incorporate all three proportionality principles identified in this Article. If identical crimes receive different penalties there is a substantial risk that offenders who receive the more severe penalty have been punished in excess of their deserts, that the benefits achieved by the more severe penalty are not worth the greater burdens on defendants, and/or that the greater penalty is not needed to achieve all relevant sentencing purposes.

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157. People v. Lewis, 677 N.E.2d 830, 831–33 (Ill. 1996) (citation omitted) (invalidating penalty for armed violence that was greater than penalty for identical offense of armed robbery).

158. *Miller*, 781 N.E.2d at 307. The other two clauses of the first test appear to prohibit severe punishments based on "original meaning" and desuetude.

159. *See supra* Part II.

B. PROPORTIONALITY RULES UNDER THE DUE PROCESS CLAUSES

1. Punitive Damages

In a series of cases beginning in the late 1980s, the Supreme Court imposed proportionality limits on punitive damages awards under the Due Process Clauses of the Fifth and Fourteenth Amendments. These limitations appear to reflect both limiting retributive and utilitarian means proportionality principles.

The Court first held that punitive damages awards are subject to due process limits in *Pacific Mutual Life Insurance Co. v. Haslip*.[160] The Court noted that punitive damages are "quasi-criminal"; that they are imposed for purposes of retribution and deterrence; and that they must be "reasonable in their amount and rational in light of [the above purposes]."[161] The Court also suggested that such awards must not be "grossly out of proportion to the severity of the offense and [must] have some understandable relationship to compensatory damages."[162] The award in that case was upheld although it was more than four times the compensatory damages awarded, and more than 200 times the plaintiff's out-of-pocket expenses.[163]

In *BMW of North America, Inc. v. Gore*,[164] the Court, citing *Solem v. Helm* (but not *Harmelin*), held that due process prohibits punitive damages awards that are "grossly excessive" in relation to the goals of punishment and deterrence.[165] The Court pointed to three factors which together supported the conclusion that the $2 million award against BMW arising out of a violation of the state's consumer protection law was grossly excessive: "[(1)] the degree of reprehensibility of [BMW's] nondisclosure; [(2)] the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award [500 times the compensatory damages award]; and [(3)] the difference between this remedy and the civil penalties authorized

160. 499 U.S. 1 (1991). The Court had previously held that punitive damages are not covered by the Excessive Fines Clause. Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 275 (1989).

161. *Haslip*, 499 U.S. at 19, 21.

162. *Id.* at 22.

163. *Id.* at 23.

164. 517 U.S. 559 (1996).

165. *Id.* at 574–76.

or imposed in comparable cases."[166] The Court's reference to the defendant corporation's "reprehensibility" (which it added, is "perhaps the most important" factor)[167] and its later discussion of the defendant's "blameworthiness,"[168] suggest that the Court was primarily imposing retributive upper limits on punitive damages awards. But here, as in the case of prison durations and forfeitures, the Court's recognition of deterrence as a valid purpose underlying such awards[169] requires a nonretributive concept of "excessiveness." At one point in its opinion, the Court suggested a utilitarian means proportionality limitation:

> The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal. The fact that a multimillion dollar penalty prompted a change in policy sheds no light on the question whether a lesser deterrent would have adequately protected the interests of Alabama consumers.[170]

Later cases have further elaborated the due process proportionality limits on punitive damages awards. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,[171] the Court showed little concern for judicial restraint or federalism, holding that punitive damages awards should be reviewed de novo, under the substantive standards announced in *Gore*. In *State Farm Mutual Automobile Insurance Co. v. Campbell*,[172] the Court's relatively nondeferential review standards were justified on the grounds that, although punitive damages awards have the same goals as criminal punishments, they lack criminal due process safeguards, thus raising "an acute danger of arbitrary deprivation of property."[173] Strangely, the Court does not seem to be nearly as concerned with the danger of arbitrary and extreme deprivations of *physical liberty*, in the context of very long prison sentences.[174] Nor has the Court required a

166. *Id.* at 574–75.

167. *Id.* at 575.

168. *See id; see also* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 422–24 (2003) (discussing "reprehensibility analysis").

169. *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 416; Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 432 (2001); *Gore*, 517 U.S. at 568; Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 19 (1991).

170. *Gore*, 517 U.S. at 584.

171. 532 U.S. 424 (2001).

172. 538 U.S. 408 (2003).

173. *Id.* at 417 (citation omitted).

174. The factors suggesting equally acute dangers of excessive criminal sentences are discussed below. *See infra* notes 320–22 and accompanying text.

"threshold" showing of gross disproportionality before subjecting punitive damages awards to comparative analysis (damages awards and civil penalties for the same conduct). Finally, in assessing punitive damages awards, the Court has added a limitation on the relevance of the defendant's "prior record": only violations of a similar nature may be considered.[175] Thus, in at least three respects—de novo review, more frequent use of comparative analysis, and more lenient treatment of recidivists—the Court seems to be much more protective of civil defendants' bank accounts than it has been of criminal defendants' liberty.

Of course, there are differences between the punitive damages and sentencing contexts, but the differences cut in both directions.[176] Punitive damages awards arguably justify stricter constitutional scrutiny than prison sentences for several reasons: damages awards can only be reviewed by the Supreme Court (not lower federal courts); they are imposed by untrained and unconstrained local juries, not judges and legislators; and they can be objectively compared to the size of the accompanying compensatory damages award.[177] On the other hand, damages only involve money, not physical liberty. The complaining party is usually a large company much better able to defend itself than most criminal defendants and trial judges can set aside excessive damages claims, whereas criminal defendants often have no subconstitutional law remedies against excessive prison terms.[178]

2. Limits on Forced Medication

In a series of cases the Court has held that inmates and persons awaiting trial have a due process liberty interest in avoiding forced medication with antipsychotic drugs. In *Sell v. United States*, the Court held that:

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175. *State Farm Mut. Auto. Ins. Co.*, 538 U.S. at 422–24. Furthermore, the Court suggested that "as a general rule . . . a State [does not] have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction." *Id.* at 421.

176. *See* Karlan, *supra* note 144, at 903–14; Van Cleave, *supra* note 131, at 253–58. *See generally* Adam M. Gershowitz, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249 (2000).

177. *See* Karlan, *supra* note 144, at 906–14.

178. *See* Gershowitz, *supra* note 176, at 1253–55.

> the Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests [which exists where the offender is charged with a "serious crime" against person or property].[179]

The reviewing court then "must find that any alternative, less intrusive treatments are unlikely to achieve substantially the same results."[180] The court must also consider less intrusive means for administering the drugs, e.g., ordering the defendant to take the drugs before forcibly administering them, and it must assure that administration of the drugs is in the patient's best medical interest in light of his medical condition, the potential side effects, and the likely effectiveness of the drugs in his case.[181]

These standards embody independent ends and means proportionality principles. Forced medication violates ends proportionality principles if the loss of liberty and attendant medical risks outweigh the importance of the charges and the probable effectiveness of the drugs in restoring competence and assuring a fair trial. Forced medication violates means proportionality if there are less intrusive means of restoring competency or of administering the drugs.

3. Administrative Due Process

The Supreme Court's requirements for procedural due process in administrative agency proceedings incorporate a form of ends proportionality. In *Mathews v. Eldridge*, the Court declined to grant evidentiary hearings on demand in all cases prior to termination of disability benefits.[182] Three factors were deemed relevant in deciding the requirements of administrative due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Govern-

179. 539 U.S. 166, 179–80 (2003); *see also* Riggins v. Nevada, 504 U.S. 127 (1992) (pretrial detainee); Washington v. Harper, 494 U.S. 210 (1990) (prison inmate).

180. *Sell*, 539 U.S. at 181.

181. *Id.*

182. 424 U.S. 319 (1976).

> ment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[183]

In *Mathews*, the Court concluded that the burdens of the requested procedural safeguard would outweigh the benefits such a safeguard would provide.[184] This is essentially a version of ends proportionality, comparing the marginal benefits gained by added procedural safeguards with the added cost and administrative burdens of those safeguards. Note, however, that a finding of disproportionality in this context works in favor of the government, not the citizen.

4. Petty Offense Limits on Criminal Procedure Guarantees

In several cases, the Supreme Court has held that lower standards of due process apply to minor crimes. *Baldwin v. New York* held that the Sixth Amendment jury trial right does not apply to crimes punishable with incarceration of six months or less.[185] A different but analogous rule limits the scope of the automatic Sixth and Fourteenth Amendment right to appointed counsel, recognized in *Gideon v. Wainwright*.[186] The Court has held that in misdemeanor cases the *Gideon* right to appointed counsel applies only if the actual sentence imposed includes some period of incarceration,[187] or at least a suspended custody term.[188] Similar rules are found in state statutes and rules of criminal procedure, granting offenders charged with minor violations fewer rights of appointed counsel, defense discovery, jury trial, and jury size—what might be called "making the procedure fit the crime."[189] The implicit rationale of these rules is similar to that explicitly adopted by the Court in *Mathews*—that in minor cases the benefits of additional procedural safeguards (reduced risk of erroneous or unfair outcomes, multiplied by the severity of those outcomes) are outweighed by the

183. *Id.* at 335. *But see* Medina v. California, 505 U.S. 437, 443 (1992) (declining to apply *Mathews* to procedural requirements in state criminal prosecutions).

184. *Mathews*, 424 U.S. at 347.

185. 399 U.S. 66 (1968).

186. 372 U.S. 335 (1963).

187. Scott v. Illinois, 440 U.S. 367 (1979).

188. Alabama v. Shelton, 535 U.S. 654 (2002).

189. *See, e.g.*, MINN. CONST. art. I, § 6 (jury size); MINN. R. CRIM. P. 5.02 (appointed counsel); MINN. R. CRIM. P. 9 (pretrial discovery); MINN. R. CRIM. P. 26.01, subd. 1 (jury trial right).

costs and administrative burdens of such safeguards.[190] Again, this is a form of ends proportionality, and a finding of disproportionality favors the government, not the citizen.

C. CONSTITUTIONAL EXCLUSIONARY RULES

The Court has often used implicit proportionality arguments to justify limitations on the scope of exclusionary remedies for violations of constitutionally protected rights. For example, a cost-benefit rule premised on ends proportionality has been used to admit evidence obtained in reasonable reliance on an invalid search warrant,[191] to limit the number of persons granted "standing" to contest police illegalities,[192] and to permit impeachment use of evidence obtained in violation of the Fourth Amendment or the *Miranda* rule.[193] The Court often concludes that the added deterrence of police illegality that would be obtained by applying or extending the exclusionary rule in the manner sought by the defendant is outweighed by the cost of excluding reliable evidence.[194]

A different ends proportionality argument underlies another limitation on exclusionary remedies, the "attenuation" doctrine. In *Brown v. Illinois*, the Court recognized four factors as relevant to whether the causal link between an illegal arrest

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190. *See Scott*, 440 U.S. at 373 (reasoning that further extension of the *Gideon/Argersinger* right to appointed counsel would "impose unpredictable, but necessarily substantial, costs on 50 quite diverse States").

191. *See* United States v. Leon, 468 U.S. 897, 907 (1984) (determining admissibility by "weighing the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence").

192. Rakas v. Illinois, 439 U.S. 128, 137–38 (1978).

193. *See, e.g.*, Harris v. New York, 401 U.S. 222, 225 (1971).

194. *See, e.g.*, Calandra v. United States, 414 U.S. 338, 351–52 (1974) (stating that costs of extending exclusionary rule to grand jury proceedings are not justified by limited probable increase in deterrence of police misconduct).

Recently, several Justices have suggested that some constitutional criminal procedure rights or exclusionary remedies may also be subject to a "no-more-than-necessary" test reflecting means proportionality principles. In his plurality opinion (joined by Chief Justice Rehnquist and Justice Scalia) in *United States v. Patane*, 124 S. Ct. 2620 (2004), Justice Thomas repeatedly stressed the need to maintain "the closest possible fit between the Self-Incrimination Clause and any rule designed to protect it." *Id.* at 2628; *see also id.* at 2627 ("[A]ny further extension of these [Miranda] rules must be justified by its necessity."); *id.* at 2628 (stating the "close fit" requirement); *id.* at 2629–30 (requiring the "closest possible fit"). A similar necessity test, applicable to the scope of the Fifth Amendment privilege itself, was suggested in another recent case, *Chavez v. Martinez*, 538 U.S. 760, 778–79 (2003) (Souter, J., concurring).

and a subsequent confession would be deemed sufficiently attenuated to allow the confession to be admitted in the prosecution's case: whether *Miranda* warnings were given; the temporal proximity between the illegality and the confession; the presence or absence of intervening circumstances; "and *particularly*, the purpose and flagrancy" of the illegal arrest.[195] Thus, it appears that the gravity of the police "offense" against the constitution is the most important factor in determining the scope of the exclusionary rule—more egregious illegalities justify exclusion of more remote evidentiary fruits.[196] The implicit reasoning is similar to one of Bentham's arguments in favor of punishments proportional to crime seriousness: "The greater an offence is, the greater reason there is to hazard a severe punishment for the chance of preventing it."[197]

As was true in the contexts of administrative due process and adjudication procedures for petty crimes, discussed above, a finding of disproportionality in assessing the scope of exclusionary remedies favors the government, not the citizen.

D. POLICE POWERS UNDER THE FOURTH AMENDMENT

Utilitarian ends and means proportionality principles are implicit in many of the Court's decisions defining the scope of police search and seizure powers, and have sometimes been explicitly recognized.

1. Limits on Police Powers in Less Serious Cases

In *Welsh v. Wisconsin*, the Court used ends proportionality principles to hold that the police could not make a warrantless, exigent circumstances entry of a person's house to effect an arrest for a nonjailable drunk driving offense.[198] The officers had probable cause to arrest, and also had a very plausible claim that delaying the arrest until a warrant was obtained would have resulted in the loss of crucial evidence of intoxication. The Court noted that many lower courts have viewed the serious-

195. Brown v. Illinois, 422 U.S. 590, 603–04 (1975) (emphasis added).

196. *See also* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 290.2(4) (1975) (proposing that, unless constitutionally required, a motion to suppress evidence "shall be granted only if the court finds that tbe violation upon which it was based was substantial," considering the degree and willfulness of the violation, the extent of the privacy invasion, and the extent to which exclusion would serve to prevent violations).

197. BENTHAM, *supra* note 110, at 326.

198. 466 U.S. 740 (1984).

ness of the offense as an important factor in assessing the reasonableness of a warrantless entry.[199] The Court also cited Justice Jackson's view that warrantless entry to arrest for a minor offense would display "a shocking lack of all sense of proportion."[200] Although drunk driving poses major risks to persons and property, the Court considered the Wisconsin legislature's decision, classifying first-time violations as nonjailable, civil offenses, to be the best indication of the extent of the State's interest in making an arrest and enforcing this law.[201]

In *Tennessee v. Garner*, the Supreme Court relied on both ends and means proportionality principles to limit police use of deadly force to arrest a fleeing suspect.[202] The Court held that such force may not be used unless the suspect is reasonably believed to pose a significant threat of death or serious physical injury to the officer or others, or has committed a crime involving the infliction or threatened infliction of serious physical harm.[203] *Garner* reflects ends proportionality. The Court expressly assumed it is better that a nonviolent suspect flee than that he be killed.[204] The decision in *Garner* may also be based in part on means proportionality. Noting that a majority of American police departments forbid their officers to use deadly force against nonviolent suspects, the Court concluded "there is a substantial basis for doubting that the use of such force is an essential attribute of the arrest power in all felony cases."[205] In other words, nondeadly force appears adequate to enforce the law against nonviolent suspects.

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199. *Id.* at 751–52 (citing Dorman v. United States, 435 F.2d 385, 392 (1970)).

200. *Id.* at 750–51 (citing McDonald v. United States, 335 U.S. 451, 459 (1948) (Jackson, J., concurring)).

201. *Id.* at 754; *cf.* Illinois v. McArthur, 531 U.S. 326, 335–36 (2001) (distinguishing *Welsh* and rejecting a proportionality argument). The offense in *McArthur* was punishable with up to thirty days in jail, and the police intrusion (barring the suspect from entering his home unsupervised for two hours until a search warrant was obtained) was less serious than the warrantless home entry in *Welsh*. *Id.*

202. 471 U.S. 1, 11–12 (1985).

203. *Id.* at 3, 11–12. The Court thus implicitly adopted the standard for use of deadly force found in MODEL PENAL CODE § 3.07(2)(b)(iv) (and the lower court explicitly did so, 471 U.S. at 6 n.7). The linkage of Fourth Amendment reasonableness standards with the Model Penal Code justification rules shows that constitutional and nonconstitutional proportionality principles draw from similar underlying values.

204. *Garner*, 471 U.S. at 11.

205. *Id.*

Ends and means proportionality principles have also been used to assess claims of excessive nondeadly force in making arrests, investigatory stops, and other seizures of the person. In *Graham v. Connor*, the Supreme Court held that three factors should be considered in such cases: "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[206] The first and second factors reflect ends proportionality; as in *Garner*, the Court is saying that the force police use to effect a seizure may be excessive relative to the benefits of such force, as measured by the seriousness of the suspected crime or the suspect's dangerousness. The third *Graham* factor may reflect means proportionality—in the absence of resistance or flight, police force may exceed what is necessary to effect the seizure.

Dicta in *United States v. Hensley* suggest that completed crimes less serious than a felony would not permit the use of *Terry* stop-and-frisk powers,[207] and some lower courts have adopted this ends-proportionality-based rule.[208] Moreover, in a variety of other contexts lower courts have considered the seriousness of the offense to be an important factor in determining issues of Fourth Amendment reasonableness, particularly with regard to the use of intrusive police powers.[209] A similar ends

206. 490 U.S. 386, 396 (1989).

207. 469 U.S. 221, 229 (1985).

208. *See, e.g.*, Blaisdell v. Comm'r of Pub. Safety, 375 N.W.2d 880, 883–84 (Minn. Ct. App. 1985), *aff'd on other grounds*, 381 N.W.2d 849 (Minn. 1986) (finding that *Hensley* was inapplicable to a misdemeanor committed two months earlier); *cf.* State v. Stich, 399 N.W.2d 198, 199 (Minn. Ct. App. 1987) (upholding stop to investigate misdemeanor committed "moments" before).

209. For example, many courts have invalidated suspicionless strip searches of jail inmates charged with traffic or other minor crimes. *See, e.g.*, Chapman v. Nichols, 989 F.2d 393 (10th Cir. 1993); Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983); Wilson v. Shelby County, 95 F. Supp. 2d 1258, 1262–63 (N.D. Ala. 2000), *rev'd sub nom.* Wilson v. Jones, 251 F.3d 1340 (11th Cir. 2000) (noting that eight federal circuits have condemned blanket strip search policies applied to minor-offense detainees). Similarly, long before the Supreme Court's decision in *Welsh v. Wisconsin*, 466 U.S. 740 (1984), most lower courts had considered the seriousness of the offense an important factor in assessing whether exigent circumstances permit warrantless entry of a home. *See* Dorman v. United States, 435 F.2d 385, 392 (1970). Offense severity has also been cited in numerous other Fourth Amendment cases. *See* Wayne A. Logan, *Street Legal: The Court Affords Police Constitutional Carte Blanche*, 77 IND. L.J. 419, 461 (2002); William A. Schroeder, *Factoring the Seriousness of the Offense into Fourth Amendment Equations—Warrantless Entries Into Premises: The Legacy of* Welsh v. Wisconsin, 38 U. KAN. L. REV. 439, 444 n.26 (1990). The pros and cons of basing rules on this

proportionality principle underlies the common law rule, still recognized in some form by most states[210] forbidding warrantless arrest for misdemeanors not committed within the arresting officer's presence.

2. Fourth Amendment "Reasonableness Balancing"

The cases cited above can also be viewed as applications of the Court's balancing approach under the Reasonableness Clause of the Fourth Amendment—the strength of the government interests supporting the search or seizure are weighed against the nature and degree of the intrusion on the citizen's privacy, liberty, and/or property rights. The Court has often used this approach to uphold warrantless—and usually also suspicionless—searches of regulated industries; automobile and jail inventories; immigration and drunk driving roadblocks; drug testing and other searches of high school students, public employees, and convicts; and various other intrusions.[211] On the "government interest" side of the balance, the Court examines a wide range of factors, including the seriousness and immediacy of the harm sought to be prevented, the degree of individualized or target-group suspicion, the presence of a warrant, warrant-substitute, or other limits on police discretion, the feasibility of applying individualized suspicion and warrant requirements in this context, the importance of the evidence or other expected fruits of the intrusion, the availability of other means to achieve the government's interest, and the effectiveness of the means chosen.[212] These factors reflect both ends and means proportionality principles.

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factor are discussed in Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 VA. L. REV. 1957 (2004).

210. *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE § 10.02 (3d ed. 2002); William A. Schroeder, *Warrantless Misdemeanor Arrests and the Fourth Amendment*, 58 MO. L. REV. 771, 777 (1993); *see also* Thomas Y. Davies, *The Fictional Characeter of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239, 322–26 (2002) (discussing other common law distinctions between felony and misdemeanor arrest powers). The Court has never decided whether any aspect of the in-presence rule is enforceable under the Fourth Amendment. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 340 n.11 (2001).

211. The Court's balancing approach is extensively discussed in Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in* Atwater v. City of Lago Vista, 71 FORDHAM L. REV. 329, 348–89 (2002). For a more recent case using balancing, see *Illinois v. Lidster*, 540 U.S. 419 (2004).

212. *See generally* DRESSLER, *supra* note 210, §§ 18.01 to 19.05.

Although Fourth Amendment proportionality principles have been articulated by a number of scholars,[213] the Court has never explicitly sought to justify its reasonableness balancing approach or decisions on proportionality grounds. However, at least one Justice has cited proportionality principles in dissent. Ironically, that Justice was Sandra Day O'Connor—the author of the *Ewing* plurality opinion that adopted the narrow proportionality principle from Justice Kennedy's *Harmelin* concurrence. In *Atwater v. City of Lago Vista*, the Court refused to engage in case-specific balancing, and upheld the custodial arrest of a woman for violation of a seat belt law punishable only by a $50 fine.[214] In her forceful dissent, Justice O'Connor argued that Atwater's arrest was disproportionate not only in relation to the nature and seriousness of her offense[215] (ends proportionality), but also relative to any legitimate case-specific need to take her into custody[216] (means proportionality). Atwater was a long-time resident of the town, her identity was well known to the arresting officer, and there was no reason to fear imminent danger or continued violations if she were released on citation, which is the normal procedure in such cases.[217] Justice O'Connor thus clearly approved of both ends and means proportionality principles.

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213. *See* Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1724–25 (1998); Frase, *supra* note 211, at 389–94; Christopher Slobogin, *Let's Not Bury* Terry*: A Call for Rejuvenation of the Proportionality Principle*, 72 ST. JOHN'S L. REV. 1053 (1998); Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1, 51–55 (1991). Other Fourth Amendment articles which implicitly apply proportionality principles include: Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 785 (1994); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 436–37 (1974); Timothy P. O'Neill, *Beyond Privacy, Beyond Probable Cause, Beyond the Fourth Amendment: New Strategies for Fighting Pretext Arrests*, 69 COLO. L. REV. 693, 719–24 (1998); Schroeder, *supra* note 209, at 530; and William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 869–76 (2000).

214. Atwater v. City of Lago Vista, 532 U.S. 318 (2001). *See generally* Frase, *supra* note 211, at 342–74, 407–15 (critiquing the Court's ruling in *Atwater* and proposing workable limits which state courts and rule drafters should impose on arrests in minor traffic cases).

215. *Atwater*, 532 U.S. at 364.

216. *Id.* at 372.

217. *Id.* at 370–71.

E. OTHER CONSTITUTIONAL DOCTRINES

In a variety of other contexts, the Court has adopted one or both utilitarian proportionality principles. Some Justices have explicitly used the language of proportionality, occasionally recognizing both ends and means proportionality concepts.[218]

1. First Amendment Cases

Both forms of utilitarian proportionality analysis are reflected in the requirements that content-based restrictions on political speech in a public forum must be necessary to serve a compelling state interest, and must also be narrowly drawn.[219] Restrictions will be struck down if their burdens on free speech rights are not supported by sufficiently weighty state interests (ends proportionality), or if the restrictions are broader than necessary to achieve their valid purposes (means proportionality). These ends and means proportionality requirements operate independently; a violation of either one will invalidate the speech restriction.[220] Similar independent requirements of compelling state interest and narrow tailoring apply to laws burdening religious practice that are not neutral or not of general application.[221] Analogous but looser ends and means proportionality limits apply to regulation of commercial speech.[222]

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218. In addition to the examples cited here, the Court has invoked something akin to the ends proportionality principle when evaluating government "takings" of private property. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 388–91 (1994) (requiring "rough proportionality" between the onerousness of required building permit conditions and the adverse impact of the project on public interests, that is, the interests which justify imposing the permit conditions).

219. *See, e.g.*, Boos v. Barry, 485 U.S. 312, 321–22 (1988); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

220. *See, e.g.*, Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 118–23 (1991) (holding that although the state had a compelling interest in ensuring that crime victims are compensated, the challenged law was not sufficiently narrowly tailored to achieve that goal); Cohen v. California, 403 U.S. 15, 22–23 (1971) (holding, without reaching requirements for narrowly-tailored regulation, that a conviction for disturbing the peace, based on the defendant's wearing of jacket with the words "fuck the draft," violated the First Amendment; the state cannot ban such language from public discourse either on the theory that its use is "inherently likely to cause violent reaction" or on the ground that states are "guardians of public morality").

221. *See, e.g.*, Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546–47 (1993).

222. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564–66 (1980). The Court found that to regulate commercial speech

In certain First Amendment contexts some Justices have endorsed a lower (but still "heightened") level of scrutiny which appears to explicitly incorporate both ends and means proportionality principles. In his concurring opinion in *United States v. American Library Association*, Justice Breyer used this approach to uphold the Children's Internet Protection Act, a federal statute conditioning the grant of subsidies to public libraries on the installation of technology to help prevent library computer users from gaining Internet access to pornography and other material comparably harmful to minors.[223] Justice Breyer believed that neither "rational basis" nor "strict scrutiny" analysis was appropriate. Instead, he argued, the Act should be evaluated:

> as the Court has examined speech-related restrictions in other contexts where circumstances call for heightened, but not "strict," scrutiny—where, for example, complex, competing constitutional interests are potentially at issue or speech-related harm is potentially justified by unusually strong governmental interests. . . .
>
> In such cases the Court has asked whether the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives. It has considered the legitimacy of the statute's objective, the extent to which the statute will tend to achieve that objective, whether there are other, less restrictive ways of achieving that objective, and ultimately wbether the statute works speech-related harm that, in relation to that objective, is out of proportion.[224]

Justice Breyer's examination of the government's objectives and the extent to which the statute achieves them involves questions of ends proportionality; his consideration of less restrictive ways to achieve those objectives represents a means proportionality analysis.

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which is neither misleading nor related to unlawful activity, the state must assert a "substantial interest" to be achieved by the restrictions, and:

> the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal . . . [as] measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Id.

223. United States v. Am. Library Ass'n, 539 U.S. 194, 215 (2003) (Breyer, J., concurring).

224. *Id.* at 217–18.

2. Equal Protection

The strict scrutiny given to certain classifications under the Equal Protection Clause incorporates elements of both ends and means proportionality. Such classifications (e.g., based on race, or impinging on the exercise of fundamental rights) must be justified by a "compelling governmental interest" (lesser "ends" can never justify such a classification), and the government's chosen means to effectuate its purposes must be "narrowly tailored to the achievement of that goal."[225] So-called "intermediate scrutiny," such as that applicable to gender-based classifications,[226] may also incorporate elements of ends and means proportionality, albeit in very attenuated form. Such classifications are invalid unless they serve "important governmental objectives" and the means employed are "substantially related to the achievement of those objectives."[227] At both levels of scrutiny, the implicit ends and means proportionality requirements operate independently—a violation of either requirement will invalidate the challenged classification.[228]

3. Federal Legislation Enforcing Fourteenth Amendment Rights

Proportionality principles have been expressly cited by the Court in cases deciding whether Congress has overstepped its proper role when enacting laws under Section 5 of the Fourteenth Amendment. In *City of Boerne v. Flores*, for example, the Court held that "there must be congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[229] The Court's underlying concern is that courts, not Congress, should define the substantive scope of Fourteenth Amendment rights; legislative remedies which go far beyond existing rights may in effect broaden the rights themselves.[230] This concern suggests an overbreadth analysis

225. Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 274, 280, 283–84 (1986).

226. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).

227. Tuan Anh Nguyen v. INS, 533 U.S. 53, 60 (2001) (citations omitted).

228. *See, e.g.*, *Craig*, 429 U.S. at 199–200 (assuming that traffic safety is an important government interest, but holding that the higher drinking age Oklahoma imposed on males was not shown to be substantially related to achievement of that interest).

229. 521 U.S. 507, 520 (1997).

230. *Id.* at 519–20.

akin to means proportionality, and this interpretation finds support in later cases and commentary on *Boerne*.[231]

4. Dormant Commerce Clause Cases

In evaluating state regulations burdening interstate commerce, the Court has used an approach which "necessarily involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce."[232] This weighing or balancing approach could incorporate both forms of utilitarian proportionality analysis, but in practice seems to focus more on ends proportionality. For example, in cases invalidating state law limits on oversized semitrailers the Court has concluded that the substantial burden on interstate commerce imposed by these laws outweighed the safety dangers supposedly associated with these trucks.[233] It would also be possible to attack such regulations on means proportionality grounds, but the Court did not discuss whether more narrowly tailored truck-size regulations would have adequately met all of the State's asserted safety concerns.

231. *See* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001); United States v. Morrison, 529 U.S. 598, 626 (2000); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 (2000); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 645–48 (1999). One recent analysis of the *Boerne* line of cases discusses the ends and means proportionality rules found in European law (discussed *infra*) and suggests that *Boerne* reflects a means proportionality principle. *See* Elisabeth Zoller, *Congruence and Proportionality for Congressional Enforcement Powers: Cosmetic Change or Velvet Revolution?* 78 IND. L.J. 567, 580, 584–85 (2003). Other articles have reached similar conclusions, without specifically distinguishing between ends and means proportionality. *See* Marci A. Hamilton & David Schoenbrod, *The Reaffirmation of Proportionality Analysis Under Section 5 of the Fourteenth Amendment*, 21 CARDOZO L. REV. 469, 477–82 (1999) (arguing that the proportionality requirement of *Boerne* is grounded in traditional rules limiting remedies to what is necessary to ensure that the wronged party's rights are fully restored); Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 166 (1997) ("[T]he *Boerne* Court replaced something akin to 'rational basis scrutiny' with a narrow tailoring requirement typical of intermediate scrutiny.").

232. Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429, 441 (1978).

233. *Id.* at 447; Kassel v. Consol. Freightways Corp. of Del., 450 U.S. 662, 678 (1981). The Court appears to deem any dangers to be minor, given the number of exceptions to these laws—mostly in favor of in-state companies.

F. SUMMARY

The preceding discussion reveals examples of all three proportionality concepts, operating independently of each other and in widely differing areas of the Supreme Court's constitutional jurisprudence. The limiting retributive proportionality principle, which specifies that sanctions must not exceed the offender's just deserts as measured by harm and culpability, has been applied to capital punishment, fines and forfeitures, and punitive damages. Ends proportionality principles, which demand that the chosen or proposed means must not cost or intrude more than the benefits they achieve, have been applied to forced medication; administrative due process standards; adjudication procedures for petty crimes; exclusionary rules; police investigatory powers; and in First Amendment, Equal Protection, and Commerce Clause cases. Means proportionality principles, specifying that the chosen means must not be overbroad or unnecessary in light of available less intrusive measures, have been applied to capital punishment; bail; punitive damages; forced medication; police investigatory powers; and in First Amendment, Equal Protection, and Fourteenth Amendment Section 5 cases. At least two of these principles—limiting retributivism and ends proportionality—seem implicit in case law interpreting the proportionate penalties clause of the Illinois state constitution.[234]

The many examples of ends and means proportionality limits show that, contrary to the views expressed by Justice Scalia in *Ewing*, proportionality principles can be and often have been meaningfully applied to government measures supported by utilitarian goals. Justice Scalia himself has often expressly or implicitly supported the application of one or both of these utilitarian proportionality principles, particularly in cases limiting Fourth Amendment rights and exclusionary remedies.[235] Justice Thomas, who also rejected any proportionality review in *Ewing*, wrote the Court's opinion in *Bajakajian*, seeming to en-

234. *See supra* notes 153–57 and accompanying text.

235. *See, e.g.*, Illinois v. Lidster, 540 U.S. 419 (2004) (using reasonableness balancing to uphold police roadblock); Blanton v. City of N. Las Vegas, 489 U.S. 538 (1989) (holding no right to jury trial for petty offense); Boos v. Berry, 485 U.S. 312 (1988) (holding that statute regulating sidewalk protesters was not narrowly tailored to serve a compelling state interest); Murray v. United States, 487 U.S. 533, 537 (1987) (applying independent source exception to Exclusionary Rule, balancing deterrence of Fourth Amendment violations against loss of probative evidence).

dorse retributive and perhaps also utilitarian proportionality review of *in personam* criminal forfeitures.[236]

IV. EXAMPLES OF PROPORTIONALITY PRINCIPLES IN FOREIGN AND INTERNATIONAL LAW

Each of the three proportionality principles identified in this Article enjoys widespread support in foreign and international laws. Although U.S. constitutional requirements must be defined in terms of American legal, political, cultural, and historical traditions, the Supreme Court has occasionally found additional support for its decisions in the laws of other nations and under the terms of international human rights conventions.[237] The following is a brief sampling of foreign and international law proportionality requirements.

A. SENTENCING

Recent comparative sentencing scholarship reveals broad support for retributive and means proportionality principles. There is general agreement across Western nations not only on the definition of various crime-control punishment purposes and on the most important aggravating and mitigating culpability and harm factors, but also on the overarching importance of the principles of proportionality and parsimony.[238] Propor-

236. See *supra* notes 143–44 and accompanying text (noting that case factors cited by Justice Thomas correspond to traditional elements of retributive proportionality; also suggesting that utilitarian proportionality assessments are also implicitly endorsed, since the Court views forfeitures as serving deterrent as well as retributive purposes). Justice Thomas has also supported other decisions implicitly applying utilitarian proportionality principles. *See, e.g., Lidster*, 540 U.S. 419.

237. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 572–73 (2003) (noting that under English law since 1967, and under a 1981 decision of the European Court of Human Rights, private consensual homosexual conduct may not be criminally punished); Thompson v. Oklahoma, 487 U.S. 815, 830–31 (1988) (noting tbat offenders less than sixteen years old at the time of the offense cannot be executed in many foreign nations, both within and outside of the Anglo-American sphere, and under three international human rights treaties); *id.* at 830 n.31 (citing three earlier cases in which the Court recognized the relevance of international perspectives, when deciding what penalties should be deemed cruel and unusual).

238. Richard S. Frase, *Comparative Perspectives on Sentencing Policy and Research*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES 259, 277–79 (Michael Tonry & Richard S. Frase eds., 2001). Proportionality and parsimony principles seem to be given particularly great weight in Australia and Minnesota. *See* Arie Freiberg, *Three Strikes and You're Out—It's Not Cricket: Colonization and Resistance in Australian Sentencing*, *in* SENTENCING AND

tionality appears to be defined in terms more consistent with limiting than defining retributivism—there is much greater emphasis on avoiding disproportionately severe sentences than unduly lenient ones, and courts are granted considerable flexibility in mitigating penalties and choosing among sanction types of roughly equal severity. As was noted previously,[239] the principle of parsimony—a preference for the least severe sanction which will adequately serve all applicable crime control punishment purposes—is a form of means proportionality.

Some excellent examples of constitutional sentencing proportionality requirements can be found in high court decisions from other common law countries. For instance, the Canadian Supreme Court has held that the Canadian Charter of Rights and Freedoms requires government intrusions to minimize impairment of protected rights (a form of means proportionality), and also explicitly requires a form of ends proportionality, weighing the competing values (e.g., burdens on free speech rights versus the goal of combating racial hatred).[240] Applying these general proportionality requirements in *Smith v. The Queen,* the court held that a mandatory seven-year-minimum sentence for importing narcotics violated the Charter.[241] In reaching this conclusion, the court also appeared to apply limiting retributive as well as utilitarian ends and means proportionality standards.

Section 12 of the Charter bans "cruel and unusual treatment or punishment."[242] The court appeared to assume that

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SANCTIONS IN WESTERN COUNTRIES, *supra* at 29, 38–39; Frase, *Sentencing Principles*, *supra* note 104, at 364. Sentencing proportionality is also explicitly recognized in international criminal prosecutions. *See* Rome Statute of the International Criminal Court, July 17, 1998, art. 81(2)(a), at 54, U.N. Doc. A/CONF.183/9 (1998) (granting defense and prosecution rights to appeal the sentence on grounds that it is disproportionate to the crime); *see also id.*, art. 78(1), at 53 ("[The trial court shall] take into account such factors as the gravity of the crime and the individual circumstances of the convicted person."). National courts and the European Court of Human Rights have also barred extradition of offenders on the grounds that the punishment they would receive in the demanding state would be disproportionate. *See* NORA V. DEMLEITNER ET AL., SENTENCING LAW AND POLICY: CASES, STATUTES, AND GUIDELINES 506 (2004).

239. *See supra* note 115 and accompanying text.

240. Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening up the Conversation on "Proportionality," Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 604–16 (1999).

241. 40 D.L.R. (4th) 435 (1987).

242. CAN. CONST. (Constitutional Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 12.

section 12 imposes a retributive standard,[243] and held the mandatory minimum penalty invalid, reasoning that since that penalty applied regardless of the drug type or quantity and the offender's purposes or other characteristics, "it is inevitable that, in some cases, a verdict of guilt will lead to the imposition of a term of imprisonment which will be grossly disproportionate" to what the offender deserves.[244] However, that finding was only the first step in the proportionality analysis. Section 1 of the Charter provides that charter rights may be subject to such "reasonable limits . . . as can be demonstrably justified in a free and democratic society."[245] The *Smith* court found that deterring drug importation was a goal of sufficient importance to warrant overriding the retributive limits of section 12, essentially using an ends proportionality test.[246] But the court further held that the means chosen to pursue this goal were disproportionate. Section 1 requires that, to override charter rights, the means chosen should impair those rights as little as possible.[247] The court in *Smith* held that the mandatory minimum statute in question failed this minimum impairment requirement, stating "[w]e do not need to sentence the small offenders to seven years in prison in order to deter the serious offender."[248]

Other examples of the application of multiple, independent constitutional sentencing proportionality standards can be found in foreign cases involving dangerous offenders. High Courts in Canada, England, and South Africa have upheld lengthy indeterminate prison terms imposed on such offenders, provided that the conviction offense is very serious (retributive and/or ends proportionality), and provided further that there are provisions for periodic review of the offender's dangerousness, so that his detention continues no longer than is necessary to protect the public (means proportionality).[249]

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243. *Smith*, 40 D.L.R. (4th) at 477.

244. *Id.* at 481.

245. CAN. CONST. (Constitutional Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1.

246. *Smith*, 40 D.L.R. (4th) at 483. The Court also stated in dicta that "there must be a proportionality between the *effects* of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance' [to overcome the charter right or freedom]." *Id.* at 483.

247. *Id.* at 482–83.

248. *Id.* at 483.

249. *See* Smit & Ashworth, *supra* note 108, at 550–52. This means propor-

B. OTHER FOREIGN LAWS

Proportionality principles are well established in the domestic legal systems of several foreign countries.[250] Perhaps the most well-developed jurisprudence is found in Germany, where three distinct proportionality principles are recognized in administrative and constitutional law: (1) the principle of suitability (public authorities must use means appropriate to the ends they hope to achieve); (2) the principle of necessity (authorities must choose the least harmful, restrictive, or burdensome means available to achieve their ends); and (3) the principle of proportionality in the strict sense (the injury, costs, or burdens of the chosen means must be less than the benefits sought to be gained).[251] The second and third of these principles are clearly recognizable as means and ends proportionality. The first principle is perhaps comparable to the American "rational basis" test,[252] and some writers have argued that it is not really a form of proportionality at all.[253]

Proportionality principles are important not only in German administrative and constitutional law and in sentencing, as discussed above, but also in criminal procedure rules. For example, custodial arrest and pretrial detention are limited by an ends proportionality test; these measures are not permitted if they would be disproportionate to the severity of the offense and the expected penalty.[254] Ends proportionality principles are

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tionality requirement also provides a strong argument against any sentence of life without possibility of parole. *See infra* notes 300–01 and accompanying text.

250. *See, e.g.*, NICHOLAS EMILIOU, THE PRINCIPLE OF PROPORTIONALITY IN EUROPEAN LAW: A COMPARATIVE STUDY 1–3, 23–114 (1996); JÜRGEN SCHWARZE, EUROPEAN ADMINISTRATIVE LAW 680–702 (1992); Jackson, *supra* note 240, at 604–16; E. Thomas Sullivan, *Antitrust Remedies in the U.S. and EU: Advancing a Standard of Proportionality*, 48 ANTITRUST BULL. 377, 415–18 (2003); Zoller, *supra* note 231, at 568–69.

251. EMILIOU, *supra* note 250, at 23–66, 268; SCHWARZE, *supra* note 250, at 685–92; Sullivan, *supra* note 250, at 415–17; Zoller, *supra* note 231, at 581–83.

252. Sullivan, *supra* note 250, at 417.

253. EMILIOU, *supra* note 250, at 25–26. However, actions which fail this test can be seen as excessive, and therefore disproportionate, in the sense that they impose totally useless costs or burdens.

254. Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?* 18 B.C. INT'L & COMP. L. REV. 317, 326–28 (1995). A means proportionality test is also implicit in German arrest and detention law—custody is not permitted unless it is necessary to identify the suspect, prevent flight, or prevent further crime. *Id.* at 326. Similar necessity requirements apply to pretrial detention in the

also implicit in the standards used to determine whether illegally seized evidence can be used at trial. German courts balance the competing interests by weighing the seriousness of the offense, the need for the evidence to support a conviction, and the seriousness of the illegality which led to the evidence.[255]

Both ends and means proportionality rules can be found in the laws of many other countries, including Australia, Belgium, Canada, Denmark, England and Wales, France, Ireland, Israel, Italy, Luxembourg, Portugal, South Africa, and Spain.[256]

C. REGIONAL AND INTERNATIONAL LAW

European Community law now appears to incorporate all three of the German proportionality principles described above,[257] and these principles are also recognized and applied by the European Court of Human Rights.[258] The laws of war, as reflected in the Hague and Geneva Conventions (and before that, religious writings and canon law) also incorporate both ends and means proportionality limitations.[259] Military actions must seek to minimize unnecessary suffering (means proportionality), and must not be excessive relative to the military advantage (ends proportionality) sought to be achieved.[260]

V. IMPLICATIONS FOR EIGHTH AMENDMENT ANALYSIS OF PRISON TERMS

The previous discussion has shown that there are three well-established proportionality principles recognized in Ameri-

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United States, see *id.* at 327, but not to the arrest decision. Atwater v. City of Lago Vista, 532 U.S. 318, 318 (2001).

255. Frase & Weigend, *supra* note 254, at 336.

256. *See* sources cited *supra* note 250.

257. EMILIOU, *supra* note 250, at 115–274; SCHWARZE, *supra* note 250, at 677–79, 708–866; Sullivan, *supra* note 250, at 414–18; Zoller, *supra* note 231, at 569, 584–85.

258. SCHWARZE, *supra* note 250, at 704–07; Zoller, *supra* note 231, at 569.

259. SCHWARZE, *supra* note 250, at 703–04; Sullivan, *supra* note 250, at 415 n.246.

260. *See, e.g.*, Rome Statute of the International Criminal Court, July 17, 1998, art. 8(2)(a)(iv), U.N. Doc. A/CONF.183/9 (1998) (defining war crimes to include "[e]xtensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly"); *id.*, art. 8(2)(b)(iv) (prohibiting "[i]ntentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated").

can, foreign, and international law. Each of these principles is independent of the others, because each is supported by important core values. Retributive proportionality limits reflect fundamental human rights concerns about fairness and abuse of governmental power.[261] Although the Supreme Court has seemed to reject any independent constitutional role for retributive values in limiting the duration of prison sentences, such values play significant roles in regulating capital punishment, fines and forfeitures, and punitive damages awards; there is no good reason why prison terms should not also be subject to meaningful retributive limits.[262]

The utilitarian "ends" proportionality principle—that costs and burdens of government measures should not outweigh the benefits—has been explicitly or implicitly recognized in a wide variety of contexts, and has been used to protect individual rights, limit certain rights and remedies, and protect states' rights against congressional overreaching. Utilitarian "means" proportionality's preference for equally effective but less costly or burdensome measures, is likewise a well-established principle recognized in many areas of American constitutional, foreign, and international laws. Whenever government measures interfere with fundamental liberties it is especially important that such measures be scrutinized for excessiveness relative to the ends being pursued and the available alternative means for achieving those ends. Granted, the degree of scrutiny as to both ends and means proportionality depends on the importance of the government's purposes and the competing liberties at stake. In the context of prison sentencing, there are very important public safety goals supporting such sentences. But as will be discussed more fully in the concluding section of this Article, lengthy prison terms seriously threaten defendants' vital interests in physical liberty, social status, privacy, dignity, health, and safety. The supervisory role of courts is limited by the values underlying our federal system, and by the assumed greater democratic legitimacy of legislative policymaking. But federalism and separation of powers concerns have not prevented

261. NORVAL MORRIS & COLIN HOWARD, STUDIES IN CRIMINAL LAW 147–96 (1964); Frase, *supra* note 238, at 279–81; Frase, *Limiting Retributivism*, *supra* note 104, at 92–93; Smit & Ashworth, *supra* note 108, at 542–44.

262. *Cf.* Solem v. Helm, 463 U.S. 277, 289 (1983) ("It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not.").

courts from imposing constitutional proportionality limits in many other areas of law.

A clearer understanding of the three proportionality principles identified in this Article can help to make sense of the Court's current approach to claims of excessiveness in prison sentencing. A majority of the Justices are willing to impose at least narrow ("gross disproportionality") limits on such sentences, but the Court has also said that states are free to pursue a variety of sentencing purposes. The independent utilitarian ends- and means-proportionality principles can be used to evaluate excessiveness relative to nonretributive sentencing goals. Retributive proportionality is obviously especially relevant when states assert retributive sentencing goals, but as suggested above it is arguable that some degree of retributive proportionality should be an independent constitutional requirement, limiting the duration of prison terms imposed to achieve utilitarian sentencing goals. Again, retributive proportionality limits have been applied to several other forms of punishment, including the death penalty, fines and forfeitures, and punitive damages.[263]

One interpretation of the Court's most recent holdings is that a sentence only violates the Eighth Amendment if it is grossly disproportionate in relation to *all* traditional sentencing purposes, or at least all purposes asserted by the State. Even under this narrow interpretation, the two utilitarian proportionality principles identified in this Article should still apply disjunctively because each represents a distinct and important form of excessiveness; a sentence supported by utilitarian purposes should be held unconstitutional if it grossly violates ends proportionality (because the sentence's burdens greatly exceed the likely crime-control benefits) *or* if it grossly violates means proportionality (because a much less severe sentence would be adequate to achieve the State's asserted crime-control purposes). The better approach, however, would apply all three proportionality principles disjunctively; a gross violation of any one of them should be sufficient grounds to find an Eighth Amendment violation. Again, the three proportionality principles are logically independent and operate independently in other areas of constitutional law.

But how should courts integrate these proportionality principles into existing or alternative approaches to Eighth

263. *See supra* notes 132–46, 160–78 and accompanying text.

Amendment jurisprudence? Assuming that the Supreme Court and courts interpreting state constitutions will retain the current *Solem/Harmelin/Ewing* standards, the three independent proportionality principles could be applied: (1) to the "threshold" assessment of the first *Solem* factor, as outlined in Justice Kennedy's *Harmelin* concurrence; (2) to all three *Solem* factors; and/or (3) to the ultimate requirement of "gross disproportionality."

Applying independent retributive, ends, and means proportionality requirements to the threshold determination would address a major problem with Justice Kennedy's approach. Justice Kennedy puts greatest emphasis on the first *Solem* factor (comparison of the gravity of the offense with the severity of the sentence), yet that factor is the least objective of the three.[264] Applying the three proportionality principles at the first step of the *Solem* analysis would help to make these determinations more objective. If the three principles were given independent force, more cases would support a "threshold" inference of gross disproportionality, thereby justifying resort to more objective intra- and inter-jurisdictional comparative analyses. As Justice Breyer noted in his dissent in *Ewing*, there is no point in having a "threshold" test if its standards are just as strict as the ultimate test; "[a] threshold test must permit *arguably* unconstitutional sentences, not only *actually* unconstitutional sentences, to pass the threshold."[265] Although it might seem unlikely that the current Court would adopt a rule with a potential to increase Eighth Amendment limits on prison terms, the Court has occasionally adopted overbroad, "bright-line" rules which provide greater guidance to decision makers, and/or facilitate review of their decisions.[266] Finally, even if retributive and utilitarian proportionality principles are applied conjunctively in the manner suggested above (that is, both the

264. Ewing v. California, 538 U.S. 11, 41–42 (2002) (Breyer, J., dissenting); Harmelin v. Michigan, 501 U.S. 957, 1020 (1991) (White, J., dissenting); Van Cleave, *supra* note 131, at 230. The third *Solem* factor is difficult to apply in the absence of reliable and comparable data on sentences imposed and served in other states, but such data is becoming more and more readily available, particularly in states with sentencing guidelines commissions. *See* Richard S. Frase, *Sentencing Guidelines in Minnesota, Other States, and the Federal Courts: A Twenty-Year Retrospective*, 12 FED. SENTENCING REP. 69, 75 (1999).

265. *Ewing*, 538 U.S. at 42 (Breyer, J., dissenting).

266. *See* Frase, *supra* note 211, at 352–53 (noting that the Court's "bright-line" rules most often favor the police, but citing several examples of pro-defendant rulings).

retributive principle and one of the utilitarian principles would have to be violated), in close cases courts should consider the cumulative impact of these findings—a sentence that is arguably "grossly disproportionate" both retributively and in one or both utilitarian senses should justify finding at least a threshold Eighth Amendment violation.

Applying the three proportionality principles to the second and third *Solem* factors, or to the ultimate "gross disproportionality" test, is more problematic. Although intra- and interjurisdictional comparisons have some relevance to each of the proportionality principles, the connection in any given case is unclear—each of those *Solem* factors is indicative of more than one type of disproportionality.[267] And if the second and third *Solem* factors are retained, as important indicators of "gross disproportionality," then that ultimate standard will also not be closely tied to any one proportionality principle.

Another way to incorporate retributive and utilitarian proportionality principles into the assessment of whether criminal penalties are constitutionally excessive under the *Solem/Harmelin/Ewing* standards would be to recognize different levels of scrutiny—analogous to those used in First Amendment and Equal Protection jurisprudence—for different categories of penalties.[268] The Supreme Court has hinted at this approach by suggesting that "death is different" for Eighth Amendment purposes.[269] Consistent with this assumption and the proportionality principles identified in this Article, the Court (or state courts) could divide penalties into two or three major categories, for instance: (1) noncustodial and short to medium-length custody terms; (2) lengthy custodial terms; and (3) death sentences. The constitutional limits on the first category, constituting the vast majority of sentences imposed, would be something akin to rational basis analysis. For lengthy custodial terms, the three proportionality principles would apply disjunctively to Justice Kennedy's "threshold" determination, as suggested above. Death sentences would face the strictest limits, being held unconstitutional if they violate any of the

267. *See* discussion *supra* notes 150–58 and accompanying text.

268. Samuel H. Pillsbury, *A Problem in Emotive Due Process: California's Three Strikes Law*, 6 BUFF. CRIM. L. REV. 483, 523 n.89 (2002); *see also* Radin, *supra* note 14, at 1009–30, 1062–67.

269. *Harmelin*, 501 U.S. at 994 (opinion of Justice Scalia); Solem v. Helm, 463 U.S. 277, 289–90 (1983); Rummel v. Estelle, 445 U.S. 263, 272 (1980).

three proportionality principles, and with limited need to consider intra- and inter-jurisdictional comparisons.[270]

One problem with this approach is the difficulty of defining the boundaries of the penalty categories—when is a custodial sentence "lengthy" enough to justify heightened, but not the highest, scrutiny? It may help to recognize that the federal and state constitutional standards need not be identical. For federal purposes, it may be that only prison sentences of life without parole—formally or de facto (where the defendant will probably die in prison)[271]—would qualify for the second category. Under state constitutions, however, courts would be free to draw the lines more generously, including in the second category any sentence which is likely to keep the offender in prison more than some readily calculable number of years (for instance: three times the average time served by offenders convicted of that crime, or twice the ordinary maximum term for that offense).

A different multitiered approach would be to apply heightened scrutiny, along the lines sketched above, whenever the circumstances surrounding the penalty's enactment or imposition suggest a high risk of disproportionality.[272] Such circumstances might include severe penalties enacted in response to a "moral panic" generated by one or more high profile cases,[273] rapid escalation in penalties over a relatively short period of time,[274] and indications of potential racial bias in the enact-

270. The Court's decisions invalidating death sentences usually consider sentences for similar offenders in other states, but not sentences for different offenses within the same state. *See, e.g.*, Atkins v. Virginia, 536 U.S. 304, 313–17 (2002); Enmund v. Florida, 458 U.S. 782, 792–93 (1982). *But see* Coker v. Georgia, 433 U.S. 584, 593–96 (comparing rape penalties in other states); *id.* at 600 (comparing Georgia's penalties for rape and for deliberate killing without aggravating circumstances).

271. These appear to have been the actual facts in both *Ewing* and *Andrade*. *See supra* notes 77, 93 and accompanying text.

272. For similar proposals see Pillsbury, *supra* note 268, at 523 n.89, and King, *supra* note 13, at 187–89.

273. MICHAEL TONRY, THINKING ABOUT CRIME: SENSE AND SENSIBILITY IN AMERICAN PENAL CULTURE 85–96 (2004) (discussing the concept of moral panic and citing examples); Richard S. Frase, *Sentencing Guidelines in Minnesota, 1978–2003*, 32 CRIME & JUST.: REV. RES. 131, 137, 159–64 (2005) (discussing several instances where severe penalties were hastily enacted in response to one or several high profile cases).

274. For example, one might question the proportionality of some of Minnesota's current and proposed sex crime penalties. From 1980 until 1989, the presumptive sentence for first degree criminal sexual conduct by an offender with no prior record was 43 months; in 1989 the penalty was raised to 86

ment of the penalty or handling of the case.[275] This approach could also be combined with the penalty-category approach, allowing the cumulative effects of relatively severe penalties and circumstances suggesting high risk of disproportionality to invoke heightened scrutiny where neither of these factors alone would suffice. Each of these approaches or a combined approach could also incorporate different allocations of the burden of proof—ordinarily on defendants, but shifting to the state at some higher levels(s) of scrutiny.[276]

For present purposes, I will assume that courts will—and should—take the following simpler approach: (1) apply the three proportionality principles independently to Justice Kennedy's "threshold" determination; (2) if the penalty appears "grossly disproportionate" relative to any of the three proportionality principles, then make intra- and inter-state[277] comparisons under the second and third *Solem* factors; and (3) find an Eighth Amendment violation if either[278] of those compari-

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months; it was further raised to 144 months in 2000, and proposals were made in the 2004 legislative session to subject some or all of these offenders to life in prison, or even life without parole. *See* Frase, *supra* note 273.

275. For example, the defendant in *Hutto v. Davis* may have received his severe sentence at least in part because he was an African American man in a rural Virginia community who had dared to date white women and marry one. *See* Grossman, *supra* note 13, at 120 n.80. It might be possible to view sentencing proportionality standards as a way to "flush out" illicit government motives, which some view as the function of strict scrutiny analysis, see *supra* note 148, but it is not clear what those motives might be other than racism. *Cf.* Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 560–63 (2004) (arguing that punishment is unconstitutional if motivated by malice or a desire to demean).

276. Various burden of proof allocations are discussed in King, *supra* note 13, at 187; Radin, *supra* note 14, at 1009–30, 1049, 1054–55, 1062; Singer, *supra* note 99, at 72; and Spece, *supra* note 121, at 1056–58. Standards could also address the degree of certainty demonstrated or required, regarding the ends likely to be achieved by the sentence and/or the relative effectiveness of proposed and alternative means. *Cf.* MODEL PENAL CODE § 1.02(2)(a)(ii) (Preliminary Draft No. 3, 2004) (stating that crime control and restorative justice goals may be pursued "when possible with realistic prospect of success" (and within retributive upper and lower limits)).

277. Some have argued that external comparisons under the third *Solem* factor should include sentencing in other nations, not just in other states. Smit & Ashworth, *supra* note 108, at 555. In several cases, the U.S. Supreme Court has been willing to make international sentencing and criminalization comparisons. *See supra* note 237 and accompanying text.

278. Sometimes only intra-state comparisons will suggest disproportionality (e.g., a recidivist law which imposes more severe penalties on minor property offenders than many murderers receive in that state, but whose penalties are not much more severe than those imposed in a number of other states). In

sons corroborates the threshold inference of "gross disproportionality." The latter standard is admittedly vague, but the Court continues to apply it not only to prison terms, but also to death sentences, punitive damages, and fines and forfeitures.

The remainder of this Article will use the facts of the Court's six modern prison-duration cases to illustrate how these cases should be analyzed under the approach summarized above. I will argue that, with a better understanding of proportionality principles, *Solem* would still be decided the same way, but several of the other cases might have been decided in favor of the defendant, and should be so decided under state constitutional counterparts of the Eighth Amendment.

A. *RUMMEL V. ESTELLE*

Rummel v. Estelle is not an easy case even under a more precise and generous set of proportionality principles.[279] On the one hand, the very minor nature of Rummel's conviction offense (obtaining $121 by false pretenses, in failing to perform a contract) provides a strong basis to find both retributive and ends disproportionality. His limited blameworthiness for this offense hardly seems to justify a life sentence, and the burden such a sentence imposes on the offender may greatly outweigh any crime-control or other social benefits likely to be achieved.[280] Even if one were to count Rummel's two prior crimes, including fraudulent use of a credit card to obtain $80 worth of goods or services and passing a forged check in the amount of $28.36, as part of his "deserts" and the utility calculus, his case seems far from grave.

On the other hand, Rummel does seem likely to commit further property crimes, which arguably increases his deserved punishment at least somewhat,[281] and certainly increases the social harm to be assessed under ends proportionality. In sev-

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other cases, the sentence will only appear disproportionate in light of interstate comparisons (e.g., a state with extremely severe penalties for most crimes). Either scenario may violate retributive and/or utilitarian ends or means proportionality limits.

279. 445 U.S. 263 (1980). For a summary of the facts and opinions in *Rummel*, see *supra* notes 16–22 and accompanying text.

280. In computing the likely crime-control benefits one must deduct any negative consequences of disproportionate penalties, such as distorted societal norms and reverse deterrence. *See* discussion *supra* notes 114–15 and accompanying text.

281. See *infra* note 285 and accompanying text for a discussion of differing views of the retributive significance of a defendant's prior record.

eral cases the Court has stated that a defendant may only be punished for the current offense, which is deemed to be "aggravated" by his recidivism.[282] This focus on the current offense is necessary to avoid claims that recidivist penalties constitute double jeopardy. However, the application of this theory was severely strained by the Court's decision in *Ewing*, upholding a twenty-five-to-life sentence imposed on a recidivist charged with stealing three golf clubs; it is difficult to avoid the conclusion that Ewing was, in fact, being punished again for his prior crimes.[283] Thus, the Court may be forced to reconsider the heavy weight it has allowed states to give to prior record. Applying an independent, limiting retributive proportionality standard, as this Article has proposed, would limit the weight accorded to prior crimes, and avoid double jeopardy problems.

Another serious difficulty in assessing the proportionality of Rummel's sentence is that the Court assumed he would become eligible for parole in ten to twelve years; a sentence of that length is hardly unusual, at least in the American context. But since parole is discretionary, Rummel might very well end up serving substantially more than twelve years. Must the defendant have already served an excessive sentence before he can challenge it? One solution to this problem would be to require the state to compute an expected release date based on past practices for similar offenders, with a further requirement of administrative due process (hearing, statement of reasons) if that release date is later postponed. A reviewing court could then use the expected release date to assess proportionality on the "front end."

Suppose, in Rummel's case, that his expected time to serve is fifteen years. Such a sentence still seems "grossly disproportionate" to his minor conviction offense, under the retributive and ends proportionality criteria discussed above. There re-

282. Witte v. United States, 515 U.S. 389, 402–03 (1995) (quoting Gryger v. Burke, 334 U.S. 728, 732 (1948)); Solem v. Helm, 463 U.S. 277, 296 n.21 (1983) ("[The recidivist] already has paid the penalty for each of his prior offenses."); Coker v. Georgia, 433 U.S. 584, 599 (1977) (stating that the defendant's prior violent crimes, including murder, "do not change the fact that the instant crime [did not involve] the taking of life"); Graham v. West Virginia, 224 U.S. 616, 623 (1912) (stating that recidivists "are not punished the second time for the earlier offense, but the repetition of criminal conduct aggravates their guilt and justifies heavier penalties when they are again convicted"); Moore v. Missouri, 159 U.S. 673, 677 (1895) (same).

283. Nathan H. Seltzer, Note, *When the Tail Wags the Dog: The Collision Course Between Recidivism Statutes and the Double Jeopardy Clause*, 83 B.U. L. REV. 921, 936–37 (2003).

mains the question of how much weight to give Rummel's two prior crimes, in setting the retributive and utilitarian upper limits on his third sentence. The future harms "saved" by locking up such a repeat offender are uncertain, but may be sufficiently plausible to avoid a threshold finding of gross ends disproportionality. Given our present state of knowledge, it would be even more difficult to base such a finding on means proportionality (that a sentence of less than fifteen years would adequately serve the state's deterrent and incapacitative goals).[284]

Threshold gross disproportionality might be shown on retributive grounds, depending on how much Rummel's "deserved" punishment is deemed to increase, in light of his prior crimes. Retributive scholars differ greatly on this point; some would give prior record no weight, while others would permit modest penalty increases for recidivists.[285] This lack of theoretical clarity and consensus is perhaps the most important reason why the Court has declined to give retributive values significant independent weight in assessing prison terms for recidivists under the Eighth Amendment. Capital punishment cases have been the exception; the Court appears to have been willing to apply significant retributive limits even to habitual offenders.[286] The *Ewing* decision suggests that in prison duration cases the majority of Justices view prior crimes as relevant to both the threshold and the ultimate disproportionality issues. It is possible that more precise analysis of the independent retributive and utilitarian meanings of proportionality, as discussed here, would persuade at least one Justice in *Ewing* to reconsider and apply the conviction-offense-based retributive standards used in the death penalty cases. If not, the imposition of Eighth Amendment retributive limits on recidivist enhancements will have to await further elaboration and broader consensus in the philosophy of punishment.

Even in the absence of such developments, however, courts interpreting state constitutions are free to take a different ap-

284. *See* ZIMRING ET AL., *supra* note 99, at 190–91.

285. *Compare* ANDREW VON HIRSCH, PAST AND FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 88–91 (1985) (arguing that repeat offenders deserve somewhat greater punishment), *with* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 460–66 (1978) (questioning whether a prior record increases an offender's culpability to any degree). *See generally* Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIME & JUST.: REV. RES. 303, 317–19 (1997).

286. For example, the defendant in *Coker v. Georgia*, 433 U.S. at 584, had an extensive and very violent prior record.

proach. For example, they might discard the separate "threshold" question entirely, and examine *Solem* factors two and three in every case. Or they might ignore prior crimes for purposes of deciding whether threshold retributive disproportionality has been shown, or place much stricter retributive limits on the weight given to prior record in the threshold determination (for instance, holding that all recidivist enhancements more than two or three times the maximum term for a first offender raise an inference of gross disproportionality). Any of these approaches would have the advantage of reducing emphasis on the problematic first *Solem* prong, with its difficult line-drawing problems, and allowing more cases to be decided under the more objective comparative analysis called for by the second and third *Solem* factors.

But even these more generous approaches might not produce a ruling in Rummel's favor if, as was hypothesized above, his expected sentence is only fifteen years. He would fare poorly under the second Solem factor in any state imposing lengthy prison terms for most crimes. As for the third factor, a fifteen-year sentence might not appear grossly excessive, given the large number of states with three strikes and other severe habitual offender penalties.

B. *HUTTO V. DAVIS*

As in *Rummel*, *Hutto v. Davis*[287] involved a relatively minor current offense and a lengthy prison term subject to uncertain parole. Davis's current offenses—sale of three ounces of marijuana to a furloughed inmate, plus possession of six more ounces, two drug scales, and other paraphernalia—are arguably more serious.[288] His maximum sentence of forty years is probably less severe than Rummel's life sentence, but we do not know when Davis would have become eligible for parole, or how soon after that he was likely to be released. His prior offense of selling LSD was more serious, and he committed the current offenses while released on appeal of the prior conviction. However, a more retributive, offense-based approach, that excluded his prior record or gave it very limited weight, might still find Davis's sentence grossly disproportionate to possession and sale

287. 454 U.S. 370 (1982) (per curiam). For a summary of the facts and opinions in *Hutto*, see *supra* notes 23–27 and accompanying text.

288. *Hutto*, 454 U.S. at 376–80 (Powell, J., concurring).

of less than nine ounces of marijuana,[289] thus passing the threshold test under *Harmelin* and *Ewing*. A further argument in favor of finding Davis's sentence presumptively disproportionate could be based on the Virginia legislature's decision, a few years later, to reduce the maximum penalty for his crime to twenty years.[290] This action suggests that the Legislature would view a forty-year sentence as clearly violating one or more of the proportionality principles—as exceeding desert; as imposing sentence burdens which outweigh the benefits; and/or as more severe than necessary to adequately control this type of criminal behavior. Another factor which might raise a "threshold" inference of gross disproportionality is the role which race may have played in producing Davis's severe sentence.[291] If Davis could get past the threshold determination he might have a strong claim based on an intrajurisdictional comparison (*Solem* step two). Although there is no published data on contemporary penalties given for other crimes in Davis's state, a lower court had found that in a recent one-year period the average Virginia prison sentence for the *same* crime of selling marijuana, was a little over three years, and no defendant had received a sentence of over fifteen years.[292]

C. *SOLEM V. HELM*

The three-pronged proportionality test announced in *Solem v. Helm*[293] has been modified by later cases. Justice Kennedy's *Harmelin* concurrence dispenses with the second and third *Solem* prongs except in "rare" cases, and Justice O'Connor's opinion in *Ewing* argues that an offender's prior record is part of the critical "threshold" proportionality assessment under the first *Solem* prong. Do these later modifications mean that even

289. In Minnesota, as of 2004, Davis's conviction offense would be a fifth degree drug crime with a five-year-maximum sentence and a recommended sentence of probation (which can include up to one year in a local jail). *See* MINN. SENTENCING GUIDELINES COMM'N, REPORT TO THE LEGISLATURE ON DRUG OFFENDER SENTENCING ISSUES 44–46 (2004), http://www.msgc.state.mn.us/reports_to_the_legislature.htm. Drug penalties have become much harsher in many states since 1982, and Minnesota's current penalties are particularly harsh. *Id.* at 48–54.

290. *Hutto*, 454 U.S. at 386 (Brennan, J., dissenting).

291. *See supra* note 275.

292. The Supreme Court and lower court opinions in *Davis* did not contain any interjurisdictional comparative data.

293. 463 U.S. 277 (1983). For a summary of the facts and opinions in *Solem*, see *supra* notes 28–43 and accompanying text.

Helm's sentence would no longer be found unconstitutional? The Supreme Court is, of course, reluctant to overrule prior decisions, and the Court can also claim (notwithstanding its decision in *Harmelin*) that life without parole is "objectively" much more severe than any lesser prison term. But the three independent proportionality principles identified in this Article also provide a strong basis to affirm the result in *Solem*. Helm's extremely severe sentence is very disproportionate to his culpability as measured by his conviction offense (passing a $100 bad check) or even his entire criminal record—all of his crimes were minor, nonviolent offenses, with alcohol a contributing factor in each case. Given the minor nature of his past and probable future crimes, life without parole also seems likely to be far more costly in human terms than the crimes it will prevent through deterrence and incapacitation (discounted by the risk of encouraging more serious crimes (reverse deterrence), and the long term disutility of disproportionate penalties).[294] And since alcohol appears to be a major cause of Helm's criminality, treatment of that problem seems a much less onerous and more effective response (means proportionality). To the extent that this recidivist statute is based on the goal of incapacitating dangerous offenders, the absence of any parole release option under this recidivist statute also violates means proportionality—it is virtually certain that some recidivists sentenced under this law will cease to be dangerous at some point before they die.[295] Thus, all three proportionality standards, both independently and collectively, establish a strong inference of gross disproportionality, thereby requiring intra- and inter-jurisdictional comparisons. For the reasons stated in Justice Powell's majority opinion in *Solem*, such comparisons amply confirm the threshold finding of gross disproportionality, and require a ruling in Helm's favor.

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294. *See* further discussion *supra* notes 114–15 and accompanying text. Even without these discounts there is good reason to doubt the deterrent and incapacitative effects of longer prison terms. *See* Andrew Ashworth, *Criminal Justice Reform: Principles, Human Rights and Public Protection*, 2004 CRIM. L. REV. 516, 519–21. *See generally* HANS ZEISEL, THE LIMITS OF LAW ENFORCEMENT (1982).

295. Similar means proportionality arguments, emphasizing the importance of periodic reviews of the offender's continuing dangerousness, have been accepted by courts in Canada, England and Wales, and South Africa. *See supra* note 249 and accompanying text.

D. *HARMELIN V. MICHIGAN*

Harmelin v. Michigan[296] is the only one of the six modern Supreme Court prison-duration cases that involved a first offender, so retributive and utilitarian offense-based proportionality issues are central. Although the 672 ounces of cocaine involved was a large amount, the defendant was charged only with possession, not sale or intent to sell. As the dissent pointed out,[297] Harmelin's life-without-parole sentence treated him the same as if he had been charged and convicted of sale or intent to sell.[298] Moreover, it would not be proper for a sentencing court to infer intent to sell from the large quantity of drugs; subsequent Supreme Court cases have held that contested sentencing factors which raise the maximum authorized penalty must be submitted to the jury and proven beyond a reasonable doubt.[299]

Justice Kennedy's plurality opinion appeared to evade these retributive and legal process issues by focusing on the serious social harms associated with such a large quantity of cocaine. Implicitly, Justice Kennedy was arguing that Harmelin's sentence was consistent with one element of retributive proportionality (harm) and with ends proportionality—severe social harms justify severe penalties. As was previously noted, however, severe penalties can also cause reverse deterrence if offenders, expecting no great difference in penalty, become more likely to sell, not just possess, or are even tempted to kill witnesses or arresting officers to avoid detection or capture. In any case, satisfying only one of the three proportionality standards should not suffice; the three standards are independent, and reflect different values. It is plausible to argue that Harmelin's sentence was excessive relative to his culpability, especially when compared to the greater culpability of offenders who are proven to have sold or intended to sell, yet receive penalties no more severe. This argument should be sufficient to establish threshold disproportionality, which would then be strongly

296. 501 U.S. 957 (1991). For a summary of the facts and opinions in *Harmelin*, see *supra* notes 44–61 and accompanying text.

297. *Harmelin*, 501 U.S. at 1025 (White, J., dissenting).

298. This argument was accepted by the state supreme court, which subsequently struck down this drug statute under the Michigan Constitution. People v. Bullock, 485 N.W.2d 866, 877 (Mich. 1992).

299. Blakely v. Washington, 124 S. Ct. 2531, 2543 (2004); Ring v. Arizona, 536 U.S. 584, 609 (2002); Apprendi v. New Jersey, 530 U.S. 466, 491–92 (2000).

supported by intra- and inter-jurisdictional analysis. Inter-jurisdictional comparison also supports an argument based on means disproportionality—the much lower sentences imposed in almost all other jurisdictions imply that a less severe penalty would achieve just as good results.

The defendant in *Harmelin* also contested the mandatory nature of his penalty. This argument was summarily rejected by Justice Scalia, joined on this point by four other Justices. Scalia pointed to the long history of mandatory penalties in the United States, and distinguished the individualization required to impose capital punishment because death is different. But unlike Justice Scalia, the other four Justices who approved of Michigan's mandatory penalty all accept Eighth Amendment proportionality limits;[300] one or more of these Justices might be persuaded to take another look at the problems posed by the interaction between severity and lack of case-specific sentencing discretion. A strong case can be made that severe mandatory penalties, particularly those which apply to a large number of offenders, are inherently excessive relative to desert—it is quite possible that many of these offenders deserve the mandatory penalty, but it is very unlikely that *every* eligible offender does.[301] Similar inherent overbreadth arguments can be made on utilitarian grounds, particularly with respect to means proportionality—when a large group of offenders is subjected to a severe mandatory penalty with no possibility of parole release, it is almost certain that, at least in some of these cases, such a penalty is unnecessary to achieve adequate deterrence, incapacitation, and other valid utilitarian goals.[302]

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300. Chief Justice Rehnquist joined Justice Scalia's opinion for the Court in *Harmelin*, but joined Justice O'Connor's plurality opinion in *Ewing*, accepting narrow proportionality limits. *See supra* note 4. The three concurring Justices in *Harmelin*, Justices Kennedy, O'Connor, and Souter, all accept such limits.

301. Desert overbreadth arguments led the Michigan Supreme Court to invalidate several mandatory minimum penalties under the state constitution. *See Bullock*, 485 N.W.2d at 875–76 (mandatory life without parole); People v. Laurentzen, 194 N.W.2d 827, 831 (Mich. 1972) (mandatory twenty-year minimum sentence).

302. The Supreme Court of Canada used a means disproportionality argument to strike down a mandatory drug penalty, concluding that such a law would inevitably impose unnecessarily excessive penalties on some offenders. *See supra* notes 246–48 and accompanying text. In *Harmelin*, Justice Stevens argued that a mandatory sentence of life without parole is irrational in conclusively presuming that all offenders subject to the penalty are wholly incorrigible so that society's interests in deterrence and retribution outweigh any considerations of rehabilitation. *Harmelin*, 501 U.S. at 1028 (Stevens, J., dissenting); *see also* ZIMRING ET AL., *supra* note 99, at 194–200 (arguing that

E. *EWING V. CALIFORNIA*

Given his extensive prior record, Ewing's case[303] is more comparable to *Rummel* and *Solem* than to *Harmelin*. Ewing's theft of three golf clubs worth about $400 each was more serious than either Rummel's or Helm's conviction offense, but a strong argument can still be made that a sentence of twenty-five-years-to-life is grossly disproportionate to Ewing's desert. Such a severe sentence also raises ends proportionality questions.

Justice O'Connor's plurality opinion in *Ewing* implicitly addressed the ends proportionality issue, citing data purporting to demonstrate the crime-control benefits of the three strikes law.[304] Incapacitative effects were implied by data showing high recidivism rates for convicted offenders, especially property offenders, and by a study in which a sample of three-strikes offenders were found to have an average of five prior felony convictions, half including robbery or burglary, and eighty-four percent including one or more violent crimes.[305] Deterrent effects were implied by data showing that after the three strikes law became effective fewer parolees were returning to prison for the commission of new crimes, and more parolees were leaving the state than were entering it.[306] Of course, incapacitative effects must be measured by future crimes prevented, not prior convictions. As for deterrence, any changes in parolee recidivism and rates of departure from the state are inconclusive; crime rates may have been falling for all offenders during this period, including those not subject to the three strikes law, and rates of departure from the state may have increased generally. Scholars have subjected the California three strikes law to more precise examination, and have concluded that the law's crime-control benefits are quite modest.[307]

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three features of mandatory minimum statutes guarantee that these laws will result in excessive punishment of many offenders—the overaggregation and "worst-case" orientation inherent in picking a single penalty; the legislature's disregard of the important difference between symbolic and actual sanctions; and its inability to consider all offender- and case-specific mitigating factors).

303. Ewing v. California, 538 U.S. 11 (2003). For a summary of the facts and opinions in *Ewing*, see *supra* notes 62–84 and accompanying text.

304. *Ewing*, 538 U.S. at 25–28.

305. *Id.* at 26.

306. *Id.* at 27.

307. *See, e.g.*, JUSTICE POLICY INST., STILL STRIKING OUT: TEN YEARS OF CALIFORNIA'S THREE STRIKES 14 (2004); ZIMRING ET AL., *supra* note 99, at 85–105; Mike Males & Dan Macallair, *Striking Out: The Failure of California's*

Finally, Ewing's sentence may grossly exceed what is needed to achieve the legislature's utilitarian goals, thus violating means proportionality requirements. As Justice Breyer argued in his dissent, there is no reason to believe that a more narrowly tailored three strikes law requiring that the third strike also be a "serious or violent" crime would be less effective in preventing such crimes through deterrence and incapacitation.

Again, to be consistent with the Court's rulings on other issues of constitutional proportionality, the Court should treat each of the three proportionality principles as independent limits on prison duration, at least for purposes of the threshold analysis required by Justice Kennedy's opinion in *Harmelin*. Once analysis proceeds to the second and third *Solem* factors, Ewing's challenge might succeed, at least under somewhat more generous standards of review appropriate to state constitutional adjudication.[308] Although he had a very long and sometimes violent criminal history, the intra- and inter-jurisdictional comparisons presented in Justice Breyer's dissent suggest that Ewing's sentence "is virtually unique in its harshness for his offense of conviction, and by a considerable degree."[309] Justice O'Connor responded that such severe sentences are no longer rare in California—other offenders have received similarly disproportionate penalties under the three strikes law.[310] But those cases cannot serve to justify Ewing's sentence. Otherwise, a state could avoid all proportionality

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"Three Strikes and You're Out" Law, 11 STAN. L. & POL'Y REV. 65, 67 (1999) ("[C]ounties that vigorously and strictly enforce the Three Strikes law did not experience a decline in any crime category relative to more lenient counties."); Linda S. Beres & Thomas D. Griffith, *Did "Three Strikes" Cause the Recent Drop in California Crime? An Analysis of the California Attorney General's Report*, 32 LOY. L.A. L. REV. 101, 102 (1998) ("[T]here is no evidence that Three Strikes played an important role in the drop in the crime rate."). Broader studies of jurisdictions with and without three strikes laws have concluded that these laws do not significantly reduce crime. Linda S. Beres & Thomas D. Griffith, *Do Three-Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation*, 87 GEO. L.J. 103 (1998); Tomislav V. Kovandzic et al., *"Striking Out" As Crime Reduction Policy: The Impact of "Three Strikes" Laws on Crime Rates in U. S. Cities*, 21 JUST. Q. 207 (2004); Susan Turner et al., *The Impact of Truth-in-Sentencing and Three Strikes Legislation: Prison Populations, State Budgets, and Crime Rates*, 11 STAN. L. & POL'Y. REV. 75, 75 (1999).

308. *See infra* note 323 and accompanying text.

309. *Ewing*, 538 U.S. at 47 (Breyer, J., dissenting).

310. *Id.* at 24 n.1.

limitations on newly enacted penalties, no matter how severe, so long as those penalties were not too infrequently applied.

F. *LOCKYER V. ANDRADE*

The Supreme Court did not directly address the Eighth Amendment issue in *Lockyer v. Andrade*,[311] so it is possible that at least one of the Justices in the plurality would find a violation, even under the strict *Harmelin* approach. Indeed, if Andrade's fifty-years-to-life sentence for stealing nine videotapes worth $150 does not violate the Eighth Amendment, then as argued in Justice Souter's dissent, disproportionality has no meaning.[312] In any case, the Court should find a violation under the approach suggested here, and a state court could do so easily. Andrade had a strong basis to claim retributive and utilitarian ends disproportionality, based on his trivial conviction offenses which included two episodes of shoplifting, each normally classified as misdemeanor theft.[313] Even when Andrade's substantial but nonviolent prior record is factored in, it can be argued that the burdens of his de facto life-without-parole sentence outweigh the crime-control benefits of deterrence and incapacitation (discounted by the potential for reverse deterrence, and the long-term disutility of offense disproportionality).

Andrade's sentence also violates utilitarian means proportionality. As argued in Justice Souter's dissent,[314] Andrade's *second* twenty-five-year term is not justified by the State's asserted rationale of incapacitating dangerous defendants—he did not become twice as dangerous when he stole a second time, so doubling his sentence is irrational. Similarly, if the State were also to claim that the three strikes law is justified by deterrence, Andrade's second shoplifting trip did not double the need for deterrence of other shoplifters. Justice Souter was essentially making a means proportionality argument—the State cannot show why a single minimum twenty-five-year sentence, or something much less than fifty years, would be inadequate

311. 538 U.S. 63 (2003). For a summary of the facts and opinions in *Andrade*, see *supra* notes 85–95 and accompanying text.

312. *Id.* at 83.

313. The classification of such thefts as misdemeanors shows that the legislature recognized the minor culpability and social harm associated with these crimes. Erwin Chemerinsky, *Cruel and Unusual: The Story of Leandro Andrade*, 52 DRAKE L. REV. 1, 13 (2003).

314. *Andrade*, 538 U.S. at 79–83 (Souter, J., dissenting).

to achieve the State's asserted crime-control purposes. A persuasive means proportionality argument can also be based on Andrade's drug addiction, which apparently motivated all of his crimes. He and similar offenders are not deterrable by more severe penalties,[315] and treatment is likely to be a much less onerous and more effective means of achieving the State's crime-prevention goals.

CONCLUSION

In *Ewing*, the recent California three strikes case, seven Justices agreed that the Eighth Amendment sets proportionality limits in noncapital cases. However, these Justices disagreed on the application of the proportionality principle in Ewing's case and did not clearly say what they meant by proportionality or how it should apply to nonretributive sentencing goals. As shown in this Article, both retributive proportionality and two distinct requirements of utilitarian proportionality are well established in other areas of American constitutional law, and also in foreign and international law. Applying these three principles to the assessment of prison terms under the Eighth Amendment would make such assessments more precise, and would make the Supreme Court's jurisprudence more consistent across fields of law.

The Court's decisions in *Harmelin* and *Ewing* might be read as holding that a sentence only violates the Eighth Amendment if it is grossly disproportionate in relation to *all* sentencing purposes. Even under this interpretation, the utilitarian ends and means proportionality principles identified in this Article should still apply disjunctively—only one of them need be violated—because each represents a distinct and important form of utilitarian excess. The better approach would be to apply all three proportionality principles disjunctively, finding an Eighth Amendment violation if any one of the three is violated. The three principles are logically independent, represent distinct values, and operate independently in many other areas of constitutional law. Independent application of the three proportionality principles is particularly appropriate in making the "threshold" determination of gross dispropor-

315. *Cf.* Atkins v. Virginia, 536 U.S. 304, 318–19 (2002) (mentally retarded offenders are not deterred); Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (offenders younger than sixteen years old are not deterred). Andrade's addiction also arguably reduces his culpability, even if it does not provide a complete defense, thus strengthening his retributive disproportionality argument.

tionality required under the Court's current Eighth Amendment approach (comparing the gravity of the defendant's offense and the harshness of the penalty, the first *Solem* factor). Without further modification, the standards guiding this threshold determination are extremely vague, and the language and results in *Harmelin* and *Ewing* suggest that virtually no cases will survive that determination. Applying the three proportionality principles would add greater precision and some degree of objectivity to the threshold standard. Applying these principles independently would allow additional cases to become eligible for intra- and inter-jurisdictional comparisons under the more objective second and third *Solem* factors.

It is particularly important to recognize retributive proportionality limits[316] on lengthy prison terms under the Eighth Amendment. Punishment in excess of blameworthiness is fundamentally unfair and a violation of human rights.[317] Limiting retributivism is a sound jurisprudential principle which enjoys widespread support, and the Supreme Court has used this principle to place constitutional limits on the imposition of capital punishment, fines and forfeitures, and punitive damages.[318] As the latter examples show, even serious wrongdoers are entitled to proportionate punishment. Prison terms may be less severe and final than capital punishment, but they are often far more onerous for the individual than fines, forfeitures, and punitive damages; there is no good reason to set retributive upper limits on the latter, but not on lengthy prison terms.

Appellate courts and articles such as this one necessarily deal in abstractions—legal principles, applied within and across factual contexts. But it is important for courts and scholars to keep in mind the human reality of the specific context at issue—in this case, the reality of what a lengthy prison term means for the offender and his family. Foremost, of course is the loss of freedom[319]—decades of a person's life, caged like

316. *See supra* notes 102–05 and accompanying text (discussing the difference between limiting and defining retributivism).

317. *See supra* note 261.

318. *See* discussion *supra* notes 104–05 and accompanying text.

319. Spece, *supra* note 121, at 1067 ("The right to freedom from confinement was and is one of the primary values sought to be protected by the Constitution."); *id.* at 1072 (stating that freedom from confinement is the "elemental" liberty (quoting Arnett v. Kennedy, 416 U.S. 134, 157 (1974) (Rehnquist, J.))). Some have argued that measures of the quantum of freedom lost by a prison term should also take account of the severity of prison conditions this

an animal, usually the best years, and often most of the person's remaining years. Long prison terms also impose extended or even permanent loss of social status and employability; lost privacy and dignity;[320] substantial risk of serious physical injury from more or less forcible rape, other assaults, HIV, and other infections;[321] constant fear of these assaults and injuries; and as the ultimate result, profound demoralization, dehumanization, and brutalization.[322] Of course, the things that criminals do to their victims, the harms they cause and the fears they stir up, are also very serious. But as indicated by the six modern cases in the Supreme Court, most Eighth Amendment proportionality cases are not about violent offenders, or even high-level drug dealers. They are mostly about repeat property offenders, most of whom have serious drug or alcohol dependencies and/or mental health problems—people who are basically just a nuisance, who we wish would go away.

Violations of utilitarian proportionality also have important constitutional implications whenever the accused citizen's physical liberty, security, or other fundamental rights are threatened. Utilitarian ends and means proportionality principles are well established in many areas of American constitutional law. In sentencing, as in these other areas, government measures may be found unconstitutional if they are excessively intrusive relative to their supposed benefits, and/or if they are much more intrusive than equally effective, alternative measures.

The Supreme Court is understandably reluctant to give broad effect to any of these proportionality principles under the Eighth Amendment, for reasons of federalism and democratic legitimacy—state legislators, chief executives, prosecutors, and

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offender is likely to face, and any physical or other vulnerabilities that would make the prison sentence particularly severe for the offender. Smit & Ashworth, *supra* note 108, at 548–49.

320. *See* Singer, *supra* note 99, at 87–88 (noting that prisons as of 1972 had become more dangerous and more degrading than a century earlier); JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENTS AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE (2003) (noting that conditions and treatment of inmates in U.S. prisons are much worse than in Western European prisons).

321. *See* HUMAN RIGHTS WATCH, NO ESCAPE: MALE RAPE IN U.S. PRISONS (2001); Steve Lerner, *Rule of the Cruel: How Violence is Built into America's Prisons*, THE NEW REPUBLIC, Oct. 15, 1984, at 17.

322. James E. Robertson, *"Four Little Eighteenth-Century Words": An Integrated Reading of the Cruel and Unusual Punishments Clause*, 37 CRIM. L. BULL. 475, 483–85, 501–07 (2001).

judges are more directly accountable to the public than are Supreme Court Justices. But sentencing is an area in which it is particularly important for federal courts to play a limiting role, checking the excesses of elected and politically appointed officials. Criminal defendants are precisely the sort of powerless and despised subgroup who will not be adequately protected through democratic political processes.[323] Moreover, there is a well-established tradition of overly severe criminal penalties being hurriedly enacted in response to a few high profile cases, generating a "moral panic" of media and political frenzy[324] in which politicians dread (even more than they usually do) appearing to be "soft" on crime and unsympathetic to actual and potential victims.[325] Often, the only practical barrier to such dramatic penalty increases is their budgetary impact. But when already-severe penalties are made still more severe, the

323. Many scholars have made this point over the years, often citing the Court's famous statement in footnote four of *Carolene Products* and the "representation reinforcing" theories of judicial review found in the works of Professors John Hart Ely and Jesse Choper. *See* United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938) ("[P]rejudice against discrete and insular minorities may be a special condition which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."); ELY, *supra* note 148; JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980). The problems of popular democratic passions directed at persons accused of crime were noted by the framers of the Bill of Rights, see Heald, *supra* note 98, at 473 n.68, and by utilitarian philosophers, see *id.* ("[L]egislators and men in general are naturally inclined [toward undue severity because of] antipathy, or want of compassion for individuals who are represented as dangerous and vile." (quoting Jeremy Bentham)). Modern writers who have discussed this problem include: ELY, *supra* note 148, at 97, 172–73; Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislators Give a Damn About the Rights of the Accused?* 44 SYRACUSE L. REV. 1079 *passim* (1993); Gershowitz, *supra* note 176, at 1297–1301; Karlan, *supra* note 144, at 890–91; Robertson, *supra* note 322, at 479–91; William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 20 (1996); Van Cleave, *supra* note 131, at 276–78; Gilchrist, *supra* note 99, at 1126; and Heald, *supra* note 98, at 476–77. Despite these well-known dangers, the Court seems to be more concerned to protect corporations and other deep-pocket defendants from the "acute danger of arbitrary deprivation of property" via punitive damages awards. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 417 (2001).

324. *See supra* note 273 and accompanying text; *see also* Van Cleave, *supra* note 131, at 277 (citing anticriminal passions that led to enactment of the California three strikes law).

325. *Cf.* Erik G. Luna, *Foreword: Three Strikes in a Nutshell*, 20 T. JEFFERSON L. REV. 1, 5 (1998) (noting that California politicians were afraid to question the wisdom of the proposed three strikes law).

increased costs are paid by future generations; the political benefits (and risks) are immediate.[326]

The rights to jury trial and proof beyond a reasonable doubt, recently expanded by the Supreme Court to include many sentence-enhancement factors,[327] do not adequately protect defendants from the imposition of unreasonably severe penalties. These new rights do not apply to facts invoking a mandatory minimum penalty,[328] or to the most common sentence-enhancement factor—the defendant's prior conviction record.[329] Nor do these rights apply when defendants are sentenced to the statutory maximum, no matter how severe, under traditional indeterminate sentencing systems or voluntary sentencing guidelines—the systems employed by the majority of states.[330] Even where these new rights apply, they grant limited protection. Juries determine historical facts, not the wisdom or fairness of the often draconian sentences which may be authorized or mandated if certain facts are proven.[331] For present purposes, perhaps the most significant contribution of the Court's recent sentencing due process cases is tbeir underlying premise—that the Constitution protects not only the innocent but also the guilty, limiting the degree of punishment as well as findings of guilt, and deliberately preferring to err on the side of leniency. But, for the reasons summarized above, these fundamental human rights principles will have little impact if they are implemented only with procedural guarantees; they must be supplemented with meaningful substantive limitations on severe penalties.

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326. Van Cleave, *supra* note 131, at 276–77. Between 1986 and 2001 state per-resident prison expenditures adjusted for inflation more than doubled. OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS: SPECIAL REPORT; STATE PRISON EXPENDITURES, 2001, at 2 tbl.1 (2004). But the average annual percentage change—6.4%, *id.*—might have seemed tolerable, especially from the short-term perspective of officials seeking to win the next election.

327. *See supra* note 299 and accompanying text (discussimg *Blakely*, *Ring*, and *Apprendi*); *see also infra* addendum.

328. Harris v. United States, 536 U.S. 545, 568 (2002).

329. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

330. Kevin R. Reitz, *The Disassembly and Reassembly of U.S. Sentencing Practices*, *in* SENTENCING AND SANCTIONS IN WESTERN COUNTRIES, *supra* note 238, at 222, 224–33.

331. Indeed, jurors are usually not even told the current and future sentencing consequences of the facts they are asked to determine, nor may the jury be told of the its power to "nullify" unjust laws. United States v. Dougherty, 473 F.2d 1113, 1130–38 (D.C. Cir. 1972).

State courts interpreting their own constitutional counterparts of the Eighth Amendment have an especially important limiting role to play. Decisions of these courts raise no issues of federalism; state courts also confront fewer problems of democratic legitimacy because their members are elected or are otherwise more directly politically accountable than are federal judges. In addition, some state constitutions are worded in a way that more readily supports proportionality analysis.[332] Of course, a state judge may be reluctant to check the other two branches precisely because he or she is directly politically accountable. Yet there are numerous examples of state court decisions, as well as lower federal court decisions, finding prison sentences unconstitutionally excessive.[333] With a clearer understanding of proportionality principles, more judges may find the will and the legal tools to combat excessive prison sentences.

Finally, even if federal and state constitutional proportionality review under the principles suggested here has a limited near-term impact on the incidence of extremely severe sen-

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332. For example, the Illinois Constitution specifies that "penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." ILL. CONST. art I, § 11; *see supra* notes 155–57 and accompanying text (discussing cases interpreting this provision); *see also* W. VA. CONST. art. III, § 5 (forbidding cruel and unusual punishment, but also specifying that "[p]enalties shall be proportioned to the character and degree of the offense"). Some state constitutions prohibit cruel *or* unusual punishment, which courts have interpreted as an easier standard to meet than cruel *and* unusual. *See supra* note 44 (Michigan). For other examples of this formulation, see ALA. CONST. art. I, § 15; CAL. CONST. art. I, § 17; LA. CONST. art. I, § 20. *Cf.* DEL. CONST. art. I, § 11 (forbidding "cruel punishments").

333. *See, e.g.*, Wilson v. State, 830 So.2d 765, 781–82 (Ala. 2001); State v. Davis, 79 P.3d 64, 72 (Ariz. 2003); People v. Dillon, 668 P.2d 697, 719 (Cal. 1983) (citing *In re* Lynch, 503 P.2d 921 (Cal. 1972)); People v. Gaskins, 923 P.2d 292 (Colo. Ct. App. 1996); Crosby v. State, 824 A.2d 894 (Del. 2003); People v. Miller, 781 N.E.2d 300 (Ill. 2002); State v. Hayes, 739 So. 2d 301, 303–04 (La. Ct. App. 1999); People v. Bullock, 485 N.W.2d 866 (Mich. 1992); and State v. Deal, 358 S.E.2d 226, 231 (W. Va. 1987). *Miller* and several other Illinois sentencing proportionality cases are discussed *supra* notes 155–58 and accompanying text. Lower federal court cases overturning prison sentences on Eighth Amendment grounds include: Henderson v. Norris, 258 F.3d 706, 712 (8th Cir. 2001); United States v. Gracia, 755 F.2d 984, 990 (2d Cir. 1985); and Hart v. Coiner, 483 F.2d 136, 143 (4th Cir. 1973). *See also* Ramirez v. Castro, 365 F.3d 755, 767, 769–70 (9th Cir. 2004) (holding, in a post-*Ewing* case, that a California three strikes sentence violated the Eighth Amendment, and that state court rulings to the contrary were sufficiently unreasonable to justify relief on federal habeas corpus; on the latter point, compare the discussion of *Andrade*, *supra* notes 89–91 and accompanying text).

tences, the articulation and clarification of these principles will serve a useful purpose if it discourages further escalation in sanction severity, and encourages judges, attorneys, and legislators to take proportionality values seriously.

ADDENDUM

As this Article went to press, the Supreme Court decided *United States v. Booker*, holding that the jury trial rights recognized in *Apprendi v. New Jersey* and *Blakely v. Washington* also apply to the federal sentencing guidelines.[334] In a separate opinion written by Justice Breyer, the Court held that the guidelines should be deemed advisory rather than legally binding, pending further legislation clarifying whether and how Congress wishes to enact binding guidelines that comply with the Court's constitutional requirements. Justice Breyer's opinion also provides that trial courts should continue to consider the sentencing purposes and other factors listed in 18 U.S.C. § 3553(a). Moreover, sentence appeals are still permitted, and the standard of review is one of "reasonableness."[335] It is very unclear exactly what this review standard means, or how lower courts are to reconcile the competing criteria in § 3553(a).

As courts struggle to make sense of these opinions, they may find guidance in the three proportionality principles discussed in this Article. Although the Article focuses on constitutional limitations on excessively severe sentences, the three proportionality principles can be adapted to address and clarify the statutory and policy issues identified in § 3553(a), as well as the Court's review standard. For these purposes, reversible disproportionality does not have to be "gross," but some deference to trial courts is appropriate. A sentence should be found unreasonable if: (1) it is clearly disproportionate to the offender's just deserts; or (2) its burdens on the offender clearly outweigh the likely crime-control benefits (ends proportionality); or (3) its burdens are clearly unnecessary in light of effective alternative measures (means proportionality); or (4) the sentence is clearly inadequate to achieve one of the purposes listed in § 3553(a) (means proportionality as a lower limit on sanction severity, within limits of the offender's desert).

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334. No. 04-104, 2005 WL 50108 (U.S. Jan. 12, 2005). The Court's decision consolidated *United States v. Fanfan* with *United States v. Booker*. *See id.* For a discussion of *Blakely* and *Apprendi*, see *supra* notes 299, 327, and accompanying text.

335. *Id.* at *25–27 (opinion of Breyer, J.).