

**Cruel Punishment:
Proportionate Sentencing and the Delaware Constitution**

by
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ABSTRACT

This paper builds an argument for why the Delaware Supreme Court should establish broader protections against disproportionate prison sentences under the Delaware Constitution's Cruel Punishment Clause than the United States Supreme Court has interpreted to exist under the United States Constitution's Cruel and Unusual Punishment Clause. Beginning with *Rummel v. Estelle* in 1980, the United States Supreme Court decided a line of six cases on the issue of excessive prison terms. These cases failed to establish clear, consistent, or humane standards for disproportionality claims. Unlike federal courts, state courts are not bound to follow all of the Supreme Court's precedents. Under the doctrine of "judicial federalism," state courts can interpret their state constitutions in ways that extend greater protections to citizens of the state. To explore the issue of disproportionality claims at the state level, the LEXIS KEY WORDS system was used to locate major state supreme court decisions on sentencing disproportionality from 1980 to 2011. State courts have essentially followed one of two paths. The first path is to apply the United States Supreme Court's jurisprudence to disproportionality claims. The second is to establish broader protections against lengthy prison terms under the state constitution. Although the Delaware Supreme Court has attempted to make sense of the United States Supreme Court's holdings, the results have been contradictory. This paper concludes with the assertion that the Delaware Supreme Court should extend broader protections against excessive sentences under the Cruel Punishment Clause of the Delaware Constitution, using preponderance of the evidence as the threshold standard for disproportionality claims.

Chapter 1

INTRODUCTION

Today, America incarcerates more people per capita than any other country in the world.¹ As of December 2010, out of every 100,000 people, the United States locks up 731 of them, totaling more than 2.26 million people held in federal and state prisons and city, county and local jails.² Compare that number to other countries in the western world. For every 100,000 population, the United Kingdom incarcerates 153 people; Canada, 116; France, 96; Germany, 89; Denmark, 63.³ Put in the simplest terms, the United States imprisons a higher percentage of its citizens than any other nation.⁴

¹ ROY WALMSLEY, *WORLD PRISON POPULATION LIST 1* (8th ed. 2009).

² LAUREN E. GLAZE, *CORRECTIONAL POPULATION IN THE UNITED STATES, 2010* 7 (2011).

³ WALMSLEY, *supra* note 1, at 3-5. America fares no better stacked up against other countries. Russia, with the world's second highest incarceration rate, imprisons 629 people per 100,000 population, still well below the United States. Other countries with high incarceration rates include Belarus (468), Belize (455), Bahamas (422), Georgia (415), Kazakhstan (378), Israel (326), and the Ukraine (323). (These numbers are from 2008, at the time America incarcerated 756 people per 100,000) *.Id.*

⁴ It is often unclear exactly why America differs so dramatically from other western countries when it comes to punishment policy. Part of the explanation may be historical. In countries with traditional status hierarchies like France and Germany, over time society extended milder, less degrading punishments—previously reserved for the nobility and special status offenders—to society as a whole. In America,

The explosion of the United States prison population has been well documented.⁵ Beginning in the early 1970s, the phenomenon of “mass incarceration” has entrenched itself in American society, spawning a class of people with vested interests in maintaining a high rate of incarceration.⁶ If prison growth was purely a reaction to rising crime rates, the trend would be less disturbing, but the politics of “getting tough” have outlived the actual increases in crime rates that catalyzed the movement.⁷ Nor can the disproportionate incarceration of non-violent, drug offenders and black men be ignored.⁸

special privileged punishments were attacked on the basis of inequality and instead low-status, harsher treatment proliferated. *See* JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 9-11 (2003).

⁵ *See generally* MARC MAUER, *RACE TO INCARCERATE* 1-40 (2006) (cataloging the rise of mass incarceration and the consequences of “tough on crime” movement).

⁶ *Id.* at 10-11. *See* Philip J. Wood, *The Rise of the Prison Industrial Complex in the United States*, in *CAPITALIST PUNISHMENT: PRISON PRIVATIZATION & HUMAN RIGHTS*, 16, 16-17, 26-27 (Andrew Coyle et al. eds., 2003) (describing the nexus of interests, known as the “prison industrial complex,” that have benefited from increasing incarceration, including “tough on crime” politicians, private prison operators, and Correctional Officers’ Unions).

⁷ *See* MAUER, *supra* note 5, at 68-81 (describing the “law and order” one-upmanship that occurred in the early 1990s under President Bill Clinton); DAVID GARLAND, *THE CULTURE OF CONTROL* 90-92 (2001) (explaining that the high crime rates of the 1960s, 1970s, and the early 1980s were a predictable occurrence brought about by social, economic, and cultural changes characteristic of the post-WWII period in western societies and correlating with the life-span of the baby boom generation).

⁸ *See* Loïc Wacquant, *The Great Penal Leap Backward*, in *THE NEW PUNITIVENESS* 3, 19-21 (John Pratt et al. eds., 2005) (noting the rapid increases in incarceration of both drug offenders and black men resulting from the “War on Drugs,” the use of increased

The recently decided case of *Brown v. Plata*⁹ can fully attest to the results of modern penal policy. As a result of persistent, uncorrected constitutional violations of the Eighth Amendment occurring in the California prison system, the State of California was ordered by two Federal District Courts to release prisoners in order to reduce the severe overcrowding that made correction of the unconstitutionally inadequate medical and mental health care impossible.¹⁰ At the time of federal judicial intervention, the California prison system was operating at almost 200% capacity; California was ordered to reduce the prison population to 137.5%.¹¹ The United States Supreme Court was tasked with deciding whether the remedial order was consistent with the Prison Litigation Reform Act.¹² Because the overcrowding was the “primary cause” of systemic failures to provide minimally adequate medical and mental health care, the Court concluded that the order was within the authority of the three-judge panel of the District Court.¹³ As the Supreme Court itself noted, this judicially mandated reduction in prison population was an order of “unprecedented sweep and

incarceration as a form of punitive social control of black urban populations, the rise of incapacitation as a primary goal of criminal justice policy, and the correlative criminalization of poverty).

⁹ 131 S. Ct. 1910 (2011).

¹⁰ *Id.* at 1922.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

extent,” but the Court nevertheless affirmed the order because it was necessary to stop the ongoing, widespread violations of the prisoners’ right to be free from cruel and unusual conditions of confinement.¹⁴

For all of the harm caused by mass incarceration, judicial remedies such as the intervention in California can only mitigate some of the worst excesses. Reform of the more alarming consequences of American crime policy can only come from the legislature. Courts are not the solution. But, there is one issue that courts have a constitutional duty to rectify: the imposition of extraordinary long prison terms on minor offenders. Courts have largely failed in this duty. Both the United States Constitution and almost all state constitutions contain a prohibition on cruel and unusual punishment.¹⁵ Despite the proliferation of harsh sentencing policies that, sometimes radically, increase penalties, the United States Supreme Court has rejected almost every constitutional challenge to disproportionately long prison terms.

In terms of punishment theory, excessively long prison terms contravene one of the core tenets of retributive theory: that all punishments should be proportionate—grounded in an equitable weighing of the culpability of the offender and the seriousness of the offense.¹⁶ The Cruel and Unusual Punishment clause does not

¹⁴ *Id.*

¹⁵ “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII.

¹⁶ See Andrew Ashworth, *Desert, in* PRINCIPLED SENTENCING 181, 181 (Andrew von Hirsh & Andrew Ashworth eds., 1992). There are two types of retributive

mandate that legislatures act in accordance with the principle of proportionality,¹⁷ but the prohibition on “cruel and unusual” punishments does implicate some limits on excessively long prison terms.¹⁸ As a constitutional matter, proportionality limitations are best expressed by the principle of “limiting retributivism.” Limiting retributivism refers not to strict proportionality between offense and “just desert” but instead to a range of semi-proportionate punishments, tethered to a normative proportionate ideal, but also accommodating some variability around that norm in the service of other goals of criminal justice.¹⁹ If punishment fails to reflect the actual seriousness of the

proportionality. “Ordinal” proportionality refers to the precept that crimes should be proportionate to each other, based on their relative seriousness. “Cardinal” proportionality refers to the precept that a punishment should be proportionate to the offense itself. *Id.* In general, a violation of constitutional proportionality will be a violation of cardinal proportionality—the punishment is disproportionate to the offense itself. Lacking the means to gauge cardinal proportionality per se, violations of ordinal proportionality are often used as evidence that cardinal proportionality is also violated. *See Solem v. Helm*, 463 U.S. 227, 291 (1983) (explaining why comparison of the penalties assigned to more and less serious crimes within a jurisdiction produces some evidence of whether a sentence is excessive).

¹⁷ *See Gregg v. Georgia*, 428 U.S. 153, 182-83 (1976) (explaining that the Court cannot dictate what punishment should be meted out, but not unconstitutional punishment “cannot be so totally without penological justification that it results in the gratuitous infliction of suffering”).

¹⁸ *See Solem*, 463 U.S. at 284-90 (cataloging the historical basis of proportionality limitations and the Court’s incorporation of those principles in its jurisprudence);

¹⁹ *See* Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571, 591-92 (2005).

offense and the culpability of the offender, it becomes truly excessive and violative of limiting-retributive proportionality.

Since the 1910 case of *Weems v. United States*,²⁰ the Supreme Court has recognized that punishments that are disproportionate to the offense may violate the Cruel and Unusual Punishment Clause of the Eighth Amendment.²¹ However, the admitted existence of such a proportionality principle has not been accompanied by any meaningful protections against lengthy prison terms. In a line of six cases, beginning in 1980, the Supreme Court attempted to develop a body of jurisprudence to govern disproportionality claims.²² This is the *Rummel* or modern line of proportionality cases. Unsurprisingly, every one of these cases involved a lengthy prison term imposed under either a mandatory minimum statute or a habitual offender law. Despite the best efforts of the Court to maintain some semblance of rationale order and consistency, one of the hallmarks of this line of cases remains its

²⁰ 217 U.S. 349 (1910).

²¹ The most recent application of this proportionality limitation was the case of *Graham v. Florida*, 130 S. Ct. 2011 (2010), wherein the Court held that the Eighth Amendment prohibited the imposition of a life without the possibility of parole sentence on a minor convicted of a non-homicide offense. However, this case should be considered distinct from the Court's other disproportionality decisions involving lengthy prison terms because the Court's reasoning substantially relied on the categorical differences in culpability between juvenile and adult offenders. *See id.* at 2026.

²² The six cases included: *Rummel v. Estelle*, 445 U.S. 263 (1980), *Hutto v. Davis*, 454 U.S. 370 (1982), *Solem v. Helm*, 463 U.S. 277 (1983), *Harmelin v. Michigan*, 501 U.S. 957 (1991), *Ewing v. California*, 538 U.S. 11 (2003), and *Lockyer v. Andrade*, 538 U.S. 63 (2003).

irreconcilable opinions.²³ In the last of this modern line, Justice O'Connor, writing for the majority in *Lockyer v. Andrade*, conceded that: “[W]e have not established a clear or consistent path for courts to follow.”²⁴ Justice O'Connor would go on to conclude that only one legal principle survived the gauntlet of conflicting opinions: a term of years may be so disproportionate to the offense that it violates the Eighth Amendment.²⁵ Substantively, that conclusion is no different from the conclusion of the Court in *Weems*, almost a hundred years before. More than just lacking legal specificity, this result is troubling because it leaves minor offenders who have received prison terms far in excess of what they deserve without a constitutional remedy.

Lower federal courts have no choice but to apply these precedents. As a consequence, federal appellate courts regularly uphold sentences that could not be imposed in any other western industrial nation.²⁶ Unless the Supreme Court takes another case on this issue of disproportionality, and repudiates at least parts of its prior holdings, no doubt this pattern will continue. State courts, however, are not strictly bound to follow the United States Supreme Court's precedents. Under the doctrine of “judicial federalism,” a state court may extend broader constitutional rights under the

²³ See *Solem*, 463 U.S. at 304 (Burger, C.J., dissenting) (“[T]oday's holding cannot rationally be reconciled with *Rummel*.”).

²⁴ *Lockyer*, 538 U.S. at 72.

²⁵ *Id.*

²⁶ See, e.g., *United States v. Williams*, 576 F.2d 1149 (10th Cir. 2009) (upholding concurrent life sentences for two counts of possession of cocaine).

provisions of its state constitution than the United States Supreme Court has interpreted to exist under the Federal Constitution.²⁷

State courts that are brought claims of disproportionality may select one of two paths. The first path is to apply United State Supreme Court precedents to the case.²⁸ The second path available for state courts is to rule on the basis of the state constitution.²⁹ Because many state supreme courts have interpreted the state

²⁷ See *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983) (entreating state courts to make it clear whether state court decisions rest on adequate and independent state grounds and whether federal precedents are cited as controlling authority or merely persuasive authority in what is otherwise a state constitutional opinion); *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) (“where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment”); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) (emphasizing that state constitutions are a “font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law”).

²⁸ See, e.g., *State v. Davis*, 79 P.3d 64, 67-68 (Ariz. 2003) (finding it unnecessary to define protections against cruel and unusual punishment under the state constitution because the fifty-two year sentence for a young man convicted of having fully consensual sex with two minors violated the Eighth Amendment to the United States Constitution); *Wilson v. State*, 830 So.2d 765, 778 (Ala. Crim. App. 2001) (applying the standard developed by the plurality concurring opinion in *Harmelin* to a disproportionality claim made under both the Federal and State Constitution).

²⁹ See, e.g., *In re Lynch*, 503 P.2d 921, 926 (Cal. 1972) (concluding that disproportionality determinations involving indeterminate sentences under the California Constitution must judge excessiveness by the maximum term of imprisonment authorized); *People v. Bullock*, 485 N.W.2d 866, 872 (Mich. 1992) (citing three compelling reasons why the Michigan Constitution’s “cruel or unusual” punishment clause offers broader protections against disproportionate sentences than the United States Constitution: textual differences, historical factors, longstanding Michigan precedent).

constitution's cruel and/or unusual punishment clause to extend the same protections as the Eighth Amendment's Cruel and Unusual Punishment Clause, adjudication of federal and state claims of unconstitutional disproportionality often have the same result.³⁰ Many different factors may convince a state court that the state constitution should be interpreted to extend greater protections under the state constitution.³¹ One reason why a state court might want to take independent state action in this particular area of law is that, by the Supreme Court's own admission, the modern line of proportionality decisions "have not been a model of clarity."³²

In 2003, the Delaware Supreme Court took the case of *Crosby v. State*.³³ Chris Crosby was sentenced to life imprisonment under Delaware's habitual offender law, following his conviction for second-degree forgery.³⁴ Using the standard promulgated

³⁰ See, e.g., *State v. Pugh*, 640 N.W.2d 79, 85 (S.D. 2002) ("[T]he foremost line of review under both our federal and state constitutions is the gross disproportionality test.").

³¹ See *State v. Ross*, 646 A.2d 1318, 1356 (Conn. 1994) (citing *State v. Geisler*, 610 A.2d 1225 (Conn. 1992)) (identifying six factors to consider when interpreting the state constitution: text of the provision, Connecticut precedents, persuasive federal precedents, intent of the framers, and "contemporary understandings of applicable economic and sociological norms"); *State v. Hunt*, 450 A.2d 952, 965 (N.J. 1982) (identifying factors that should be considered: textual language, legislative history, preexisting state law, structural differences between federal and state constitutions, concerns or interests specific to the state, state traditions, and public attitudes).

³² *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003).

³³ 824 A.2d 894 (Del. 2003).

³⁴ *Id.* at 896.

by Justice Kennedy, concurring in *Harmelin v. Michigan*, the Delaware Supreme Court determined that Crosby's sentence violated the Eighth Amendment.³⁵ Although the Delaware Supreme Court reached an equitable result in this case, it left itself open to reversal by the United States Supreme Court. In its analysis of Crosby's sentence, the Delaware Supreme Court analogized the facts of this case to the facts of *Rummel v. Estelle*, *Solem v. Helm*, and *Ewing v. California*,³⁶ leaving a lot of room for argument about just why these cases do or do not differ.

The Delaware Supreme Court missed a prime opportunity in this case to rule on the basis of the Delaware Constitution's "cruel" punishments clause.³⁷ Although in the past the Delaware Supreme Court has been hesitant to establish more robust standards of review under the Delaware Constitution,³⁸ there is good reason to do so now. The primary goal of this paper is to substantiate this claim.

My research focuses on the reasoning and opinions of courts that have dealt with the issue of constitutional limitations on the length of prison terms. Using the LexisNexis legal database and a process called "shepardization", I have tracked the

³⁵ *Id.* at 912.

³⁶ *Id.* at 909-10.

³⁷ "Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted; and in the construction of jails a proper regard shall be had to the health of prisoners." DEL. CONST. art. I, § 11.

³⁸ *See State v. Ayers*, 260 A.2d 162, 169 (Del. 1969) (explaining that assignment of penalties is a legislative matter that will not be interfered with by the courts as long as the punishment is "within the traditional limitations of forms of punishment").

jurisprudence of both the United States Supreme Court and many state courts, to see how significant decisions on issues of proportionality have played out.

Chapter two breaks down the six modern proportionality cases of the United States Supreme Court, highlighting the many problems that still confound attempts to make consistent, humane decisions under the Cruel and Unusual Punishments Clause.

Chapter three further explicates some of the issues that the Supreme Court has raised in proportionality cases, and attempts to show why the Court's concerns have been overstated and cannot convincingly legitimate the Court's unwillingness to strike down disproportionate prison terms.

Chapter four looks to the many state supreme courts that have dealt with proportionality issues, exploring the different paths state supreme courts have taken. This chapter also addresses some of the differences between the state and federal court systems and why states courts may choose to establish constitutional standards separate from the United States Supreme Court.

Chapter five incorporates the issues from the preceding chapters into a specific argument for why it is both advisable and appropriate for the Delaware Supreme Court to demarcate a more humane standard of proportionality review under the Delaware Constitution's Cruel Punishments Clause.

A final section will explain just what this new standard should be and why the Delaware Supreme Court should adopt the preponderance of the evidence test as the threshold test under the Delaware Constitution.

Chapter 2

The Supreme Court's Disproportionality Jurisprudence

In 1980 the United States Supreme Court took the first case in the modern line of proportionality decisions, *Rummel v. Estelle*.³⁹ The Court dismissed Rummel's claim that his life sentence, imposed under Texas' habitual offender statute, was unconstitutionally disproportionate in violation of the Eighth Amendment's Cruel and Unusual Punishment Clause.⁴⁰ Two years later, the Court rejected another claim of disproportionality in *Hutto v. Davis*.⁴¹ Finally, in *Solem v. Helm*, the dissenters from *Rummel* and *Hutto* gained a fifth vote and affirmed the existence of proportionality limitations for lengthy prison terms, striking down a life without the possibility of parole sentence for a minor, nonviolent offender.⁴² *Solem's* pro-proportionality ruling was the last word on the subject until the Court decided *Harmelin v. Michigan* eight years later.⁴³ In *Harmelin*, the Court split into three factions with differing interpretations of the Eighth Amendment's relationship to lengthy prison terms. The

³⁹ 445 U.S. 263 (1980).

⁴⁰ *Id.* at 284-85.

⁴¹ 454 U.S. 370 (1982) (per curiam).

⁴² 463 U.S. 277, 303 (1983).

⁴³ 501 U.S. 957 (1991).

actual holding of *Harmelin* was completely overshadowed by these divisions.⁴⁴ A three-Justice plurality affirmed that a grossly disproportionate prison term could qualify as “cruel and unusual” punishment, but effectively “eviscerate[d]” *Solem* by reducing a three-part test for proportionality used in *Solem* to a subjective threshold comparison of crime and punishment.⁴⁵ Referred to as the “gross disproportionality” standard, this test was the result of the plurality’s effort to reconcile the conflicting opinions of the Court’s proportionality jurisprudence, not only between *Rummel/Hutto* and *Solem*, but also between *Rummel/Hutto* and the Court’s other Eighth Amendment decisions.⁴⁶ In 2003, the Court decided the last of this line of cases, the companion cases of *Ewing v. California*⁴⁷ and *Lockyer v. Andrade*.⁴⁸ The Court upheld both sentences, both of which were imposed under California’s three-strikes law.⁴⁹ Neither *Ewing* nor *Lockyer* brought any further clarity to this area of jurisprudence, leaving the *Harmelin* plurality’s “gross disproportionality” test as the working standard for lower courts.

⁴⁴ Only part IV of Justice Scalia’s opinion garnered five votes. In part IV, the Court ruled that the individual sentencing requirement of death penalty cases did not extend to life without the possibility of parole cases. *Id.* at 994-96.

⁴⁵ *Id.* at 1016-19 (White, J., dissenting).

⁴⁶ *See id.* at 998-1001.

⁴⁷ 538 U.S. 11 (2003).

⁴⁸ 538 U.S. 63 (2003).

⁴⁹ CAL. PENAL CODE § 667 (1999).

Rummel v. Estelle

In 1973 a Texas jury convicted William Rummel of felony theft for obtaining money under false pretenses, an offense normally punishable by two to ten years of imprisonment.⁵⁰ However, because Rummel had two prior felony convictions, he was prosecuted under Texas' recidivist statute.⁵¹ Rummel's prior offenses consisted of fraudulent use of a credit card for \$80 and passing a forged check for \$28.36.⁵² For those convictions, Rummel was sentenced, respectively, to three years and four years of imprisonment.⁵³ His trigger offense was a similarly minor incident: Rummel accepted \$120.75 in return for his promise to fix an air conditioner, which he failed to do.⁵⁴ Rummel was charged with obtaining money under false pretences, convicted, and subsequently sentenced to a mandatory life term as an habitual offender.⁵⁵

⁵⁰ *Rummel v. Estelle*, 445 U.S. 263, 266 (1980).

⁵¹ *Id.*

⁵² *Id.* at 265-66.

⁵³ *Id.*

⁵⁴ *Id.* at 286 (Powell, J., dissenting).

⁵⁵ *Id.*

The Fifth Circuit Court of Appeals

On appeal, a panel of the United States Court of Appeals for the Fifth Circuit held that Rummel’s life sentence violated the Cruel and Unusual Punishment Clause on the basis of disproportionality.⁵⁶ Central to the Fifth Circuit panel’s decision was the recently decided *Coker v. Georgia*.⁵⁷ In *Coker*, the United States Supreme Court ruled that the death penalty was an unconstitutionally disproportionate punishment for the crime of rape.⁵⁸ According to the panel, two particular principles of Eighth Amendment jurisprudence from *Coker* applied here: disproportionality was a valid basis for a claim of cruel and unusual punishment and—“to the maximum extent possible”—disproportionality determinations should rely on objective factors.⁵⁹ The Fifth Circuit panel also found persuasive another disproportionality decision, *Hart v. Coiner*, from the United States Court of Appeals for the Fourth Circuit.⁶⁰ Applying a

⁵⁶ *Rummel v. Estelle*, 568 F.2d 1193 (5th Cir. 1978).

⁵⁷ 433 U.S. 584 (1977).

⁵⁸ *Id.* at 592.

⁵⁹ *Rummel*, 568 F.2d at 1196 (citing *Coker*, 433 U.S. at 97).

⁶⁰ 483 F.2d 136, 138 (4th Cir. 1973) (holding that a life sentence imposed under West Virginia’s recidivist statute for three prior convictions: “(1) writing a check on insufficient funds for \$50; (2) transporting across state lines forged checks in the amount of \$140; and (3) perjury”—was “so grossly excessive that it amounts to cruel and unusual punishment”), *cert. denied*, 415 U.S. 983 (1974); *But cf. Davis v. Davis*, 585 F.2d 1226 (4th Cir. 1978) (rejecting petitioner’s claim that two consecutive twenty year sentences for possession of marijuana with intent to distribute and distribution of marijuana were constitutionally excessive and violated the Eighth Amendment).

four-part test used by the Fourth Circuit in *Hart*, the panel noted that Rummel's felonies were all minor and nonviolent,⁶¹ that Texas' recidivist statute included such a broad range of offenses that it "seem[ed] to be independent of degrees,"⁶² that Rummel's sentence was irrationally severe when compared to the penalties for more serious, violent crimes, and that, most likely, in no other state could a defendant have received life imprisonment for similar offenses.⁶³ Based on this assessment, the Fifth Circuit panel held that Rummel's life sentence was grossly disproportionate and therefore unconstitutional.⁶⁴

The Fifth Circuit reheard the case en banc that same year, splitting eight to six in favor of vacating the panel's decision and denying Rummel's Eighth Amendment claim.⁶⁵ While the en banc court agreed that the Eighth Amendment contained a prohibition on excessively long prison sentences, the majority concluded that the imbalance between crime and punishment had to be so great as to have no rational

⁶¹ *Rummel*, 568 F.2d at 1198.

⁶² *Id.* (quoting *Weems v. United States*, 217 U.S. 349, 365 (1910)) (internal quotation marks omitted).

⁶³ *Id.* at 1199-1200. The only crime, other than habitual offender offenses, punished by mandatory life imprisonment in Texas, at the time, was capital murder. *Id.*

⁶⁴ *Id.*

⁶⁵ *Rummel v. Estelle*, 587 F.2d 651 (5th Cir. 1978) (en banc).

basis.⁶⁶ According to the en banc majority, both the Fifth Circuit panel and the Fourth Circuit in *Hart* inappropriately emphasized the triviality of the underlying criminal conduct over the state’s legitimate interest in punishing habitual offenders.⁶⁷ The majority further emphasized Texas’ relatively liberal system of allocating good time credits, reasoning that in “reality” Rummel was likely to serve much less than a full life term.⁶⁸ In this light, Rummel’s life sentence did have a rational basis and was therefore considered constitutional.⁶⁹

Unlike the en banc Court, the Fifth Circuit panel rejected the State’s argument that the possibility of parole should be taken into account when considering Rummel’s sentence.⁷⁰ The decision of whether or not to grant parole was, usually, unreviewable by a federal court because parole decisions were a “matter of administrative grace,” not a guarantee.⁷¹ An unconstitutional punishment could not be made constitutional

⁶⁶ *Id.* at 655; *cf.* *Renner v. Beto*, 447 F.2d 20 (5th Cir. 1971) (affirming the denial of a writ of habeas corpus for a man convicted of second offense possession of marijuana and sentenced to thirty years imprisonment because the classification of marijuana as a narcotic drug was not unreasonable).

⁶⁷ *Rummel*, 587 F.2d at 659.

⁶⁸ *Id.* at 657-662.

⁶⁹ *Id.*

⁷⁰ *Rummel v. Estelle*, 568 F.2d 1193, 1196 (5th Cir. 1978) (citing *Brown v. Kearney*, 355 F.2d 199 (5th Cir. 1966)).

⁷¹ *Id.*; *see Greenholtz v. Inmates of Neb. Penal and Correctional Complex*, 442 U.S. 1, 7 (1979) (“There is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence.”); *See also Jago v. Van*

by the State promising it might not go through with it.⁷² Also, the en banc dissenters noted that the majority seemed to conflate the system of good time with parole: whereas a prisoner with a fixed term of years would be released after sufficient accumulation of good time credits, a prisoner, like Rummel, with a life sentence could not gain release based on good time alone.⁷³ The only opportunity for release for offenders sentenced to life (rather than a term of years) was release on parole.⁷⁴

The Fifth Circuit panel and the Fifth Circuit en banc decisions essentially split over how exactly Rummel's life sentence should be viewed. The divisions between the majority and the dissent in the United States Supreme Court were much more complex.

The Supreme Court's Holding

The Supreme Court upheld Rummel's sentence five to four.⁷⁵ Writing for the majority, Justice Rehnquist reasoned that the length of the sentence was "purely a matter of legislative prerogative," because such determinations were inherently

Curen, 454 U.S. 14 (1981) (holding that no constitutional liberty interest attaches after the decision to grant parole but before actual release).

⁷² *Rummel*, 568 F.2d at 1196.

⁷³ *Rummel*, 587 F.2d at 666 (Clark, J., dissenting).

⁷⁴ *Id.*

⁷⁵ Justice Rehnquist's majority opinion was joined by Burger, C.J., Stewart, White, and Blackmun, J.J.

subjective and therefore unsuitable for judicial review.⁷⁶ In a footnote, the Court did concede, as an example, that “a proportionality principle would [] come into play ... if a legislature made overtime parking a felony punishable by life imprisonment.”⁷⁷ Justice Rehnquist’s majority opinion forwarded a number of arguments in support of rejecting the disproportionality claim. First, although the Court had struck down punishments on the basis of proportionality before, it had never done so for a pure prison term.⁷⁸ Second, courts were not competent to make proportionality determinations because such determinations were inherently subjective.⁷⁹ Third, the legislature had a legitimate interest in punishing recidivists more harshly than other offenders.⁸⁰ Fourth, federalism demanded that the Court not attempt to impose sentencing uniformity on the states.⁸¹ Each of these arguments suffered from serious flaws.

⁷⁶ *Rummel v. Estelle*, 445 U.S. 263, 274-76 (1980).

⁷⁷ *Id.* at 274 n.11.

⁷⁸ *See id.* at 271-75, 276-77.

⁷⁹ *See id.* at 275, 279-81.

⁸⁰ *See id.* at 277-78.

⁸¹ *See id.* at 281-84.

Precedent

The *Rummel* majority's attempt to isolate lengthy prison terms from other proportionality decisions was unconvincing at best. Both the dissent⁸² and the Fifth Circuit panel⁸³ saw *Weems v. United States*⁸⁴ and *Coker v. Georgia* as cases of general principle that substantiated the idea that proportionality limitations applied to all punishments. Conversely, Justice Rehnquist insisted that *Weems* and *Coker* were limited by the particular methods of punishment involved in those cases.⁸⁵ The actual reasoning of *Weems* and *Coker* supports the broader interpretation.

Weems v. United States came to the Court from the Philippine Islands.⁸⁶ Convicted of falsifying a public and official document, Weems was sentenced to fifteen years imprisonment as part of a punishment known as *cadena temporal*, which included both a sentence to "hard and painful labor" as well as a certain "accessory penalties."⁸⁷ The *Weems* Court regarded these punishments as so excessive that, for

⁸² *Id.* at 289-93 ("Nothing in the *Coker* analysis suggests that principles of disproportionality are applicable only to capital cases.").

⁸³ *Rummel v. Estelle*, 568 F.2d 1193, 1195-96 (5th Cir. 1978) ("[The Supreme Court's] reasoning never has suggested that a disproportionately long prison sentence would be immune from Eighth Amendment challenge.").

⁸⁴ 217 U.S. 349 (1910).

⁸⁵ *See Rummel*, 445 U.S. at 273-75.

⁸⁶ *Weems*, 217 U.S. at 357.

⁸⁷ *Id.* at 364 ("(1) civil interdiction; (2) perpetual absolute disqualification; (3) subjection to surveillance during life").

the first time, the Court found a sentence violative of the Eighth Amendment on the grounds of proportionality.⁸⁸ According to Justice Rehnquist, the *Weems* holding was limited by three factual aspects of the case: the triviality of the offense (requiring neither harm nor illicit gain), the harsh mandatory minimum sentence of twelve years, and, most importantly, the accessory punishments of *cadena temporal*.⁸⁹ This reading of *Weems* was correct insofar as the accessory punishments did influence the Court's decision.⁹⁰ But, the accessories were an additional—but not necessary—factor in reaching the decision to strike the sentence down.⁹¹ The *Weems* Court itself belied limiting the application of its reasoning: “Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth.”⁹² Consistent with that warning, the Court has time and again cited *Weems* as the precedential basis for a general prohibition on grossly disproportionate sentences.⁹³ Historically, the primary

⁸⁸ *Id.* at 377.

⁸⁹ *Rummel*, 445 U.S. at 273-74.

⁹⁰ *See Weems*, 217 U.S. at 364 (“[T]he fine and “accessories” must be brought into view.”).

⁹¹ *See* Thomas F. Cavalier, *Salvaging Proportionate Prison Sentencing: A Reply to Rummel v. Estelle*, 15 U. Mich. J.L. Reform 285, 291-92 (1982) (identifying textual basis in the *Weems* decision to conclude that the Court considered the elements of *cadena temporal* to individually violate the Eighth Amendment).

⁹² *Weems*, 217 U.S. at 373.

⁹³ *See, e.g.,* *Ingraham v. Wright*, 430 U.S. 651, 667 (1977) (citing *Weems* as evidence that disproportionate punishments violate the Eighth Amendment); *Hutto v. Finney*,

concern underlying the prohibition on “cruel and unusual” punishment was the method of punishment, but it was not the only concern.⁹⁴ *Weems* simply does not exclude pure imprisonment as a valid Eighth Amendment disproportionality claim.⁹⁵

As further evidence of the limited applicability of *Weems*, Justice Rehnquist cited *Badders v. United States*⁹⁶ and *Graham v. West Virginia*.⁹⁷ Both of these decisions rejected Eighth Amendment claims and closely followed *Weems* chronologically, perhaps suggesting that the *Weems* decision was unique and limited.

437 U.S. 678, 685 (1978); *Lockett v. Ohio*, 438 U.S. 586, 620 (1978); *Estelle v. Gamble*, 429 U.S. 97, 102 n.7 (1976).

⁹⁴ See *Powell v. Texas*, 392 U.S. 514, 531-32 (1968) (identifying method of punishment as the primary purpose of the Eighth Amendment); DANIEL A. FARBER, *RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* 29-37 (2007) (explaining that opposition to the Bill of Rights was based on the fear that enumeration of rights would imply a unacceptably narrow conception of rights, particularly that any right not explicitly included might be disparaged; the Ninth Amendment was presented by James Madison to negate such a possibility).

⁹⁵ See *Trop v. Dulles*, 356 U.S. 86, 100-1 (1958) (citing *Weems* as establishing the principle that the meaning of the Eighth Amendment must be drawn from the “evolving standards of decency that mark the progress of a maturing society”); *cf.* *District of Columbia v. Clawans*, 300 U.S. 617, 628 (citing *Weems* to support the proposition that punishments once thought mild may become regarded as so harsh as to constitutionally require jury trial, regardless of whether jury trial was required when the Constitution was adopted).

⁹⁶ 240 U.S. 391 (1916) (affirming defendant’s conviction for seven counts of mail fraud, each carrying a five year sentence, to be served concurrently, in addition to \$1,000 fine on each count).

⁹⁷ 224 U.S. 616 (1912) (affirming defendant’s life sentence under West Virginia’s recidivist statute for grand larceny, with prior convictions for grand larceny and burglary).

But, neither the *Badders* nor the *Graham* decision convincingly supported such a limited reading of *Weems*.

In *Badders*, the Eighth Amendment claim turned on the issue of defining every letter placed in the mail with the intent to defraud as a separate offense, and imposing an additional fine and prison term for each count.⁹⁸ While extremely long prison terms based on multiple smaller offenses do fall within the larger inquiry of proportionate sentencing,⁹⁹ the difference between an excessive aggregate sentence and an excessive sentence based on a single offense distinguishes *Badders* sufficiently from *Weems* to regard *Badders* as minimally instructive as to *Weems*' credentials as a general proportionality case.¹⁰⁰

Like *Badders*, *Graham* applicability to *Rummel* simply does not hold up under scrutiny. Justice Rehnquist claimed that *Graham* “seem[ed] factually indistinguishable” from *Rummel*, based on the monetary value attached to three

⁹⁸ *Badders*, 240 U.S. at 393.

⁹⁹ See *O’Neil v. Vermont*, 144 U.S. 323 (1892) (Field, J., dissenting) (arguing that individually justified punishments brought together may become excessively severe).

¹⁰⁰ See *State v. Berger*, 134 P.3d 378 (Ariz. 2006) (upholding a 200 year sentence—ten year sentences served consecutively for possession of twenty pictures of child pornography—reasoning that a sentence cannot become constitutionally disproportionate in aggregate, if each constituent offense is constitutional), *cert denied*, *Berger v. Arizona*, 549 U.S. 1252 (2007); *cf.* *State v. Taylor*, 773 P.2d 974 (Ariz. 1989) (rejecting an Eighth Amendment claim against an aggregate 2975 year sentence without the possibility of parole for eighty five offenses involving sexual conduct with children, noting that although extraordinary in total years, in practice the sentence was simply life without parole).

instances of horse theft.¹⁰¹ But, the monetary value alone of theft offenses does not determine the seriousness of the crime.¹⁰² Comparing horse theft at the turn of the century to Rummel's offenses in the modern day based on similar dollar amounts seems, at best, a bit misleading. Moreover, *Graham* offered no positive analysis of the possible merits of the Eighth Amendment claim.¹⁰³ It would be hard to conclude anything from an opinion as taciturn as *Graham*. So, neither *Badders* nor *Graham* substantiated the *Rummel* Court's narrow reading of the applicability of the *Weems* decision.

A final problem with the majority's analysis of *Weems* was its failure to narrow the broad interpretation of the values safeguarded by the Eighth Amendment established by the *Weems* Court.¹⁰⁴ Debate about the Eighth Amendment was

¹⁰¹ *Rummel*, 445 U.S. at 276-77.

¹⁰² Compare *State v. Davis*, 530 A.2d 1223, 1232 (Md. 1987) (recognizing that, regardless of a daytime housebreakers intentions, there is significant potential for violence in burglary offenses and therefore the legislature was justified in categorizing burglary as a crime of violence), with *Solem*, 463 U.S. at 296 (noting that passing a "no account" check is an entirely passive offense with no potential for or threat of violence).

¹⁰³ *Graham v. West Virginia*, 224 U.S. 616, 631 (1912) ("Nor can it be maintained that cruel and unusual punishment has been inflicted."); See also *Rummel*, 445 U.S. at 290 n.7 (Powell, J., dissenting) (arguing further that an Eighth Amendment holding consisting of one-sentence and predating incorporation was minimally instructive in this case).

¹⁰⁴ See Pressly Millen, *Interpretation of the Eighth Amendment—Rummel, Solem, and the Venerable Case of Weems v. United States*, 1984 Duke L.J. 789, 799-802 (1984) (reviewing the Court's discussion in *Weems* of the framer's intent for Eighth

minimal prior to its adoption, but the *Weems* Court nevertheless concluded that the Cruel and Unusual Punishments Clause was intended to extend protection beyond the abuses of power that occurred under the Stuarts.¹⁰⁵ Accordingly, it implicitly rejected the argument, advanced by some during debates about the Bill of Rights, that a prohibition on “cruel and unusual punishments” was superfluous in a country ruled by a democratically elected legislature.¹⁰⁶ The sanction of the legislature would not be sufficient to shield a punishment from Eighth Amendment scrutiny.¹⁰⁷ The Eighth Amendment was intended as a protection of substance, prohibiting more than just the second coming of the Bloody Assizes.

Amendment interpretation to be broad based and to evolve overtime in response to societal changes).

¹⁰⁵ *Weems v. United States*, 217 U.S. 349, 371-73 (1910). The Court argued that it was not in the character of the framers to enshrine a prohibition solely on already antiquated punishments. Rather, the framers were wary of all abuses of governmental power, historical as well as unforeseeable future cruelties, regardless of the form such excesses might take. *Id.*

¹⁰⁶ See Millen, *supra* note 104, at 801.

¹⁰⁷ See *Weems*, 217 U.S. at 378-79 (asserting that the judiciary was unjustified in interfering with the legislature’s power to assign punishment, except when the legislature contravenes a constitutional protection: “In such case not our discretion but our legal *duty* ... is invoked.”) (emphasis added); *Marbury v. Madison*, 5 U.S. 137, 177 (1803) (asserting that the legislature did not have the power to define the Constitution, rather it was “the province and duty of the judicial department” to uphold the higher law of the Constitution over legislative acts).

Similar to its treatment of *Weems*, the *Rummel* majority also mischaracterized the holding of *Coker v. Georgia*.¹⁰⁸ Justice Rehnquist maintained that, because *Coker* was a death penalty case, the proportionality analysis performed in *Coker* had little relevance outside of other death penalty cases.¹⁰⁹ Part of his reasoning was that “death is different.”¹¹⁰ The irrevocability and harshness of the death penalty had long required a variety of special protections under the Eighth Amendment for death

¹⁰⁸ See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (identifying two bases for finding a punishment constitutionally excessive based on the ruling of *Gregg v. Georgia*: “(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”).

¹⁰⁹ *Rummel v. Estelle*, 445 U.S. 263, 272 (1980).

¹¹⁰ See *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (explaining that the gravity of death penalty required heightened procedural protections, guiding and limiting discretion “so as to minimize the risk of wholly arbitrary and capricious action”); *Woodson v. North Carolina*, 428 U.S. 280, 303-304 (1976) (striking down North Carolina’s mandatory death penalty statute because it impermissibly treated all people convicted of certain enumerated offenses as an “undifferentiated mass,” contrary to the Eighth Amendment’s requirement that death sentences be individually tailored); *Harmelin v. Michigan*, 501 U.S. 957, 995-96 (refusing to extend the requirement of individualized sentencing in capital cases to cases of life imprisonment without the possibility of parole); *but, see Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (refusing to mandate the appointment of counsel for indigent death penalty defendants pursuing state postconviction relief because additional trial safeguards were sufficient to fulfill the heightened reliability requirement of the Eighth Amendment in death penalty cases); *McCleskey v. Kemp*, 481 U.S. 279, 312 (1987) (rejecting both equal protection and cruel and unusual punishment claims based on the Baldus study—a complex statistical study that demonstrated the pervasive influence of race on Georgia’s capital sentencing scheme—insisting that at most “the Baldus study indicates a discrepancy that appears to correlate with race,” and unless McCleskey could prove that racial bias pervaded *his* trial, the Court could not uphold his claims).

penalty cases, and only for death penalty cases.¹¹¹ The other part was that a “bright line” could be drawn between the death penalty and all other forms of punishment, allowing for a more objective comparison than could ever be achieved by distinguishing between terms of years.¹¹² Both of these arguments for limiting proportionality review to death penalty cases made fair points, but once again legitimate concerns were taken too far: good reasons to take proportionality analysis seriously and conservatively were instead taken as reasons not to engage in proportionality analysis at all. Although *Coker* and its predecessor *Gregg v. Georgia* were factually about capital punishment, the reasoning of those cases makes clear that excessiveness alone was sufficient to render the punishment unconstitutional in *Coker*.¹¹³ The *Rummel* majority’s attempt to mask this fact involved some misleading word play.

In order to support his claim that proportionality, in effect, has no place in claims involving prison terms, Justice Rehnquist first cited *Coker* (emphasizing the importance of objectivity in proportionality analysis) and then cited the concurring opinion of Justice Stewart in *Furman v. Georgia*¹¹⁴ (emphasizing the uniqueness of

¹¹¹ *Id.*

¹¹² *Rummel*, 445 U.S. at 274-75 (citing *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

¹¹³ Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court’s Tortured Approach to Cruel and Unusual Punishment*, 84 Ky. L.J. 107, 113 (1995).

¹¹⁴ 408 U.S. 238 (1972).

the death penalty as a punishment).¹¹⁵ The juxtaposition of *Coker* and *Furman* in this way was deceptive. The section of *Coker* that Justice Rehnquist quoted reads: “[J]udgment should be informed by objective factors to the maximum possible extent.”¹¹⁶ That was as far as Justice Rehnquist quoted before arguing that the uniqueness of the death penalty (and of similarly unique punishments like *cadena temporal*) established a level of “objectivity” that legitimated proportionality analysis.¹¹⁷ The *Coker* majority was concerned with the uniqueness of the death penalty. Death was a uniquely severe punishment, only suitably given to uniquely serious offenders.¹¹⁸ But, those arguments were put forward only as part of the proportionality analysis. The initial justification for performing proportionality analysis at all was rooted in the constitutional protection against excessive punishment.¹¹⁹ From where Justice Rehnquist left off, the actual *Coker* opinion continued: “To this end, attention must be given to the public attitudes concerning a

¹¹⁵ *Rummel*, 445 U.S. at 274-75 (citing *Coker*, 433 U.S. at 592; *Furman*, 408 U.S. at 306).

¹¹⁶ *Coker*, 433 U.S. at 592.

¹¹⁷ *Rummel*, 445 U.S. at 274-75.

¹¹⁸ *Id.* at 597-98 (discussing why rape, although a serious crime, does not warrant the death penalty because, if nothing else, the victim will live).

¹¹⁹ *Id.* at 592 The Court cites four cases as the basis for the Eighth Amendment’s prohibition on “excessive” punishments: *Furman v. Georgia*, 408 U.S. 238 (1972), *Trop v. Dulles*, 356 U.S. 86 (1958), *Weems v. United States*, and *Robinson v. California*, 370 U.S. 660 (1962); three out of the four are non-death penalty cases.

particular sentence – history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted.”¹²⁰ These factors would be more difficult to apply terms of imprisonment cases, but certainly not impossible. According to the *Rummel* majority’s reasoning, these factors were simply too variable to be reliably applied to prison terms.

The dissent handily showcased how at least one of the factors identified in *Coker*, legislative attitudes, could be applied, and would support finding Rummel’s sentence unconstitutionally disproportionate.¹²¹ Based on the number of states that have habitual offender statutes under which an offender like William Rummel could receive a life sentence, the dissent concluded that the actions of legislatures tended to support a finding of disproportionality in this case.¹²² Although the Court had not fully established the number of legislatures authorizing a practice¹²³ and the consistency of the direction of legislative change¹²⁴ as touchstones of Eighth Amendment

¹²⁰ *Coker*, 433 U.S. at 592.

¹²¹ *Rummel*, 445 U.S. at 296-300.

¹²² *Id.*

¹²³ *See Coker*, 433 U.S. at 585-96 (noting that, at that time, only one jurisdiction, Georgia, authorized the death penalty for the rape of an adult woman); *Edmund v. Florida*, 458 U.S. 782, 789-90 (1982) (holding that the Eighth Amendment prohibits the execution of a participant in a felony murder who did not kill, intend to kill, or attempt to kill, based on evidence of a societal consensus against the practice—eight jurisdictions authorized such an execution).

¹²⁴ *See Atkins v. Virginia*, 536 U.S. 304, 315 (2002) (“It is not so much the number of these States [that authorize the death penalty for mentally retarded offenders] that is

jurisprudence at this point, the dissent noted that only three states, including Texas, would impose a mandatory life sentence on an offender of Rummel’s caliber, and nine states had repealed statutes that authorized mandatory life sentences for second or third offense nonviolent felons.¹²⁵ Based on this evidence, it would not be unreasonable to conclude that the number of states permitting the sentence (three) was verging on insignificant, and that legislatures were consistently moving away from such harsh statutes.¹²⁶

Application of Proportionality Review to Prison Terms

As Justice Rehnquist correctly pointed out, an accurate, objective comparison of sentencing schemes would need to take into account a number of factors, including differences between recidivist statutes, parole and good time systems, and the definition of certain behaviors as “violent” or “nonviolent.”¹²⁷ Distinctions between an ostensibly harsh system and a milder one might often be “subtle rather than gross.”¹²⁸ Nevertheless, principled distinctions can be drawn between more and less

significant, but the consistency of the direction of change.”); *Roper v. Simmons*, 534 U.S. 551, 564-65 (2005) (finding a constitutionally significant consistent change against the execution of sixteen and seventeen year olds).

¹²⁵ *Rummel*, 445 U.S. at 296-300.

¹²⁶ *Cf. Id.* at 297-99 (Powell, J., dissenting).

¹²⁷ *Id.* at 275, 279-281.

¹²⁸ *Id.* at 279.

serious crimes and applied in cases of lengthy imprisonment.¹²⁹ After all, courts have devised standards to guide the application of otherwise amorphous and vague distinctions in many and varied contexts. Were punitive damages excessive?¹³⁰ What process was due?¹³¹ When was discrimination a violation of equal protection?¹³² How speedy should a trial have been?¹³³ Had the legislature impermissibly lumped separate

¹²⁹ See Peter H. Rossi et al., *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 Am. Sociological Rev. 224 (1974).

¹³⁰ See *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-75 (1996) (determining whether a punitive damages award is constitutionally excessive based on the degree of reprehensibility of the conduct, the disparity between the harm or potential harm of the conduct and the punitive damages award, and how the instant case compares to the civil awards in comparable cases); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21-22 (1991) (citing *Green Oil Co. v. Hornsby*, 539 So. 2d 218 (1989)) (holding that punitive damages are subject to due process limitations, and approvingly noting factors used by the Alabama courts to constrain the discretion of fact finders for punitive awards: the relationship between award and the harm likely to result from the conduct, duration and reprehensibility of the conduct, profitability of the conduct, and the mitigating factors of criminal sanction or other civil awards).

¹³¹ See, e.g., *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (“[D]ue process generally requires consideration of three distinct factors: 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 Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.”).

¹³² See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (recognizing an intermediate level of equal protection review for cases of gender discrimination: gender based distinctions must be substantially related to the achievement of an important governmental interest).

¹³³ See *Barker v. Wingo*, 407 U.S. 514 (1972) (holding that courts should balance the conduct of both the prosecution and defense in light of whether and when a speedy

offenses together, thwarting the requirement that each element of the offense be found beyond a reasonable doubt?¹³⁴ Courts deal routinely with combinations of diverse, imprecise factors in order to balance individual rights against the prerogatives of the state.

Two main concerns undergirded the *Rummel* Court's decision not to look closely at whether Rummel's punishment was disproportionate: the state's legitimate interest in punishing habitual offenders more harshly and the idea that courts were not qualified to grade the seriousness of an offense.¹³⁵ Both reasons for overlooking the particular facts of the case prove insufficient for the same reason: courts are qualified to draw meaningful distinctions between degrees of criminal conduct and degrees of punishment, even when multiple offenses need to be taken into account.¹³⁶

trial claim was asserted, while emphasizing that speediness of trial is an inherently vague and relative concept).

¹³⁴ See *Schad v. Arizona*, 501 U.S. 624 (1991) (noting that the distinction between alternative means of committing a single crime and alternative means which are themselves separate offenses is primarily a legislative determination but nevertheless subject to the due process requirement of fundamental fairness, guided by history, common practice, and the equivalency of alternative means).

¹³⁵ Having already concluded that line drawing between terms of years was a subjective process, properly dealt with by the legislature, Justice Rehnquist did not even attempt to take the relative triviality of Rummel's prior offenses into account. See *Rummel v. Estelle*, 445 U.S. 263, 275-76 (1980).

¹³⁶ This was essentially the point made by Justice Powell in *Solem v. Helm*. Courts are qualified to judge the gravity of an offense, in a general way, for the same reason legislatures are able to assign penalties to offenses—because widely shared and accepted indicia of seriousness have existed and guided both legislatures and courts in criminal sentencing throughout history. *Solem v. Helm*, 463 U.S. 277, 292-93 (1983).

To illustrate, Justice Rehnquist rejected Rummel’s claim that the small amount of money involved in his trigger offense should convince the Court of the excessiveness of his punishment.¹³⁷ According to Justice Rehnquist, Rummel’s definition of a “small” amount of money was entirely subjective: “to recognize that the State of Texas could have imprisoned Rummel for life if he had stolen \$5,000, \$50,000, or \$500,00 rather than the \$120.75 that a jury convicted him of stealing is virtually to concede that the lines to be drawn are indeed ‘subjective.’”¹³⁸ It would be entirely subjective to claim that past “X” precise dollar amount William Rummel’s life sentence would not be unconstitutionally excessive. However, the question asked here was not what dollar amount would have justified Rummel’s sentence, but does this dollar amount—given the circumstances of the offense and the seriousness of his criminal record—justify Rummel’s sentence? Objectivity increases as more and more evidence is taken into account. Considering that none of Rummel’s convictions

¹³⁷ *Rummel*, 445 U.S. at 275-76.

¹³⁸ *Id.*; See *Solem*, 463 U.S. at 294, for Justice Powell’s counter-argument that although making a principled distinction between a 15-year constitutionally proportionate sentence and a 25-year constitutionally disproportionate sentence may be a difficult call for a court to make, courts are called on to line draw in many areas of law; there is no reason courts may not do so here. This sentiment echoes his accusation, writing in dissent in *Rummel*, that the *Rummel* majority had “chosen the easiest line rather than the best,” forswearing proportionality review because it would be difficult, rather than because proportionality limitations do not exist under the Eighth Amendment.

involved violence or threat of violence,¹³⁹ that all his convictions involved small amounts of money,¹⁴⁰ and that the trigger offense did not even qualify as a felony in a number of jurisdictions,¹⁴¹ it becomes clear Rummel was a man punished far in excess of his deserts.

Recidivism

The *Rummel* Court's insistence that the Court could not objectively state that Rummel's trigger offense was a minor crime flew in the face of common sense, but on the issue of recidivism, the *Rummel* majority presented a much stronger case. To begin, Justice Rehnquist reiterated the argument made by the Fifth Circuit en banc¹⁴²: recidivists need not be treated the same way that a first time offender convicted of the same conduct would be treated because recidivist statutes legitimately increase penalties for repeat offenders.¹⁴³ Recidivist statutes enjoy a well-established history in

¹³⁹ *Rummel*, 445 U.S. at 296 (“Nor does the commission of any [crimes like William Rummel’s] ordinarily involve a threat of violent action against another person or his property.”).

¹⁴⁰ In total, Rummel’s offenses totaled less than \$230. Moreover, the threshold dollar amount to qualify as a felony for both fraudulent use of a credit card and for obtaining money under false pretences was \$50, meaning both offenses were barely considered felonies. *Id.* 265-66.

¹⁴¹ *Id.* at 269 (nothing that Rummel’s trigger offense could have been classified as a felony in at least thirty-five states and the District of Columbia).

¹⁴² *Rummel v. Estelle*, 587 F.2d 651, 660 (5th Cir. 1978).

¹⁴³ *Rummel*, 445 U.S. at 284-85.

Anglo-American law, as well as a healthy winning streak against many and varied constitutional challenges.¹⁴⁴ Although recidivist statutes have survived, courts have not necessarily convincingly explained away the problems—particularly double jeopardy concerns—that recur under habitual offender statutes.¹⁴⁵ Justice Rehnquist’s analysis of the issue of habitual offending did acknowledge the goals of both deterring and incapacitating repeat offenders, but the crux of his argument appears to be that recidivists “demonstrated the necessary propensities” for criminality and therefore legitimately bore “the onus of one who [was] simply unable to bring his conduct within the social norms.”¹⁴⁶ The problem with this analysis was not only that it disregarded the relative seriousness of the trigger felony,¹⁴⁷ but also that it treaded

¹⁴⁴ See *Graham v. West Virginia*, 224 U.S. 616, 623-24 (1912); *McDonald v. Massachusetts*, 180 U.S. 311 (1901) (upholding Massachusetts’s habitual offender statute against a double jeopardy challenge); *Oyler v. Boles*, 368 U.S. 448, 451 (1962) (stating that “the constitutionality of the practice of inflicting harder criminal penalties upon habitual offenders is no longer open to serious challenge”); *Spencer v. Texas*, 385 U.S. 554 (1967) (affirming that the introduction of proof of prior convictions before the determination of guilt was not so unfairly prejudicial that it violated due process).

¹⁴⁵ See Ahmed A. White, *The Juridical Structure of Habitual Offender Laws and the Jurisprudence of Authoritarian Social Control*, 37 U. TOL. L. REV. 705, 734-37 (2006) (arguing that courts have engaged in “a formalistic and legalistic ruse,” claiming habitual offender penalties are enhancements of the trigger offense, in order to avoid the serious double jeopardy and retroactivity problems inherent in habitual offender statutes).

¹⁴⁶ *Rummel*, 445 U.S. at 284-85.

¹⁴⁷ *But see Ewing*, 538 U.S. at 16-17, 28-29 (finding that a “wobbler” trigger offense — an offense which prosecutors may either charge as a misdemeanor or a felony—had no significance for proportionality review).

towards justifying habitual offender laws as punishment for simply being a repeat offender, rather than because the state had a sufficient interest in deterring or incapacitating the repetitive conduct of the particular offender.¹⁴⁸ In this way, Justice Rehnquist overemphasized the state's interest in punishing habitual offenders and too casually disregarded the defendant's actual conduct.¹⁴⁹

This argument (that the state may deal much more harshly with habitual offenders as nonconforming members of society) inherently draws on utilitarian rationales for punishment, specifically incapacitation.¹⁵⁰ The application of this general justification for recidivist statutes to this case was simply too abstract, too

¹⁴⁸ See White, *supra* note 145, 734-35 (noting that the logic of habitual offender laws often reduces to making character or "resistance to moral correction" a relevant factor in sentencing, rather than the actual seriousness of the prior or trigger offenses).

¹⁴⁹ Over-penalization of recidivists is often most troubling when enhanced sentences are handed out for minor trigger offenses, offenses that are technical in nature, and for offenses that fail to reflect in practice the type of "serious" or "violent" conduct that habitual offender statutes usually target. See, e.g. Lockyer v. Andrade, 538 U.S. 63, 66-67 (2003) (describing Andrade's two petty theft convictions that as "wobbler" offenses were prosecuted as felonies, instead of as misdemeanors, resulting in a fifty-year prison term); People v. Carmony, 26 Cal. Rptr. 3d 365, 368 (Cal. Ct. App. 2005) (describing Carmony's offense of failure to register his residence as a sex offender within five days of his birthday, for which he received twenty-five to life under California's Three Strikes law, even though he had registered at his current address a month ago and his probation officer was aware of where he was).

¹⁵⁰ See generally STEPHAN VAN DINE ET AL., RESTRAINING THE WICKED (1979). Of course, incapacitation is not the only possible justification for increasing punishment for recidivists, but it was the rationale most emphasized in this case.

dismissive of the relevant details of the case that indicated that this was not someone society had quite so strong an interest in incapacitating.¹⁵¹

Justice Rehnquist's discussion of Rummel's criminal record focused on the fact that he was twice incarcerated for felony offenses before his trigger offense, that he was given the chance to not commit any more crimes, and that the state was therefore justified in punishing him, as a recidivist, much more harshly, than might otherwise be warranted.¹⁵² This discussion placed no significance on the relative seriousness of Rummel's criminal history, other than to note that both prior offenses were felonies serious enough to result in imprisonment.¹⁵³ Why should a court see only the fact of conviction and incarceration and act blind as to the circumstances of the underlying conduct, especially when the trigger offense itself strikes the court as relatively minor?¹⁵⁴

¹⁵¹ *See Rummel*, 445 U.S. at 295 (noting the lack of violence or significant harm done by defendant's actions that made it "difficult to imagine felonies that pose[d] less danger to the peace and good order of a civilized society").

¹⁵² *See Id* at 278.

¹⁵³ *See id.* at 278 ("[A] recidivist must twice demonstrate that conviction and actual imprisonment do not deter him from returning to crime once he is released.").

¹⁵⁴ Justice Rehnquist's focus on the interests of society and de-emphasis on the triviality and lack of violence that actually characterized Rummel's record accords with modern shifts in thinking about crime and criminals. In particular, his reasoning echoes the troubling, emergent idea that society has the unbounded right to control offenders in order to protect society. *See* DAVID GARLAND, *THE CULTURE OF CONTROL* 180-82 (2001) (noting that as the interests of the offender and the interests of society/the victim come to be seen as diametrically opposed and that offenders

Federalism

The final, seemingly cinching, claim made by the *Rummel* Court was that respect for federalism cautioned the Court against taking up proportionality review.¹⁵⁵ “Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State.”¹⁵⁶ How striking down rare, truly disproportionate sentences after a careful examination of the circumstances of the particular offense and the background of the particular offender would impose “uniformity” on the states was not fully explained. Nor does this argument necessarily comport with the actions of courts that have struck down sentences as disproportionate. For example, in some cases where a court has overturned a lengthy prison sentence, the actions of the legislature were explicitly cited as evidence supporting the decision.¹⁵⁷ In other cases, courts have recognized that when a range of sentences is authorized under the law, it is

“perceived worth tends towards zero,” resulting in increased willingness to see an any offender as an inherently criminal other, rightfully subject to repressive state power).

¹⁵⁵ *Rummel*, 445 U.S. at 282.

¹⁵⁶ *Id.*

¹⁵⁷ *See, e.g.*, *State v. Wilson*, 859 So.2d 957, 960 (La. Ct. App. 2003) (noting that the Louisiana Supreme Court had directly stated that the defendant was entitled to bring a claim of unconstitutional excessiveness as part of a resentencing order, in part, because of recent amendments to Louisiana’s Habitual Offender Law); *People v. Lorentzen*, 194 N.W.2d 827, 832-33 (Mich. 1972) (noting that the Michigan legislature had reduced the sentencing range for Lorentzen’s offense of first offense sale of marijuana from a mandatory minimum of twenty years to a maximum sentence of four years).

reasonable to assume the legislature entrusted the sentencing judge with some duty to proportion the penalty to the crime.¹⁵⁸ The implication of deferring to federalism was that courts would contravene the judgment of the legislature about what punishment was appropriate. However, in many cases the legislature itself has indicated that certain punishments were not warranted, either by reducing penalties or by authorizing a range of sentences in order to accommodate a range of offenders.

The Results of *Rummel*

The fundamental problem with *Rummel v. Estelle* is that the majority read the Court's own precedents too narrowly, even disingenuously, in order to justify extending legitimate judicial concerns—deference to the legislature, the objectivity of line-drawing, federalism—so far as to preclude, in effect, any attempt at proportionality review. But, as the dissent noted, limiting proportionality review to the death penalty and bizarre *Weems* type punishments “finds no support in the history of

¹⁵⁸ See, e.g., *United States v. McKinney*, 427 F.2d 449, 455 (6th Cir. 1970) (remanding for reconsideration, after *sua sponte* raising an excessiveness claim for the imposition of the maximum sentence of five-years for a man who refused to be inducted into the Armed Services but clearly indicated willingness to serve in a noncombat position); cf. *State v. Davis*, 79 P.3d 64, 72 (Ariz. 2003) (concluding that Davis, a young man who had sex with fully consenting minors and was sentenced to fifty-two years imprisonment, was “caught in the very broad sweep of the governing statute,” triggering mandatory minimums that were clearly inappropriate in this particular case).

Eighth Amendment jurisprudence.”¹⁵⁹ It may seem excessive to ascribe so much “fault” to a single decision, but *Rummel* set a dissonant tone for the entire modern proportionality line of cases. The cases that followed had to at least attempt to find continuity with *Rummel*.¹⁶⁰

Hutto v. Davis

The case of Roger Trenton Davis had a long journey coming up from the Court of Appeals for the Fourth Circuit. Davis was convicted of one count of possession of marijuana with intent to distribute and one count of distribution of marijuana.¹⁶¹ Even though, combined, the offenses involved less than nine ounces of marijuana, Davis received two twenty year prison terms, to be served consecutively, in addition to two \$10,000 fines.¹⁶² On federal habeas petition, the District Court for the Western

¹⁵⁹ *Rummel*, 445 U.S. at 288.

¹⁶⁰ See *Solem*, 463 U.S. at 288 (citing *Rummel*, 445 U.S. at 274 n.11); *Harmelin*, 501 U.S. at 997 (Kennedy, J., concurring) (same); cf. *Ewing*, 538 U.S. at 21-23 (discussing the *Rummel* line of cases); *Lockyer*, 538 U.S. at 72 (explaining that the only “clearly established” legal principle in this area of law was that “[a] gross disproportionality principle is applicable to sentences for terms of years”).

¹⁶¹ *Hutto v. Davis*, 454 U.S. 370, 370-71 (1982).

¹⁶² *Id.* Davis was a black man married to a white woman. He was convicted by a rural jury, “amid a local war on drug use,” to forty-years for a crime that, at the time, carried a three and a half year sentence on average in the United States. Described as a “black hippie leader,” known for socializing with white women, Davis himself believed the trial was more about miscegenation than marijuana. Mike Sager, *9 Ounces Equals 40-Year Sentence*, WASH. POST, Jan. 22, 1982, at B1.

District of Virginia applied the test developed by the Fourth Circuit in *Hart v. Coiner* and granted the writ, finding the sentence violative of the Cruel and Unusual Punishments Clause.¹⁶³ That decision was later reversed by a panel of the Fourth Circuit Court of Appeals,¹⁶⁴ affirmed by the Fourth Circuit sitting en banc,¹⁶⁵ and then vacated and remanded by the Supreme Court for reconsideration following *Rummel v. Estelle*.¹⁶⁶ On remand, the District Court's decision was once more affirmed by the Court of Appeals by an equal division of the en banc court.¹⁶⁷ Finally, the Supreme Court accepted the case, accused the Court of Appeals of "fail[ure] to heed our decision in *Rummel*," and remanded the case to the District Court for dismissal of Davis' habeas petition.¹⁶⁸

Recapping the majority opinion of *Rummel*, the Court took specific issue with the Court of Appeals' affirmation of a decision based on the factors laid out in *Hart v. Coiner*.¹⁶⁹ The *Rummel* Court had rejected the four factors identified in *Hart*.¹⁷⁰

¹⁶³ *Davis v. Zahradnick*, 432 F. Supp. 444 (1977).

¹⁶⁴ *Davis v. Davis*, 585 F.2d 1126 (1978).

¹⁶⁵ *Davis v. Davis*, 601 F.2d 153 (1979).

¹⁶⁶ *Hutto v. Davis*, 445 U.S. 947 (1980).

¹⁶⁷ *Davis v. Davis*, 646 F.2d 123 (1981).

¹⁶⁸ *Hutto v. Davis*, 454 U.S. 370, 372 (1982).

¹⁶⁹ *Id.* at 373, n.2.

¹⁷⁰ *Id.*

Chastising the Circuit Court of Appeals for seemingly bucking the federal hierarchy, the Court nonetheless included, once more in a footnote, the admission that a bizarrely extreme sentence might violate the Eighth Amendment.¹⁷¹

More interesting than the Court's refusal to regard this case as one of those bizarrely extreme cases was the position taken by Justice Powell. Justice Powell authored the dissenting opinion in *Rummel*, but, rather than author another dissent or join Justice Brennan's, Justice Powell concurred out of respect for stare decisis, believing that *Rummel* controlled the facts of the case.¹⁷² In Justice Powell's estimation, Davis' offense, considering his prior drug-related convictions, was more serious than Rummel's, his sentence less severe, and the evidence of disparity between jurisdictions less persuasive.¹⁷³ While deferring to precedent in this case, Justice Powell nevertheless called for *Rummel's* reversal, arguing that the Court had unjustifiably narrowed the scope of "cruel and unusual punishments" to exclude lengthy imprisonment, and, as a result, lower courts would be forced to uphold punishments which were cruel and unusual but not unconstitutional.¹⁷⁴

¹⁷¹ *Id.* at 374-75, n.3.

¹⁷² *Id.* at 375.

¹⁷³ *Id.* at 379-80 Davis did have prior convictions, but his charges were not brought under a habitual offender statute.

¹⁷⁴ *Id.* at 377-81.

Solem v. Helm

A year later, the Court seemingly changed its mind about proportionality, holding Jerry Helm's life without the possibility of parole sentence, imposed for his seventh nonviolent felony, to be unconstitutionally disproportionate.¹⁷⁵ Although Justice O'Connor had replaced Justice Stewart in the interim between *Rummel* and *Solem*, composition change was not the explanation for this switch. Rather, Justice Blackmun, who had joined the majority opinion in *Rummel* and the per curiam opinion in *Hutto*, now joined the four *Rummel* dissenters in a majority opinion authored by Justice Powell. The *Solem* majority struck down Helm's sentence and established a three-part test for evaluating proportionality claims.¹⁷⁶ The result of this case is somewhat curious. The Court actually found a term of imprisonment constitutionally disproportionate, and, instead of overturning *Rummel* and *Hutto* or abandoning the reasoning of those cases while retaining the outcome, the Court cherry-picked lines out of the *Rummel* and *Hutto* decisions, emphasizing specific words and phrases in order to twist their contextual meaning and maintain that this decision was consistent with those cases.¹⁷⁷

¹⁷⁵ *Solem v. Helm*, 463 U.S. 277, 303 (1983).

¹⁷⁶ *Id.* at 291-92.

¹⁷⁷ See Grossman, *supra* note 113, 128-30 (contending that the *Solem* majority was forced into this "tortured interpretation" of *Rummel* and *Hutto* and the result was an otherwise just opinion, crippled by its inconsistent precedents).

Arguably, Jerry Helm's criminal history was more serious than William Rummel's: three convictions for third-degree burglary, one for grand larceny, one for obtaining money under false pretences, one for third offense driving while intoxicated, and a trigger offense of uttering a "no account" check for \$100.¹⁷⁸ Under South Dakota's recidivist statute, Helm's "no account" check was sentenced as a Class 1 felony, increasing the maximum prison term for the offense from five years to life imprisonment without the possibility of parole.¹⁷⁹ So, even though Helm's criminal history was marginally more serious than Rummel's, his sentence was significantly more severe. The Court of Appeals for the Eighth Circuit relied on that fact when it reversed a District Court's denial of a writ of habeas corpus, and held that Helm's life without parole sentence did constitute cruel and unusual punishment.¹⁸⁰ The Court of Appeals reasoned that Helm's case diverged substantively from Rummel's, despite the similarities in criminal records, because Helm's sentence did not carry the possibility of parole.¹⁸¹ Life without the possibility of parole significantly differed from almost all other prison terms, which usually terminate before death.¹⁸² Furthermore, only one other state, Nevada, authorized a life without the possibility of parole sentence for an

¹⁷⁸ *Solem*, 463 U.S. at 279-281.

¹⁷⁹ *Id.*

¹⁸⁰ *Helm v. Solem*, 684 F.2d 582, 582 (8th Cir. 1982).

¹⁸¹ *Id.* at 582-87.

¹⁸² *Id.*

offender like Jerry Helm.¹⁸³ As a final point, the Court of Appeals found it noteworthy that alcohol contributed to every one of Helm’s crimes, making his life without the possibility parole sentence—a sentence which inherently rejected the prospect of rehabilitation¹⁸⁴—all the more inappropriate because alcoholism is a treatable condition.¹⁸⁵

¹⁸³ *Id.*

¹⁸⁴ The complete rejection of rehabilitation has been cited many times by the Court as one of the reasons why “death is different.” *See, e.g.,* Rummel v. Estelle, 445 U.S. 263, 272 (1980) (citing Furman v. Georgia, 408 U.S. 238, 306 (1972)) (“It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice.”). In actuality, the death penalty is not entirely “unique” in its rejection of rehabilitation. Arguably, both life without the possibility of parole sentences, and terms of years that can reasonably be expected to exceed the defendant’s life span also reject rehabilitation. *See* Graham v. Florida, 130 S. Ct. 2011, 2030 (2010) (explaining that the state may not constitutionally reject entirely the possibility of rehabilitation for juvenile offenders convicted of non-homicide offenses by sentencing them to life without the possibility of parole); *cf. Lockyer*, 538 U.S. at 79 (Souther, J., dissenting) (“Andrade was 37 years old when sentenced, the substantial 50-year period amounts to life without parole.”).

¹⁸⁵ *Helm*, 684 F.2d at 582-87. According to Helm’s testimony, he passed the trigger offense “no account” check inadvertently while binge drinking. Although the United States Supreme Court has rejected the argument that punishing chronic alcoholics for public intoxication amounts to an unconstitutional punishment of the status of being an alcoholic, *Powell v. Texas*, 392 U.S. 514, 536 (1968), some state courts have ruled that alcoholics may not be criminally punished for public intoxication because alcoholism is a disease, *see State ex. rel. v. Zegeer*, 296 S.E.2d 873, 875 (W. Va. 1982) (holding that “punishing alcoholics for being publicly intoxicated violates the prohibition against cruel and unusual punishment” of the West Virginia Constitution); *cf. State v. Fearon*, 166 N.W.2d 720, 724 (Minn. 1969) (concluding that the defendant, as an alcoholic, could not fulfill the voluntariness requirement of the public intoxication law). Clearly, alcoholism cannot justify or excuse most criminal behavior, but in a case like Helm’s, where a minor crime was committed in the pursuit of satisfying an alcohol addiction and no aggravating factors (e.g. violence or threat of violence) were present, the defendant’s status as an alcoholic should at least inhibit the

The United States Supreme Court granted certiorari and affirmed the Court of Appeals decision.¹⁸⁶ Instead of overturning *Rummel*, the majority settled for wrenching the Court's perfunctory admission that an unconstitutionally disproportionate sentence might exist out of the footnotes, stating unambiguously that the Cruel and Unusual Punishment Clause does prohibit disproportionate sentences.¹⁸⁷ To substantiate this claim, Justice Powell expanded the historical argument he presented in *Rummel*¹⁸⁸: Proportionality is a principle rooted in Anglo-American history and common law, one that the Framers clearly intended to incorporate in the Eighth Amendment.¹⁸⁹ Justice Powell traced proportionality limitations to the Magna Carta's prohibition on excessive "amercements" (a type of fine), to decisions of the royal courts that extended proportionality to prison terms, and to the English Bill of Rights of 1689, where the phrase "cruel and unusual punishment" originated.¹⁹⁰ Because of this historical pedigree, "cruel and unusual punishment" would have been

imposition of a life without the possibility of parole sentence, or a sentence reasonably expected to exceed the defendant's life span.

¹⁸⁶ *Solem v. Helm*, 463 U.S. 277, 303 (1983).

¹⁸⁷ *Id.* at 284.

¹⁸⁸ *Rummel v. Estelle*, 445 U.S. 263, 288-89 (1980) (Powell, J., dissenting).

¹⁸⁹ *Solem*, 463 U.S. at 284-86.

¹⁹⁰ *Id.*

understood to incorporate the principle of proportionality, both in England and in the Colonies.¹⁹¹

Justice Powell also argued that the Court's own precedents, from *Weems* and *Coker* through to *Rummel* and *Hutto*, recognized the existence of the principle of proportionality.¹⁹² Despite Justice Powell's claim, the *Rummel* Court clearly intended to sever the Court's proportionality analysis in death penalty cases from cases involving terms of imprisonment.¹⁹³ Nevertheless, Justice Powell insisted that the difference between proportionality review in death penalty cases and proportionality review in lengthy incarceration cases was not a difference in kind (one permissibly objective and the other wholly subjective), but in degree: lengthy imprisonment cases

¹⁹¹ *Id.*; *But see* Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CAL. L. REV. 839, 860-65 (1969) (arguing that while the "cruel and unusual punishments" clause contained in the English Bill of Rights did incorporate the principle of proportionality, the Framers misinterpreted that heritage and understood the phrase as a proscription of torturous methods of punishment and not of excessive punishment).

¹⁹² This was an example of the *Solem* Court somewhat disingenuously highlighting specific snippets of the *Rummel* decision. Arguing that the Court had not rejected the application of proportionality to prison sentences. Justice Powell stated: "According to *Rummel v. Estelle*, "one could argue without fear of contradiction by any decision of this Court ... [that] the length of sentence actually imposed is purely a matter of legislative prerogative." *Solem*, 463 U.S. at 289 n.14 (quoting *Rummel v. Estelle*, 445 U.S. 263, 274 (1980)) (emphasis added in *Solem*). According to Justice Powell, that quotation from *Rummel* was meant only as a "possible" argument, not an argument of the Court itself. *Solem*, 463 U.S. at 289 n.14.

¹⁹³ *See Rummel*, 445 U.S. at 274-75 (arguing that an objective "bright line" differentiates the death penalty from all other forms of punishment, but delineations between less and more serious crimes are so subjective that legislatures, not courts, must make those decisions).

demanded that courts be more cautious and deferential before striking down a sentence because the relevant factors were more variable.¹⁹⁴ According to Justice Powell, there was “no basis” for the argument that the proportionality principle adopted with the Eighth Amendment would apply to “the lesser punishment of a fine and the greater punishment of death,” but not to terms of imprisonment.¹⁹⁵

The biggest problem with *Solem*, in terms of consistency, was not that the *Rummel* Court construed precedents like *Weems* and *Coker* differently, but that the test adopted by the Court in *Solem* was in direct conflict with both *Rummel* and *Hutto*. The Chief Justice correctly pointed out: “today’s ruling cannot rationally be reconciled with *Rummel*.”¹⁹⁶ The Court in *Hutto* rejected the four-part test developed by the Fourth Circuit in *Hart v. Coiner*, making explicit what the per curiam Justices saw as strongly implicit in *Rummel*.¹⁹⁷

The Fourth Circuit used these four factors in its analysis: the gravity of the offense, the legislative purpose behind the punishment,¹⁹⁸ how the same offense

¹⁹⁴ *Solem*, 463 U.S. at 289-90.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 304 (Burger, C.J., dissenting). *But, cf.* *Harmelin v. Michigan*, 501 U.S. 957, 996-97 (1991) (“Although our proportionality decisions have not been clear or consistent in all respects, they can be reconciled.”).

¹⁹⁷ *Hutto v. Davis*, 454 U.S. 370, 373-75 (1982).

¹⁹⁸ “Legislative purpose” refers to the traditional rationale of criminal punishment, but the Fourth Circuit went farther and adopted Justice Brennan’s belief, expressed in *Furman v. Georgia*, 408 U.S. 238, 279 (1972), that a punishment is excessive “[i]f

would be punished in other jurisdictions, and how the punishment compares to those available for other offenses in the same jurisdiction.¹⁹⁹ The “legislative purpose” factor could be construed as a harder version of the constitutional requirement that punishment must have some valid penological justification or else it would be no more than the “gratuitous infliction of suffering.”²⁰⁰ The other three factors were the exact same factors that the Court adopted in *Solem*: a comparison of “the gravity of the offense and the harshness of the penalty,” a comparison with “the sentences imposed on other criminals in the same jurisdiction,” and a comparison with “the sentences imposed for the commission of the same crime in other jurisdictions.”²⁰¹ Together these three comparisons are known as the *Solem* three-part test.

The *Rummel* Court dismissed Rummel’s argument that his offense was petty because the criteria Rummel identified as distinguishing more serious crimes from less serious crimes did not necessarily hold true in every case.²⁰² (For example, white-collar crimes may cause substantial harm to many people and yet involve no violence

there is a significantly less severe punishment to achieve the purposes for which the punishment is inflicted.” This way of defining excessiveness is derived from the principle of “parsimony,” the idea that in sentencing “[t]he least restrictive (punitive) sanction to achieve defined social purposes should be imposed.” NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 59 (1974).

¹⁹⁹ *Hart v. Coiner*, 483 F.2d 136, 140-42 (4th Cir. 1973).

²⁰⁰ *See Gregg v. Georgia*, 428 U.S. 153, 183 (1976).

²⁰¹ *Solem*, 463 U.S. at 291-92.

²⁰² *Rummel*, 445 U.S. at 275-76.

or threat of violence.) However, in *Solem*, Justice Powell claimed that courts could objectively evaluate the gravity of an offense by applying “widely shared views as to the seriousness of crimes.”²⁰³ In general, violent crimes are more serious than nonviolent crimes; in general, completed crimes are more serious than attempts; in general, purposeful conduct is more serious than reckless conduct, which, in turn, is more serious than negligent conduct.²⁰⁴ Of course, Justice Powell admitted, there would be caveats and exceptions, but courts could nevertheless draw principled distinctions based on this type of commonly accepted indicia of gravity and culpability.²⁰⁵ He continued by arguing that courts were similarly qualified to compare crimes in order to gauge proportionality, considering all the line drawing courts engage in, in other contexts.²⁰⁶

Although in conflict with the analysis of the *Rummel* Court, the proportionality analysis of *Solem* clearly demonstrated that *Solem* drew its substance “from the evolving standards of decency that mark the progress of a maturing society.”²⁰⁷ Considering the gravity of the offense, Justice Powell noted that passing a “no account” check was a nonviolent crime and \$100 a close to trivial amount of

²⁰³ *Solem*, 463 U.S. at 293-94.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 294-95.

²⁰⁷ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

money.²⁰⁸ Furthermore, Powell insisted that while Helm’s status as a habitual offender was significant, it was simply unreasonable to sanction any punishment against a recidivist without regard for the circumstances of his or her prior convictions.²⁰⁹ Jerry Helm did have six prior felony convictions, but the offenses “were nonviolent and none was a crime against a person.”²¹⁰ As the majority concisely pointed out, life without the possibility of parole was “the most severe punishment that the State could have imposed on any criminal for any crime,” leaving Helm only one possible saving grace—executive clemency.²¹¹

Moving on to inter and intra-jurisdictional analysis, Justice Powell noted that many offenders in South Dakota—convicted of far more serious crimes—would not be eligible for a life without the possibility of parole sentence.²¹² Other felonies that qualified for class one sentencing included murder, treason, and kidnapping, but first-degree rape, aggravated riot, and aggravated assault were respectively classified as class two, three, and four felonies.²¹³ Moreover, as the Court of Appeals had noted, the only other state that might have authorized life without parole for such a petty

²⁰⁸ *Solem*, 463 U.S. at 296-97.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.* at 298-300.

²¹³ *Id.*

criminal record and trigger offense was Nevada, but it appeared that Nevada had never actually carried out that possibility.²¹⁴

Before concluding that Helm's sentence was constitutionally disproportionate, the majority took care to distinguish this case from *Rummel* once more. Unlike Rummel, who had a reasonable expectation that he would eventually be paroled, Helm's only hope of release was executive clemency, an act of grace that may be just as readily extended after sober reflection as it is denied based on caprice or personal malice.²¹⁵ Finally, the Court concluded that Helm's case was one of those exceedingly rare instances where the sentence was so disproportionate to the crime that it violated the Eighth Amendment. But, despite the majority's attempts to reconcile *Solem* with *Rummel*, the two cases remained fundamentally in conflict

Harmelin v. Michigan

Perhaps, if *Solem* had been left as the final word on the subject, over time, the ruling would come to eclipse *Rummel* and the body of jurisprudence as a whole would gradually abandon the *Rummel* Court's emaciated conception of proportionality limitations. However, in 1991 the Court took the case of Ronald Harmelin, a first time offender sentenced to life without the possibility of parole for possession of

²¹⁴ *Id.*

²¹⁵ *Id.* at 300-3.

cocaine.²¹⁶ Michigan’s drug law, at the time, provided the same mandatory life without the possibility of parole sentence for anyone caught manufacturing, delivering, or even in mere possession of 650 grams or more of any mixture *containing* narcotics.²¹⁷ Moreover, since Michigan had no death penalty, life without parole was the most severe punishment the State could impose.²¹⁸ A majority of the Court voted to uphold Harmelin’s sentence, but no five justices agreed on the underlying reasoning. In fact, the actual holding of the case was limited to the last section of Justice Scalia’s opinion, wherein the Court refused to extend the individualized sentencing requirement of death penalty cases to cases of life imprisonment without the possibility of parole.²¹⁹

For lower courts, the most important part of the *Harmelin* opinion would be Justice Kennedy’s concurrence.²²⁰ Justice Kennedy argued that even though the Court’s proportionality jurisprudence had “not been clear or consistent in all respects,” the situation was not beyond resolution.²²¹ The plurality concluded that the Cruel and Unusual Punishments Clause did contain a “narrow” proportionality principle that did

²¹⁶ *Harmelin*, 501 U.S. at 961.

²¹⁷ *Id.* at 1021-22.

²¹⁸ *Id.*

²¹⁹ *Id.* at 994-96.

²²⁰ Justice Kennedy was joined by Justices O’Connor and Souter.

²²¹ *Harmelin*, 501 U.S. at 996-97.

apply in noncapital cases, but “its precise contours [were] unclear.”²²² The Court’s jurisprudence yielded four established guiding principles.²²³ First, the length of imprisonment for a given offense was properly a legislative judgment and so must command substantial deference from courts.²²⁴ Second, “the Eighth Amendment [did] not mandate the adoption of any one penological theory.”²²⁵ Third, in a federal system, significant differences in the severity of punishment were inevitable and the simple fact of having the toughest law in the land did not automatically qualify a punishment as grossly disproportionate.²²⁶ Fourth, the overarching concern of proportionality review was objectivity.²²⁷ At this point, the plurality had done little more than catalog the points of, ostensible, agreement from the Court’s proportionality jurisprudence. The plurality went on to conclude that successful proportionality claims must be limited to the “grossly disproportionate.”²²⁸ With the Court’s established principles in mind, Justice Kennedy went on to institute a new rule for proportionality claims: instead of performing all three parts of the *Solem* test, reviewing courts would

²²² *Id.*

²²³ *Id.* at 997-1001.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

now begin with a threshold comparison of the severity of the offense and the harshness of the penalty.²²⁹ If no “inference of gross disproportionality” was drawn, then the court would dismiss the claim without any further consideration of the proportionality claim.²³⁰

This new rule conspicuously drew the ire of the dissenters, who accused Justice Kennedy of “eviscerat[ing]” *Solem*.²³¹ The inter and intra-jurisdictional analysis, according to Justice White’s dissent, were the most objective parts of the *Solem* test.²³² The proposed threshold comparison of offense to penalty could not be anything other than subjective without the context offered by comparison of the contested punishment with punishments meted out to similar offenders.²³³ Justice White’s objection merits considerable weight, not only because he correctly questioned the plurality’s adherence to its self-identified principle of proportionality jurisprudence—objectivity—but also because Justice White voted against the individual in *Rummel*, *Hutto*, and *Solem*. Whereas Justice Kennedy warned of the parade of horrors that might result were the drugs in Harmelin’s possession to get

²²⁹ *Id.* at 1005.

²³⁰ *Id.*

²³¹ *Id.* at 1018 (White, J., dissenting).

²³² *Id.*

²³³ *Id.* at 1020.

out,²³⁴ Justice White cautioned against holding someone like Harmelin responsible for what other people might do, for the “collateral consequences” over which Harmelin himself would not necessarily have influence or direct culpability.²³⁵ Regardless, the plurality determined that Harmelin’s possession offense was *potentially* harmful enough that the Michigan legislature had legitimate reason to punish it with life without the possibility of parole.²³⁶ Therefore, the sentence did not lead to an inference of gross disproportionality and should be upheld.²³⁷

While Justice Kennedy felt the need to at least pay lip service to proportionality, Justice Scalia, who was joined by Chief Justice Rehnquist, took the much bolder position that “*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee.”²³⁸ The bitter divide between Justice Scalia’s opinion

²³⁴ *Id.* at 1002-3.

²³⁵ *Id.* at 1023-24; *See also* *People v. Bullock*, 485 N.W.2d 866, 876 (1992) (“[I]t would be profoundly unfair to impute full personal responsibility and moral guilt to defendants for any and all collateral acts, unintended by them, which might have been later committed by others.”)

²³⁶ *Harmelin*, 501 U.S. at 1002-4. This issue of potential harm may be one of the most troubling things about the opinion, as Justice White pointed out in dissent, the most danger to individual rights often arises when “grave evils” such as drug trafficking are confronted because of the urge to attack the evil with the full might of society. *Id.* at 1024 (quoting *Turner v. United States*, 396 U.S. 398, 427 (1970) (Black, J., dissenting)).

²³⁷ *Id.* at 1002-4.

²³⁸ *Id.* at 965.

and Justice White’s dissenting opinion, with a three-person plurality in the middle, serves as ample evidence of the problems inherent in this line of cases.

Amongst other contentions, Justice Scalia argued that the prohibition on cruel and unusual punishments stems from the “Bloody Assizes,” in particular from the use of punishments that were “not authorized by common-law precedent or statute,” meaning illegal punishments, as opposed to disproportionate punishments.²³⁹ Justice Scalia concluded that the Cruel and Unusual Punishments Clause applies only to methods of punishment that are both “cruel” and “unusual.”²⁴⁰ According to Justice Scalia, Harmelin’s punishment might be considered “cruel” but it could not legitimately be considered “unusual” in a constitutional sense.²⁴¹ The Michigan Supreme Court has even taken the opposite position in the past, that a prohibition on excessiveness was derived from the ban on “unusual” punishments in the Michigan Constitution’s “cruel or unusual” punishment clause.²⁴² Attempting to explain proportionality limitations out of the constitution in this way simply takes the “and”

²³⁹ *Id.* at 967-68; *But see* Granucci, *supra* note 153, at 859 (explaining that the original meaning of “cruel and unusual” punishments, extrapolated from the case of Titus Oates, referred to excessive punishments, not to particular methods of punishment).

²⁴⁰ *Harmelin*, 501 U.S. at 976.

²⁴¹ *Id.* at 967.

²⁴² *People v. Bullock*, 584 N.W.2d 866, 872 n.13 (noting that Justice Scalia’s opinion in *Harmelin* that an excessive sentence might qualify as “cruel” but could not be considered constitutionally “unusual” contradicts the Michigan Supreme Court’s argument in *People v. Lorentzen*, 194 N.W.2d 827,829 (Mich. 1972), that an “*unusually* excessive” (emphasis added) punishment might not necessarily be cruel).

construction far too literally. Excessive punishments might legitimately be considered both cruel and/or unusual. In either case, Justice Scalia’s argument would be fully convincing only if the Constitution were a static document, a conception that the Court has long rejected.²⁴³

Rather than attacking Justice Scalia’s historical analysis, Justice White instead addressed three specific points of contention with Justice Scalia’s analysis. First, it was unreasonable to assume that so-called “plaintalking” Americans would have stated directly everything that was prohibited by the Eighth Amendment, after all they were hardly clear in regards to other rights (e.g. *due* process and *unreasonable* searches and seizures).²⁴⁴ Second, if there were no “usual” punishments—e.g. common-law punishments—to use as a yardstick for measuring “unusual” punishments, as Justice Scalia argued, then the Cruel and Unusual Punishments Clause was essentially void.²⁴⁵ Third, the fact that proportionality was not explicitly included in the Eighth Amendment could not prove its absence from the legitimate scope

²⁴³ See, e.g., *Weems v. United States*, 217 U.S. 349, 373 (1910); *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958); *Coker v. Georgia*, 433 U.S. 584, 597 (1977); *Kennedy v. Louisiana*, 554 U.S. 407, 419 (2008) (quoting *Furman v. Georgia*, 408 U.S. 238, 382 (1972); *Graham v. Florida*, 130 S. Ct. 2011, 2021 (2010).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

either.²⁴⁶ Just because some state constitutions contained more specific proportionality language does not amount to real evidence of a rejection of proportionality.²⁴⁷

Justice Scalia's arguments may be striking, but they never garnered more than a few votes on the Court and its clear that a majority of the Court rejected such a constrained conception of the scope of the Eighth Amendment.²⁴⁸ It is unclear whether that rejection bears any real substantive weight because the gross disproportionality standard presents such a high bar that it approaches, without quite reaching, rejection of a proportionality standard altogether.²⁴⁹

Ewing v. California and Lockyer v. Andrade

Ewing v. California and *Lockyer v. Andrade* contributed little to this area of law, except to highlight the unresolved conflict between the Court's precedents. Both

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Justice Scalia was joined only by Chief Justice Rehnquist in *Harmelin*. Justice Thomas has also stated that there was no proportionality principle of the Eighth Amendment in his concurring opinion in *Ewing v. California*, 538 U.S. 11, 32 (2003).

²⁴⁹ Although most lower courts have adopted the truncated gross disproportionality standard as the test for proportionality review, that does not mean that lower courts are necessarily in agreement about how to apply that standard. See James J. Brennan, The Supreme Court's Excessive Deference To Legislative Bodies Under Eighth Amendment Sentencing Review, 94 J. CRIM. L. & CRIMINOLOGY 551, 568-69 (2004) (explaining that following *Harmelin* lower courts lacked standards for evaluating gross disproportionality and adopted an unduly deferential stance towards the constitutionality of the sentence and contorted proportionality review into argument by analogy between the case at hand and the Supreme Court's decisions).

Ewing and Andrade were sentenced under California's Three-Strikes Law, which was passed in the hope that violent and serious repeat offenders would be kept off the streets.²⁵⁰

Gary Albert Ewing was convicted of felony grand theft for stealing three golf clubs, each \$399, from a pro shop and sentenced to twenty-five years to life under the three-strikes law.²⁵¹ Ewing's prior offenses included multiple theft convictions, grand theft auto, battery, multiple burglaries, possession of drug paraphernalia, appropriating lost property, unlawfully possessing a firearm, trespass, and a robbery, during which he held a victim at knife-point.²⁵² At first, Ewing's trigger offense seems like something of a joke (especially considering that he absconded with the golf clubs by sticking them down his pants leg)²⁵³ and his twenty-five to life sentence the absurd punch line, but his criminal history was clearly far more serious than either Rummel's or Helm's.

The case for proportionate sentencing for Ewing was not as easy to make because of Ewing's extensive criminal history, but his case was not without some

²⁵⁰ See generally DOUGLAS W. KIESO, UNJUST SENTENCING AND THE CALIFORNIA THREE STRIKES LAW (2005); see *Ewing v. California*, 538 U.S. 11, 14-15 (2003) (explaining the history of the California "Three Strikes and You're Out" law, which gained rapid support after the murder of Polly Klaas, a twelve year-old girl who was kidnapped and murdered by a man with a long criminal history).

²⁵¹ *Ewing*, 538 U.S. at 18-20.

²⁵² *Id.*

²⁵³ *Id.*

irregularities. First, grand theft was considered a “wobbler” offense in California, meaning it could have been prosecuted as either a felony or as a misdemeanor.²⁵⁴ Moreover, even though Ewing’s prior offenses demonstrated both a propensity for crime and a willingness to at least threaten violence, this offense was nonviolent and, arguably, a relatively minor one.²⁵⁵ Despite the non-serious nature of the trigger offense, the Court upheld the sentence, citing the state’s legitimate interests in punishing recidivists more harshly, in deterring crime, and in incapacitating criminals.²⁵⁶

The facts of *Lockyer v. Andrade* made a much stronger disproportionality case.²⁵⁷ Leandro Andrade was sentenced to two consecutive twenty-five years to life sentences for two incidences of shoplifting videotapes from two Kmart stores.²⁵⁸ The first incident involved the theft of five videotapes worth \$84.70; the second, four

²⁵⁴ *Id.* at 16-17.

²⁵⁵ *See id.* at 51 (Breyer, J., dissenting) (challenging the inclusion of Ewing’s property offense as a trigger offense for a statute that was meant to target serious and violent crime).

²⁵⁶ *Id.* 30-31.

²⁵⁷ *See* Erwin Chermersky, *Cruel and Unusual: The Story of Leandro Andrade*, 52 DRAKE L. REV. 1, 1-4 (2003) (explaining the circumstances of Andrade’s crime and claiming that there were 344 people incarcerated in California with 25 to life sentences for petty theft, shoplifting offenses).

²⁵⁸ *Lockyer v. Andrade*, 538 U.S. 63, 66-67 (2003).

videotapes worth \$68.84.²⁵⁹ His prior criminal history included misdemeanor theft, multiple residential burglaries, and transportation of marijuana.²⁶⁰ Like Ewing, Andrade's petty theft offense was a "wobbler" offense.²⁶¹ In order to qualify as a third-strike offender, a defendant may be convicted of any felony offense, regardless of whether the trigger "felony" wobbled or not.²⁶²

Since *Lockyer* was brought to the Supreme Court on habeas corpus, not on direct appeal, the Court's inquiry was limited to whether the State court's ruling was decided "contrary to, or involved an unreasonable application of, clearly established Federal law."²⁶³ Because the Court itself had "not established a clear or consistent path for courts to follow," the only "clearly established" principle under *Rummel*, *Hutto*, *Solem*, and *Harmelin* is that a disproportionate term of imprisonment may violate the Cruel and Unusual Punishment Clause.²⁶⁴ In effect, unless a case is "materially indistinguishable" from the facts of one of the Court's precedents, a state

²⁵⁹ *Id.* Andrade was stealing the videotapes in order to support his longtime heroin addiction. *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.* But in order to qualify for sentencing under the three-strikes law the defendant must be convicted of "at least two serious of violent felonies that serve as qualifying offenses. *Id.*

²⁶³ *Id.* at 70-71 (quoting 28 U.S.C. § 2254(d)(1) (1996)).

²⁶⁴ *Id.* at 72.

court cannot arrive at a decision that contradicts “clearly established Federal law.”²⁶⁵

Under this reasoning the Court held that Andrade’s fifty-year minimum sentence for shoplifting was “not an unreasonable application of our clearly established law.”²⁶⁶

Justice O’Connor, who wrote the majority opinion in *Lockyer*, succinctly explained the conclusion of the Court’s modern proportionality jurisprudence: “we have not established a clear or consistent path for courts to follow.”²⁶⁷

²⁶⁵ *Id.* at 72-74 (citing *Williams v. Taylor* 529 U.S. 362, 406 (2000)).

²⁶⁶ *Id.* at 77.

²⁶⁷ *Id.* at 72.

Chapter 3

Judging Proportionality

While the *Rummel* line of cases contains many troubling flaws in its reasoning, those decisions are not without considerable merit when it comes to questioning the ability of courts to fairly adjudicate proportionality claims according to contemporary standards of decency. How are courts supposed to objectively distinguish a not unconstitutionally disproportionate term of imprisonment from an unconstitutionally disproportionate term of imprisonment?²⁶⁸ How can the Court justify imposing national constitutional standards that offend “traditional notions of federalism?”²⁶⁹ How are courts supposed to discern the evolution of standards of decency?²⁷⁰ These questions, that were used to justify a narrow reading of the Cruel and Unusual Punishment Clause, really speak to the limitations of courts as an institution, not to limitations that are based on the right itself.²⁷¹ The idea that courts are simply not competent to enforce proportionality in a way that is both objective and respectful of

²⁶⁸ See, *Rummel v. Estelle*, 445 U.S. 263, 275 (1980) (nothing that the line between the death penalty and all other forms of punishment is much clearer than the line between any given term of years);

²⁶⁹ *Rummel*, 445 U.S. at 282;

²⁷⁰ See, *Rummel*, 445 U.S. at 283-84 (rejecting *Rummel*’s argument that a “nationwide trend” had emerged towards “lighter, discretionary sentences”).

²⁷¹ See, *Sager*, *supra* note 272.

the prerogatives of the legislature to delineate punishment is entirely consistent with the belief that proportionality limitations do exist under the Eight Amendment.

Also, consistent with these concerns is the idea that the protections of the Cruel and Unusual Punishment Clause are being underenforced. Lawrence Gene Sager forwarded a theory of the proper conception of certain constitutional rights that fairly applies to the issue of constitutional disproportionality.²⁷² Sager's basic thesis was that too often in American law the Supreme Court's rulings on the possibility of enforcement of constitutional provisions are equated with the actual limits of the right.²⁷³ To further clarify this thesis, Sager posited three basic definitional levels of constitutional norms.²⁷⁴ The broadest, most abstract level, called the "concept," refers to the statement of a constitutional ideal or meaning. A "conception" is "a statement which attempts to translate such an ideal into a workable standard for the decision of concrete issues."²⁷⁵ The conception is derived from the underlying concept, so the goal of a valid conception should be to "exhaust" the scope of the concept.²⁷⁶ Finally, Sager defines "constructs" as models or structures of analysis developed by the Court,

²⁷² Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1221 (1978).

²⁷³ *Id.*

²⁷⁴ *Id.* at 1213-15.

²⁷⁵ *Id.*

²⁷⁶ *Id.*

which are analogous to conceptions, except that a construct “may be truncated for reasons which are based not upon analysis of the constitutional concept but upon various concerns of the [Supreme] Court about its institutional role.”²⁷⁷

“Underenforced constitutional norms” are constitutional provisions whose protections have been limited because of institutional concerns about the ability of courts to realize the full measure of the constitutional concept.²⁷⁸ Thought of in this manner, many of the Supreme Court’s pronouncements on the limits of proportionality sound more like explanations of “construct,” rather than “concept,” reasons why the Court feels compelled to stop judicial enforcement short of the conceptual limit of “cruel and unusual” punishment.²⁷⁹ If Eighth Amendment protections are indeed underenforced, a state court could almost take it as a duty to interpret/enforce its state

²⁷⁷ *Id.* For example, there are three different levels of judicial review for equal protection claims: rational basis, mid-level scrutiny (used for gender-based claims), and strict scrutiny. These are constructs that allow almost every claim of unequal treatment under the law, which does not involve either a suspect class (race) or a semi-suspect class (gender), to pass under rational-basis scrutiny. The reasons why equal protection review has been narrowed in this way include institutional concerns about courts interfering in legislative decision-making and the competency of courts to adequately delineate and enforce less limited standards. *Id.* at 1216-17.

²⁷⁸ *Id.* at 1218.

²⁷⁹ For example, in *Rummel v. Estelle* Justice Rehnquist wrote that the Texas legislature’s power to set punishments for criminal conduct was circumscribed only by “those strictures of the Eighth Amendment that can be informed by objective factors.” 445 U.S. 263, 284 (1980). This language suggests that the Supreme Court’s construct of Eighth Amendment protection is defined by what courts can objectively adjudicate, implying that valid claims under the concept/conception of “cruel and unusual” punishment, that cannot be objectively substantiated, will remain unenforced.

constitution to the conceptual limit of the right, even if the state court draws no substantive difference between the state constitutional right and the federal right. With this duty to enforce constitutional protections against disproportionate punishment to its conceptual limit, state courts could finally begin the slow process of formulating constitutional lines case by case.²⁸⁰

In *Harmelin v. Michigan*, Justice Scalia maintained that courts could not legitimately rule on whether a punishment was disproportionate to an offense because such a determination would ultimately be a subjective judgment.²⁸¹ Each part of the *Solem* three-part test, he argued, relied on the idea that there are “objective” standards by which courts can evaluate the gravity of an offense.²⁸² In particular, Justice Scalia insisted that inter and intrajurisdictional analysis become meaningless when deterrent and rehabilitative rationales were taken into account.²⁸³ Even if two offenses could objectively qualify as “similarly grave,” dissimilar punishment could still be readily justified because legislatures are not obliged to grade punishments according to the

²⁸⁰ Determining the limits of proportionality review case-by-case would hardly be the first time courts have engaged in such a process. Consider the “*ad hoc*” way in which courts tackled the meaning of the Due Process Clause, “pricking the lines” of due process case-by-case in order to see what broader patterns emerged. BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 96-97 (1928).

²⁸¹ 501 U.S. at 986-89

²⁸² *Id.*

²⁸³ *Id.*

relative seriousness of offenses.²⁸⁴ Although only Chief Justice Rehnquist joined this section of Justice Scalia’s opinion, the same basic objections to the viability of proportionality review have been voiced by many of the Justices.²⁸⁵ In some respects, evaluating the seriousness of a crime, in and of itself and relative to other crimes, will always be a subjective determination, but there are broadly accepted societal indicia of seriousness, as well as other evidence, that a court may take into account in order to make an acceptably objective determination.

Weighing Offenses

The weighing of offenses is undoubtedly a complex subject. Attempts to formulate comprehensive theories or models of punishment need to account for the differences (or for the lack of differentiation) between negligent, reckless, and deliberate acts; between attempts and completed crimes; and between fully liable acts and those that are justified or excused.²⁸⁶ Rather than attempting to canvas all, or

²⁸⁴ *Id.*

²⁸⁵ *Rummel v. Estelle*, 445 U.S. 263, 275-82 n.27; *Solem v. Helm*, 463 U.S. 277, 307-10 (Burger, C.J., dissenting).

²⁸⁶ *See, e.g.*, LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY* 17-19 (2009) (arguing that the criminal law should be structured around criminally culpable choices, around “the risks to others’ legally protected interests that the actor believes he is imposing and the reasons he has for imposing those risks,” and not the resultant harm); Michael Davis, *How to Make the Punishment Fit the Crime*, 93 *ETHICS* 726, 742-46 (1983) (arguing that punishment should be apportioned according to the “unfair advantage” gained by the law breaker; in this conception,

most, of the areas of potential disagreement between theorists on the weighing of crimes and punishments, this section will examine the relationship between attempts and completed crimes as an informative example of some of the problems of weighing offenses and the possibility of general consensus that justifies using the principle of “limiting retributivism”²⁸⁷ as the basis for constitutional claims of disproportionality.²⁸⁸

crimes are likened to objects of commerce, the price to be paid for the crime corresponds to the illicit advantage over the law-abiding gained by breaking the law).

²⁸⁷ “Limiting retributivism” refers to a variant of traditional retributive proportionality. Instead of insisting on strict proportion between offense and penalty, a limiting retributivist would permit a range of punishments that accommodate variation in punishment in service to other purposes of punishment (i.e. deterrence). However, as the name suggests, this accommodation only goes so far. Once a punishment becomes unfairly distant from the traditional retributive proportionality core, it becomes unacceptable. See Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 MINN. L. REV. 571, 592 (2005). As explained by Norval Morris: “The concept of “just desert” sets the maximum and minimum of the sentence that may be imposed for any offense and helps to define the punishment relationships between offenses; it does not give any more fine-tuning to the appropriate sentence than that.” MADNESS AND THE CRIMINAL LAW 199 (1982).

²⁸⁸ See Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107, 168-72 (1996) (arguing that the Supreme Court should adopt limiting retributivism as the philosophical basis for evaluating disproportionality claims); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 704-708 (2005) (arguing that the Eighth Amendment should be understood to impose retributive, proportionate, punishment as a “side constraint,” meaning the Constitution does not prescribe retributive goals of punishment, but does limit excessive punishments).

In *Solem v. Helm*, Justice Powell argued that courts are competent to weigh offenses, based on widely accepted standards of Anglo-American law, including the tenet that attempts should be punished less severely than completed crimes.²⁸⁹ Should a court, engaging in intrajurisdictional analysis, look askance at an attempt conviction that carried the same penalty as a conviction for the completed crime?²⁹⁰

Michael Davis has argued that the bulk of modern theory actually supports treating attempts and completed crimes as equals under the law.²⁹¹ Many advocates of retributivism and deterrence do place substantial weight on the fully culpable mindset of criminal attempt.²⁹² Why should an equally “wicked” person receive a lesser punishment because of random happenstance (i.e. gun misfire)?²⁹³ Therefore, the

²⁸⁹ 463 U.S. at 293.

²⁹⁰ Under the Model Penal Code, attempted and completed crime would lead to the same treatment because the underlying dangerousness of the offender does not change based on their successful completion of the crime, Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 *NEW CRIM. L. REV.* 319, 325-26 (2007).

²⁹¹ MICHAEL DAVIS, *TO MAKE THE PUNISHMENT FIT THE CRIME* 101 (1992). In contrast, Davis argues that attempt does deserve less punishment because the offender who attempts a crime accrues less “unfair advantage” than the offender who completes the crime. Attempt still deserves punishment because the risk of doing harm is still an “advantage” that the law-abiding forgo, but that “advantage” is categorically less than the gain associated with the complete crime. *Id.* 101-20.

²⁹² H. L. A. HART, *PUNISHMENT AND RESPONSIBILITY* 129-30 (2nd ed. 2008).

²⁹³ *See, id.* at 130-31. Hart is hardly the only person to note the illogic of distinguishing punishment for attempts from completed crimes. Sanford H. Kadish, for example, explicated why the difference in resultant harm could not rationally justify the difference in treatment. According to Kadish, if the purpose of criminal

traditional distinction between attempt and completion in apportioning punishment is probably derived from differences in resultant harm.

The “wicked”-mind conception of liability plays out fully in the theory of punishment laid out by Larry Alexander and Kimberly Kessler Ferzan.²⁹⁴ According to Alexander and Ferzan, the criminally culpable choice to act, regardless of resultant harm, is both necessary and sufficient for liability.²⁹⁵ Because of this, every variation of attempt deserves the same punishment as the completed crime, even if the attempt is impossible (trying to “steal” your own belongings, believing them to be someone else’s), or inherently impossible (trying to break into a safe using the beam of a flashlight).²⁹⁶ Other theorists would assign lesser punishment to those attempting impossible crimes. Hyman Gross proposed that liability for attempts should be tripartite: completion thwarted only by happenstance should carry liability equal to the completed crime (i.e. gun misfire); attempt that is highly unlikely to succeed should

punishment is the prevention of further criminal acts by the individual (through reform, specific deterrence, and/or incapacitation), then differentiating punishment for attempts and completed crimes makes no sense because the dangerousness of the offender does not increase because the full measure of harm happened to be averted. If the purpose of punishment is punishing those who deserve it, the resultant harm, completion of the crime, should not increase punishment because once the offender has acted, the results are out of their control. *Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 684-89 (1994).

²⁹⁴ See, Alexander, *supra* note 286.

²⁹⁵ *Id.* at 171.

²⁹⁶ *Id.* at 221-23.

carry less liability (i.e. trying to shoot someone with a gun incapable of hitting the intended target); attempt with no possibility of success should carry even less liability because the “harm” risked does not exist (i.e. trying to shoot someone with a toy gun).²⁹⁷ Even limiting the discussion of punishment to retributive theories does not produce consensus on how to apportion the punishment of attempts.

If there is no other area of agreement about apportioning punishment for attempt versus completion, it should be that attempts, all other factors held equal, should not be punished *more* than completed crimes.²⁹⁸ But, even that extremely limited statement cannot be held sacred when judging whether or not a punishment is constitutionally disproportionate. Consider the case of *State v. Griffin*.²⁹⁹ In this case, the Arizona Court of Appeals overturned a twenty-one year sentence for attempted second-degree murder because the maximum sentence authorized for second-degree murder was only twenty years.³⁰⁰ The Court of Appeals reasoned that this sentence

²⁹⁷ HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 430-34 (1979).

²⁹⁸ Arguably, if an individual convicted of an attempt crime received a greater sentence than authorized for completion of the same crime, the discrepancy could still be justified. Punishment, which is justified for an individual, does not become unjustified because of the punishments received by other people, Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1662-64 (1986). In that light, it would not matter what punishments were authorized for completed crimes relative to attempts of the same crime, because the moral rightness of the penalty exists independent of the comparison. But, that still would not answer the question of what rational reason a legislature might have for the discrepancy.

²⁹⁹ 744 P.2d 8 (Ariz. Ct. App. 1986).

³⁰⁰ *Id.* at 8-9.

was unconstitutional under *Solem v. Helm* because the lesser offense of attempt was punished more harshly than the more serious completed crime.³⁰¹ Rather than perform all three parts of the *Solem* test, the Arizona court elevated a violation of relative proportionality to dispositive importance.³⁰² The problem with the holding in *Griffin* is that violations of relative proportionality do not automatically constitute violations of constitutional proportionality. A sentence is unconstitutionally disproportionate if the penalty is sufficiently disproportionate to the offense itself, not if it fails to fall into some prescribed hierarchy of seriousness.³⁰³ This is why intrajurisdictional

³⁰¹ *Id.*

³⁰² Relative, or ordinal, proportionality refers to the concept that offenses must be proportioned relative to one another, in a hierarchy of seriousness. Relative proportionality was violated in this case because the lesser crime of attempted second-degree murder carried a higher penalty than the more serious crime of second-degree murder. This type of proportionality is distinct from non-relative, or cardinal, proportionality. Non-relative proportionality refers to the concept that offenses should not carry a punishment disproportionate to the offense itself. Non-relative proportionality would have been violated in this case if the court determined that twenty-one years imprisonment was disproportionate to the crime of attempted second-degree murder, regardless of how harshly second-degree murder was punished. *See, Andrew von Hirsch, Proportionality in the Philosophy of Punishment*, 16 CRIME & JUST. 55, 76-77 (1992).

³⁰³ If an attempt were punished more than the completed crime, it would violate precepts of relative proportionality, but not necessarily constitutional proportionality. A better conception of the argument that there is something constitutionally wrong with a sentencing scheme that punishes attempts more harshly than completed crimes is as a violation of equal protection. *Cf. Skinner v. Oklahoma*, 316 U.S. 535, 538 (1942) (holding that when different punishments were meted out to larceny versus embezzlement, which are intrinsically the same offense, equal protection was violated).

comparison is only one part of the *Solem* three-part test.³⁰⁴ Violations of relative proportionality only offer some evidence that a punishment is disproportionate to the offense.

The *Griffin* case illustrates why courts should not rely solely on any single violation of proportionality principles. If a violation of such a clear and limited principle (attempts must not be punished more harshly than the completed crime) does not justify a ruling of constitutional disproportionality, then it is hard to imagine a case where disproportionality could be demonstrated based on an “objective” violation of a single principle of proportionality. Determination of constitutional proportionality must be holistic.

Trying to limit proportionality review to only the most objective comparisons improperly elevates evidence of relative disproportionality to proof of constitutional proportionality.³⁰⁵ Evidence of relative proportionality is useful in constitutional determinations because it speaks to whether the punishment is disproportionate to the

³⁰⁴ Constitutional proportionality determinations necessarily look to many different indicia of how offenses should be weighed. Consider if *Griffin* was sentenced to three months imprisonment for attempted second-degree murder when the maximum sentence for second-degree murder was two months. In that situation a court might well raise an eyebrow at why attempt carried the higher penalty, but it would be hard pressed to say that a three-month sentence for attempted second-degree murder is cruel, though it might be unusual in its lenity.

³⁰⁵ In terms of the *Solem* three-part test, this fallacy would be committed if a court found a prison term unconstitutionally disproportionate solely because it was longer than those authorized for equally or more serious offenses. This is what the *Griffin* court did.

offense. Taking more crimes and punishments into comparative context results in a fuller picture of what ranges of punishment are generally permitted for criminal conduct.³⁰⁶

Alternative Avenues for Challenging Punishments

It is important to recognize that not all disproportionate punishments are unconstitutionally disproportionate. But, the Eighth Amendment is not the only avenue available to attack unjust sentences. Courts have struck down troubling criminal sanctions based on the right to privacy,³⁰⁷ equal protection,³⁰⁸ due process,³⁰⁹ and even free speech.³¹⁰ These bars on criminalization are important but

³⁰⁶ See, e.g., *People v. Bullock*, 485 N.W.2d 866, 877 (Mich. 1992) (performing intra and interjurisdictional analysis on Michigan's 650 gram law).

³⁰⁷ *Ravin v. State*, 537 P.2d 494, 504 (Alaska 1975). The Alaska Supreme Court concluded that the Alaska Constitution's right to privacy does encompass private, noncommercial use of small amounts of marijuana in the home and "that no adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of possession of marijuana by an adult for personal consumption in the home ha[d] been shown." *Id.* at 511. See, *United States v. Orito*, 413 U.S. 139, 142-143 (1973) ("It is hardly necessary to catalog the myriad activities that may be lawfully conducted within the privacy and confines of the home, but may be prohibited in public.")

³⁰⁸ In *People v. Sinclair*, the Michigan Supreme Court ruled that the state had no rational basis for classifying marijuana as a narcotic drug. Therefore, marijuana's classification as a narcotic drug violated the equal protection guarantees of both the United States and the Michigan Constitution. 194 N.W.2d 878, 887 (Mich. 1972).

³⁰⁹ For example, in *People v. Bradley* the Illinois Supreme Court found that the Illinois' Controlled Substances Act violated the due process clause of the Illinois Constitution because the penalties for possession of a schedule IV controlled substance exceeded the penalties for delivery of the same schedule IV substance.

distinct from proportionality claims, which do not question the legitimacy of criminalization per se, but the imposition of unwarranted punishment.

To illustrate, in *People v. McCabe*, the Illinois Supreme Court ruled that the classification of marijuana under Illinois' Narcotic Drug Act rather than under the Drug Abuse Control Act violated the equal protection clause of the Illinois Constitution.³¹¹ Based on the scientific, medical, and social data available at the time, the Illinois Supreme Court concluded that there was no rational basis for the classification of marijuana under the Narcotic Drug Act.³¹² Unlike opiates (including heroin) and cocaine, which were also classified under the Narcotic Control Act, marijuana use does not lead to physical dependence or withdrawal symptoms.³¹³ Furthermore, marijuana abuse characteristics were far more similar to those drugs classified under the Drug Abuse Control Act (barbiturates, amphetamines, and

Because the legislature had expressly stated that the intent of the act was to punish distribution of controlled substances more harshly than simple users, the Illinois Supreme Court found that the schedule IV possession and distribution provisions of the Act were “not reasonably designed to remedy the evil” and, therefore, violated due process. 403 N.E.2d 1029, 1032 (1980).

³¹⁰ See, *Stanley v. Georgia*, 394 U.S. 557, 559 (1969) (holding that the punishment of mere private possession of obscene materials violated the First Amendment).

³¹¹ 275 N.E.2d 407, 413 (Ill. 1971). The Narcotic Drug Act prescribed a mandatory minimum sentence of ten years for the sale of marijuana, even for first time offenders like Thomas McCabe. Sale of drugs under the Drug Abuse Control Act carried a maximum first offense penalty of one year. *Id.* at 408-409.

³¹² *Id.* at 413.

³¹³ *Id.* at 411.

hallucinogens).³¹⁴ Having concluded that the placement of marijuana under the Narcotics Drug Act was “arbitrary,” the Illinois Supreme Court did not have to address the cruel and unusual punishment argument that was also raised.³¹⁵

Other Guiding Factors

Courts should not limit themselves to just comparing different authorized ranges of punishment.³¹⁶ Rather, courts should take note of other types of relevant information. The Louisiana Supreme Court has explicitly cited Louisiana’s Code of Criminal Procedure, which lists factors that should cause a court to impose a sentence of imprisonment and factors that weigh in favor of suspension of the sentence or probation, as a guiding document for Louisiana courts that are brought claims of excessiveness under the Louisiana Constitution.³¹⁷ If a case truly is abnormal, it is likely that there will be other evidence that something has gone wrong.

³¹⁴ *Id.* at 411-12. In particular, the Illinois Supreme Court pointed out that methamphetamine, a drug arguably much worse than marijuana, was classified under the Drug Abuse Control Act. Compared to use of other amphetamines, “[t]he potential for violence, paranoia and physical depletion are substantially more severe.” *Id.*

³¹⁵ *Id.* at 413.

³¹⁶ *See* *People v. Martinez*, 90 Cal. Rptr.2d 517, 520 (Cal. Ct. App. 1999) (emphasizing that an offense should not just be viewed in the abstract, but as a particular crime, committed by a particular offender).

³¹⁷ *State v. Sepulvado*, 367 So.2d 762, 768-69 (La. 1979).

Oftentimes, if a sentencing statute is too harsh, the legislature itself will take action to reduce the penalties. Courts that have overturned lengthy prison terms often cite the actions of the legislature as further proof of the contested sentence's disproportionality.³¹⁸ Alternatively, sometimes it is simply obvious that the conduct punished cannot be what the legislature intended to target. This occurs in cases of statutory rape,³¹⁹ or in cases where a "crime of violence" does not actually involve violence.³²⁰ Sometimes the "crime" committed does not fit with the legislature's intentions because the sentencing court erred.³²¹

³¹⁸ See *Humphrey v. Wilson*, 652 S.E.2d 501, 522 (Ga. 2007) (noting that since petitioner's conviction for aggravated child molestation, for engaging in consensual oral sex with a fifteen year-old girl when he was seventeen, the Georgia legislature had amended the sexual offenses statute such that his crime would now be classified as a misdemeanor and was no longer subject to registration requirements as a sex offender); *State v. Wilson*, 859 So.2d 957, 962 (La. Ct. App. 2003) (observing that the petitioner would no longer qualify for a mandatory life sentence under the revised habitual offender law); *People v. Lorentzen*, 194 N.W.2d 827, 832 (Mich. 1972) (marking the reduction of the penalty for first offense sale of marijuana from a minimum twenty-year sentence to a maximum four-year sentence).

³¹⁹ See, e.g., *Humphrey*, 652 S.E.2d at 522 (Ga. 2007) (explaining that Wilson was convicted of aggravated child molestation for having consensual oral sex with a fifteen year-old, for which he was sentenced to the statutory minimum of ten years, without the possibility of parole); *Sepulvado*, 367 So.2d at 772 (holding that Sepulvado's three and a half year sentence for consensual sexual intercourse with a fifteen and a half year-old girl, when he was eighteen, was unconstitutionally excessive under the Louisiana Constitution).

³²⁰ See *State v. Hayes* 739 So.2d 301, 303 (La. Ct. App. 1999) (explaining that the "crime of violence" which qualified Hayes for his sentence of life imprisonment as a habitual offender was a simple robbery: Hayes "pushed a minor, and stole his bicycle"); *Forehand v. State*, 997 A.2d 673, 678 (Del. 2010) (explaining that the classification of a "walk away" escape from custody should not qualify as a crime of

The Problem of Recidivist Statutes

Another difficulty the United States Supreme Court identified with weighing offenses was how to account for habitual offenders.³²² Through their actions, repeat offenders have, arguably, shown themselves to be ongoing threats to society, unwilling to be deterred from proscribed activity by the standard penalties for criminal action.³²³ Although habitual offender statutes have experienced a much-noted

violence because, unlike other classifications of escapes, actually does not require violence or threat of violence).

³²¹ See *State v. Sepulvado*, 367 So.2d 762, 770 (La. 1979) (asserting that the trial court had inappropriately found two aggravating factors, by seemingly believing that a prior incident of sexual intercourse with a minor also qualified as a criminal offense, indicating recidivist tendencies, even though at the time of the prior incident the defendant was also a minor); *Haygood v. State* 483 S.E.2d 302, 304 (Ga. Ct. App. 1997) (finding the imposition of the maximum possible sentence, twelve months imprisonment, for a woman who intentionally damaged her neighbors hedges by trimming them to be cruel and unusual punishment).

³²² As Justice Rehnquist phrased the issue, the state has a legitimate interest “in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society.” *Rummel v. Estelle*, 445 U.S. 263, 276 (1980).

³²³ The problem of repeat offenders as a class should not be underestimated. Policy makers have oftentimes tailored criminal statutes to target and incapacitate this subset of offenders, who commit a disproportionate share of offenses. See, MATT DELISI, *CAREER CRIMINALS IN SOCIETY* 5-7 (2005) (claiming that crime rates could be halved if “career criminals,” less than ten percent of offenders, were incapacitated); cf. Alex R. Piquero, David P. Farrington & Alfred Blumstein, *The Criminal Career Paradigm*, 30 *CRIME & JUST.* 359, 470-71 (2003) (explaining that, despite extensive research, identifying individual career criminals continues to be an imperfect process, characterized by a high percentage of “false positive[s],” individuals predicted to be dangerous high-rate offenders who turn out not to be).

resurgence in the last few decades,³²⁴ they are hardly a new phenomenon and courts have repeatedly affirmed the constitutionality of recidivist statutes, despite numerous attacks.³²⁵ The Supreme Court's refusal to strike down lengthy prison terms in *Ewing v. California*³²⁶ and *Lockyer v. Andrade*³²⁷ was just the latest in a long judicial history of upholding recidivist statutes.³²⁸ In *Ewing*, Justice O'Connor, writing for the majority, reiterated not only the legitimacy of the state's goal of incapacitating recidivists, but also the Court's longstanding approval of the constitutionality of habitual offender laws.³²⁹ While the issue of the constitutionality of habitual offender laws in general may be a settled issue, they remain problematic in theory and practice and therefore warrant, if anything, more careful scrutiny under judicial review for

³²⁴ See, JOHN CLARK ET AL., "THREE STRIKES AND YOU'RE OUT": A REVIEW OF STATE LEGISLATION 1 (1997) (noting the proliferation of new habitual offender legislation during the 1990s).

³²⁵ See, Ahmed A. White, *The Juridical Structure of Habitual Offender Laws and the Jurisprudence of Authoritarian Social Control*, 37 U. TOL. L. REV. 705, 729-30 (2006) (claiming that courts have never satisfactorily explained how habitual offender statute do not violate constitutional prohibitions on double jeopardy, retroactivity, and status-based offenses).

³²⁶ 538 U.S. 11 (2003).

³²⁷ 528 U.S. 63 (2003).

³²⁸ See, *Oyler v. Boles*, 368 U.S. 448, 451 (1962) ("[T]he constitutionality of the practice of inflicting severe criminal penalties upon habitual offenders is no longer open to serious challenge.").

³²⁹ *Ewing*, 538 U.S. at 24-28.

disproportionality when either the trigger offense or the defendant's criminal history seem unusually minor.

A number of state courts have noted that at least some defendants sentenced under habitual offender statutes are in danger of being over-penalized.³³⁰ For example, in *Wanstreet v. Bordenkircher*, the West Virginia Supreme Court expressed its belief that proportionality standards would most likely only come into play in cases of sentences with no statutory maximum penalty and in cases involving life sentences for recidivists.³³¹ Given the harshness of West Virginia's habitual offender laws,³³² it is unsurprising that the West Virginia Supreme Court would single out recidivist sentences as a potential source of true excessiveness.³³³

³³⁰ See *Alvarez v. People*, 797 P.2d 37, 40 (Colo. 1990) (en banc) (quoting *People v. Drake*, 785 P.2d 1257, 1275 (Colo. 1990)) (ordering trial and appellate courts to perform abbreviated proportionality review when asked because of the "unique possibility" of disproportionate sentencing under the habitual offender law); *State v. Burns*, 723 So.2d 1013, 1019 (La. Ct. App. 1998) ("Whenever a defendant is faced with a mandatory life sentence as a multiple offender, heightened scrutiny is triggered when determining if defendant falls within those "rare" circumstances where a downward departure is warranted.").

³³¹ 276 S.E.2d 205 (1981).

³³² See, *Rummel*, 445 U.S. at 279 (discussing the similarities between the harshest habitual offender statutes in the nation: West Virginia, Texas, and Washington).

³³³ Cf. *State ex rel. Ringer v. Boles*, 157 S.E.2d 554, 558 (W.Va. 1967) (noting that, because habitual offender enhancements are statutory and "in derogation" of the common law, courts generally should interpret them strictly and resolve ambiguities in favor of the accused).

Consider the difference between Justice Rehnquist’s argument in *Rummel* that Texas could rightfully conclude that an offender, having been incarcerated twice already, was simply incapable of conforming their behavior to the law³³⁴ and the West Virginia Supreme Court’s declaration that it could “[n]ot conceive of *any* rational argument” justifying a life sentence for a third time felony offender whose trigger offense under West Virginia’s recidivist statute was forging a forty-three dollar check.³³⁵ Moreover, while Justice Rehnquist further played down the harshness of William Rummel’s life sentence by noting the possibility of parole,³³⁶ the West Virginia Supreme Court reasoned that, because parole is not an enforceable right³³⁷ and because of discrepancies in parole eligibility under West Virginia law,³³⁸ the possibility of parole should not truncate judicial inquiry into the harshness of a

³³⁴ 445 U.S. at 284.

³³⁵ *Wanstreet*, 276 S.E.2d at 214 (emphasis added). George Wanstreet’s felony record included forging a check for \$18.62, arson (burning a hay barn worth \$490), and the trigger offense of forging a \$43 check. *Id.* at 207.

³³⁶ 445 U.S. at 280.

³³⁷ *Wanstreet*, 276 S.E.2d at 213. The West Virginia Supreme Court also noted that even if parole is granted, the life sentence does not suddenly disappear; the paroled offender still faces the possibility of re-incarceration, not only for further serious criminal activity, but also for minor infractions of parole like driving a car without a license. *Id.*

³³⁸ Wanstreet’s crime of check forgery as a recidivist carried a mandatory life sentence, a penalty shared only by other recidivists, first degree murderers, traitors, and kidnapers who inflict bodily harm. Under West Virginia law, Wanstreet would have been eligible for parole after fifteen years, while non-recidivist offenders who receive life sentences may become eligible for parole after only ten years. *Id.* at 212-13.

penalty. Finally, while Justice Rehnquist rejected Rummel’s argument that the petty, nonviolent nature, of his crimes should convince the Court of the excessiveness of his life sentence,³³⁹ the West Virginia Supreme Court ruled that, under the West Virginia Constitution,³⁴⁰ none of Wanstreet’s felonies “carried the threat of potential or actual violence to the person, which *should be crucial* to the application of the proportionality principle.”³⁴¹ Where Justice Rehnquist, writing for a majority of the Court, in *Rummel* found reason to side with the state’s general arguments over Rummel’s fact specific arguments, the West Virginia Supreme Court’s analysis found reason to pay closer attention to the sentencing scheme as applied.

The *Wanstreet* Court arguably was more concerned than was the *Rummel* Court with the possibility of minor offenders being over-penalized under habitual offender laws. While an offender with a case as striking as William Rummel’s might be expected to receive an early parole, parole decisions that turn on predictions of future dangerousness often turn out to be erroneous.³⁴² However much society wants

³³⁹ *Rummel*, 445 U.S. at 275 (“[T]he presence or absence of violence does not always affect the strength of society’s interest in deterring a particular crimes or in punishing a particular criminal.”).

³⁴⁰ In relevant part: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted. Penalties shall be proportioned to the character and degree of the offence.” W. VA. CONST. art. III, § 5.

³⁴¹ *Wanstreet*, 276 S.E.2d at 213 (emphasis added).

³⁴² See, NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 66-68 (1974) (explaining that basing parole decisions on predictions of future dangerousness, the likelihood that a specific individual will commit serious or violent offenses in the future, places too

to protect itself from dangerous offenders, attempts to use criminal sentencing as a vehicle for incapacitation results in the regular imposition of purposefully excessive sentences.³⁴³ This practice becomes much more difficult to justify when the trigger offense itself is minor.³⁴⁴ If recidivists are a continuing danger to society, then increased penalties should adhere to conduct that actually presented danger to society.³⁴⁵

One particular “recidivist” issue that many courts have dealt with is sexual offender statutes that have registration and reporting requirements for convicted sex offenders.³⁴⁶ These statutes often prescribe heavy penalties for violations.³⁴⁷ Although

much confidence in the ability to accurately predict future dangerousness and results in the overprediction of dangerousness as the safer public policy choice).

³⁴³ See Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429, 1435-37 (2001) (noting how “prevention-oriented sentencing guidelines,” like habitual offender statutes, increase penalties dramatically for large swaths of offenders).

³⁴⁴ For example, a recidivist in Arkansas was given a seventy-five year sentence for selling one \$20 rock of crack cocaine because of his prior offenses: “(1) burglary; (2) theft of over \$ 100; (3) breaking and entering and theft of property; (4) escape in the second degree; (5) rape, burglary, and battery in the second degree; (6) escape in the second degree; and (7) possession of a controlled substance with intent to deliver.” *Williams v. State*, 898 S.W.2d 38, 38 (Ark. 1995).

³⁴⁵ Unjustifiable additional penalties also occur under penalty enhancement statutes other than habitual offender laws. For example, Randolph Williams was convicted of burglary and possession of criminal tools. He was sentenced to three to five years for each offense, to be served consecutively. The “criminal tool” was a flashlight. *State v. Williams*, 624 N.E.2d 259, 260 (Ohio Ct. App. 1993).

³⁴⁶ Failure to cooperate with the special restrictions that sex offenders are forced to comply with is somewhat different from other crimes, so an offender whose only

the state may have good reason to want to know where sex offenders live, failure to cooperate alone does not involve any harm or threat to any person or their property.³⁴⁸

These unique problems that occur under recidivist statutes are good reason for courts to look twice at a sentence that appears harsh because of the possibility of minor, nonviolent conduct getting inadvertently caught up in a sentencing scheme meant for more serious criminals.

convictions are for the trigger sex offense and the violation of sexual offender reporting requirements should not necessarily be considered a recidivist in the usual sense.

³⁴⁷ See *People v. Carmony*, 26 Cal. Rptr.3d 365, 368 (Cal. Ct. App. 2005) (explaining that defendant's failure to register was "not more than a harmless technical violation," which carried a twenty-five years to life sentence because he failed to register his residence within five days of his birthday, even though he had registered at an accurate address the month before and his parole officer knew where he was); *Bradshaw v. State*, 671 S.E.2d 485 (Ga. 2008) (holding a mandatory life sentence for a second violation of reporting statute to be unconstitutional under both the Eighth Amendment and the Georgia Constitution).

³⁴⁸ For example, *Megaletto Andrews* had a history of serious, violent offending, including: two counts of sexual battery, armed kidnapping, armed robbery, and armed burglary. Because of his status as a habitual violent felony offender under Florida law, his two convictions for failure to report a temporary residence as a sex offender were enhanced and he was sentenced to twenty-years. *Andrews v. State*, 80 So.3d 979 (Fla. Dist. Ct. App. 2011). More striking than that was the case of *Delbert Meeks*. *Meeks* was sentenced to twenty-five years to life for failure to register his changed address. Because of his serious history of offending—second degree robbery, rape, attempted rape by force, assault with a deadly weapon, burglary—the majority upheld his sentence as not unconstitutionally disproportionate. However, the lone dissenter objected strenuously to this result, noting that, prior to his failure to register, *Meeks* had not committed a sex offense in twenty-three years and had not committed a felony in nine years. More than that, *Meeks* was fifty-two years old, dying of AIDS, and had been living on the street. His failure to register was a consequence of his despair about his diagnosis and his inability to care about anything. *People v. Meeks*, 20 Cal. Rptr.3d 445, 455, 458 (Cal. Ct. App. 2004).

Conclusions

While more problems have been brought up in this chapter than resolved, the intention was not to show that criminal sentencing involves so many diverse factors that it cannot possibly be acceptably objective. Rather, it should be clear that disproportionate sentences often reveal themselves in a number of ways. In order to give full effect to constitutional protections against cruel and/or unusual punishment, courts should take all factors into account. The most “objective” determination can be made in full context, looking not only at the punishments meted out for similar and more serious crimes, but also at other available evidence that suggests something has gone awry.

Chapter 4

Punishment Provisions of State Constitutions

The vast majority of state constitutions contain a provision that parallels the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution. Forty-one state constitutions forbid either “cruel and unusual”³⁴⁹ or “cruel or unusual” punishment;³⁵⁰ six forbid “cruel” punishment;³⁵¹ two contain no explicit punishment clause;³⁵² and one, Illinois, mandates only that punishment “be

³⁴⁹ Twenty-one states prohibit “cruel and unusual” punishment: ALASKA CONST. art. I, § 12; ARIZ. CONST. art. II, § 15; COLO. CONST. art. II, § 20; FLA. CONST. art. I, § 17; GA. CONST. art. I, § I, para. XVII; IDAHO CONST. art. I, § 6; IND. CONST. art. I, § 16; IOWA CONST. art. I, § 16; MO. CONST. art. I, §21; MONT. CONST. art. II, § 22; NEB. CONST. art. I, §9; N.J. CONST. art. I, para. 12; N.M. CONST. art. II, § 13; N.Y. CONST. art. I, § 5; OHIO CONST. art. I, § 9; OR. CONST. art. I, § 16; TENN. CONST. art. I, § 16; UTAH CONST. art. I, § 9; VA. CONST. art. I, § 9; W. VA. CONST. art. III, § 6; WIS. CONST. art. I, § 6.

³⁵⁰ Twenty states prohibit “cruel or unusual” punishment: ALA. CONST. art. I, § 15; ARK. CONST. art. II, § 9; CAL. CONST. art. I, § 17; HAW. CONST. art. I, § 12; KAN. CONST. B. of R. § 17; LA. CONST. art. I, § 20; ME. CONST. art. I, § 9; MD. CONST. Dec. of R. art. 25; MASS. CONST. pt. 1, art. XXVI; MICH. CONST. art. I, § 16; MINN. CONST. art. I, § 5; MISS. CONST. art. 3, § 28; NEV. CONST. art. I, § 6; N.H. CONST. pt. I, art. 33; N.C. CONST. art. I, § 27; N.D. CONST. art. I, § 11; OKLA. CONST. art. II, § 9; S.C. CONST. art. VI, § 15; TEX. CONST. art. I, § 13; WYO. CONST. art. I, § 14.

³⁵¹ DEL. CONST. art. I, § 11; KY. CONST. B. of R. § 17; PA. CONST. art. I, § 13; R.I. CONST. art. I, § 8; S.D. CONST. art. VI, § 23; WASH. CONST. art. I, § 14.

³⁵² Neither the Connecticut, nor the Vermont Constitution specifically addresses limitations on punishment. However, in *State v. Ross*, 646 A.2d 1318, 1354-56 (1994), the Connecticut Supreme Court held that the due process clauses of the Connecticut

determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.”³⁵³ However, the Illinois Constitution is not the only one to mention proportionate penalties. Other state constitutions contain proportionality language in addition to a cruel and/or unusual punishment clause.³⁵⁴ The New Hampshire Constitution even contains an entire article of the Bill of Rights devoted to proportionality.³⁵⁵

Constitution (Article first, §§ 8, 9) implicitly prohibited cruel and unusual punishment, in part, because that right was recognized under the common law of Connecticut. Article first, § 8 of the Connecticut Constitution reads in relevant part: “No person shall... be deprived of life, liberty or property without due process of law...”; Article first, § 9 reads: “No person shall be arrested, detained or punished, except in cases clearly warranted by law.” It appears that Vermont has no similar case law on the subject, except for the case of *State v. O’Brien*, 170 A. 98, 102 (1934), in which the Vermont Supreme Court denied any basis in the Vermont Constitution for a claim of cruel and unusual punishment but maintained that the principle was a recognized component of the common law of Vermont.

³⁵³ ILL. CONST. art. I, § 11.

³⁵⁴ . IND. CONST. art. I, § 16 (“All penalties shall be proportioned to the nature of the offense.”); OR. CONST. art. I, § 9 (“[A]ll penalties shall be proportioned to the offense.”); R.I. CONST. art. I, § 8 (“[A]ll punishments ought to be proportioned to the offense.”); W.VA. CONST. art. III, § 5 (“Penalties shall be proportioned to the character and degree of the offense.”).

³⁵⁵ “All penalties ought to be proportioned to the nature of the offense. No wise legislature will affix the same punishment to the crimes of theft, forgery, and the like, which they do to those of murder and treason. Where the same undistinguishing severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do the lightest offenses. For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate mankind.” N.H. CONST. pt. I, art. 18. In *Harmelin v. Michigan*, Justice Scalia cited the New Hampshire Constitution as evidence that the framers were fully aware of the possibility of including a constitutional mandate of proportionality, 501

Typically, reviewing courts have held that any punishment within statutory limits either cannot be considered cruel and/or unusual punishment³⁵⁶ or that it carries a strong presumption of constitutionality.³⁵⁷ Some state courts have ruled that the standard of review for a claim of disproportionality under the state constitution is whether or not a given prison term shocks the conscience.³⁵⁸ Others have ruled that

U.S. 957, 977-78 (1991). However, as the language of article 18 suggests, this section of the New Hampshire Constitution was probably not regarded as mandatory. *See* *State v. Foster*, 113 A. 211, 214 (N.H. 1921) (“It is probable that this article is merely directory.”); *State v. Elbert*, 480 A.2d 854, 862 (N.H. 1984) (noting that the New Hampshire Supreme Court had never decided formally if article 18 was a constitutional mandate or “merely advises and admonishes”).

³⁵⁶ *See, e.g.*, *Darden v. State*, 430 S.W.2d 494, 496 (Tex. Crim. App. 1968) (explaining that the court could not review punishments within statutory limits for excessiveness); *cf.* *Renner v. Beto*, 447 F.2d 20, 23 (5th Cir. 1971) (rejecting an Eighth Amendment claim against a thirty-year sentence for possession of a single marijuana cigarette because the punishment was within statutory limits).

³⁵⁷ *See* *State v. Johnson*, 709 So.2d 672, 676 (La. 1998) (establishing that a court “may only depart from the minimum sentence if it finds that there is clear and convincing evidence in the case before it which would rebut [the] presumption of constitutionality”); *State v. Farwell*, 170 P.2d 397, 401 (Idaho 2007) (explaining that punishments within statutory limits should only be examined for excessiveness when it is clear that the trial court abused its discretion).

³⁵⁸ *See, e.g.*, *State v. Becker*, 51 N.W. 1018, 1022 (S.D. 1892) (“so excessive or so cruel as to meet the disapproval and condemnation of the conscience and reason of men generally”); *People v. Sharpe*, 839 N.E.2d 492 (Ill. 2005) (“cruel, degrading or so wholly disproportionate to the nature of the offense that it shocked the moral sense of the community”); *State v. Freitas*, 602 P.2d 914 (Haw. 1979) (“in the light of developing concepts of decency and fairness, the prescribed punishment is so disproportionate to the conduct proscribed and is of such duration as to shock the conscience of reasonable persons or to outrage the moral sense of the community”); *In re Lynch*, 503 P.2d 921, 921, 930 (Cal. 1972) (“so disproportionate to the crime... that it shocks the conscience and offends fundamental notions of human dignity”).

there are a few limited exceptions to the presumed constitutionality of any legislatively authorized punishment.³⁵⁹ Several have simply held that the state constitution's provision should be evaluated under the same standards as the Eighth Amendment.³⁶⁰ However, many state courts have, in the same breath, maintained that the state courts owe ultimate loyalty to the state constitution, indicating that interpretation of the state constitutional provision, which currently accords with the United States Supreme Court's jurisprudence, may incorporate broader protections in the future, should the state supreme court deem it necessary.³⁶¹

³⁵⁹ See, e.g., *Bunch v. State*, 43 S.W.3d 132, 138 (Ark. 2001) (listing exceptions to constitutionality: "(1) where the punishment resulted from passion or prejudice; (2) where it was a clear abuse of the jury's discretion; or (3) where it was so wholly disproportionate to the nature of the offense as to shock the moral sense of the community"); *Fink v. State*, 817 A.2d 781, 790 (Del. 2003) ("In reviewing a sentence within the statutory guidelines, this Court will not find error unless it is clear that the sentencing judge relied on impermissible factors or exhibited a closed mind.").

³⁶⁰ See, e.g., *People v. McDonald*, 660 N.E.2d 832, 847 (Ill. 1995) (indicating that, in accordance with the understanding of the framers, the proportionate penalties clause of the Illinois Constitution was roughly synonymous with the Cruel and Unusual Punishment Clause); *State v. Gehrke*, 491 N.W.2d 421, 423 (S.D. 1992) (concluding that the standard of review used in South Dakota was consistent with the "gross disproportionality" test outlined by Justice Kennedy in *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991)); *State v. Brown*, 825 P.2d 482, 491 (Idaho 1992) (asserting that the traditional "shocks the conscience" standard used for the Idaho Constitution's cruel and unusual punishment clause was "essentially equivalent" to *Harmelin*'s gross disproportionality test); *Humphrey v. Wilson*, 652 S.E.2d 501, 505 (Ga. 2007) ("[T]his Court has cited with approval Justice Kennedy's concurrence in *Harmelin v. Michigan*.").

³⁶¹ See, e.g., *State v. Davis*, 380 P.3d 64, 67-68 (Ariz. 2003) (declining to establish whether "cruel and unusual" under the Arizona Constitution encompasses broader protections than the Eighth Amendment—despite being briefed on that question—because the fifty-two year sentence for a twenty-year-old man who had consensual sex

Text and Interpretation of Parallel Provisions

For many state courts, it is clear that the state constitution offers no more protection against excessive punishment than the Eighth Amendment.³⁶² Other courts, while acknowledging that the state constitution might offer broader protections, decline to do so.³⁶³ Some have made it a particular point to maintain the interpretational distinction between the state constitution and the Federal Constitution, asserting the propriety of state courts engaging in independent analysis and even the duty of state courts to do so.³⁶⁴ In a number of states, independent analysis has led to

with two minor girls was unconstitutional under *Harmelin*'s gross disproportionality standard); *cf.* *Commonwealth v. Edmunds*, 586 A.2d 887, 898 (Pa. 1991) (explaining that the Pennsylvania Constitution's search and seizure clauses had been interpreted identically to Fourth Amendment protections until the early 1970s when it became clear that the United States Supreme Court considered the exclusionary rule to be a prophylactic rule intended to deter unlawful police conduct, whereupon the Pennsylvania Supreme Court made clear that the Pennsylvania Constitution's search and seizure provisions did "embody a strong notion of privacy").

³⁶² *See* *Adaway v. State*, 902 So.2d 746, 752 (Fla. 2005).

³⁶³ *See* *Sikeo v. State*, 258 P.3d 906, 912 (Alaska Ct. App. 2011) ("The Alaska Constitution's prohibition on cruel and unusual punishments might potentially be construed more broadly than its federal counterpart."); *Humphrey v. Wilson*, 652 S.E.2d 501, 505 (Ga. 2007) (explaining that Georgia has chosen to cite Justice Kennedy's *Harmelin* concurrence as a model).

³⁶⁴ *See* *Commonwealth v. Edmunds*, 586 A.2d 887, 895-96 (Pa. 1991) (stating that the Pennsylvania Supreme Court was not bound to follow the United States Supreme Court when engaging in analysis of the State Constitution, even "even where the text is similar or identical"); *People v. Cartwright*, 46 Cal. Rptr.2d 351, 357 (Cal. Ct. App. 1995) ("We construe this ["cruel *or* unusual" punishment] provision separately from its counterpart in the federal Constitution.").

the recognition of protections under the state constitution well before those same protections were incorporated into the Eighth Amendment.³⁶⁵

A particularly striking example of state court adherence to federal precedents involves the Florida Constitution's prohibition on "cruel and unusual" punishment. In 2002, Florida amended article I, § 17 of the Florida Constitution, striking the "or" from "cruel or unusual punishment" and substituting "and."³⁶⁶ The amended section required judicial interpretation of this new "cruel and unusual" punishment clause, as well as the former "cruel or unusual" clause, to conform to the U.S. Supreme Court's interpretation of the Cruel and Unusual Punishment Clause.³⁶⁷ This revision is notable, not just because the State of Florida deliberately circumscribed state courts'

³⁶⁵ In *Fleming v. Zant*, 386 S.E.2d 339, 342 (Ga. 1989), the Georgia Supreme Court held that the execution of the mentally retarded was cruel and unusual punishment under the Georgia Constitution. Having rejected that same claim in that same year, *Penry v. Lynaugh*, 492 U.S. 302 (1989), the U.S. Supreme Court waited thirteen years before reaching the same conclusion in *Atkins v. Virginia*, 536 U.S. 304 (2002). The Court of Appeals of Kentucky (the highest court in Kentucky at the time) held that a life sentence without the possibility of parole imposed on a juvenile offender violated the Kentucky Constitution, *Workman v. Commonwealth*, 429 S.W.2d 374 (Ky. 1968), more than forty years later in *Graham v. Florida*, 130 S. Ct. 2011 (2010).

³⁶⁶ *Sancho v. Smith*, 830 So.2d 856, 860 (Fla. Dist. Ct. App. 2002).

³⁶⁷ *Id.* One of the issues in this case was whether the ballot summary of the proposed amendments accurately conveyed that this additional language was meant to prevent Florida courts from interpreting the state constitution more broadly than the Eighth Amendment. The current section as amended reads: "...the prohibition against cruel and unusual punishment[] shall be construed in conformity with decisions of the United States Supreme Court." Without an accurate ballot summary, this modification might easily be read as a bolstering of constitutional protections, rather than as a limitation on the ability of state courts to establish broader protections.

ability to limit excessive punishment, but also because Florida courts had not recognized any greater rights under the previous wording.³⁶⁸

One state that has recognized greater rights is California.³⁶⁹ In the case of *In re Lynch*, the California Supreme Court ruled that disproportionality was a valid basis for a claim of “cruel or unusual” punishment under the California Constitution.³⁷⁰ The California Supreme Court went on to outline three “techniques” which it deemed instructive to making a proportionality determination: an examination of the particular characteristics of the offense and offender, a comparison of “the challenged penalty with the punishments prescribed in the same jurisdiction for different offenses,” and “a comparison of challenged penalty with the punishments prescribed in other jurisdictions.”³⁷¹ This exact same triad would be employed for proportionality analysis under the U.S. Constitution eleven years later in *Solem v. Helm*.³⁷²

³⁶⁸ See *Hale v. State*, 630 So.2d 521, 526 (Fla. 1993) (refraining from discussing the scope of “cruel or unusual” punishment under the Florida Constitution, but noting that the “or” construction is “arguably” a broader provision than the Cruel and Unusual Punishment Clause “and” construction); *Adaway*, 902 So.2d at 752 (“We have never concluded... that the difference between the federal “and” and the Florida “or” was constitutionally decisive. For this reason, we have never precisely identified the parameters of the former Cruel or Unusual Punishment Clause.”).

³⁶⁹ In full, the Article I, § 17 of the California Constitution reads: “Cruel or unusual punishment may not be inflicted or excessive fines imposed.”

³⁷⁰ *Lynch*, 503 P.2d at 930.

³⁷¹ *Id.* at 930-33.

³⁷² 463 U.S.277 (1983). However, *In re Lynch* is not cited in *Solem*.

Although the California Supreme Court talked in a general way about how a disproportionate sentence qualified as cruel or unusual, the Court did not directly make a point of picking out either cruelty or unusualness as the basis for overturning a disproportionate sentence.³⁷³ Other courts have either explicitly noted the potential significance of the “or” construction,³⁷⁴ or even affirmatively declared that the “or” construction does imply broader protections against excessive punishments.³⁷⁵ Some have stressed that the difference between “cruel and unusual” and “cruel or unusual” is entirely textual, not substantive.³⁷⁶ As an example, the Minnesota Supreme Court

³⁷³ *Lynch*, 503 P.2d 921, 927 (Cal. 1972) (quoting *In re Finley*, 81 P. 1041 (Cal. Ct. App. 1905)) (explaining that an unconstitutionally “unusual” punishment is one “all [out of] proportion to the offense, and is beyond question an extraordinary penalty”).

³⁷⁴ *See State v. Hale*, 630 So.2d 521, 526 (1993) (declining to explore whether the Florida Constitution’s “cruel or unusual” punishment clause actually encompassed broader protections, while acknowledging that the argument could be made that it does).

³⁷⁵ *People v. Lorentzen*, 194 N.W.2d 827, 829 (Mich. 1972) (“The prohibition of punishment that is unusual but not necessarily cruel carries an implication that unusually excessive imprisonment is included in that prohibition.”); *People v. Anderson*, 493 P.2d 880, 883 (Cal. 1972) (explaining that the use of the “disjunctive form” in the California “cruel or unusual” punishment clause was deliberate and is intended to carry substantive weight).

³⁷⁶ *Compare State v. Kido*, 654 P.2d 1351, 1353 n.3 (Haw. Ct. App. 1982) (claiming no substantive difference between the Hawaii Constitution’s “cruel or unusual” construction and the Cruel and Unusual Punishment Clause of the Eighth Amendment), *with Huihui v. Shimoda*, 644 P.2d 968, 971 (Haw. 1982) (noting that the court would follow federal Eighth Amendment precedent when interpreting “cruel or unusual” punishment protections, as the 1950 Constitutional Convention delegates intended, except “when logic and a sound regard for the purposes of those protections” warranted it).

considered a claim of “cruel or unusual” punishment brought by a convict sentenced to life imprisonment (thirty-year minimum) for first-degree murder committed during an armed robbery, which he committed when he was fifteen.³⁷⁷ Although the Minnesota Supreme Court ultimately rejected the claim, the Court divided its analysis between whether the punishment was cruel and whether it was unusual, treating both elements as independent bases for a valid claim.³⁷⁸

Suffice it to say that the small semantic differences between “cruel and unusual,” “cruel or unusual,” and “cruel punishment” clauses may or may not carry much significance.³⁷⁹

Interpretation of State Constitutions

Given the punitive character of punishment in America in general,³⁸⁰ and the troubling history of incarceration in the last fifty years,³⁸¹ a state court might well be

³⁷⁷ *State v. Mitchell*, 577 N.W.2d 481, 490 (1998).

³⁷⁸ *Id.*

³⁷⁹ *See State v. Cannon*, 190 A.2d 514, 515 (Del. 1963) (discussing the change in wording in the Delaware Constitution of 1776, which read “cruel or unusual,” to just “cruel” punishments and concluding that “the omission of the phrase ‘or unusual’ has little or no significance”).

³⁸⁰ *See* JAMES Q. WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 41-67 (2003) Whitman identifies a number of factors that make punishment in America particularly “harsh,” including the criminalization of broader ranges of conduct, the incarceration of offenders for longer periods of time, and the “grading” up of offenses, meaning increasing condemnation and punishment for previously less serious offenses.

tempted to *unjustifiably* invoke provisions of the state constitution as a remedy for the harshness of American punishment.³⁸² This is why, when considering the potential impact of ambiguous phrases like “cruel and/or unusual punishment,” state courts should look to legitimate indicia of the meaning and scope of constitutional provisions.³⁸³

³⁸¹ See Loïc Wacquant, *The great penal leap backward: Incarceration in America from Nixon to Clinton*, in *THE NEW PUNITIVENESS* 3 (John Pratt et. al. eds., 2005) (detailing the rapid expansion of prison populations, and the increasing frequency and duration of prison terms, especially for drug offenders—despite stable or declining crime rates overall).

³⁸² See *State v. Hunt*, 450 A.2d 952, 964 (N.J. 1982) (“There is a danger... in state courts turning uncritically to their state constitutions for convenient solutions to problems not readily or obviously found elsewhere.”).

³⁸³ This does not mean that a state court should magically discover bases for why the state constitution should suddenly differ in interpretation from the Federal Constitution. Rather, these indicia serve to explain why certain protections exist under the state constitution. State courts should not continue to follow the Supreme Court solely because that was the course followed in the past. Compare *People v. Mitchell*, 650 N.E.2d 1014, 1018 (Ill. 1995) (citing *People v. Tisler*, 469 N.E.2d 147 (Ill. 1984)) (“[A]fter having accepted the pronouncements of the Supreme Court in deciding fourth amendment cases as the appropriate construction of the search and seizure provisions of the Illinois constitution for so many years, absent some substantial grounds, we should not suddenly change course.”), with *Mitchell*, 650 N.E.2d at 1025 (Heiple, J., dissenting) (“There is no reason for deference in this area of constitutional interpretation. It would be similarly unsupportable to suggest that the United States Supreme Court, in interpreting a provision of the Federal Constitution, is bound by decisions of the Illinois Supreme Court which interpret a similar provision of the Illinois Constitution.”).

Although the most clear-cut sign that a provision was intended to differ in some way from the Federal Constitution is textual differences,³⁸⁴ textual differences are not necessary for a parallel provision to be construed differently.³⁸⁵ Especially when the applicability of a constitutional provision is unclear, courts should look to sources other than the text itself for guidance.³⁸⁶ This is particularly true for proportionality claims because many courts recognize that contemporary standards of decency, which are not discernable from the text itself, should inform

³⁸⁴ *E.g.* *People v. Bullock* 485 N.W.2d 866, 872 n.11 (“[I]t seems self-evident that any adjectival phrase in the form “A *or* B” necessarily encompasses a broader sweep than a phrase in the form “A *and* B.” The set of punishments which are *either* “cruel” *or* “unusual” would seem necessarily broader than the set of punishments which are *both* “cruel” *and* “unusual.”).

³⁸⁵ *See* *State v. Johnson*, 346 A.2d 66, 67-68 (N.J. 1975) In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the Supreme Court held that the validity of a non-custodial search under the Fourth Amendment should be evaluated based on whether consent was voluntarily given based on the totality of the circumstances; knowledge of the right to refuse consent constitutes only part of that voluntariness determination. In *Johnson*, the New Jersey Supreme Court ruled that the search and seizure provision of the New Jersey Constitution required knowledge of the right to refuse consent for a search to be considered voluntary. This determination was based on what the court saw as the “plain meaning” of the search and seizure clause of the New Jersey Constitution *Johnson* 346 A.2d at 68 n.2. What is noteworthy about this “plain meaning” interpretation of the New Jersey Constitution is that both N.J. CONST. art. I, para. 7 and U.S. CONST. amend. IV read: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.”

³⁸⁶ Of course, even when the text is “clear” courts may have good reason to look to other sources for guidance. *See* *State v. Ross*, 646 A.2d 1318, 1355 (Conn. 1994) (cautioning that the state constitution “should not be interpreted too narrowly or too literally” because it “is an instrument of progress... intended to stand for a great length of time”).

disproportionality judgments.³⁸⁷ Judge Handler while serving on the New Jersey Supreme Court articulated a non-exhaustive list of criteria that might guide constitutional interpretation: textual language, legislative history, preexisting state law, structural differences between state and federal constitutions, matters of particular state interest or local concern, state traditions, and public attitudes.³⁸⁸ Other state courts have assembled similar lists.³⁸⁹ The Vermont Supreme Court, frustrated with

³⁸⁷ See *State v. Cannon*, 190 A.2d 514, 516 (Del. 1963) (accepting that the words of the Delaware Constitution are “not necessarily static in meaning” in reference to the prohibition against “cruel” punishments); *cf.* *People v. Moss*, 795 N.E.2d 208, 220 (Ill. 2003) (explaining that an unconstitutionally disproportionate penalty must shock “the moral sense of the community”); *State v. Freitas*, 602 P.2d 914, 920 (Haw. 1979) (same). Implicitly all “shocks the conscience” type tests invoke the evolving standards of decency because the “conscience” of the community that is shocked refers to the contemporary community.

³⁸⁸ *Hunt*, 450 A.2d at 965-67.

³⁸⁹ See *State v. Ross*, 646 A.2d 1318, 1356 (Conn. 1994) (citing *State v. Geisler*, 610 A.2d 1225, 1232 (Conn. 1992)) (identifying factors relevant to analysis of the state constitution: “(1) the text of the constitutional provisions; (2) related Connecticut precedents; (3) persuasive federal precedents; (4) persuasive precedents of other state courts; (5) historical insights into the intent of our constitutional forebearers; and (6) contemporary understandings of applicable economic and sociological norms”); *Commonwealth v. Edmunds*, 586 A.2d 887, 895 (Pa. 1991) (directing claims made on state constitutional grounds to include analysis of: “1) text of the Pennsylvania constitutional provision; 2) history of the provision, including Pennsylvania case-law; 3) related case-law from other states; 4) policy considerations, including unique issues of state and local concern, and applicability within modern Pennsylvania jurisprudence”); *State v. Gunwall*, 720 P.2d 808, 811 (Wash. 1986).

inadequately briefed state constitutional claims, even went out of its way to say directly, not just as part of its reasoning, what it wanted from claimants.³⁹⁰

All of these state court opinions that list factors to be considered evidenced an awareness that state constitutions have a unique history of adoption tied to the history of the state.³⁹¹ Many state constitutions are modeled, at least in part, on the provisions of the federal constitution,³⁹² but some state constitutions predate the U.S. Constitution and served as models themselves.³⁹³ Consider, for example, the more conservative, counter-democratic shift in discourse about government that came about, partially, as a result of the Pennsylvania Constitution of 1776.³⁹⁴ With a unicameral

³⁹⁰ The Vermont Court identified a number of different types of argument: historical arguments, based on legislative history or political and social history, textual arguments, comparisons between Vermont and the jurisprudence of other states' constitutions, and "economic and sociological materials." "Economic and sociological materials," the Vermont Supreme Court explained, meant using data to substantiate a constitutional claim, much like Louis Brandeis did in *Muller v. Oregon*, 208 U.S. 412 (1908), to show that restrictions on working hours for women were a valid exercise of the state's police power, justified to protect women's health and welfare, even though such restrictions violated liberty of contract. *State v. Jewett*, 500 A.2d 233, 236-37 (Vt. 1985).

³⁹¹ See *Hunt*, 450 A.2d at 965-66 (state traditions); *Ross*, 646 A.2d at 1356 (historical insights); *Edmunds*, 586 A.2d at 895 (history of the provision); *Jewett*, 500 A.2d at 236-37 (legislative, political, or social history).

³⁹² See *Adaway v. State*, 902 So.2d 746, 752 (Fla. 2005).

³⁹³ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 501-502 (1977).

³⁹⁴ Robert F. Williams, *The Influences of Pennsylvania's 1776 Constitution on American Constitutionalism During the Founding Decade*, THE PENNSYLVANIA MAGAZINE OF HISTORY AND BIOGRAPHY, Jan. 1988, at 25, 26.

assembly and a distinct lack of restraints on the legislature, the Pennsylvania Constitution of 1776 embodied the supremacy of the will of people and illustrated the dangers of an unchecked legislative power.³⁹⁵ Until Pennsylvania adopted a new constitution in 1790, a highly visible debate developed about the virtues of the Constitution of 1776, attracting supporters like Thomas Paine, critics like Benjamin Rush and John Dickinson, and the attention of many other interested persons.³⁹⁶ Pennsylvania's experience with a radically democratic government came to influence the formation of both other state constitutions and the federal constitution.³⁹⁷ Thus formative substance of constitutions often flows from state to state,³⁹⁸ and from states to the Federal Constitution,³⁹⁹ rather than from the U.S. Constitution down.

³⁹⁵ *Id.* at 26-31. The supporters of this ultra-democratic government believed that the legislature could be effectively moderated from below, rather than by executive power or judicial oversight. This reasoning—the solution for the problems of democracy is more democracy—unsurprisingly echoes the free-speech tenet voiced by Justice Brandeis in *Whitney v. California*, 274 U.S. 357, 375-77 (1927), that “noxious doctrine[s]” were best counted by more speech, not repression.

³⁹⁶ *Id.* at 31-32.

³⁹⁷ *Id.* at 26-28.

³⁹⁸ *E.g.* *State v. Wheeler*, 175 P.3d 538, 441, 445 (Or. 2007) (discussing the adoption of the proportionate penalties language of the Oregon Constitution from the Indiana Constitution);

³⁹⁹ *See* Patrick T. Conley & John P. Kaminski, *Antecedents of the Bill of Rights*, in *THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES* xvii (Patrick T. Conley & John P. Kaminski eds., 1992) (identifying the state constitution precedents to every clause of the United States Bill of Rights).

Although the United States Supreme Court’s decisions about the meaning of “cruel and unusual” punishment may be persuasive, it is not necessary for a state court to assume that the Supreme Court’s interpretation is necessarily “right,” because roughly the same wording arose in forty-eight different contexts.⁴⁰⁰

Federalism

Even without textual differences between parallel state and federal constitutional provisions, the structure of federalism alone provides some support for interpreting state constitutional provisions differently than their federal counterparts.⁴⁰¹ To start, the Federal Constitution embodies a limited grant of power, while state constitutions embody the sovereign power of the people. Some state courts have explicitly recognized that this difference in the relationship of the state

⁴⁰⁰ For example, Virginia, Delaware, Maryland, North Carolina, South Carolina, Massachusetts, New Hampshire, and New York all contained punishment provisions that predated the Federal Constitution’s Cruel and Unusual Punishment Clause. *Id.* at xx. State constitutions that postdate the adoption of the Bill of Rights could have drawn on the Federal Constitution, any of these state constitutions, or have adopted an independent understanding.

⁴⁰¹ There are a number of relevant ways that state and federal jurisprudence differ. Because the Supreme Court has jurisdiction over all fifty states, its jurisprudence is often deliberately restrained; its rulings will bind all the states and potentially interfere with the democratic process. State courts do not face this constraint. Also, in general, “fixing” a mistake of constitutional interpretation is easier at the state level. States tend to have an easier amendment process and smaller more cohesive populations capable of overturning unpopular decisions. Moreover, state courts can take local conditions and traditions into account, as well as craft solutions to constitutional problems that fit the values and conditions of the state. RANDY J. HOLLAND ET AL., STATE CONSTITUTIONAL LAW 138-40 (2010).

constitution to the people, as opposed to the Federal Constitution to the people, makes a difference.⁴⁰² Also, states need only take into account the sensibilities of the people of that state when deciding if society has evolved enough to prohibit a particular punishment. In the particular context of Eighth Amendment claims, states' standards of decency may often differ from the national standard of decency.⁴⁰³ Alternatively, while the Supreme Court may feel constrained from judging the evolution of "standards of decency" because its decisions control the entirety of the American people, a state court, with no power over or obligation to other states, may find evidence of social change more persuasive.⁴⁰⁴

Justice Brennan once argued that the Supreme Court was unwarrantedly limiting the protections of the federal Bill of Rights, based on the notion of respect for

⁴⁰² See *State v. Gunwall*, 720 P.2d 808, 812-13 (Wash. 1986) (explaining that because state constitutions inhere directly in the people, rights under the state constitutions may be seen as affirmative rights against the totality of the people's sovereign power, whereas federal rights may be seen as a restriction on the enumerated powers of the federal government); *State v. Hunt*, 450 A.2d 952, 365-66 (N.J. 1982) (same).

⁴⁰³ See *Fleming v. Zant*, 386 S.E.2d 339, 342 (Ga. 1989) (emphasizing that the "standard of decency" of the people of Georgia, not the people of the United States, prohibited the execution of the mentally retarded); cf. *Miller v. California*, 413 U.S. 15, 24-25 (1973) (explaining that the test for determining whether a work qualifies as obscenity, which is unprotected by the First Amendment, must apply "contemporary community standards," not a national standard).

⁴⁰⁴ See *State v. Sepulvado*, 367 So.2d 762, 771 (La. 1979) (citing statistics that indicated the social context of "sexual permissiveness" when it comes to consensual sexual intercourse between young people, which evidenced the inappropriateness of imprisonment for such "crimes")

“equity, comity and federalism.”⁴⁰⁵ If the U.S Supreme Court feels compelled to adopt narrow interpretations of federal rights so as not to unduly infringe on the purview of the states, then it is the duty of the state to ensure the full measure of constitutional protection under the state constitution.⁴⁰⁶

Conclusions

Justice Brennan’s belief that the Supreme Court’s concerns for comity and federalism were strangling constitutional rights is conspicuously salient when it comes to proportionate penalties because of *Rummel v. Estelle*. In *Rummel*, concerns for federalism and deference so dominated the Court’s analysis that Justice Rehnquist disavowed any place for courts in judging the constitutionality of the length of prison sentences because it is “purely a matter of legislative prerogative.”⁴⁰⁷ When it comes to proportionate penalties, the Supreme Court has not just curtailed the expansion of an established right but attempted to nullify the right completely. While state courts have largely declined up to this point to establish robust protections against cruel and/or unusual punishment, that avenue has not been closed.

⁴⁰⁵ William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502 (1977).

⁴⁰⁶ *Id.* at 503 (“With federal scrutiny diminished, state courts must respond by increasing their own.”).

⁴⁰⁷ *Rummel v. Estelle*, 445 U.S. 263, 274 (1980).

Chapter 5

The State of Delaware

In 1791, the Delaware General Assembly called for the formation of a new constitutional convention.⁴⁰⁸ Although sections of the Constitution of 1792 imitated the Federal Constitution, Delaware's Bill of Rights was largely derived from Delaware's Declaration of Rights (its predecessor from the 1776 Constitution) and the Pennsylvania Bill of Rights of 1790.⁴⁰⁹ On the whole, the Delaware Bill of Rights has not substantively changed since it was first enacted.⁴¹⁰ The current Bill of Rights, from the Constitution of 1897, is all but indistinguishable from the Constitution of 1792.⁴¹¹ Although the Delaware Supreme Court has willingly ruled on the

⁴⁰⁸ RANDY J. HOLLAND, *THE DELAWARE STATE CONSTITUTION* 5 (2002). The Delaware Constitution of 1776 was the first state constitution to be created by a popularly elected convention. Among other things, the constitutional convention established a Declaration of Rights, a weakened executive branch (no veto power), a bicameral legislature, and a Court of Appeals. *Id.* at 3-5.

⁴⁰⁹ *Id.* at 5-8.

⁴¹⁰ *Id.*

⁴¹¹ *Id.* Although the Constitution of 1897 is the current Constitution of Delaware, it has been amended more than eighty times; substantive changes include the establishment of the Supreme Court of Delaware. *Id.* at 20-21.

independent basis of the Delaware Constitution in many areas of law,⁴¹² but it has not recognized any greater protection against disproportionate prison terms under the Delaware Constitution, than the U.S. Supreme Court has recognized under the Federal Constitution.⁴¹³ On the basis of the Delaware Supreme Court's jurisprudence in other areas of law and the evident weaknesses of existing cruel punishments case law,⁴¹⁴ a strong argument can be made to recognize greater protections against disproportionate punishments under the Delaware Constitution's Cruel Punishment Clause, than have been interpreted to exist under the Federal Constitution.

⁴¹² See *State v. Holden*, 2010 Del. Super. LEXIS 493, 11-12 n.14 (Del. Super. Ct. 2010) (citing cases that establish broader rights under the Delaware Constitution, including: preservation of evidence, the right to confrontation, the right to counsel, the right to trial by jury, and search and seizure rights).

⁴¹³ See *Crosby v. State*, 824 A.2d 894, 913 (Del. 2003) (striking down a forty-five year prison sentence on the basis of disproportionality under the Eighth Amendment, making no reference to the cruel punishments clause of the Delaware Constitution, at all); *State v. Ayers*, 260 A.2d 162, 169 (Del. 1969) (stating that the actions of the legislature in fixing penalties "within the traditional limitations of forms of punishment will not be struck down by the courts").

⁴¹⁴ Some have taken the view that the jurisprudence of "New Federalism" advocated by Justice Brennan in *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977), has resulted in independent state constitutional law that is impoverished, as well as unintelligible, when compared to the robust discourse that surrounds federal constitutional law. See James A. Gardner, *The Failed Discourse of State Constitutionalism* 763-64, 90 MICH. L. REV. 761 (1992). Such concerns, that the expansion of rights based on state constitutions lack firm grounding in history and precedent, are arguably lessened in this particular area of law because of the United States Supreme Court's failure to establish a clear and consistent jurisprudence. See *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003). In this situation, a state court would not be muddying up the waters by amending otherwise solid federal jurisprudence, rather state courts would probably bring a greater measure of clarity and enhance constitutional discourse.

Interpretation of the Delaware Constitution

Delaware does not have a history of strict adherence to the interpretations of the U.S. Supreme Court. The Delaware Supreme Court has, at times, insisted on the necessity of independence from the U.S. Supreme Court's interpretation of the federal Constitution: "If we were to hold that our Constitution is simply a mirror image of the Federal Constitution, we would be relinquishing an important incident of this State's sovereignty."⁴¹⁵ Accordingly, the Delaware Supreme Court has proven willing to rule on the independent basis of rights guaranteed by the Delaware Constitution in a number of areas of law, including rights to trial by jury,⁴¹⁶ to preservation of evidence,⁴¹⁷ to confrontation at trial,⁴¹⁸ and to counsel.⁴¹⁹ The Delaware Bill of Rights of 1792, Article I of the Delaware Constitution, was primarily intended as an enumeration of common law protections; as such, the Delaware Bill of Rights mirrors the text of the Pennsylvania Constitution of 1790, not the text of the federal Bill of Rights.⁴²⁰

⁴¹⁵ *State v. Sanders*, 585 A.2d 117, 145 (Del. 1990).

⁴¹⁶ *Claudio v. State*, 585 A.2d 1278, 1297 (Del. 1991).

⁴¹⁷ *Hammond v. State*, 569 A.2d 81, 86-87 (Del. 1989).

⁴¹⁸ *Arsdall v. State*, 524 A.2d 3, 6-7 (Del. 1987).

⁴¹⁹ *Bryan v. State*, 571 A.2d 170, 175-76 (Del. 1990).

⁴²⁰ HOLLAND, *supra* note 408 at 26-27.

To illustrate, the Pennsylvania Constitution of 1790 reads: “That trial by jury shall be as heretofore, and the right thereof remain inviolate.”⁴²¹ The Delaware Constitution of 1792 reads almost identically: “Trial by jury shall be as heretofore.”⁴²² This wording was intended to encompass the common law understanding of trial by jury rights⁴²³ and indicates a deliberate variation from the wording of the federal Bill of Rights, which was enacted in the preceeding year.⁴²⁴ The federal Bill of Rights guarantees only “a speedy and public trial, by an impartial jury.”⁴²⁵ For this reason, the United States Supreme Court has made it a point to distinguish common-law jury trial rights from Sixth Amendment rights.⁴²⁶ Consequently, the Delaware jury trial clause includes broader rights than the Sixth Amendment.⁴²⁷

⁴²¹ PA. CONST. of 1790, art. IX, § 6. The trial by jury clause of the Pennsylvania Constitution remains all but unchanged today. PA. CONST. art. I, § 6.

⁴²² DEL. CONST. of 1792, art. I, § 4.

⁴²³ See *Claudio*, 585 A.2d at 1297; HOLLAND, *supra* note ###, at 28-30.

⁴²⁴ See HOLLAND, *supra* note 408 at 27

⁴²⁵ U.S. CONST. amend. VI.

⁴²⁶ See *Williams v. Florida*, 399 U.S. 78, 99 (1970) ([T]here is absolutely no indication in ‘the intent of the Framers’ of an explicit decision to equate the constitutional and common-law characteristics of the jury.”).

⁴²⁷ Compare *Fountain v. State*, 275 A.2d 251, 251 (Del. 1971) (explaining that jury verdicts under the Delaware Constitution must be unanimous), and *Hopkins v. Justice of the Peace Court No. 1*, 342 A.2d 243 (Del. Super. Ct. 1975) (recognizing that the common law and the Delaware Constitution require twelve jurors) with *Apodaca v. Oregon*, 406 U.S. 404, 410-11 (1972) (holding that unanimous jury verdicts are not required by the Sixth Amendment), and *Williams*, 399 U.S. at 99-101 (arguing that the

For jury trials, the divergence between rights guaranteed by the U.S. Constitution and rights guaranteed by the Delaware Constitution appears relatively clear. The U.S. Constitution guarantees only those common law features of jury trials that are essential to its function as a safeguard against overzealous or unsupported accusations of the state against the individual.⁴²⁸ In contrast, the Delaware Constitution's jury trial clause guarantees all features of common law jury trials,⁴²⁹ regardless of whether the particulars are essential to the function of a jury.⁴³⁰ When it comes to other sections of the Delaware Bill of Rights, the extent to which the provisions extend greater protections than those found under the U.S. Constitution tends to be more complicated. Nevertheless, the Delaware Supreme Court has enumerated a number of sources that may legitimately inform judicial decisions about the meaning of the Delaware Constitution.⁴³¹ Among the sources identified by the

“essential feature” of a jury is its ability to deliberate as an independent lay group, a group which may constitutionally be composed of only six jurors). *But cf.* *Ballew v. Georgia*, 435 U.S. 223, 239 (1978) (holding that a five member jury would violate the Sixth Amendment).

⁴²⁸ See *Apodaca*, 406 U.S. at 410-11.

⁴²⁹ See *Claudio*, 585 A.2d at 1298 (“[T]he proper focus of any analysis of the right to trial by jury, as it is guaranteed in the Delaware Constitution, requires an examination of the common law.”).

⁴³⁰ *Cf. Williams*, 399 U.S. at 89-90 (concluding that the twelve member jury is a “historical accident,” without particular significance in the proper functioning of a jury, and therefore not required by the Sixth Amendment).

⁴³¹ See *Jones v. State*, 745 A.2d 856, 864-65 (Del. 1999) (citing *State v. Hunt*, 450 A.2d 952, 962 (N.J. 1982) (Handler, J., concurring)).

Delaware Supreme Court are textual language, legislative history, preexisting state law, structural differences between federal and state constitutions, matters of particular state interest or local concern, state traditions, and public attitudes.⁴³²

In its decisions involving jury trial rights, the Delaware Supreme Court cited textual language, legislative history, and preexisting state law as the basis for the existence of broader rights.⁴³³ But, Delaware courts have not backed down from ruling independently when the evidence of divergence is less concrete.

To illustrate, citizens of Delaware enjoy greater rights to access evidence than mandated by the U.S. Constitution. In 1988, the United States Supreme Court decided the case of *Arizona v. Youngblood*, holding that unless a defendant could prove bad faith on the part of police who failed to preserve evidence that was potentially exculpatory, the Court would not recognize a denial of due process of law.⁴³⁴ In *Deberry v. State*, the Delaware Supreme Court had held that the state had a duty to preserve potentially exculpatory evidence on the basis of due process under the Fourteenth Amendment and on the basis of Article I, section 7 of the Delaware Constitution.⁴³⁵ *Deberry* was now in conflict with *Youngblood*. So, the Delaware

⁴³² *Id.*

⁴³³ *See Claudio*, 585 A.2d at 1295-96.

⁴³⁴ 488 U.S. 51 (1988).

⁴³⁵ 457 A.2d 744, 751-52 (Del. 1983).

Supreme Court took the case of *Hammond v. State*.⁴³⁶ In *Hammond*, the Delaware Supreme Court noted that *Youngblood* now superseded the portion of *Deberry* that relied on the Fourteenth Amendment.⁴³⁷ However, the Delaware Supreme Court reaffirmed its decision in *Deberry* because it had ruled in independently on Article I, section 7 of the Delaware Constitution.⁴³⁸ The Court explained that the Delaware Constitution demanded that courts look at the whole record, including the degree of bad faith involved, the potential importance of the evidence, and the quality of the other evidence against the defendant, in evaluating what remedy is warranted for unpreserved evidence.⁴³⁹

The Delaware Supreme Court offered little explanation for why due process under the Delaware Constitution entails more in this case than the U.S. Constitution, except to say that fundamental fairness demanded consideration of the full record.⁴⁴⁰ So, the Delaware Supreme Court's independent rulings have been sustained both on relatively clear and concrete evidence of common-law precedents and on the remarkably vague justification of fundamental fairness.

⁴³⁶ 569 A.2d 81 (Del. 1989).

⁴³⁷ *Id.* at 85.

⁴³⁸ *Id.*

⁴³⁹ *Id.*

⁴⁴⁰ *Id.*

Incorporating Proportionality Limitations

The state of federal constitutional law is not static. The U.S. Supreme Court must incorporate emerging controversies into existing bodies of jurisprudence,⁴⁴¹ reevaluate its own precedents in light of new evidence,⁴⁴² and ultimately develop new boundaries for constitutional rights. As a result, state courts may decide that provisions of the state constitution, once defined as synonymous with federal constitutional rights, must now be defined on independent state grounds because the Supreme Court's interpretation no longer accords with state constitutional rights.⁴⁴³ Although the Delaware Supreme Court has not delineated greater protections against disproportionate prison terms under the Delaware Constitution, there is an argument to be made that proportionately analysis might be, or even should be, recognized independently under the Delaware Constitution's Cruel Punishment Clause.

⁴⁴¹ See, e.g. *United States v. Jones*, No. 10-1259, slip op. (U.S. 2012) (holding that GPS monitoring of a vehicle constitutes a search under the Fourth Amendment).

⁴⁴² See, e.g. *McCleskey v. Kemp*, 481 U.S. 279, 321-23 (1987) (Brennan, J., dissenting) (arguing that the Baldus study, a statistical analysis of racial factors in the disposition of death penalty cases in Georgia, proved that the death penalty could not be constitutionally meted out because the risk of arbitrary sentencing was too great).

⁴⁴³ See *Jones v. State*, 745 A.2d 856, 869 (Del. 1999). The Delaware Supreme Court ruled that a "seizure" occurs under the Delaware Constitution "when a reasonable person would have believed he or she was not free to ignore the police presence," refusing to incorporate the limiting ruling of *California v. Hodari D.*, 499 U.S. 621 (1991), into the search and seizure provisions of the Delaware Constitution. In *Hodari D.* the Supreme Court ruled that a show of authority by police was a necessary but not a sufficient component of a "seizure" under the Fourth Amendment.

First, the Delaware Supreme Court has expressed support for proportionality limitations, at least in death penalty cases, implicitly critiquing the U.S. Supreme Court for its continued divisiveness on proportionality issues.⁴⁴⁴ Furthermore, while the phrase “evolving standards of decency” comes from the U.S. Supreme Court’s jurisprudence,⁴⁴⁵ the Delaware Supreme Court has expressed support for this principle independently under the Delaware Constitution.⁴⁴⁶ The Delaware Supreme Court has even taken note that any consideration of evolving standards of decency under the Cruel Punishment Clause of the Delaware Constitution need only take the State of Delaware into account, unlike analysis under the Eighth Amendment, which considers the punishment practices of all American jurisdictions.⁴⁴⁷ Some members of the U.S. Supreme Court have argued that there is no objective way to evaluate evolving

⁴⁴⁴ See *State v. Sanders*, 585 A.2d 117, 142 (Del. 1990) (questioning why courts are capable of weighing the interests involved in due process and free speech cases, yet a plurality of justices of the U.S. Supreme Court would abandon proportionality analysis under the Eighth Amendment because it “vests appellate courts with untrammelled discretion”).

⁴⁴⁵ *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

⁴⁴⁶ See *Sanders*, 585 A.2d at 146 (“[In order to determine what “cruel punishment” entails under the Delaware Constitution] we may trace the evolution of our laws over time and discern constitutional significance in the patterns that emerge.”); *State v. Cannon*, 190 A.2d 514, 591 (Del. 1963) (explaining that the determination of whether a punishment is constitutionally “cruel” must take into account both the changing mores of society as well as the mores at the time the cruel punishments clause was enacted).

⁴⁴⁷ *Sanders*, 585 A.2d at 146

standards of decency, much less a way that shows proper deference to federalism.⁴⁴⁸ A state court, evaluating the progress of society under the state constitution, would handily dodge the federalism issue, because, as the Delaware Supreme Court has noted, the state court need only take into account the evolution of punishment practices in its own state.⁴⁴⁹

It is true that the Delaware Supreme Court has, in the past, argued that the best indicia of what constitutes cruel punishment are to be found in the actions of the General Assembly.⁴⁵⁰ However, these opinions are in conflict with the Court's own jurisprudence, which states "construction must be avoided which would make any provision [of the Delaware Constitution] idle and nugatory."⁴⁵¹ Under the current body of jurisprudence, the Delaware Supreme Court has effectively nullified the Cruel Punishment Clause of the Delaware Constitution. In fact, the only real guidance

⁴⁴⁸ See *Harmelin v. Michigan*, 501 U.S. 957, 986-90 (1991). This portion of *Harmelin* was joined only by Justice Scalia and Chief Justice Rehnquist. However, a slightly less strident version of the same argument was made by Justice Rehnquist, writing for the majority, in *Rummel v. Estelle*, 445 U.S. 263, 275-76, 282 (1980). The *Rummel* majority consisted of Justices Rehnquist, Stewart, White, Blackmun, and Chief Justice Burger.

⁴⁴⁹ *Sanders*, 585 A.2d at 146 ("The laws and history of our sister States have no bearing upon the scope of our own constitutional protections.").

⁴⁵⁰ See *State v. Ayers*, 260 A.2d 162 (Del. 1969) (holding that penalties imposed by the legislature, which are not unconstitutional in form, must be upheld by courts); *State v. Cannon*, 190 A.2d 514 (Del. 1963).

⁴⁵¹ Opinion of Justices, 225 A.2d 481, 484 (Del. 1966).

furnished by the Delaware Supreme Court is a vague standard described as whether or not the sentencing judge “exhibited a closed mind.”⁴⁵²

Furthermore, this notion of total deference to the legislature, while merited in most cases, may be legitimately called into question if statutory definitions lack a sound basis. For example, in *Forehand v. State*, Kevin Forehand simply walked away from work release, was arrested, and sentenced to a mandatory minimum of eight years imprisonment as a habitual offender because the “walk away” escape was classified as a violent felony under Delaware law.⁴⁵³ Although the majority rejected the Eighth Amendment claim made in this case, the dissent argued that the classification of Class D Escape as a “violent” felony was simply irrational, because the escape itself involved no violence or threat of violence, the definition of Class D Escape did not include elements of violence or threat of violence, and, in fact, other classifications of escapes under Delaware law do include violence or threat of violence as elements of the offense.⁴⁵⁴ While this type of classification may not rise to the level of unconstitutional irrationality,⁴⁵⁵ it does provide a strong case for a more thorough

⁴⁵² *Fink v. State*, 817 A.2d 781, 790 (Del. 2003).

⁴⁵³ 997 A.2d 673 (Del. 2010) (en banc) (3-2 decision).

⁴⁵⁴ *Id.* at 677-78 (Steele, C.J., dissenting).

⁴⁵⁵ *See id.* at 676 (arguing that while a “walk away” escape may factually involve no violence, the legislature may conclude that an escaped convict has sufficient motivation to engage in violence (e.g. in order to avoid recapture) that classifying the offense as “violent” is reasonable).

judicial inquiry into whether eight years may be considered “cruel” under the Delaware Constitution. Legislative anomalies such as nonviolent “violent” crimes offer courts another means of distinguishing which punishments should not receive an automatic pass on proportionality claims, just because a legislature has authorized them.

The Application of United States Supreme Court Precedents

It is always possible that seemingly unbending or irreconcilable United States Supreme Court decisions turn out to work fine in practice. If the application of federal precedents to new disproportionality challenges resulted in a body of jurisprudence that was consistent and clear in practice, then no “fix” would be necessary. However, this has not been the case in Delaware when it comes to proportionality decisions.

If a case exists that supports the argument that the *Rummel* line produces equitable decisions in practice, then that case is *Crosby v. State*.⁴⁵⁶ In *Crosby*, the Delaware Supreme Court ruled that Crosby’s life sentence, imposed under Delaware’s habitual offender law, violated the Cruel and Unusual Punishment Clause.⁴⁵⁷ Chris Crosby was convicted of Second Degree Forgery and Criminal Impersonation for

⁴⁵⁶ 824 A.2d 894 (Del. 2003).

⁴⁵⁷ *Id.* at 913. Crosby’s life sentence was calculated by the Delaware Supreme Court to be equivalent to a fixed term of forty-five years and “subject to reduction and conditional release.” *Id.* However, at best, Crosby would have to serve thirty-six years before release. He would be eighty-two years old. *Id.* at 908. Although Crosby was eligible for “good behavior and merit credits,” he was not eligible for parole because parole release was eliminated in Delaware pursuant to the 1989 Truth-in-Sentencing Act. *Id.* at 900.

giving the police a false name and date of birth following his arrest for misdemeanor drug charges.⁴⁵⁸ The Second Degree Forgery conviction, a class G felony, “the lowest category of felony-level offenses in Delaware,” qualified Crosby as a habitual offender.⁴⁵⁹ His five prior felonies included Third Degree Burglary, Second Degree Burglary, Possession of a Deadly Weapon by a Person Prohibited, Possession with Intent to Deliver, and Second Degree Forgery.⁴⁶⁰ Despite the fact that the State recommended a sentence of approximately ten years, the trial judge sentenced Crosby to life.⁴⁶¹

The Delaware Supreme Court compared Crosby’s trigger offense and criminal history to *Rummel*, *Solem*, and *Ewing*.⁴⁶² If Crosby was sentenced to the State’s recommendation of ten years, the Delaware Supreme Court reasoned, then the case would be controlled by *Rummel*, but, given that the minimum time Crosby would spend in prison was equivalent to a life term “in the literal sense” and that Crosby’s trigger was entirely passive, *Solem* controlled instead.⁴⁶³ Concluding that Crosby’s sentence passed the gross disproportionality threshold, the Delaware Supreme Court

⁴⁵⁸ *Id.* at 897. Crosby was indicted for Possession of a Hypodermic Needle and Syringe and Possession of Drug Paraphernalia. *Id.* at 897 n.5.

⁴⁵⁹ *Id.* at 902.

⁴⁶⁰ *Id.* at 897. The Second Degree Forgery conviction was a previous conviction, distinct from his trigger offense.

⁴⁶¹ *Id.* 907. The maximum sentence available for class G felonies, like Second Degree Forgery, without the habitual offender enhancement, is two years. *Id.*

⁴⁶² *Id.* at 909-911.

⁴⁶³ *Id.*

noted that Crosby's sentence was well outside the range of sentences typically received by Crosby-type offenders and ruled that the sentence violated the Eighth Amendment.⁴⁶⁴

What went unmentioned in the *Crosby* opinion was a previous case decided by the Delaware Supreme Court that, essentially, came to the opposite conclusion, using the same precedents. In *Williams v. State*, the Delaware Supreme Court upheld Martin Williams's life without the possibility of parole sentence,⁴⁶⁵ imposed under Delaware's habitual offender law for his third Second Degree Burglary conviction.⁴⁶⁶ The trigger Second Degree Burglary offense involved Williams walking into a house during the day, taking a wallet and some loose change, and walking out again without incident.⁴⁶⁷ Arguably, Crosby's criminal history was largely similar, if not worse, than William's,⁴⁶⁸ yet the Delaware Supreme Court struck down Crosby's sentence while upholding Williams, using the same precedents.⁴⁶⁹ Because the Delaware

⁴⁶⁴ *Id.*

⁴⁶⁵ To be clear, William's life without the possibility of parole sentence was effectively equal to Crosby's life sentence because parole was eliminated in Delaware in the interim between these cases. *See supra* note 458.

⁴⁶⁶ 539 A.2d 164, 180 (1988).

⁴⁶⁷ *Id.* at 166.

⁴⁶⁸ *See supra* note 461 and accompanying text.

⁴⁶⁹ Of course, *Harmelin v. Michigan*, *Ewing v. California*, and *Lockyer v. Andrade* had not yet been decided by the United States Supreme Court, so the precedents the Delaware Supreme Court relied upon were not entirely the same. However, if anything this discrepancy adds more weight to the conflict between the *Crosby* and the *Williams* decisions. *Williams* was decided after *Solem* but before *Harmelin*, at a time when the Delaware Supreme Court believed that *Solem* eroded much of the reasoning from *Rummel*. *See Id.* at 172. Arguably, the federal precedents were strongest for

Supreme Court did not mention *Williams* in the *Crosby* opinion, there is no way to tell what reasoning it might have for the apparent conflict between these two decisions. Nevertheless, these two contradictory opinions remain “good law” in Delaware.

A Recommendation

The Delaware Supreme Court has declined up to this point to establish broader protections against disproportionate punishment under the Delaware Constitution’s Cruel Punishment Clause.⁴⁷⁰ It would be consistent with the Delaware Supreme Court’s protection of other rights⁴⁷¹ to do the same for proportionality. Even though some Delaware precedents have disavowed a place for courts in overturning punishments authorized by the legislature, others have acknowledged and established principles that would support a more robust jurisprudence of proportionality limitations.⁴⁷² Although some equitable decisions have been based on the Supreme Court’s Eighth Amendment Jurisprudence,⁴⁷³ it is not necessary to look any further than the decisions of the Court itself in *Rummel v. Estelle*, *Harmelin v. Michigan*, and

proportionality claims after *Solem* because *Harmelin* and *Ewing* were both decided against the individual under the looser “gross disproportionality” standard.

⁴⁷⁰ *See supra* note 414.

⁴⁷¹ *See supra* notes 417-420 and accompanying text.

⁴⁷² *See supra* notes 432, 444-45, 447-48 and accompanying text.

⁴⁷³ *E.g.* *Henderson v. Norris*, 258 F.3d 706 (8th Cir. 2001) (holding life imprisonment unconstitutionally disproportionate for first offense delivery of .238 grams of cocaine).

Lockyer v. Andrade to know that truly disproportionate sentences have been and will continue to be upheld under the current Eighth Amendment standard. One of those truly disproportionate sentences, Martin William's life sentence for Second Degree Burglary, still stands under the current proportionality jurisprudence of Delaware. The Delaware Constitution contains a Cruel Punishment Clause.⁴⁷⁴ It is time to use it and recognize that proportionality limitations are an important component of vindicating the people's right to be free of cruel punishment.

The core of my proposed standard is the same one that the United States Supreme Court established in *Solem v. Helm*,⁴⁷⁵ the same one the Michigan Supreme Court⁴⁷⁶ and the California Supreme Court⁴⁷⁷ have used in their jurisprudence: comparison of the gravity of the offense to the harshness of the penalty; comparison of the penalty to those received for similar, and worse, offenses within the same jurisdiction; and comparison of the penalty to those received for similar offenses in other jurisdictions.⁴⁷⁸ Courts should certainly not ignore other evidence of disproportionality outside of this framework, but the framework provides useful structure and guidance to analysis. However, this standard can be improved.

⁴⁷⁴ DEL. CONST. art. I, § 11.

⁴⁷⁵ 463 U.S. 277, 290-94 (1983).

⁴⁷⁶ *People v. Bullock*, 485 N.W.2d 866, 875-77 (Mich. 1992).

⁴⁷⁷ *In re Lynch*, 503 P.2d 921, 930-33 (Cal. 1972).

⁴⁷⁸ *Solem*, 463 U.S. at 290-94.

One of the biggest problems with Justice Kennedy’s “gross disproportionality” test is that the “threshold” for a disproportionality claim is so high, the other parts of the test, the more objective parts, become superfluous.⁴⁷⁹ A threshold for disproportionality that is set higher than legitimate claims of disproportionality makes no sense. A better standard for the courts of Delaware to adopt is preponderance of the evidence, a widely used standard of American law which courts should already be familiar with.⁴⁸⁰ Use of preponderance of the evidence as the working threshold standard for disproportionality claims would strike an equitable balance, by separating the clearly frivolous claims from those that merit closer attention.

The combination of these two elements, the three-part test and a threshold test of preponderance of the evidence, would allow courts to make objective

⁴⁷⁹ See *Lockyer v. Andrade*, 538 U.S. 63, 82 (2003) (Souter, J., dissenting) (“If Andrade’s sentence is not grossly disproportionate, the principle has no meaning.”); *Ewing v. California*, 538 U.S. 11, 42 (2003) (Breyer, J., dissenting) (“A threshold test must permit *arguably* unconstitutional sentences, not only *actually* unconstitutional sentences ... A threshold test that blocked every ultimately invalid constitutional claim—even strong ones—would not be a *threshold* test but a *determinative* test.”) (emphasis in original); cf. *Harmelin v. Michigan*, 501 U.S. 957, 1020 (1991) (“Justice Kennedy’s abandonment of the second and third factors set forth in *Solem* makes any attempt at objective proportionality analysis futile.”).

⁴⁸⁰ Preponderance of the evidence is used most prominently in civil trials. However, many other areas of American law use it as well: Grand Jury indictments, some family court determinations. *E.g.* *Patterson v. New York*, 432 U.S. 197, 206 (1977) (affirmative defense of insanity).

determinations about disproportionality claims. There is one prerequisite for these tools to work. Delaware's proportionality jurisprudence needs to be freed of the mess the United States Supreme Court has created. A freestanding jurisprudence should be developed for the State of Delaware, to ensure a more consistent and equitable treatment of legitimate claims of excessive punishment.