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"Death is Different" - Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages - Shifting Constitutional Paradigms for Assessing Proportionality

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“DEATH IS DIFFERENT,”
IS MONEY DIFFERENT?
CRIMINAL PUNISHMENTS,
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PUNITIVE DAMAGES—
SHIFTING CONSTITUTIONAL
PARADIGMS FOR ASSESSING
PROPORTIONALITY

RACHEL A. VAN CLEAVE*

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INTRODUCTION

In an intellectual property theft case, the jury awarded the plaintiffs \$95 million in punitive damages.¹ A Utah jury awarded, and the State Supreme Court upheld, \$145 million in punitive damages against State Farm Insurance for the defendant's alleged bad faith.² Another jury hit Phillip Morris Inc. with a \$3 billion punitive damages verdict after finding the company liable for fraud, negligence, and making a defective product.³ It is against the backdrop of cases like these that judges and commentators have expressed concerns about punitive damages. "Awards of punitive

¹ The federal district judge ultimately reduced the damages. Marc Davis, *Record Civil Award Cut to \$12.6 Million; But Judge Rips Defendants, Calling Them "Vultures,"* VIRGINIAN-PILOT, June 26, 2002, at D1, available at 2002 WL 23544757.

² The United States Supreme Court recently reversed the punitive damages in this case, finding a violation of due process. *State Farm Mut. Auto. Co. v. Campbell*, 123 S. Ct. 1513 (2003). I discuss the Court's decision in Part III.B.

³ *Boeken v. Phillip Morris Inc.*, No. BC 226593 (Cal. Super. Ct., Los Angeles County, June 6, 2001) (cited in *California Jury Slams Philip Morris with \$3 Billion Verdict*, 15 AIDS Litig. Rep. (Andrews Publ'ns Inc.) No. 7, at 28 (Dec. 10, 2001)).

damages are skyrocketing.”⁴ “We note . . . our concern about punitive damages that ‘run wild.’”⁵

Similarly, examples of the application of forfeiture laws have raised eyebrows. The sale of cocaine worth \$250 resulted in the forfeiture of an apartment worth \$140,000 in one case. In another case, a defendant’s farm was seized after she pled guilty to selling 2.9 grams of cocaine.⁶ Again, judges and commentators have expressed concerns. Justice Clarence Thomas has theorized that, “[i]mproperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice.”⁷

These types of concerns, at least in part, have led the United States Supreme Court to strike punitive damages awards of \$145 million and \$2 million as unconstitutionally excessive⁸ and the forfeiture of \$357,144 as “grossly disproportional to the gravity of the [defendant’s] offense.”⁹ The Supreme Court recently confirmed that it will continue to give teeth to proportionality review¹⁰ of such monetary punishments. During the current

⁴ *Browning-Ferris Indus. of Vt. v. Kelco*, 492 U.S. 257, 282 (1989) (O’Connor, J., concurring in part, dissenting in part). See also John Calvin Jefferies, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 139 (1986) (noting that “punitive damages are out of control”).

⁵ *Pacific Mut. Life Ins. v. Haslip*, 499 U.S. 1, 18 (1991). See also Victor E. Schwartz, Mark A. Behrens & Joseph P. Mastro Simone, *Reining in Punitive Damages “Run Wild”: Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1004, 1010 (1999) (arguing that “excessive punitive damages awards continue to be a major problem in many states” and “[r]eform is needed to address the chilling effect that the threat of runaway punitive damages can have on . . . the general public”); Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 417 (discussing the consequences of punitive damages for civil defendants).

⁶ See Chet Little, Note, *Civil Forfeiture and the Excessive Fines Clause: Does Bajakajian Provide False Hope for Drug-Related Offenders?*, 11 U. FLA. J.L. & PUB. POL’Y 203, 205 n.12 (2000) (citing *United States v. 58 Whalers Cove Drive*, 954 F.2d 29, 32 (2d Cir. 1992)), n.14 (citing *United States v. Santoro*, 866 F.2d 1538, 1540–41 (4th Cir. 1989)).

⁷ *Bennis v. Michigan*, 516 U.S. 442, 456 (Thomas, J., concurring), reh’g denied, 517 U.S. 1163 (1996). See also Little, *supra* note 6, at 204–05 (“While government agencies fill their coffers with proceeds from drug-related seizures, instances of forfeiture abuse become more routine across the country.”); W. David George, *Finally, an Eye for an Eye: The Supreme Court Lets the Punishment Fit the Crime in Austin v. United States*, 46 BAYLOR L. REV. 509, 509 (1994) (“Civil forfeiture of assets is one of the federal government’s most powerful tools in the war on drugs.”).

⁸ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). The Court held that \$2 million in punitive damages was excessive when BMW failed to disclose that it had repainted the car Dr. Gore purchased. The jury awarded Dr. Gore \$4,000 in compensatory damages and \$4 million in punitive damages. The Alabama Supreme Court reduced the punitive damages award to \$2 million upon determining that the jury had incorrectly used a multiplier, which included BMW’s failures to disclose such presale repairs in states other than Alabama. *Id.*

⁹ *United States v. Bajakajian*, 524 U.S. 321, 324 (1998).

¹⁰ By the term “proportionality review” I refer to an evaluation of a sentence as it relates to the offense for which the defendant was convicted. That is, an answer to the question of whether the punishment fits the crime. This is in contrast to “comparative proportionality review” which “purports to inquire . . . whether the penalty is . . . unacceptable in a particular case because it is disproportionate to the punishment imposed on others convicted of the same crime.” Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (With Lessons from New Jersey)*, 64 ALB. L.

term, in *State Farm Mutual Automobile Insurance v. Campbell* (“*State Farm*”), the Supreme Court reversed a punitive damages award of \$145 million against State Farm Insurance.¹¹ Yet, ironically, the Court has not shown the same concern about excessiveness and disproportionality when the punishment is imprisonment, a deprivation of liberty. In fact, during the 2002–2003 Supreme Court term, the Court upheld life sentences of minor theft offenses committed by recidivists.¹²

The Supreme Court has only once struck a term of imprisonment as disproportionate and thus an Eighth Amendment violation.¹³ Before the current term, when the Court last considered the issue of proportionate punishment with respect to prison sentences in 1991, it affirmed a life sentence without the possibility of parole for the defendant’s first offense, which was possession of 672 grams of cocaine.¹⁴ This article argues that the Court should give terms of imprisonment at least the same level of scrutiny used to evaluate punitive damages awards and forfeitures for proportionality. To the extent that the Court will second-guess juries in the punitive damages context, and even to second-guess Congress as to forfeitures of property, the Court should be consistent across these subject areas that involve types of punishment and thus engage in a genuine proportionality review of terms of imprisonment. However, given the decisions in *Andrade* and *Ewing*, discussed below in Part III.A, there does not seem to be any limit to the length of time a state may deprive an individual of his liberty.

Certainly, it can be difficult to identify objective and predictable criteria to define proportionality of punishment.¹⁵ Nonetheless, once the Court has decided to evaluate some forms of punishment, namely monetary, no justification truly exists for excluding other types of punishment. Furthermore, the relevant jurisprudence has identified factors at the heart of proportionality review. These include the gravity of the offense, the defendant’s culpability, an intra-jurisdictional comparison, and an inter-jurisdictional comparison.¹⁶

REV. 1161, 1167 (2001) [hereinafter Latzer, *Proportionality Review*]. For further discussion of this issue, see generally Evan J. Mandery, *In Defense of Specific Proportionality Review*, 65 ALB. L. REV. 883 (2002) (challenging the arguments made by Professor Latzer) and Barry Latzer, *A Reply to Professor Mandery*, 65 ALB. L. REV. 935 (2002).

¹¹ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513 (2003). The Utah Supreme Court held that a trial court committed reversible error when it ordered a remittitur of the punitive damages award to \$25 million. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 2001 UT 89 (2001).

¹² *Lockyer v. Andrade*, 123 S. Ct. 1166 (2003); *Ewing v. California*, 123 S. Ct. 1179 (2003).

¹³ *Solem v. Helm*, 463 U.S. 277 (1983).

¹⁴ *Harmelin v. Michigan*, 501 U.S. 957 (1991). Subsequently, the Supreme Court of Michigan determined that the statute at issue in *Harmelin* violated the state constitution. *People v. Bullock*, 485 N.W.2d 866, 878 (1992).

¹⁵ See Cass R. Sunstein, Daniel Kahneman, David Schkade & Ilana Ritov, *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1167 (2002) (noting that in the context of jury determinations of punitive damages awards, identifying “the translation problem” as the difficulty in equating the punitive intent of the jury with a “scale that can be used by the legal system, such as dollars of fines or months in jail”).

¹⁶ *Solem*, 463 U.S. at 292 (1983).

In the 2002–2003 Supreme Court Term, the Court had an opportunity to set out a meaningful method for evaluating the proportionality of prison sentences that is consistent with its approach to punitive damages awards and forfeitures. Specifically, the Court has agreed to hear two cases involving severe sentences under California's Three Strikes Law. Gary Ewing was sentenced to life without the possibility of parole for twenty-five years for attempting to steal three golf clubs,¹⁷ and Leandro Andrade received a life sentence without the possibility of parole for fifty years for shoplifting a total of nine videotapes on two occasions.¹⁸ Both defendants received these sentences because they had prior convictions.¹⁹ Otherwise, these offenses would constitute petty theft, a misdemeanor, and would carry maximum sentences of six months in jail under California law.²⁰

As to the *Ewing* case, the California Supreme Court declined to review the sentence;²¹ in the *Andrade* case, the Ninth Circuit held that Andrade's sentence was disproportionate to the crimes involved and, therefore, violated the Eighth Amendment's prohibition of cruel and unusual punishment.²² The Supreme Court upheld these sentences. If the Supreme Court had begun to take proportionality review in the context of terms of imprisonment as seriously as it takes such review of punitive damages awards and forfeitures, it might have affirmed the Ninth Circuit.²³ This

¹⁷ Brief for Petitioner at 3–4, *Ewing v. California*, 123 S. Ct. 1179, 1190 (2003) (No. 01-6978), available at 2003 WL 728753. Ewing was convicted of one count of grand theft of personal property. *Ewing*, 123 S. Ct. 1184.

¹⁸ *Lockyer v. Andrade*, 123 S. Ct. 1166, 1169–70 (2003).

¹⁹ *Id.* at 1170; *Ewing*, 123 S. Ct. 1179, 1190 (2003).

²⁰ CAL. PENAL CODE §§ 17, 666 (WEST 2003).

²¹ *People v. Ewing*, 2001 Cal. LEXIS 4704 (Cal. July 11, 2001).

²² *Andrade*, 270 F.3d at 743. Another Ninth Circuit panel reversed sentences in two consolidated cases under the same law. In *Brown v. California*, 283 F.3d 1019 (9th Cir. 2002), the court found that sentences of life without the possibility of parole for twenty-five years imposed on Earnest Bray, Jr. for attempting to steal three videotapes, and on Napoleon Brown for attempting to steal a steering wheel alarm were unconstitutional. The two Ninth Circuit panels were careful to point out that their opinions did not invalidate California's Three Strikes law. Rather, their holdings were "limited to the application of the Three Strikes law to the unusual circumstances of [the] case[s]." *Andrade*, 270 F.3d at 767; *Brown*, 283 F.3d at 1040 ("Our decision does not hold the California Three Strikes Law unconstitutional, only its application to mandate a 25-year-to-life sentence for a petty theft offense such as those in these cases.").

²³ Following the recent case, *Newdow v. United States Cong.*, 2002 U.S. LEXIS 12826 (9th Cir.), involving the "under God" language in the Pledge of Allegiance, numerous periodicals have reported on the reversal record of Ninth Circuit cases by the United States Supreme Court. Jason Hoppin, *Courting Controversy*, THE RECORDER, June 28, 2002, at 1 ("As many national news stories [after the *Newdow*] decision pointed out, the [Ninth] Circuit is overturned more often than any other circuit"); Marisa Taylor, *Influential 9th Circuit Assembles in S.D.—Weighty Issues are on Agenda for Judges Who Defy Consensus*, THE SAN DIEGO UNION-TRIB., July 15, 2002, at A1 (pointing out that "[b]y 1997, the 9th [Circuit] had the nation's worst record: 28 out of 29 cases reviewed were reversed," but also noting that the "reversal rate last year was 71 percent, which is about the national average"). *But see* Faith Bremner, *Democrats Say Bill's New Momentum Based on Court's Pledge of Allegiance Ruling*, GANNETT NEWS SERVICE, July 24, 2002 (discussing legislation that would split the Ninth Circuit into two circuits, and quoting Ninth Circuit Judge, Sidney R. Thomas, as follows: "Last year, the high court reversed all of the decisions that it agreed to hear from the 2nd, 3rd, 5th and 11th circuits, . . . [a]lthough the Supreme Court reversed 78 percent of the 9th circuit's decisions last year, it reversed 89 percent of the 6th circuit's decisions").

would have resulted in more meaningful scrutiny of terms of imprisonment and provided a check on the imposition of sometimes draconian criminal sanctions,²⁴ particularly under three strikes legislation. This missed opportunity is further highlighted by the fact that only one month after upholding the life sentences in *Andrade* and *Ewing*, the Court found a monetary sanction unconstitutional in *State Farm*.

Part I of this Article reviews the case law regarding judicial review of both terms of imprisonment and imposition of the death penalty. In this section, I argue for consistency within this area of the law. Some jurisprudence suggests that, because “death is different,” proportionality review is appropriate only in the death penalty context, and is either not required or only applies in an extremely narrow example, such as life imprisonment for a parking ticket.²⁵ Part II examines Supreme Court precedent that analyzes the question of proportionality of forfeitures and punitive damages awards. In the context of forfeitures, the debate centers primarily on the question of how broadly a court should apply the Excessive Fines Clause. Nonetheless, the relevant cases provide insight about the appropriate criteria for proportionality review. The much shorter history of proportionality review of punitive damages awards also speaks to the question of how to evaluate punishments for excessiveness. Part III of this Article discusses *Andrade*, *Ewing*, and *State Farm*, all decided during the 2002–2003 term. Finally, I argue that the Court should apply the same criteria to all these forms of punishment to achieve a greater degree of consistency.²⁶

²⁴ See Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, n.128 (1997) (stating that state law is less favorable to criminal defendants than federal law and “perhaps the most noteworthy example is California’s ‘three strikes and you’re out’ statute, requiring draconian sentences for recidivist felons”); Nina Totenberg, *Morning Edition* (National Public Radio Broadcast, Oct. 7, 2002) (describing California’s Three Strikes law as “the most Draconian such law in the country”); Kimberle Williams Crenshaw, *Tavis Smiley* (National Public Radio Broadcast, Nov. 6, 2002) (stating that California’s Three Strikes law is “more harsh” than three strikes laws in other states).

²⁵ *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980) (discussing this example, with the implication that such a sentence would be unconstitutional).

²⁶ Scholars have compared the Court’s approach to punitive damages with that of capital punishment, see, e.g., Steven Semeraro, *Responsibility in Capital Sentencing*, 39 SAN DIEGO L. REV. 79, 144 (2002) (“The Court’s treatment of punitive damages perhaps most closely mirrors the development of modern capital punishment doctrine”), and with other criminal punishments, see e.g., Adam M. Gershowitz, *The Supreme Court’s Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249, 1302 (2000) (concluding that “[t]he Supreme Court must reconsider its decisions affording more rigorous proportionality review to excessive punitive damages awards than to excessive criminal punishments”). There is also a comparison of proportionality review of criminal punishments and that of forfeitures. See, e.g., Barry L. Johnson, *Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeitures After United States v. Bajakajian*, 2000 U. ILL. L. REV. 461, 503 (arguing that the Court in *Bajakajian* adopted a standard of excessiveness for forfeitures very similar to that used to review criminal punishments, amounting “to complete judicial abdication of meaningful proportionality review”). Another scholar has compared review of punitive damages awards to that of forfeitures. Susan R. Klein, *The Discriminatory Application of Substantive Due Process: A Tale of Two Vehicles*, 1997 U. ILL. L. REV. 453 (1997) (specifically comparing the forfeiture of a jointly owned car due to the criminal activity of one co-

I. PROPORTIONALITY OF CRIMINAL SENTENCES

The Supreme Court has often acknowledged the ambiguity of the meaning of the Cruel and Unusual Punishment Clause. “[D]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted.”²⁷ Interpretation of the Cruel and Unusual Punishment Clause of the Eighth Amendment can, nonetheless, be separated into three primary areas. First, there is jurisprudence that focuses on the modes or methods of punishment.²⁸ This was the main focus of the Court’s analysis of the punishment of denationalization in *Trop v. Dulles*.²⁹ The Court stated:

While the state has the power to punish, the [Eighth] Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.³⁰

The Court ultimately concluded that the Eighth Amendment bars denationalization as a punishment.³¹ The scope of this analysis also includes cases involving methods of execution.³²

The second set of case law involves the procedural safeguards to the imposition of punishment. In the context of the death penalty, this has been of central concern to a majority of the Supreme Court Justices who have

owner in *Bennis v. Michigan*, 516 U.S. 442 (1996), and the punitive damages award in *BMW of North America v. Gore*, 517 U.S. 559)). However, there is no in-depth study comparing all four areas: capital punishment, terms of imprisonment, punitive damages and forfeitures.

²⁷ *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1878). See also *Trop v. Dulles*, 356 U.S. 86, 99 (“The exact scope of the constitutional phrase ‘cruel and unusual’ has not been detailed by this Court.”); *Weems v. United States*, 217 U.S. 349, 368 (1910) (“What constitutes cruel and unusual punishment has not been exactly decided.”).

²⁸ This area of jurisprudence is also referred to as involving the issue of “decency” to contrast it with the third area this article examines regarding proportionality. See Herbert L. Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1075–76 (1964) (describing *Weems v. United States* as speaking “to the issue of decency, not rationality”).

²⁹ 356 U.S. 86 (1958).

³⁰ *Id.* at 100.

³¹ *Id.* at 101 (“It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development.”). In *Weems*, the Court’s analysis did not distinguish between the types of penalties applied and the duration, fifteen years, of the sentence. In fact, the Court concluded that it lacked power to separate the penalties. *Weems*, 217 U.S. at 382.

³² In *re Kemmler*, 136 U.S. 436 (1889) (execution by electrocution held constitutional); *Wilkerson*, 99 U.S. 130 (1878) (execution by firing squad upheld in dicta). For a detailed discussion of the jurisprudence surrounding the issue of modes of execution, see generally, Roberta M. Harding, *The Gallows to the Gurney: Analyzing the (Un)constitutionality of the Methods of Execution*, 6 B.U. PUB. INT. L.J. 153 (1996); Deborah Denno, *Is Electrocution an Unconstitutional Method of Execution? The Engineering of Death Over the Century*, 35 WM. & MARY L. REV. 551 (Winter 1994); Dawn Macready, Student Article, *The “Shocking” Truth About the Electric Chair: An Analysis of the Unconstitutionality of Electrocution*, 26 OHIO N.U. L. REV. 781 (2000). Despite the holding in *Kemmler*, only a few states currently allow for death by electrocution. See, e.g., *Dawson v. State*, 554 S.E.2d 137 (2001) (finding execution by electrocution violative of Georgia’s constitutional prohibition of cruel and unusual punishment).

considered it. In *Gregg v. Georgia*,³³ the Court discussed the concern raised by at least three Justices in *Furman v. Georgia*³⁴—that death “not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.”³⁵ In *Lockett v. Ohio*,³⁶ the Court disapproved a scheme that limited the mitigating circumstances on which a defendant could present evidence in the sentencing phase. The Court held that before imposing the death penalty, the state must allow consideration of “[every] aspect of a defendant’s character or record and any of the circumstances of the offense” that the defendant offers as mitigating.³⁷ The procedural safeguards issue also arose in *Ford v. Wainwright*,³⁸ where the Court held that the execution of insane defendants violated the Eighth Amendment, in part because the state’s procedural scheme did not give the defendant an adequate opportunity to present an insanity claim.³⁹ Procedural safeguards related to the imposition of the death penalty are not limited to the Supreme Court’s interpretation of the Eighth Amendment. Most recently, the Supreme Court found that a state sentencing scheme violated the Sixth Amendment right to a jury trial by allowing a judge to determine facts supporting the imposition of the death penalty.⁴⁰ The Court has held that this procedural protection also applies to enhanced prison sentences.⁴¹

Third, the Supreme Court has developed a jurisprudence of substantive proportionality with respect to both the death penalty and to terms of imprisonment. To this I now turn.

A. DOES “CRUEL AND UNUSUAL” INCLUDE PROPORTIONALITY REVIEW?

The threshold question of controversy is whether the Eighth Amendment’s “Cruel and Unusual” language includes a proportionality principle at all; that is, does this part of the Eighth Amendment impose a limit on disproportional or excessive sentences? It seems that at least six

³³ 428 U.S. 153 (1976).

³⁴ 408 U.S. 238 (1972).

³⁵ *Gregg*, 428 U.S. at 188.

³⁶ 438 U.S. 586 (1978).

³⁷ *Id.* at 604. See also *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (striking a sentencing scheme that mandated the death penalty for every person convicted of first degree murder stating, the “relevant facets of the character and record of the individual offender” must be considered).

³⁸ 477 U.S. 399 (1986).

³⁹ *Id.* at 414.

⁴⁰ *Ring v. Arizona*, 536 U.S. 584 (2002). A majority of the Court in *Ring* overruled *Walton v. Arizona*, 497 U.S. 639 (1990), which had upheld the same scheme. The Court determined that the scheme was not reconcilable with the recent case, *Apprendi v. New Jersey*, 530 U.S. 466 (2000), “which held that the Sixth Amendment does not permit a defendant to be ‘exposed . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone.’” *Ring*, 536 U.S. at 588 (2002) (quoting *Apprendi*, 530 U.S. at 483).

⁴¹ *Apprendi*, 530 U.S. at 466 (2000) (finding that a jury must determine whether the defendant’s conduct came within the state’s hate crime law to justify an increase in the maximum prison sentence). But see *Harris v. United States*, 536 U.S. 545, 560 (2002) (the factual determination of whether the defendant “brandished” a weapon to justify an increase in his sentence did not constitute an element of the offense and could be found by a judge as sentencing factor).

Justices currently on the Court support the view that the Cruel and Unusual Punishment Clause includes a principle of proportionality, though they may not agree on the precise contours of such a principle. In *Harmelin v. Michigan*, Justice Kennedy wrote a concurring opinion joined by Justices O'Connor and Souter. Justice Kennedy eschewed the historical approach taken in Justice Scalia's opinion and opted to respect the proportionality jurisprudence that has developed over the last century. Justice Kennedy stated that "*stare decisis* counsels our adherence to the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years."⁴² The dissenting Justices in *Harmelin* agreed that the Eighth Amendment imposes a proportionality requirement for criminal sentences, but they applied a different standard and believed that the punishment was unconstitutionally excessive under the facts of the case. The dissenters accused Justice Kennedy of unduly narrowing proportionality review by collapsing the factors developed in cases like *Solem v. Helm*.⁴³ Of those dissenting Justices, only Justice Stevens still sits on the Court.⁴⁴

As to the Justices appointed since *Harmelin*,⁴⁵ Justice Thomas seems to agree with Justice Scalia's view that there is no proportionality guarantee as to criminal punishment. Justice Thomas joined Justice Scalia's dissenting opinion in *Atkins v. Virginia*.⁴⁶ In addition, both Justices wrote concurring opinions in *Ewing* clearly stating that they do not believe that the Eighth Amendment Cruel and Unusual Punishments Clause contains a proportionality principle.⁴⁷ Justices Breyer and Ginsburg joined the majority opinion in the recent *Atkins* case where the Court held that "death is not a suitable punishment for a mentally retarded criminal" because it is excessive.⁴⁸ Justice Stevens, writing for the majority, further observed, "we have read the text of the [Eighth A]mendment to prohibit *all* excessive punishments, as well as cruel and unusual punishments that may or may not be excessive."⁴⁹ Before joining the dissents in *Andrade* and *Ewing*, Justices Breyer and Ginsburg indicated that they support proportionality review in *Riggs v. California*.⁵⁰ In *Riggs*, as in the *Andrade* case, the trial court sentenced the defendant to life imprisonment without the possibility

⁴² *Harmelin*, 501 U.S. 957, 996 (1991).

⁴³ 463 U.S. 277 (1983). See also *Harmelin*, 501 U.S. at 1018. (White, J., dissenting) ("While Justice Scalia seeks to deliver a swift death sentence to *Solem*, Justice Kennedy prefers to eviscerate it, leaving only an empty shell."). In *Solem*, the Court held that a life sentence for writing a no account check in the amount of \$100 was unconstitutionally excessive. 463 U.S. at 303.

⁴⁴ Justice Thurgood Marshall retired on June 17, 1991; Justice Byron R. White retired on June 28, 1993; Justice Harry A. Blackmun retired on June 30, 1994. Legal Information Institute, *Historic Supreme Court Decisions—by Justice*, at <http://supct.law.cornell.edu/supct/cases/judges.htm> (last visited Apr. 10, 2003).

⁴⁵ Justice Clarence Thomas was appointed on October 23, 1991; Ruth Bader Ginsburg was appointed on August 10, 1993; Justice Stephen Breyer was appointed on August 3, 1994. *Id.*

⁴⁶ 536 U.S. 304 (2002).

⁴⁷ *Ewing v. California*, 123 S. Ct. 1179, 1190–91 (2003) (Scalia, J., concurring, and Thomas, J., concurring).

⁴⁸ *Id.* at 321.

⁴⁹ *Id.* at 311 n.7.

⁵⁰ 525 U.S. 1114 (1999).

of parole for twenty-five years for a petty theft offense.⁵¹ The Supreme Court denied certiorari in *Riggs*, but Justice Ginsburg joined a short opinion by Justice Stevens.⁵² Justice Stevens indicated that the aspect of California's Three Strikes law at issue presented substantial constitutional concerns, particularly "when the state 'double counts' the defendant's recidivism in the course of imposing . . . punishment."⁵³ However, Justices Stevens, Ginsburg, and Souter decided to defer Supreme Court review of this issue until other courts, such as the California Supreme Court or federal district and appellate courts, had entered the discussion. Justice Breyer dissented from the denial of certiorari, stating that the petition "raises a serious question concerning the application of a 'three-strikes' law to what is in essence a petty offense."⁵⁴ In *Durden v. California*, Justice Souter wrote a dissent to the denial of certiorari, in which Justice Breyer joined.⁵⁵ Similar to the defendants in the other three strikes cases cited, Mr. Durden received a life sentence with the possibility of parole in twenty-five years for a petty theft of merchandise worth forty-three dollars.⁵⁶ Both the *Ewing* and *Andrade* decisions confirm that terms of imprisonment are subject to a proportionality limitation, even if the State of California did not violate this principle. Thus, as to the issue of whether the Cruel and Unusual Punishment Clause contains a proportionality limitation, death is not different; a majority of the current Court and past Courts agree that whether the punishment is the sentence of death or life without the possibility of parole for a non-violent felony,⁵⁷ the Eighth Amendment prohibits disproportionate criminal sentences.

Two current Supreme Court Justices believe that the Cruel and Unusual language of the Eighth Amendment does not include such a limitation.⁵⁸ Most recently, Justice Thomas tersely concluded "the Cruel and Unusual Punishments Clause of the Eighth Amendment contains no proportionality principle."⁵⁹ Justice Scalia elaborated on this conclusion in *Atkins v. Virginia*,⁶⁰ arguing that the cruel and unusual language of the Eighth Amendment does not include a proportionality principle because there is no

⁵¹ *Id.* at 1114–15.

⁵² *See id.* (sentencing the defendant to life without the possibility of parole for twenty-five years for stealing a bottle of vitamins from a supermarket).

⁵³ *Id.* at 1116. The characterization of "double counting" is based on the fact that under California law, when a defendant has been convicted of certain offenses, a prosecutor is permitted to treat what would otherwise be a misdemeanor as a felony (this is the first time the defendant's recidivism is considered). Then, under the Three Strikes law, where the "bumped up" misdemeanor is the defendant's third felony, she is subject to the mandatory sentence of life without the possibility of parole for twenty-five years (the second time the defendant's recidivism is counted). Thus recidivism is counted twice—once to bump the misdemeanor up to a felony and again to subject the defendant to the mandatory sentence under the Three Strikes law.

⁵⁴ *Id.* at 1114 (Breyer, J., dissenting from the denial of certiorari).

⁵⁵ 531 U.S. 1184 (2001).

⁵⁶ *Id.* at 1184.

⁵⁷ *Solem v. Helm*, 463 U.S. 277 (1983). Discussed *infra* Part I.A.

⁵⁸ Scholars have considered the original understanding and the history of the Eighth Amendment, and I do not plan to enter into that debate.

⁵⁹ *Ewing v. California*, 123 S. Ct. 1179, 1191 (Thomas, J., dissenting).

⁶⁰ 536 U.S. 304 (2002).

textual or historical support for such a principle.⁶¹ Similarly, Justice Scalia's opinion in *Harmelin v. Michigan*⁶² included an extensive historical analysis to support the conclusion that the term "cruel and unusual" meant to prohibit only certain modes of punishment considered to be barbarous.⁶³ Chief Justice Rehnquist's position on the issue has varied somewhat. He joined Justice Scalia in *Harmelin*, but he did not join Scalia's dissent in *Atkins*, nor did he state that the Eighth Amendment does not include a principle of proportionality.⁶⁴ In addition, writing for the majority in *Alexander v. United States*,⁶⁵ the Chief Justice stated that the "Cruel and Unusual Punishments Clause . . . is concerned with matters such as the *duration* or conditions of confinement."⁶⁶ Also, before *Harmelin*, the Chief Justice wrote for the majority in *Rummel v. Estelle*,⁶⁷ concluding that the life sentence was not unconstitutional.⁶⁸ Nonetheless, he also stated, "[t]his is not to say that a proportionality principle would not come into play in the extreme example . . . if the legislature made overtime parking a felony punishable by life imprisonment."⁶⁹ More recently, in *Ewing*, Chief Justice Rehnquist did not join in the concurring opinions of Thomas and Scalia, which concluded that the Cruel and Unusual Punishments Clause does not contain a proportionality principle. While the Chief Justice's conception of a proportionality principle may be exceedingly narrow despite the fact he joined Justice Scalia's opinion in *Harmelin*, the Chief Justice Rehnquist seems to have accepted proportionality, at least in principle.

Moreover, Justice Scalia's narrow interpretation of the Eighth Amendment's Cruel and Unusual Punishment Clause has little precedential support. As early as 1892, members of the Supreme Court expressed the view that some criminal sentences could be unconstitutionally excessive. In *O'Neil v. Vermont*,⁷⁰ Justice Field argued that this clause was directed "against all punishments which by their excessive *length* or *severity* are greatly disproportionate to the offenses charged. The whole inhibition [of

⁶¹ *Id.* at 337–54 (Scalia, J., dissenting).

⁶² 501 U.S. 957 (1991) (affirming a life sentence without the possibility of parole for the first-time offense of marijuana possession is not cruel and unusual punishment).

⁶³ *See id.* at 979–86. Justice White disputed this historical analysis. *Id.* at 1009–14 (White, J., dissenting).

⁶⁴ The focus of Chief Justice Rehnquist's dissent in *Atkins* was his disagreement with the majority's reliance on "foreign laws, the views of professional and religious organizations, and opinion polls" in determining whether this is evidence of a national consensus as to the imposition of the death penalty on retarded criminals. *Atkins*, 536 U.S. at 322.

⁶⁵ 509 U.S. 544 (1993) (a forfeiture case in which the Court remanded for a determination as to whether forfeiture of the defendant's businesses and nearly nine million dollars acquired through racketeering activities was excessive).

⁶⁶ *Id.* at 558 (emphasis added).

⁶⁷ 445 U.S. 263 (1980).

⁶⁸ *Id.* at 264, 285.

⁶⁹ *Id.* at 274 n.11. *See also* David S. Mackey, *Rationality Versus Proportionality: Reconsidering the Constitutional Limits on Criminal Sanctions*, 51 TENN. L. REV. 623, 630 (1984) ("elements of the Rehnquist opinion [in *Rummel*] suggested that the proportionality criteria did survive *Rummel*").

⁷⁰ 144 U.S. 323, 338 (1892) (sentencing the defendant to fifty-four years imprisonment after a Vermont conviction for "selling, furnishing and giving away . . . intoxicating liquor, which took place in New York, to be delivered in Vermont") (Field, J., dissenting).

the Eighth Amendment] is against that which is excessive either in the bail required, or the fine imposed, or punishment inflicted.”⁷¹ Furthermore, a majority of the Court in *Weems v. United States*⁷² concluded that the drafters’ intent and the history of the Eighth Amendment did not clarify the scope of the language.⁷³ Rather, the Court considered the impulse for such a provision, namely distrust of power and the insistence “on constitutional limitations against its abuse.”⁷⁴ The Court also considered the general language used in the Eighth Amendment and concluded that this did not support a narrow meaning.

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, “designed to approach immortality as nearly as human institutions can approach it.”⁷⁵

Further acknowledging the changing nature of the prohibition against cruel and unusual punishment, Chief Justice Warren, writing for the Court in *Trop v. Dulles*,⁷⁶ stated that, “[t]he Amendment must draw its meaning

⁷¹ *Id.* at 339–40 (Field, J., dissenting) (emphasis added). The majority in *O’Neil* only briefly discussed the Eighth Amendment argument, holding that there was no federal question, but rather an issue under the Vermont Constitution. In *Barron v. Baltimore*, 32 U.S. 243 (1833), the Court held that the Eighth Amendment only limited the federal government and was not applicable to the states. Subsequently, in *Robinson v. California*, 370 U.S. 660 (1962), the Court incorporated the Eighth Amendment into the Due Process Clause of the Fourteenth Amendment, making it applicable to the states.

⁷² 217 U.S. 349, 364 (1910). The defendant was convicted of falsifying a public and official document and received the jurisdiction’s third harshest sentence, *cadena temporal*, a sentence of twelve years and one day to twenty-one years imprisonment. The Court described this punishment as follows:

“[T]hose sentenced to *cadena temporal* . . . shall labor for the benefit of the state. They shall always carry a chain at the ankle, hanging from the wrists; . . . and shall receive no assistance whatsoever from without the institution.” . . . There are, besides, certain accessory penalties imposed . . .

Id. The accessory penalties included deprivation of the rights of parental authority, guardianship of person, marital authority, subjection to surveillance during the defendant’s lifetime, deprivation of the right to vote, or to be elected to public office and the loss of retirement pay. *Id.* at 364–65. After engaging in a comparative analysis of offenses in other jurisdictions as well as in the jurisdiction at issue, the Court concluded that the sentence was unconstitutionally cruel and unusual. *Id.* at 381.

⁷³ *See generally id.*

⁷⁴ *Id.* at 372.

⁷⁵ *Id.* at 373. Herbert Packer questions the “conventional view” that *Weems* represents the Court’s acceptance of a proportionality principle that assesses the length of a prison sentence. Instead, Professor Packer asserts that *Weems* is really a case about the mode or method of punishment. Packer, *supra* note 28, at 1075. Nonetheless, in *Weems*, the Court did not distinguish between the fifteen-year sentence and the “accessories.” *E.g.*, 217 U.S. at 358, 381. Indeed, the Court specifically compared the fifteen years to the two years the defendant could have received under United States federal law. *Id.* at 380.

⁷⁶ 356 U.S. 86 (1958). The defendant was convicted by court-martial of wartime desertion, and sentenced to three years hard labor, forfeiture of all pay and allowances and dishonorable discharge. *Id.*

from the evolving standards of decency that mark the progress of a maturing society.”⁷⁷ Although the Court upheld the death sentence in *Gregg v. Georgia*,⁷⁸ it stated that the Eighth Amendment required that “punishment must not involve the unnecessary and wanton infliction of pain.”⁷⁹ This limitation focuses on the type or method of punishment imposed.⁸⁰ “Second, the punishment must not be grossly out of proportion to the severity of the crime.”⁸¹ This once again emphasizes a proportionality principle.⁸²

B. THE SCOPE OF PROPORTIONALITY REVIEW

The next step in Eighth Amendment analysis is to determine what standard is appropriate for assessing the possible excessiveness or disproportionality of a criminal punishment.⁸³ The Supreme Court has been unable to construct a method for evaluating proportionality that commands a consistent majority of Justices. This tension is based on fundamental disagreements about the proper role of the Court, as well as a concern of some Justices that any standard will necessarily reflect the subjective views of individual Justices.⁸⁴ This tension has resulted in different approaches. Some Justices concede a proportionality principle but find that it applies only to capital punishment,⁸⁵ or to both capital punishment and extreme terms of imprisonment, such as a life sentence for

at 87–88. Eight years later, the defendant discovered that the conviction had also resulted in his loss of citizenship. *Id.* at 88. The Court concluded that denationalization in this context constituted a criminal penalty and that this type of punishment was unconstitutionally cruel and unusual. *Id.* at 97–99, 100–03.

⁷⁷ *Id.* at 101.

⁷⁸ 428 U.S. 153 (1976) (finding that the procedures used in imposing the death penalty adequately guided the jury’s discretion by requiring the jury to consider statutory aggravating circumstances and any relevant mitigating circumstances). *Accord* *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). *But see* *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring) (three Justices found that the procedures used by Georgia for imposing the death penalty provided “no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not”).

⁷⁹ *Gregg*, 428 U.S. at 173.

⁸⁰ *See supra* note 63 and accompanying text regarding the modes of punishment.

⁸¹ *Gregg*, 428 U.S. at 173.

⁸² The Court reaffirmed this view in *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (noting that in *Gregg*, the Court “firmly embraced the holdings and dicta from prior cases, . . . to the effect that the Eighth Amendment bars not only those punishments that are ‘barbaric’ but also those that are ‘excessive’ in relation to the crime committed”).

⁸³ This Article focuses only on the following types of “punishments”: the death penalty, terms of imprisonment, forfeitures, and punitive damages awards. *See* Thomas K. Landry, “Punishment” and the Eighth Amendment, 57 OHIO ST. L.J. 1607 (1996) for a discussion of forms of punishment endured by prisoners.

⁸⁴ *See* Allyn G. Heald, *Criminal Law: United States v. Gonzalez: In Search of a Meaningful Proportionality Principle*, 58 BROOK. L. REV. 455, 457 (1992) (“[I]t is argued that courts will be left to impose their subjective views of whether a punishment is proportional to its crime—leading to the accusation that courts are overstepping their bounds by substituting their judgment for that of the legislature.”).

⁸⁵ *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (Scalia distinguishing *Coker*). *But see* *Atkins v. Virginia*, 536 U.S. 304, 337–54 (2002) (Scalia, J., dissenting).

overtime parking.⁸⁶ For clarity and simplicity, I will refer to these as the “no proportionality” approaches. The problem with these approaches is that no explanation exists as to why these examples should receive different treatment than other sentences of imprisonment. The phrase “death is different” is often used by the proponents of these approaches as a way to limit proportionality review to capital punishment, but this is not convincing.⁸⁷ First, nothing in the Eighth Amendment indicates that its application is limited to the punishment of death. Second, the fact that the punishment at issue is a term of imprisonment rather than a death sentence does not, in and of itself, make the punishment proportionate. Rather, the nature of the punishment is merely one factor a court should consider when reviewing a punishment for proportionality.

Justice Kennedy’s concurring opinion in *Harmelin* sets out another approach that does not meaningfully contribute to this analysis. Under this proportionality approach, the Court is to consider the gravity of the offense and the sentence imposed, and then decide whether the sentence is grossly disproportionate as a threshold matter. Only if this threshold inquiry results in a finding of gross disproportionality is the Court to engage in a comparative analysis of sentences.⁸⁸ I refer to this as the “*Harmelin*” approach. Commentators have indicated that the “*Harmelin*” and “no proportionality” approaches essentially lack proportionality review at all.⁸⁹ In addition, to the extent that Justices are concerned with the possibility of subjectivity in any proportionality review, the “*Harmelin*” approach is as subjective as one could get. As discussed in more detail below, the threshold inquiry of the “*Harmelin*” approach seems to require a type of judicial gut reaction to the punishment itself.

The final approach is to attempt some level of objectivity by setting out criteria to examine in each case, the “*Solem*” approach. This approach includes a comparison of how other jurisdictions punish particular offenses, or particular defendants, how the specific jurisdiction involved punishes other offenses, and a comparison of the offense with the punishment to determine whether the punishment furthers recognized purposes of punishment.⁹⁰ This test has been used in both death penalty cases and those

⁸⁶ This example is posed in *Rummel v. Estelle*, 445 U.S. 263, 288 (1980) (Powell, J., dissenting) and acknowledged as disproportionate by the majority in the same case. *Id.* at 274 n.11 (“This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent . . .”).

⁸⁷ *Harmelin*, 501 U.S. at 994 (“Proportionality review is one of several respects in which we have held that ‘death is different,’ and have imposed protections that the Constitution nowhere else provides . . . We [Justices Scalia and Rehnquist] would leave it there, but will not extend it further.”) (citations omitted).

⁸⁸ *Id.* at 996. (Kennedy, J., concurring).

⁸⁹ See Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 152–53 (1995) (stating that if the “Court were to limit proportionality review [as Justice Scalia and Chief Justice Rehnquist urge], the bulk of the sanctions imposed in this country would escape review entirely”). See also Johnson, *supra* note 26, at 503.

⁹⁰ See generally *Solem v. Helm*, 463 U.S. 277 (1983); *Rummel v. Estelle*, 445 U.S. 263 (1980) (Powell, J. dissenting).

involving imprisonment. Meaningful proportionality review of criminal sentences requires adherence to the “*Solem*” approach.

As a general proposition, proportionality involves a determination of whether the “punishment fits the crime.”⁹¹ This section will attempt to unpack these four words in an effort to discern their meaning. An examination of the cases in this area reveals five primary considerations the Court takes into account in assessing whether a punishment is unconstitutionally excessive. However, it is not always clear which of these considerations will dominate in a given case, or even whether the court can consider them in isolation.⁹² In fact, these factors often overlap. Thus, I set them out mainly as a method of organizing the jurisprudence.⁹³ These considerations are: First, the nature of the offense in the abstract compared to the specific punishment.⁹⁴ Second is the nature or status of the defendant in the abstract compared to the punishment imposed,⁹⁵ that is, does the defendant belong to a class of people upon whom the specific punishment should not be imposed? The third consideration is the individual defendant’s culpability as compared to the sentence; that is, the Court examines the specific conduct of the defendant and considers whether this conduct merits the punishment imposed.⁹⁶ Finally, in focusing on the severity of the specific punishment, the Court often engages in inter-jurisdictional⁹⁷ and intra-jurisdictional⁹⁸ comparative analyses.

⁹¹ See, e.g., Packer, *supra* note 28.

⁹² See *Solem*, 463 U.S. at 291 n.17 ([N]o single criterion can identify when a sentence is so grossly disproportionate that it violates the Eighth Amendment. . . . But a combination of objective factors can make such analysis possible.”); *Rummel*, 445 U.S. at 299 n.19 (Powell, J., dissenting) (“The relevant objective factors should be considered together and, although the weight assigned to each may vary, no single factor will ever be controlling.”).

⁹³ For an example of organizing case-by-case, see Kathi A. Drew & R. K. Weaver, *Disproportionate or Excessive Punishments: Is There a Method for Successful Constitutional Challenges?*, 2 TEX. WESLEYAN L. REV. 1 (1995).

⁹⁴ The Court identified this as one “objective factor” in *Solem*, 463 U.S. at 290–91 (“we look to the gravity of the offense and the harshness of the penalty”). The plurality in *Harmelin* identified this consideration as the start of the analysis, and the end if the Court determines that the sentence is not “grossly disproportionate.”

⁹⁵ The Court has not expressly identified this as a factor to consider in assessing proportionality of punishments, but it is one that emerges from the case law. See *infra* Part I.B.2.

⁹⁶ Case law indicates that the Court has not separated this out as a factor, but considers the defendant’s individual culpability within the criterion involving the gravity of the offense. I think it is helpful to distinguish between the nature of the offense in the abstract and the defendant’s individual culpability. See *Rummel*, 445 U.S. at 288 (Powell, J., dissenting) (“The inquiry [of proportionality] focuses on whether a person *deserves* such punishment, not simply on whether punishment would serve a utilitarian goal.”) (emphasis added). See also Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court’s Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107, 168 (1996) (recognizing the necessity of considering both retributive and utilitarian theories of punishment, but proposing an approach of “limiting retributivism” as a way to limit “the severity of . . . sentences consistent with the notion that no sentence can be grossly disproportionate to the crime which it seeks to punish”).

⁹⁷ See *Solem*, 463 U.S. at 291 (“courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions”).

⁹⁸ See *id.* (“[I]t may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive.”).

Accordingly, the Court asks two questions: what punishments are imposed for similar offenses in other jurisdictions, and what punishments does the relevant jurisdiction impose for more serious offenses? The first two considerations often result in bright-line rules.

1. *The Nature of the Offense*

As to the nature of the offense in the abstract (that is, without regard to the individual defendant's culpability), the Court held in *Coker v. Georgia*⁹⁹ that a death penalty sentence for the rape of an adult woman is an unconstitutionally disproportionate punishment, in part because "the rapist . . . does not take human life."¹⁰⁰ Similarly, in *Enmund v. Florida*,¹⁰¹ the Court held that the state could not impose the death penalty on a defendant who had been convicted of felony murder, but had not killed, attempted to kill, or intended to kill. In *Enmund*, the defendant participated in the underlying felony of armed robbery by driving the getaway car, but had not "actively" participated in the killing.¹⁰² While the Court was concerned with the individual culpability of the defendant in *Enmund*, this seemed to overlap with the abstract notion of using the felony murder rule to support a death sentence. In both *Coker* and *Enmund*, the Court wondered whether imposing the death penalty in those types of cases would further any of the accepted purposes of punishment.¹⁰³ The Court has considered the seriousness of the crime in evaluating other criminal sanctions as well. In *Weems v. United States*¹⁰⁴ the Court emphasized the fact that the offense of falsifying a public and official document did not require the showing of fraud or even intent to defraud, but nonetheless allowed for a severe punishment.¹⁰⁵ The Court suggested that the harsh punishment imposed for the defendant's crime exceeded the purposes of punishment.¹⁰⁶ The Court

⁹⁹ 433 U.S. 584 (1977). There were hints that the some Justices were concerned about the imposition of the death penalty for the crime of rape. In *Rudolph v. Alabama*, 375 U.S. 889 (1963) (Goldberg, J., dissenting from denial of certiorari), three Justices articulate a considerations very similar to those that prevailed in *Coker*. See also Packer, *supra* note 28, at 1072-73.

¹⁰⁰ *Coker*, 433 U.S. at 598. The Court's analysis in *Coker* overlaps with the intra-jurisdictional factor because the Court compared the imposition of the death penalty for rape to use of the same penalty for premeditated murder in Georgia. The Court noted that even as to a deliberate killing, a jury could impose the death penalty only upon an additional factual finding that aggravating circumstances existed. The Court concluded "it is difficult to accept the notion, and we do not, that the rapist, with or without aggravating circumstances, should be punished more heavily than the deliberate killer." *Id.* at 600.

¹⁰¹ 458 U.S. 782 (1982).

¹⁰² *But see* *Tison v. Arizona*, 481 U.S. 137, 147 (1987) (upholding imposition of the death penalty where the state required the finding of an aggravating factor "beyond the fact that the killing had occurred during the course of a felony").

¹⁰³ *Enmund*, 458 U.S. at 798 ("Unless the death penalty when applied to those in *Enmund*'s position measurably contributes to one or both [goals of punishment] it 'is nothing more than the purposeless and needless imposition of pain and suffering' and hence an unconstitutional punishment." (quoting *Coker*, 433 U.S. at 592)). The goals typically identified by the Court are retribution and deterrence. See generally *Gregg v. Georgia*, 428 U.S. 153 (1976); *Coker*, 433 U.S. 584.

¹⁰⁴ 217 U.S. 349 (1910). See *supra* note 72, for further discussion of this case.

¹⁰⁵ *Id.* at 380-81.

¹⁰⁶ *Id.*

stated, “[t]he purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal.”¹⁰⁷ The Court characterized the punishment’s length, as well as the additional “accessories,” as an exercise of “unrestrained power”¹⁰⁸ and as unconstitutionally cruel and unusual.¹⁰⁹ On the other hand, in *Harmelin*, Justice Kennedy’s opinion devoted considerable attention to the gravity of the drug possession crime for which the defendant was convicted.¹¹⁰ Justice Kennedy pointed out that the amount of drugs possessed by the defendant could produce between 32,500 and 65,000 doses and emphasized that possession of such a large amount of drugs “threatened to cause grave harm to society.”¹¹¹ Thus, the sentence of life imprisonment without the possibility of parole was not “grossly disproportionate” to the serious drug offense.¹¹² As to the goals served by such a harsh punishment, Justice Kennedy concluded that the state legislature could determine that possession of that amount of cocaine “is momentous enough to warrant the deterrence and retribution of a life sentence without parole.”¹¹³ Thus, Justice Kennedy did not evaluate whether such a sentence would, in fact, serve these goals, but deferred this issue to a possible legislative determination.¹¹⁴ The Court also examined the nature of the offense in *Robinson v. California*.¹¹⁵ *Robinson* held that it is cruel and unusual to punish a person for being “addicted to the use of narcotics.”¹¹⁶ As to the

¹⁰⁷ *Id.* at 381.

¹⁰⁸ *Id.*

¹⁰⁹ See generally *id.*

¹¹⁰ Justice Kennedy’s plurality opinion in *Harmelin* is considered controlling. See, e.g., Andrade v. California, 270 F.3d 743, 754 (“Our circuit and others regard Justice Kennedy’s test as ‘the rule of *Harmelin*’ because it is the ‘position taken by those Members who concurred in the judgment on the narrowest grounds’” (quoting *United States v. Bland*, 961 F.2d 123, 128–29 (9th Cir. 1992)) (other citations omitted). See also Steven F. Poe, *Civil Forfeiture and the Eighth Amendment: The Constitutional Mandate of Proportionality in Punishment in the Wake of Austin v. United States*, 70 CHI-KENT L. REV. 237, 251 (1994) (describing a Fifth Circuit opinion as “[t]he most widely adopted interpretation of the *Harmelin* opinion among the Circuit Courts of Appeals”).

By applying a head-count analysis, we find that seven members of the Court supported a continued Eighth Amendment guaranty against disproportional sentences. Only four justices, however, supported the continued application of all three factors in *Solem*, and five justices rejected it. Thus, this much is clear: disproportionality survives; *Solem* does not. Only Justice Kennedy’s opinion reflects that view. It is to his opinion, therefore, that we turn for direction.

McGruder v. Puckett, 954 F.2d 313, 316 (5th Cir. 1992). See also Gershowitz, *supra* note 26, at 1276–1279 and accompanying footnotes for discussion of appellate courts application of Kennedy’s *Harmelin* opinion.

¹¹¹ 501 U.S. 957, 1002–03 (Kennedy, J., concurring). The opinion also included statistics about drug use generally and the link between illegal drugs and violent crime.

¹¹² *Id.* at 996.

¹¹³ *Id.*

¹¹⁴ *Id.* (“the Eighth Amendment does not mandate adoption of any one penological theory”).

¹¹⁵ 370 U.S. 660 (1962).

¹¹⁶ *Id.* at 661, 667 (quoting Cal. Health & Safety Code § 11721). But see *Powell v. Texas*, 392 U.S. 514 (1968) (limiting the application of *Robinson* to the narrow situation where a defendant is punished solely on the basis of status).

status of being a drug addict, or having any other illness, “even one day in prison would be cruel and unusual.”¹¹⁷ The fact that the criminal law allowed conviction on the basis of the defendant’s status overlaps with the next factor involved in an evaluation of proportionality: where the defendant belongs to a class of people for whom punishment may be disproportionate.

2. *The Status of Defendants*

The Supreme Court has drawn bright lines in holding that the Eighth Amendment prohibits the execution of certain groups of people. These groups include the insane,¹¹⁸ the mentally retarded,¹¹⁹ and minors fifteen-years old and younger.¹²⁰ In each of these cases, the Court has considered whether the execution of individuals within these groups serves the purposes of deterrence and retribution. In *Ford v. Wainwright*,¹²¹ the Court emphasized the difficulty or even impossibility of deterring an insane person by imposing the death penalty.¹²² In addition, the Court stated that “retribution—the need to offset a criminal act by punishment of equivalent moral quality—is not served by execution of an insane person, which has a lesser value than that of the crime for which he is to be punished.”¹²³ Similarly, in *Atkins v. Virginia*, the Court concluded that mentally retarded criminals lack the level of culpability necessary to advance the retributive purpose served by the death penalty.¹²⁴ As to deterrence, the Court stated that the “diminished ability to understand and process information . . . make it less likely that [the mentally retarded] can process the information of the possibility of execution as a penalty.”¹²⁵

With respect to the execution of minors fifteen years old and younger, the *Thompson* Court stated that it is unlikely that a child “has made the kind of cost-benefit analysis that attaches any weight to the possibility of

¹¹⁷ *Robinson*, 370 U.S. at 667. The concurring opinion raised the concern that punishing a drug addict does not likely to serve the purpose of deterrence. *Id.* at 675 n.2 (“it is doubtful whether drug addicts can be deterred from using drugs by threats of jail or prison sentences” (quoting Morris Ploscowe, *Appendix A: Some Basic Problems in Drug Addiction and Suggestions for Research*, in JOINT COMM. AM. BAR ASS’N AND AM. MED. ASS’N, *DRUG ADDICTION: CRIME OR DISEASE?* 15, 19–20 (1961))).

¹¹⁸ *Ford v. Wainwright*, 477 U.S. 399 (1986).

¹¹⁹ *Atkins v. Virginia*, 536 U.S. 304 (2002) (abrogating *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

¹²⁰ *Thompson v. Oklahoma*, 487 U.S. 815 (1988). *But see* *Stanford v. Kentucky*, 492 U.S. 361 (1989) (upholding imposition of death on minors sixteen or seventeen years old).

¹²¹ 477 U.S. 399 (1986)

¹²² *Id.* at 408–10.

¹²³ *Ford*, 477 U.S. at 408 (citing Geoffrey C. Hazard & David W. Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. REV. 381, 382 (1962)).

¹²⁴ *But see* Barry Latzer, *Misplaced Compassion: The Mentally Retarded and the Death Penalty*, 38 CRIM. L. BULL. 327, 346 (2002) (arguing that the notion that the mentally retarded are not “deathworthy” is “totally at odds with one of the most fundamental precepts of death penalty jurisprudence—the individualized sentencing requirement”).

¹²⁵ *Atkins*, 536 U.S. 304, 320 (2002). *See also* Lyn Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 ALA. L. REV. 911 (2001) (discussing additional issues faced by the mentally retarded in the criminal justice system).

execution.”¹²⁶ The Court’s analysis is an abstract one; it does not ask whether the death penalty’s purposes are served by executing the individual defendants in these cases, but whether the execution of any member of these groups furthers those purposes. Outside of the death penalty context, *Robinson* stands for the proposition that *any* punishment for one’s status as an addict is unconstitutional. The majority opinion did not expressly state that the purposes of retribution and deterrence would not be served, but the concurring opinion mentions these as well as a consideration of the means used to further the government’s purpose.¹²⁷ Thus, where a defendant is insane, mentally retarded, or under sixteen years of age, a bright line rule holds that the imposition of the death penalty is unconstitutional. In addition, any punishment is unconstitutional when imposed based solely on one’s status as a drug addict.

By contrast, the status of being a habitual felon has resulted in another seemingly bright line rule: no sentence of imprisonment, no matter how long, is unconstitutional. This was the result in *Rummel v. Estelle*.¹²⁸ In *Rummel*, the defendant received a life sentence under a recidivist statute upon conviction of his third, triggering felony, a conviction for obtaining \$120.75 by false pretenses.¹²⁹ The two prior convictions involved the fraudulent use of a credit card to obtain \$80 worth of goods or services and the passing of a forged check in the amount of \$28.36. Although the Court did not expressly rely on Rummel’s status as a habitual offender to uphold the life sentence, it emphasized the importance of leaving such matters up to state legislatures. “Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction.”¹³⁰ Therefore, the *Rummel* majority believed a bright line rule allowing very severe sentences for recidivists, without consideration of individual circumstances, was permissible. Only three years later, the Court concluded that the fact of recidivism alone would not necessarily deem a term of imprisonment constitutional. In *Solem v. Helm*,¹³¹ the Court found a life sentence without the possibility of parole for a seventh non-violent felony unconstitutionally excessive. The Court recognized the state’s interest in punishing a recidivist more harshly, but stated that this status “cannot be considered in the abstract. His prior offenses, although classified as felonies, were all relatively minor. All were

¹²⁶ *Thompson*, 487 U.S. at 815, 837.

¹²⁷ *Robinson v. California*, 370 U.S. 660, 667 (Douglas, J., concurring) (“A prosecution for addiction, with its resulting stigma and irreparable damage to the good name of the accused, cannot be justified as a means of protecting society, where a civil commitment would do as well.”).

¹²⁸ See 445 U.S. 263 (1980). See also discussion of *Andrade* and *Ewing* *infra* Part III.A.

¹²⁹ The defendant accepted payment to repair an air conditioner, but did not fulfill his promise of repairing it. See *id.* at 286 (Powell, J., dissenting). Under Texas law at the time, the offense constituted a felony because the amount obtained was more than \$50. See *id.* at 266.

¹³⁰ *Id.* at 285.

¹³¹ 463 U.S. 277 (1983).

nonviolent and none was a crime against a person.”¹³² According to the *Solem* Court, the mere fact that the state classifies a defendant as a habitual criminal is insufficient to justify its own harsh sentences, such as life without the possibility of parole.¹³³ Rather, this is one factor to consider in addition to the nature of the offenses involved and the specific facts of the defendant’s conduct during the commission of the offenses. This overlaps with the next consideration, because in addition to considering the defendant’s culpability with respect to the offense in question, the Court may also consider the defendant’s more general culpability and include the defendant’s criminal history when evaluating the sentence imposed.

3. *The Defendant’s Culpability*

The third aspect that surfaces in a number of proportionality cases is the consideration of the individual defendant’s culpability. This factor resembles the first, the examination of the gravity of the offense, but the analysis here is more subjective; it is essentially a matter of what the particular defendant did. The Court considered this in *Enmund v. Florida*, when it emphasized the fact that the defendant drove the getaway car for a planned armed robbery, but did not participate in the killing.¹³⁴ The Court held that the defendant’s participation in the robbery, when considered separately, did not evince sufficient culpability for the death penalty.¹³⁵ Similarly, in *Godfrey v. Georgia*,¹³⁶ the Court set aside a death sentence on the grounds that the defendant’s crimes did not reflect “a consciousness materially more ‘depraved’ than that of any person guilty of murder.”¹³⁷ In contrast, a majority of the Court in *Rummel* did not accept the defendant’s argument that his offenses were not very serious simply because he did not use violence or engage in other life-threatening behavior.¹³⁸ Furthermore, the Court also rejected his argument that the offenses were trivial due to the small sums of money involved.¹³⁹ The Court stated that “[h]aving twice imprisoned [Rummel] for felonies, Texas was entitled to place upon [him] the onus of one who is simply unable to bring his conduct within the social

¹³² *Id.* at 296–97.

¹³³ The Court distinguished *Solem* from *Rummel*; based in part on the fact that the defendant in *Rummel* was eligible for parole in twelve years. *Id.* at 297.

¹³⁴ 458 U.S. 782, 788 n.2, 798 (1982).

¹³⁵ *Id.* at 798 (“The focus must be on *his* culpability, not on that of those who committed the robbery and shot the victims, for we insist on ‘individualized consideration as a constitutional requirement in imposing the death sentence.’” (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978))).

¹³⁶ 446 U.S. 420 (1980).

¹³⁷ *Id.* at 433.

¹³⁸ The Court stated, “[T]he presence or absence of violence does not always affect the strength of society’s interest in deterring a particular crime or in punishing a particular criminal.” 445 U.S. 263, 275 (1980).

¹³⁹ “[T]o recognize that the State of Texas could have imprisoned Rummel for life if he had stolen \$5,000, \$50,000, or \$500,000, rather than the \$120.75 that a jury convicted him of stealing, is virtually to concede that the lines to be drawn are indeed ‘subjective,’ and therefore properly within the province of the legislatures, not courts.” *Id.* at 275–76.

norms prescribed by the criminal law of the State.”¹⁴⁰ Thus, it seems that in *Rummel*, the issue of whether a defendant deserves a harsh sentence is not a consideration as long as the Court can identify a state interest to justify such a harsh sentence.

The *Rummel* dissent, on the other hand, emphasized the need to examine both the nature of the offenses and the facts involved, stating that “[i]t is difficult to imagine *felonies* that pose less danger to the peace and good order of a civilized society than the three crimes committed by [Rummel].”¹⁴¹ This became the prevailing viewpoint only three years after *Rummel*. In *Solem*, for example, the Court considered the nature of the felonies that triggered the recidivist statute. Helm’s prior felony convictions were three third-degree burglaries, obtaining money by false pretenses, grand larceny, and third-offense driving while intoxicated. The seventh felony was for uttering a “no account” check for \$100.¹⁴² While conceding that prior convictions are relevant to sentencing, the Court stated, “[w]e must focus on the principal felony—the felony that triggers the life sentence—since Helm already has paid the penalty for each of his prior offenses.”¹⁴³ Thus, in contrast to *Rummel*, the Court in *Solem* gave less weight to the defendant’s prior crimes and general culpability as a habitual felon, though it did make note of the fact that Helm’s criminal record “involves no instance of violence of any kind.”¹⁴⁴

In addition to de-emphasizing general culpability, the *Solem* Court also allowed for consideration of more subjective characteristics of the crime. In setting out its analytical framework, the Court in *Solem* discussed the “absolute magnitude of the crime” as a relevant consideration.¹⁴⁵ It concluded that “[s]tealing a million dollars is viewed as more serious than stealing a hundred dollars”¹⁴⁶ and should be treated accordingly. Meanwhile, the Court in *Rummel* dismissed such distinctions as too subjective.¹⁴⁷ Thus, *Solem* represents a retreat from the exceedingly narrow view of proportionality review,¹⁴⁸ and allows for consideration of the defendant’s individual culpability in addition to the nature of the offense, without explicitly overruling *Rummel*.

Recidivism was not at issue in either *Hutto v. Davis*¹⁴⁹ or *Harmelin v. Michigan*,¹⁵⁰ yet they are important to consider because they bear upon the

¹⁴⁰ *Id.* at 284. At another point in the opinion, the Court speaks of Rummel as one who is “simply incapable of conforming to the norms of society as established by its criminal law.” *Id.* at 276.

¹⁴¹ *Id.* at 296 (Powell, J., dissenting) (emphasis added).

¹⁴² *Id.* at 279–81.

¹⁴³ *Id.* at 297 n.21.

¹⁴⁴ *Id.* at 297 n.22.

¹⁴⁵ *Id.* at 293.

¹⁴⁶ *Id.*

¹⁴⁷ Furthermore, South Dakota law at the time did not distinguish between writing a “no account” check for a small amount and writing a “no account” check for a large sum. *Id.* at 296 n.20.

¹⁴⁸ See Grossman, *supra* note 96, at 127 n.133 (“Understandably, the Court was reluctant to overturn a decision that it had rendered only three years earlier and had relied upon in a decision the previous year.”).

¹⁴⁹ 454 U.S. 370 (1982) (per curiam).

broader issue of harsh sentencing. In both of these cases, the Court upheld harsh sentences for first-time convictions involving illegal drugs. In *Hutto*, which was decided before *Solem*, the defendant was convicted of possession of marijuana with intent to distribute and distribution of marijuana.¹⁵¹ The jury sentenced him to twenty years on each count, to be served consecutively, and imposed a \$10,000 fine for each count.¹⁵² The Supreme Court upheld the sentence, reversing the lower court's decision without engaging in any consideration of the nature of the offense, the culpability of the defendant, or the severity of the punishment.¹⁵³ Rather, the Court emphasized that "successful challenges to the proportionality of particular sentences' should be 'exceedingly rare.'"¹⁵⁴ The Court in *Rummel* at least recognized the necessity of identifying a state interest in punishing recidivists harshly. The *Davis* per curiam opinion did not attempt to identify the state's interest in punishing Davis so severely for a crime involving only about nine ounces of marijuana.¹⁵⁵ Instead, the "summary disposition"¹⁵⁶ of the case rested primarily on the intrusion by the Court of Appeals¹⁵⁷ "into the basic linedrawing process that is 'properly within the province of the legislatures, not courts.'"¹⁵⁸ This sent a signal to lower courts that the Supreme Court really did not recognize proportionality review.

The plurality opinion in *Harmelin*, on the other hand, considered some facts related to the defendant's culpability. This was not as fair as it seems, however, because the plurality credited such facts that the prosecution had not been required to prove beyond a reasonable doubt. In the context of discussing the defendant's argument regarding the mandatory nature of the life sentence without parole, the plurality referred to the significance of prosecutorial discretion:¹⁵⁹

Here the prosecutor may have chosen to seek the maximum penalty because petitioner possessed 672.5 grams of undiluted cocaine and several other trappings of a drug trafficker, including marijuana cigarettes, four brass cocaine straws, a cocaine spoon, . . . a Motorola beeper, plastic bags containing cocaine, a coded address book, and \$3,500 in cash.¹⁶⁰

Yet, the prosecutor did not charge Harmelin with the offense of possession with the intent to distribute, which would have been supported

¹⁵⁰ 501 U.S. 957 (1991).

¹⁵¹ *Hutto*, 454 U.S. at 371.

¹⁵² *Id.* at 371.

¹⁵³ *Id.* at 372-75.

¹⁵⁴ *Id.* at 374 (quoting *Rummel v. Estelle*, 445 U.S. at 272).

¹⁵⁵ *Id.* at 375 (Powell, J., concurring).

¹⁵⁶ *Id.* at 381 (Brennan, J., dissenting) (criticizing the majority for deciding the case in the absence of full briefing or oral argument).

¹⁵⁷ The Court of Appeals found the 40-year sentence unconstitutional after applying a four-part test formulated by another Court of Appeals in *Hart v. Coiner*, 483 F.2d 136 (4th Cir. 1973).

¹⁵⁸ 454 U.S. at 374 (quoting *Rummel v. Estelle*, 445 U.S. at 275-76).

¹⁵⁹ Interestingly, one commentator has observed that in the context of the imposition of capital punishment, the Supreme Court has not credited "prosecutorial discretion as a source of arbitrariness." Latzer, *Proportionality Review*, *supra* note 10, at 1183.

¹⁶⁰ *Harmelin v. Michigan*, 501 U.S. 957, 1008 (1991).

by the quoted facts and resulted in the same sentence. As the dissent pointed out, “[b]ecause the statutory punishment for the two crimes is the same, the State succeeded in punishing Harmelin as if he had been convicted of the more serious crime without being put to the test of proving his guilt on those charges.”¹⁶¹ Thus, when considering the issue of the defendant’s individual culpability, the plurality relied on facts that the prosecution was not required to prove beyond a reasonable doubt to convict Harmelin of the “lesser” offense of possession. Furthermore, the plurality did not fully consider the defendant’s culpability because it gave no consideration to the fact that the crime was his first offense.¹⁶² This is inconsistent with the analyses of general culpability in both *Rummel* and *Solem*. If the presence of a criminal record is relevant to the proportionality of a prison term, the absence of such a record should also be relevant. As discussed earlier, the plurality placed a great deal of emphasis on the threat illegal drugs pose to society on a broad and general basis. Given this, it would seem that possession with intent to distribute should be punished more severely than mere possession. This issue is addressed in the *Harmelin* dissent. The dissent’s comparison of the two offenses of drug possession and drug possession with the intent to distribute raises the fourth consideration involved in comparative analysis of the sentence imposed.

4. *Intra-Jurisdictional Comparisons of Punishment*

An intra-jurisdictional analysis of punishment focuses on the issue of gradation of punishment. Certainly, this aspect of proportionality relates to the first consideration regarding the nature of the offense as compared to the sentence imposed, but it centers more on comparing the punishment for the offense at issue to punishment for other crimes in the same jurisdiction. This principle of gradation is a component of both retributive and utilitarian theories of punishment. Jeremy Bentham stated, “for the sake of giving [the punishment] the better chance of outweighing the profit of the offense, [t]he greater the mischief of the offense, the greater is the expense which it may be worthwhile to be at, in the way of punishment.”¹⁶³ He further pronounced that “[w]here two offenses come in competition, the punishment for the greater offense must be sufficient to induce a man to prefer the less.”¹⁶⁴ Therefore, the importance of grading offenses and punishments stems from the idea that this can deter criminals from engaging in more serious behavior, an idea that rests upon the presumption that some offenses are more serious than others.

¹⁶¹ *Id.* at 1025 (White, J., dissenting).

¹⁶² *Id.* (pointing out that “the particular concerns reflected in recidivist statutes such as those in *Rummel* and *Solem* are not at issue here”).

¹⁶³ JEREMY BENTHAM, *THE INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 86–88 (John Bowring ed., 1843) (1780).

¹⁶⁴ *Id.*

In the context of proportionality, this idea was highlighted as early as 1892 by Justice Field in *O'Neil v. Vermont*.¹⁶⁵ In this case, the defendant was convicted of 457 bootlegging offenses and sentenced to 54 years of imprisonment. In his decision, Justice Field pointed out that other, more serious offenses carried less severe sentences: "Had [the defendant] been found guilty of burglary or highway robbery, he would have received less punishment than for the offenses of which he was convicted. It was six times as great as any court in Vermont could have imposed for manslaughter, forgery or perjury."¹⁶⁶ The importance of gradation was further underscored by the Court in *Weems v. United States* where it stated that "it is a precept of justice that punishment for crime should be graduated and proportioned to the offense."¹⁶⁷ The Court further supported this contention by pointing out that, in some jurisdictions, "[t]here are degrees of homicide that are not punished so severely [as the offense of falsifying a public document]."¹⁶⁸

Similarly, in *Solem*, where the non-violent recidivist received a life sentence, the Court noted that the same sentence was required for murder and permissible for "treason, first-degree manslaughter, first-degree arson and kidnapping."¹⁶⁹ The Court also pointed out that, even as to recidivism, the state's punishment scheme made distinctions between second and third convictions for certain offenses. For example, a life sentence was mandatory for a second or third conviction for treason, first-degree manslaughter, first-degree arson, or kidnapping. In addition, the scheme permitted a life sentence for a second or third conviction for first-degree rape, and allowed such a sentence after three convictions of any nature. All of this supported the notion that the defendant in *Solem* was "treated in the same manner as, or more severely than, criminals who have committed far more serious crimes."¹⁷⁰ This emphasis upon the grading of offenses reflects the idea that different crimes result in different harms, and the subsequent conclusion that more serious harms should be punished more severely. In *Coker v. Georgia*, the Court determined that imposition of the death penalty for the crime of rape was disproportionate and hence unconstitutional, in large part because the harm caused by rape, although serious, "does not compare with murder," for which the death penalty may be imposed.¹⁷¹ Following this logic, it would seem absurd that the crime for which the defendant was convicted in *Weems*, falsifying a single public document that did not result in any financial gain to the defendant, was punished the same as an offense "which might cause the loss of many

¹⁶⁵ 144 U.S. 323 (1892).

¹⁶⁶ *Id.* at 339 (Field, J., dissenting). For a description of the majority ruling in *O'Neil*, see *supra* note 71.

¹⁶⁷ *Weems v. U.S.*, 217 U.S. 349, 367 (1910).

¹⁶⁸ *Id.* at 380.

¹⁶⁹ *Solem v. Helm*, 463 U.S. 277, 298 (1983) (citations omitted).

¹⁷⁰ *Id.* at 299.

¹⁷¹ *Coker v. Georgia*, 433 U.S. 584, 598 (1977). See also *Gregg v. Georgia*, 428 U.S. 280 (1976) (holding that the death penalty for a murder conviction, in the abstract, is not unconstitutionally cruel or unusual).

thousands of dollars.”¹⁷² Again, the difference in the harms caused by different offenses, and the importance of punishing according to such differences, are underscored.

This is a clear demonstration of the Court’s inconsistency in the weight it accords the notion of grading offenses and their punishments. Some opinions reflect general skepticism about the existence of a method for evaluating terms of imprisonment for excessiveness. In *Rummel v. Estelle*, for example, the Court noted that

[o]nce the death penalty and other punishments different in kind from fine or imprisonment have been put to one side, there remains little in the way of objective standards for judging whether or not a life sentence imposed under a recidivist statute for several separate felony convictions not involving ‘violence’ violates the cruel-and-unusual punishment prohibition of the Eighth Amendment.¹⁷³

More specifically, some justices do not think it is appropriate for a court to second guess a legislature’s judgment that one crime should be punished the same or more severely than another. The *Rummel* Court gives, by way of example, the following:

The highly placed executive who embezzles huge sums from a state savings and loan association, causing many shareholders of limited means to lose substantial parts of their savings, has committed a crime very different from a man who takes a smaller amount of money from the same savings and loan at the point of a gun. Yet rational people could disagree as to which criminal merits harsher punishment.¹⁷⁴

Indeed, Bedau has pointedly asked, “Granted that murder is more harmful than rape, how much worse is it in terms of harm to the victim (or to society)? Twice as harmful?”¹⁷⁵ Similarly, the plurality in *Harmelin v. Michigan* stated “that the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is ‘properly within the province of legislatures, not courts.’”¹⁷⁶ In light of this, it seems that justices opposed to intra-jurisdictional analysis of sentences are primarily concerned with the judiciary overstepping its bounds and encroaching on matters that are exclusively within the province of the legislature.

There are at least two problems with this idea. First, the above quotes are relevant to setting the exact sentence for an offense. A court does not need to answer this question when evaluating proportionality. Intra-

¹⁷² *Weems*, 217 U.S. at 381.

¹⁷³ 445 U.S. 263, 282 n.27 (1980).

¹⁷⁴ *Id.* See also *Solem*, 463 U.S. at 309 (Burger, J., dissenting) (noting that the Court “flatly rejected *Rummel*’s suggestion that we measure his sentence against the sentences imposed by Texas for other crimes”).

¹⁷⁵ Hugo Adam Bedau, *Concessions to Retribution in Punishment*, in *JUSTICE AND PUNISHMENT* 51, 64 (J.B. Cederblom & William L. Blizak eds., 1977). However, it is not clear that the *Rummel* Court would necessarily agree with the assumption that murder is more serious than rape.

¹⁷⁶ *Harmelin v. Michigan*, 501 U.S. 957, 998 (1991) (Kennedy, J., concurring) (quoting *Rummel*, 445 U.S. at 275–76).

jurisdictional analysis should consider how, for example, the sentence for shoplifting compares to that of rape: if the sentence for shoplifting is equal to or substantially greater than the punishment for rape, the sentence for shoplifting may well be disproportionate. It is difficult to see how such a comparison of harms can be so subjective as to justify no analysis of proportionality. While such an inquiry involves a certain degree of subjectivity, when considered with the other factors discussed in this article, a reviewing court must always exercise some degree of subjective judgment when deciding whether the legislature has overstepped *its* authority.

The second problem with limiting judicial power to analyze sentencing is that the argument regarding the proper role of the court is really a response to the threshold question of whether the Eighth Amendment's Cruel and Unusual Punishment Clause requires any proportionality review at all, yet it has been used to limit any proportionality principle. This is not justifiable. While such concerns may be reflected legitimately in a test for assessing proportionality, by a somewhat deferential standard of review, the Court in *Rummel* and *Davis* provided little or no guidance for such an assessment. In those cases, the Court indicated that even though it acknowledged proportionality in principle, no federal court should find a sentence of imprisonment unconstitutionally excessive.¹⁷⁷ Such an approach does not explain why, as indicated by the Court in *Rummel*, a proportionality principle would apply in the situation of a life sentence for overtime parking but not a life sentence for other offenses.¹⁷⁸ Furthermore, it does not explain why a court is justified in evaluating the proportionality of the death penalty as punishment for certain offenses, but not in evaluating the proportionality of terms of imprisonment. As Justice Powell noted in *Rummel*, "[t]he Court concedes today that the principle of disproportionality plays a role in the review of sentences imposing the death penalty, but suggests that the principle may be less applicable when a non-capital sentence is challenged. Such a limitation finds no support in the history of Eighth Amendment jurisprudence."¹⁷⁹ Likewise, proponents of the exceedingly narrow view of proportionality exemplified by *Rummel* and *Davis* also purport to eschew an inter-jurisdictional comparison of the sentence imposed.

5. *Inter-Jurisdictional Comparisons of Punishment*

A comparative analysis of how states punish certain crimes has been consistently employed in the context of the death penalty. In *Gregg v.*

¹⁷⁷ *Rummel*, 445 U.S. at 272 ("Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare."); *Hutto v. Davis*, 454 U.S. 370, 374 (1982) (per curiam) (stating that "federal courts should be '[reluctant] to review legislatively mandated terms of imprisonment' and that 'successful challenges to the proportionality of particular sentences' should be 'exceedingly rare'" (quoting *Rummel*, 445 U.S. at 274, 272)).

¹⁷⁸ *Rummel*, 445 U.S. at 274 n.11.

¹⁷⁹ *Id.* at 288 (Powell, J., dissenting).

Georgia,¹⁸⁰ the Court pointed to language in *Trop v. Dulles* stating that the meaning of the Eighth Amendment Cruel and Unusual Punishment Clause must be drawn “‘from the evolving standards of decency that mark the progress of a maturing society.’”¹⁸¹ The Court in *Gregg* interpreted this language to mean that it requires an “assessment of contemporary values concerning the infliction of a challenged sanction.”¹⁸² It further required the Court to “look to objective indicia that reflect the public attitude toward a given sanction.”¹⁸³ In considering society’s view of the death penalty, the Court found that “[t]he most marked indication of society’s endorsement of the death penalty for murder is the legislative response to *Furman*. The legislatures of at least 35 states have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person.”¹⁸⁴ With this decision, the Court implicitly indicated that Eighth Amendment analysis requires consideration of society’s view of certain sanctions for certain crimes, and such a societal view is best reflected in legislation enacted by the representatives of the people. Indeed, in *Coker v. Georgia*, the Court began its analysis by considering “the objective evidence of the country’s present judgment concerning the acceptability of death as a penalty for rape of an adult woman.”¹⁸⁵ Most recently, in *Atkins v. Virginia*,¹⁸⁶ the Court examined how state legislatures responded to the Court’s earlier decision of *Penry v. Lynaugh*, which found that execution of mentally retarded criminals was not cruel and unusual punishment.¹⁸⁷ When the Court initially considered this issue, only two states prohibited the execution of mentally retarded criminals. Since *Penry*, sixteen more states enacted legislation prohibiting such executions.¹⁸⁸ The Court stated that these changes since *Penry* “provide[] powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal.”¹⁸⁹

The Court’s approach to inter-jurisdictional comparisons also has been inconsistent in the context of terms of imprisonment. The *Weems* Court recognized the significance of sentencing in other jurisdictions, noting that an offense similar to that for which *Weems* was convicted under the federal penal code carried a maximum sentence of two years, as compared to the

¹⁸⁰ 428 U.S. 153 (1976).

¹⁸¹ *Id.* at 173 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 179–80.

¹⁸⁵ 433 U.S. 584, 593 (1977). After examining legislation in jurisdictions imposing the death penalty, the Court concluded, “[t]he upshot is that Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman, and only two other jurisdictions provide capital punishment when the victim is a child. The current judgment with respect to the death penalty for rape . . . weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman.” *Id.* at 595–96 (citations omitted).

¹⁸⁶ 536 U.S. 304 (2002).

¹⁸⁷ 492 U.S. 302 (1989).

¹⁸⁸ See *Atkins*, 536 U.S. at 314–15.

¹⁸⁹ *Id.* at 2249.

fifteen years plus accessories imposed on him.¹⁹⁰ Likewise, in *Trop v. Dulles*, where federal law imposed a penalty of denationalization, the Court looked to the use of such punishment in other countries to conclude that “[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime.”¹⁹¹

In assessing the life sentence without parole for the recidivist in *Solem*, the Court also concluded that “[a]t the very least . . . it is clear that [the defendant] could not have received such a severe sentence in 48 of the 50 states.”¹⁹² However, unlike the Courts in the death penalty cases cited above, the Court in *Solem* failed to state expressly that the purpose of employing an inter-jurisdictional analysis of imprisonment terms for the same offense is to identify contemporary values. It did, however, cite to *Enmund*, which involved the death penalty in the context of the felony murder rule, and *Coker*, which considered the death penalty for rape, as examples of precedents in which the Court engaged in such comparative analysis.¹⁹³ Thus, it is arguable that some Justices view such a consideration of contemporary values as legitimate outside the context of the death penalty. This contention is further supported by the fact that the language regarding “evolving standards of decency” is from a non-capital case.¹⁹⁴

However, in other cases, the Court has indicated that such a comparative analysis is not determinative or even very helpful. In *Rummel*, the recidivist defendant presented evidence to show that he “might have received more lenient treatment in almost any State other than Texas, West Virginia, or Washington.”¹⁹⁵ To illustrate the inherent complexity of a comparative analysis, the Court noted that different jurisdictions define recidivism differently—some upon a third felony conviction, like Texas, and others upon a fourth felony conviction.¹⁹⁶ Moreover, some jurisdictions require that the felony be serious or violent, while in others any felony triggers the habitual criminal statute.¹⁹⁷ In addition to recognizing varying state treatment of recidivists, the Court also noted other “variable[s] complicating the calculus.”¹⁹⁸ Specifically, the Court addressed the possibility of parole under Texas law in “as little as 12 years.”¹⁹⁹ Finally, the Court found it significant that “[i]t is a matter of common knowledge that prosecutors often exercise their discretion in

¹⁹⁰ See *Weems*, 217 U.S. at 804.

¹⁹¹ 356 U.S. 86, 102 (1958).

¹⁹² *Solem v. Helm*, 463 U.S. 277, 299 (1983).

¹⁹³ *Solem*, 463 U.S. at 292 (“In *Enmund* the Court conducted an extensive review of capital punishment statutes and determined that ‘only about a third of American jurisdictions would ever permit a defendant [such as *Enmund*] to be sentenced to die.’ . . . The analysis in *Coker* was essentially the same.”) (citations omitted).

¹⁹⁴ *Trop*, 356 U.S. at 101.

¹⁹⁵ *Rummel v. Estelle*, 445 U.S. 263, 279 (1980).

¹⁹⁶ See *id.* at 279 n.19.

¹⁹⁷ See *id.* at 280.

¹⁹⁸ See *id.* at 281.

¹⁹⁹ See *id.* at 280.

invoking recidivist statutes or in plea bargaining so as to screen out truly ‘petty’ offenders who fall within the literal terms of such statutes.”²⁰⁰ The Court points to all of these considerations to illustrate “the complexities confronting any court that would attempt such a comparison.”²⁰¹

In addition to emphasizing the difficulties involved in inter-jurisdictional comparisons, the *Rummel* Court implies that such comparisons may not even be helpful. The Court claims, for example, that even if Rummel’s sentence “was the most stringent found in the 50 states, that severity hardly would render [his] punishment ‘grossly disproportionate’ to his offenses.”²⁰² Thus, according to the *Rummel* decision, the harshest punishment in the United States for a recidivist does not necessarily violate the Eighth Amendment. The decision does not make clear exactly what term of imprisonment the Court might find grossly disproportionate, other than a life sentence for a parking at an expired meter. Even in this situation, it is not clear how the *Rummel* Court would analyze such a term of imprisonment. Likewise, the *Harmelin* plurality opinion contributes little to jurisprudential clarity in this area.

C. THE *HARME LIN* APPROACH

In *Harmelin*, the plurality accepted the principle of proportionality in cases of non-capital sentences but rejected the need to engage in any intra- or inter-jurisdictional comparative analysis in all but very limited situations, again emphasizing the importance of deferring to the legislature in such matters. The plurality in *Harmelin* set out a test for proportionality which considers, as a threshold matter, whether the defendant’s sentence is “grossly disproportionate” to the gravity of the crime.²⁰³ According to Justice Kennedy, a comparative analysis is “appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.”²⁰⁴ Justice Kennedy further stated that “[t]he proper role for comparative analysis of sentences, then, is to validate an initial judgment that a sentence is grossly disproportionate to a crime.”²⁰⁵

The problem with this approach is that it is not clear how a reviewing court should decide whether, as a threshold matter, the sentence imposed is grossly disproportionate to the offense. In *Harmelin*, Justice Kennedy examined the drug problem and determined that an offense involving illegal drugs is “far more grave than the crime at issue in *Solem*.”²⁰⁶ Thus it is possible that if the offense is more serious than writing a “no account” check, any term of imprisonment is constitutional. This, however, is not

²⁰⁰ *Id.* at 281. See *supra* note 159 regarding such discretion in the context of arbitrary application of the death penalty.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring).

²⁰⁴ *Id.* at 1005 (Kennedy, J., concurring).

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 1001 (Kennedy, J., concurring).

analytically sound. A test that evaluates whether the criminal offense is more or less serious than the offense in *Solem* only serves to distinguish *Solem* as something of an anomaly, which can only be reconciled with other cases by so distinguishing it. The *Harmelin* plurality test contributes little to proportionality jurisprudence. In prior cases, the Court has emphasized the need for “objective criteria” when evaluating a punishment’s proportionality. Justice Kennedy’s approach of engaging in a comparative analysis only after an initial determination of gross disproportionality is hardly objective. In fact, it seems to allow for a sort of judicial gut reaction to a sentence before deciding whether to compare the sentence to other crimes or to sentences in other jurisdictions. At least one commentator has concluded that *Harmelin*’s “gross disproportionality standard is, in practice, tantamount to a complete abdication of judicial review of sentence proportionality.”²⁰⁷ Finally, the *Harmelin* plurality approach to reviewing prison sentences for excessiveness is inconsistent with developments in other areas where the Court evaluates proportionality—the areas of forfeitures and punitive damages awards.

II. IS MONEY DIFFERENT?

A. FORFEITURES

Before 1989, the Supreme Court had not focused on the Excessive Fines Clause of the Eighth Amendment.²⁰⁸ In *Browning-Ferris Industries v. Kelco*,²⁰⁹ the Court held that this clause did not apply to punitive damages awards in a civil suit, and further suggested that the scope of the Excessive Fines Clause was limited to criminal cases.²¹⁰ In 1993, only two years after the *Harmelin* plurality all but eliminated proportionality review of prison sentences, the Court decided two cases that signaled an expansion of the Court’s application of the Excessive Fines Clause. In *Alexander v. United States*,²¹¹ the Court was unanimous in its decision to remand the case to the Court of Appeals for an evaluation of the excessiveness of the criminal in personam²¹² forfeiture of the defendant’s wholesale and retail

²⁰⁷ Johnson, *supra* note 26, at 503. See also Gershowitz, *supra* note 26, at 1277 (“Despite a plethora of cases meting out lengthy punishments for arguably minor crimes, only two courts have struck down punishments as disproportionate in the nine years since *Harmelin*.”); Grossman, *supra* note 96, at 161 n.352 (discussing confusion among lower federal courts after *Harmelin*, with some courts concluding *Harmelin* overruled *Solem* and that there is “no proportionality requirement after *Harmelin*, notwithstanding the stance seven Justices took in support of some kind of proportionality principle”).

²⁰⁸ The Eighth Amendment states, in its entirety: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” U.S. CONST. amend. VIII.

²⁰⁹ 492 U.S. 257 (1989).

²¹⁰ See Johnson, *supra* note 26, at 469. Nonetheless, the Court stated that it was unnecessary to decide whether the Excessive Fines Clause applies only to criminal cases. *Kelco*, 492 U.S. at 263.

²¹¹ 509 U.S. 544 (1993).

²¹² This is considered a criminal forfeiture and thus makes up part of a criminal defendant’s sentence. It “requires no independent action on the part of the government.” Johnson, *supra* note 26, at 465.

businesses and nearly \$9 million.²¹³ The Court concluded that “[t]he *in personam* criminal forfeiture at issue here is clearly a form of monetary punishment no different, for Eighth Amendment purposes, from a traditional ‘fine.’”²¹⁴ During the same term, in *Austin v. United States*,²¹⁵ the Court unanimously²¹⁶ held that civil *in rem* forfeitures under 21 U.S.C. § 881 are also subject to Eighth Amendment scrutiny for excessiveness.²¹⁷ In *Austin* the Court acknowledged that its prior cases had emphasized a civil-criminal dichotomy in cases of civil forfeitures,²¹⁸ but found that for purposes of the Eighth Amendment, the critical inquiry eschews such a distinction. The Court concluded instead that the focus should be on whether the government is extracting a punishment, noting that the notion of punishments “cuts across the division between the civil and the criminal

²¹³ While four Justices dissented in *Alexander*, their dissenting opinion focused on the First Amendment issue raised by the case and urged that it was not necessary to reach the Eighth Amendment issue. *Alexander*, 509 U.S. at 578 (Kennedy, J., dissent). Nonetheless, Justice Kennedy stated, “[g]iven the Court’s principal holding, I can interpose no objection to remanding the case for further consideration under the Eighth Amendment.” *Id.* Justice Souter wrote a short concurring opinion in which he agreed “with the Court that the case should be remanded for a determination whether the forfeiture violated the Excessive Fines Clause.” *Id.* at 560 (Souter, J., concurring).

²¹⁴ *Id.* at 558.

²¹⁵ 509 U.S. 602 (1993).

²¹⁶ Justice Scalia wrote separately to question the majority’s account of history and precedent and to set out a method for evaluating the excessiveness of *in rem* forfeitures. *Id.* at 627 (Scalia, J., concurring) (“Unlike monetary fines, statutory *in rem* forfeitures have traditionally been fixed, not by determining the appropriate value of the penalty in relation to the committed offense, but by determining what property has been ‘tainted’ by unlawful use . . .”). Justice Kennedy also wrote separately to express similar concerns regarding Part III of the opinion’s use of history and precedent, but was silent as to how best to evaluate excessiveness. *Id.* at 628–29 (Kennedy, J., concurring). See also David Lieber, Note, *Eighth Amendment—The Excessive Fines Clause Austin v. United States*, 84 J. CRIM. & CRIMINOLOGY 805, 820 (1994) (suggesting that it was unnecessary for the majority to “delve into the history of forfeiture”).

²¹⁷ This is considered a civil action “brought by the government against the property itself.” Johnson, *supra* note 26, at 466. Thus, it is not dependent upon a criminal conviction.

²¹⁸ *Austin*, 509 U.S. at 608 n.4 (“As general matter, this Court’s decisions applying constitutional protections to civil forfeiture proceedings have adhered to this distinction between [constitutional] provisions that are limited to criminal proceedings and provisions that are not.”) (citations omitted). For an earlier example of the blurring of the civil-criminal dichotomy, see *Halper v. United States*, 490 U.S. 435 (1989) (holding that the Double Jeopardy Clause of the Fifth Amendment was violated by a proceeding following a criminal conviction in which the government sought additional monies from the defendant and determining that the second judgment was an additional punishment). See also Susan R. Klein, *Redrawing the Criminal-Civil Boundary*, 2 BUFF. CRIM. L. REV. 679 (1999) (discussing the Supreme Court’s inconsistent approach to defining a distinction between the criminal and the civil, noting in particular the different approaches used in the context of Double Jeopardy and the Excessive Fines Clause of the Eighth Amendment); Thomas Koenig & Michael Rustad, “Crimtorts” as Corporate Just Deserts, 31 U. MICH. J.L. REFORM. 289 (1998) (discussing the overlap of tort law and criminal law and proposing a different doctrinal approach to this hybrid); Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325, 1326 n.4 (1991) (noting that “the distinction between criminal and civil law seems to be collapsing across a broad front” and proposing that legislative labeling be the exclusive method for determining the appropriate category). But see *Trop v. Dulles*, 356 U.S. 86, 94 (1958) (analyzing whether denationalization constitutes punishment for purposes of the Eighth Amendment, and stating, “[h]ow simple would be the tasks of law generally if specific problems could be solved by inspection of the labels pasted on them!”).

law.”²¹⁹ In this instance, the Court shunned one dichotomy only to embrace another. After *Austin*, the appropriate question to ask when deciding whether the Eighth Amendment covers forfeitures is whether the forfeiture is at least partially punitive in nature or serves solely remedial purposes.²²⁰

Once the Court determined that the forfeiture involved in *Austin* furthered punitive purposes and was thus subject to Eighth Amendment scrutiny, the Court remanded the case to the Court of Appeals for an evaluation of excessiveness. The majority did not, however, provide any guidance to the lower court as to how to engage in such an evaluation.²²¹ Similarly, in *Alexander*, the Court provided little guidance as to the appropriate measure of excessiveness, other than the above statement that the forfeiture in *Alexander* is the same as a fine.²²² The Court hinted at the significance of the defendant’s culpability as relevant to excessiveness while addressing the defendant’s argument about the nature of his offense. The defendant argued that since the jury had found that only four magazines and three videotapes were obscene, the confiscation and destruction of all of his business assets was excessive. The Court pointed out that the defendant “was convicted of creating and managing . . . ‘an enormous racketeering enterprise.’ . . . It is in light of the extensive criminal activities which [the defendant] . . . conducted . . . over a substantial period of time that the question whether the forfeiture was ‘excessive’ must be considered.”²²³ Although the Court left this question to the Court of Appeals, it strongly suggested that the forfeiture in *Alexander* was not unconstitutional, given the defendant’s broad and general culpability.²²⁴

As to the standard for assessing the constitutionality of in rem forfeitures, Justice Scalia, concurring in *Austin*, attempted to provide some guidance, noting that “the excessiveness inquiry for statutory in rem forfeitures is different from the usual excessiveness inquiry.”²²⁵ Justice Scalia did concede that with respect to monetary fines and in personam forfeitures “the touchstone is [the] value of the fine [or property forfeited] in relation to the offense.”²²⁶ According to Justice Scalia, the relationship between the value of the assets forfeited and the offense committed by the defendant is not relevant to the constitutionality of in rem forfeitures. As to civil in rem forfeitures, it is necessary to determine “what property has

²¹⁹ *Austin*, 509 U.S. at 610 (citing *United States v. Harper*, 490 U.S. 443, 447–48 (1989)).

²²⁰ *Id.* (“In considering this question, we are mindful of the fact that sanctions frequently serve more than one purpose. We need not exclude the possibility that a forfeiture serves remedial purposes We, however, must determine that it can only be explained as serving in part to punish.”)

²²¹ *Id.* at 622–23 (“Prudence dictates that we allow the lower courts to consider that [excessiveness] question in the first instance.”)

²²² *Alexander v. United States*, 509 U.S. 544 (1993).

²²³ *Id.* at 559.

²²⁴ See *Johnson*, *supra* note 26, at 474–78 (noting that after *Austin* and *Alexander* lower federal courts concluded that a property owner would have to demonstrate a high threshold of disproportionality) (citations omitted).

²²⁵ *Austin*, 509 U.S. at 623 (Scalia, J., concurring).

²²⁶ *Id.* at 627.

been ‘tainted’ by unlawful use [Thus, t]he question is not *how much* the confiscated property is worth, but *whether* the confiscated property has a close enough relationship to the offense.”²²⁷ This has been coined the “instrumentality test.”²²⁸ It is not clear what justifies a different test for in rem forfeitures. One commentator has suggested that Justice Scalia’s “principal argument seems to be that excessiveness in the forfeiture context is limited to the instrumentality determination because it has always been that way.”²²⁹ It may be that Justice Scalia’s distinction is based on the historic treatment of in rem proceedings as involving “guilty property” rather than a guilty person.²³⁰

The problem with this “crabbed” approach²³¹ is that it undermines the *Austin* majority’s focus on the question of punishment rather than the civil-criminal dichotomy.²³² It does not make sense to first conclude that forfeiture serves punitive and deterrent purposes and thus comes within the reach of the Excessive Fines Clause, and then apply a test for proportionality that does not take those goals of punishment into account. The facts of *Austin* illustrate this point. Austin pled guilty to one count of possessing cocaine with intent to distribute. Austin agreed to sell some cocaine while he was at his body shop. He then went to his nearby mobile home and returned to the shop with two grams of cocaine. The government sought forfeiture of the body shop and the mobile home.²³³ According to the majority in *Austin*, such a forfeiture constitutes punishment subject to Eighth Amendment proportionality scrutiny. To ask, as Justice Scalia asserts, only whether there is a sufficient connection between the property and the offense is to divert proportionality analysis into an evaluation of “tainted” or “guilty” property, and to ignore a comparison of the offense committed and the punishment imposed.²³⁴

²²⁷ *Id.* at 627–28.

²²⁸ *Id.* (“an *in rem* forfeiture goes beyond the traditional limits that the Eighth Amendment permits if it applies to property that cannot properly be regarded as an instrumentality of the offense”). This test is also referred to as the “close enough relationship test.” Poe, *supra* note 110, at 253–56.

²²⁹ Johnson, *supra* note 26, at 475.

²³⁰ See *id.* at 466 n.33 (“This ‘guilty property’ fiction has been criticized extensively by modern commentators” (citing Mary M. Cheh, *Can Something This Easy, Quick, and Profitable also be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y.L. SCH. L. REV. 1, 19 (1994) (calling this fiction “irrational and superstitious”))).

²³¹ Johnson, *supra* note 26, at 464 n.21

²³² Poe, *supra* note 110, at 256 (“this [guilty property] fiction is based on the traditional distinction between *in rem* and *in personam* forfeiture, a distinction at odds with the *Austin* majority’s reasoning”).

²³³ The opinion notes that a search warrant was executed on the home and shop and resulted in the discovery of “small amounts of marijuana and cocaine, a .22 caliber revolver, drug paraphernalia, and approximately \$4,700 in cash.” *Austin*, 509 U.S. at 605. The opinion does not reveal whether these items were found in the home, in the shop, or both. *But see* Poe, *supra* note 110, at 240 (1994) (setting out the facts from the lower court opinion, *United States v. 508 Depot St.*, 964 F.2d 814 (8th Cir. 1992), stating that the fruits of the search were discovered in both the mobile home and the body shop).

²³⁴ See Lieber, *supra* note 216, at 825 (suggesting that Justice Scalia’s test for excessiveness, which relies heavily on the civil-criminal distinction eroded by the majority opinion, was Justice Scalia’s way of reconciling *Austin* with his opinion in *Harmelin*, which rejected any proportionality principle).

In the more recent case of *United States v. Bajakajian*, the Court clarified some aspects of the meaning of the Excessive Fines Clause, while muddying others.²³⁵ The defendant in *Bajakajian* violated a federal law by attempting to leave the country without reporting that he was carrying more than \$10,000 in currency.²³⁶ The total amount of currency that the defendant failed to disclose was \$357,144.²³⁷ The Supreme Court determined that forfeiture of this amount was unconstitutionally excessive.²³⁸ Justice Thomas, writing for the majority, applied *Austin* and concluded that the forfeiture of the unreported currency constituted punishment.²³⁹ The Court reached this conclusion based on the fact that the forfeiture was “imposed at the culmination of an underlying felony.”²⁴⁰ The Court also noted that the government argued that the forfeiture served the purpose of “deter[ing] illicit movements of cash.”²⁴¹ Rather than support the government’s argument that the forfeiture was remedial, and not punitive, the Court stated that “[d]eterrence . . . has traditionally been viewed as a goal of punishment.”²⁴² Thus, consistent with *Austin*, the Court held that as long as the forfeiture is partly punitive, it is subject to the Excessive Fines Clause.²⁴³ The Court relied on the punitive nature of this forfeiture to distinguish this case from the traditional acceptance of forfeiture of property for customs violations and other *in rem* forfeitures.²⁴⁴ This led the dissent to accuse the majority of essentially overruling *Austin* and reviving the civil-criminal dichotomy.²⁴⁵ In fact, one commentator has pointed out that several federal courts have relied on the dissenting opinion in *Bajakajian* to conclude that the Excessive Fines Clause does not cover *in rem* forfeitures.²⁴⁶ The same commentator argued that such an interpretation of the majority’s opinion is not necessary.²⁴⁷ Nonetheless, the Court does seem to have clouded the issue of the scope of the Excessive Fines Clause. However, the Court provided greater guidance as to how to assess excessiveness.

Most significantly, the Court eschewed the “instrumentality test.”²⁴⁸ The Court stated that “[t]he touchstone of the constitutional inquiry under

²³⁵ 524 U.S. 321 (1998).

²³⁶ *See id.*

²³⁷ *See id.*

²³⁸ *See id.*

²³⁹ *See id.* at 328.

²⁴⁰ *See id.*

²⁴¹ *See id.* at 329.

²⁴² *See id.*

²⁴³ *See id.* at 329 n.4.

²⁴⁴ *See id.* at 331.

²⁴⁵ *See id.* at 355 (Kennedy, J., dissenting) (“The majority subjects this forfeiture to scrutiny because it is *in personam*, but it then suggests most *in rem* forfeitures . . . may not be fines at all. The suggestion, one might note, is inconsistent or at least in tension with *Austin*.”) (citations omitted).

²⁴⁶ *See Johnson, supra* note 26, at 488.

²⁴⁷ *See id.* at 489 (“Justice Kennedy’s critique is valid only if the Framers’ view that *in rem* civil forfeitures are not fines is binding on the Court in its contemporary interpretation of that provision. The Court, however, is not so bound.”)

²⁴⁸ *Bajakajian*, 524 U.S. at 333–334 (“It is therefore irrelevant whether respondent’s currency is an instrumentality; the forfeiture is punitive, and the test for the excessiveness of a punitive forfeiture

the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.”²⁴⁹ This echoes the notion that the punishment must fit the crime, discussed in Section II.B of this Article. The standard of “gross disproportionality” adopted by the *Bajakajian* majority is similar to the standard used by Justice Kennedy in his *Harmelin* plurality opinion, yet the Court does not cite to *Harmelin*.²⁵⁰ Instead, the Court cites to *Solem*.²⁵¹ The specific cite to *Solem* is in the context of recognizing the legislature’s role in deciding appropriate punishments, thus justifying a more deferential “gross disproportionality” standard, rather than one of “strict proportionality.”²⁵² Nonetheless, the conspicuous absence of *Harmelin* is significant.

The analysis of proportionality in *Bajakajian* mirrors the factors set out earlier in this article as important considerations in the context of evaluating the proportionality of criminal punishments. As to the nature of the offense in the abstract, the Court pointed out that the defendant’s “crime was *solely* a reporting offense. It was permissible to transport the currency out of the country so long as he reported it.”²⁵³ Further, the Court stated that

[t]he harm that [Bajakajian] caused was also minimal. Failure to report his currency affected only one party, the Government, and in a relatively minor way. There was no fraud on the United States, and [he] caused no loss to the public fisc. Had his crime gone undetected, the Government would have been deprived *only* of the information that \$357,144 had left the country.²⁵⁴

This is similar to the analysis used by the *Weems* Court, which emphasized the fact that the defendant’s offense of falsifying a public document did not result in any financial gain to the defendant, yet was punished the same as an offense “which might cause the loss of many thousands of dollars.”²⁵⁵ The *Bajakajian* Court also engaged in comparative analysis when it noted that the maximum fine for the non-

involves *solely* a proportionality determination”) (emphasis added). See also Johnson, *supra* note 26, at 491–92 (noting, first, that the majority opinion did not reject *Austin*’s inclusion of in rem forfeitures within the coverage of the Excessive Fines Clause, and stating that “[t]his interpretation of *Bajakajian* suggests that the Supreme Court’s adoption of the gross disproportionality standard in that case necessarily represents a repudiation of Justice Scalia’s instrumentality test”). But see Barclay Thomas Johnson, Note, *Restoring Civility—The Civil Asset Forfeiture Reform Act of 2000: Baby Steps Towards a More Civilized Civil Forfeiture System*, 35 IND. L. REV. 1045, 1064 (2002) (concluding that the *Bajakajian* test did not abolish all consideration of instrumentality).

²⁴⁹ *Id.* at 334.

²⁵⁰ See generally *id.* See also *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991).

²⁵¹ See *Bajakajian*, 524 U.S. at 336.

²⁵² See *id.*

²⁵³ *Id.* at 337 (emphasis added).

²⁵⁴ *Id.* at 339 (emphasis added).

²⁵⁵ *Weems v. United States*, 217 U.S. 349, 381 (1910). See *supra* notes 24, 27 and accompanying text.

reporting offense under the Sentencing Guidelines was \$5,000.²⁵⁶ Primarily, however, the Court focused on the issue of the defendant's culpability. The Court emphasized the facts in this specific case—the failure to report was not related to any other illegal activities and that Bajakajian “[wa]s not a money launderer, a drug trafficker, or a tax evader.”²⁵⁷ Indeed, the district court determined that the currency “was the proceeds of legal activity and was to be used to repay a lawful debt.”²⁵⁸ The Court also noted that although the defendant was indicted for lying,²⁵⁹ this was not part of the non-reporting offense.²⁶⁰ This is similar to the consideration in *Solem* of the fact that none of the defendant's convictions involved violence, and that the amount of money at issue in each crime was small.²⁶¹ Thus, in *Bajakajian* the Court was mostly concerned with retributive notions of punishment because it focused on the severity of punishment that this individual defendant deserved. One commentator has referred to this approach to proportionality as “desert-oriented.”²⁶² While the dissent agrees with the standard of “gross disproportionality” it reaches a different conclusion in applying that standard.

Justice Kennedy's analysis of excessiveness in his dissent in *Bajakajian* is similar to that of his plurality opinion in *Harmelin*. First, Justice Kennedy argues that the offense was serious and that it was inappropriate for the Court to question the judgment of Congress in harshly punishing this offense, which is so often linked to drug trafficking and money laundering. This is similar to the federalism concerns Justice Kennedy expressed in *Harmelin* about the seriousness of drug possession and legislative judgment regarding the severity of the punishment. Secondly, like the majority, Justice Kennedy also considered the individual culpability of the defendant. However, Kennedy relied on facts that did not form the basis for the defendant's conviction. These were similar to the facts that he relied on in *Harmelin* to suggest that the defendant was in possession of drugs with the intent to distribute even though he was only convicted of illegal possession. In *Bajakajian*, Justice Kennedy argued that the defendant was “guilty of repeated lies to Government agents and suborning lies by others.”²⁶³ Yet, once the defendant pled guilty to the non-reporting offense, the Government dropped the false statement charge.²⁶⁴

²⁵⁶ *Bajakajian*, 524 U.S. at 338. However, the dissent pointed out that the Sentencing Guidelines also state “Forfeiture is to be imposed upon a convicted defendant as provided by statute.” Thus, while the Guidelines set out a fine of \$5,000, they also contemplate that the defendant will forfeit property in addition to suffering a criminal sentence and fine. *Id.* at 351 (Kennedy, J., dissenting) (citations omitted). *But see* Poe, *supra* note 110, at 260–61 (suggesting that the Sentencing Guidelines be used as an objective factor for evaluating the proportionality of a forfeiture as compared to the “‘value’ of the property owner's culpable conduct”).

²⁵⁷ *Bajakajian*, 524 U.S. at 338.

²⁵⁸ *Id.*

²⁵⁹ 18 U.S.C. § 1001

²⁶⁰ *Bajakajian*, 524 U.S. at 339 n.12.

²⁶¹ *See supra* note 92 and accompanying text.

²⁶² Johnson, *supra* note 26, at 495.

²⁶³ *Bajakajian*, 524 U.S. at 352 (Kennedy, J., dissenting).

²⁶⁴ *Id.* at 325.

Thus, he was not convicted of making false statements.²⁶⁵ Justice Kennedy also stated that Bajakajian's actions involved "most suspicious circumstances. His luggage was stuffed with more than a third of a million dollars. All of it was in cash, and much of it was hidden in a case with a false bottom."²⁶⁶ Nonetheless, the government was not able to prove that the currency was part of any illegal activity. Justice Kennedy's evaluation of culpability in both *Bajakajian* and *Harmelin* is problematic because the Court should not rely on facts not proven by the government or to speculate about certain facts, which are not part of the offense for which the defendant was convicted, in assessing the culpability of the defendant. Indeed, such a consideration seems to be inconsistent with the holdings in *Ring* and *Apprendi* requiring that factual determinations to support the death penalty or an enhanced penalty be made by a jury.²⁶⁷ Furthermore, other than disagreeing with the majority that the forfeiture was grossly disproportional, Justice Kennedy's dissent in *Bajakajian* provides no additional guidance as to what *would* constitute gross disproportionality.

It is interesting that Justice Thomas wrote the majority opinion in *Bajakajian* because, along with Justice Scalia, he has concluded that the Eighth Amendment does not require proportionality review of prison sentences, begging the question, "Is money different?"

B. PUNITIVE DAMAGES AWARDS

This same question arises in the context of punitive damages awards. The Supreme Court initially grappled with the question of whether the Constitution places any limits on punitive damages awards. The Court rejected the argument that the Excessive Fines Clause of the Eighth Amendment requires an evaluation of excessiveness as to punitive damages awards in *Browning-Ferris v. Kelco*.²⁶⁸ The Court concluded that the Eighth Amendment is concerned "with direct actions initiated by government to inflict punishment" and does not apply to "punitive damages in cases between private parties."²⁶⁹ Two years later in *Pacific Mutual Life Ins. v. Haslip*,²⁷⁰ decided the same year as *Harmelin*, the Court determined

²⁶⁵ The dissent points to statements by the district court that the defendant proffered a "suspicious and confused story, documented in the poorest way, and replete with past misrepresentation." *Bajakajian*, *id.* at 352 (Kennedy, J., dissenting). It is not clear, whether, for purposes of sentencing, such factual findings would have to be made by a jury under *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

²⁶⁶ *Bajakajian*, 524 U.S. at 353 (Kennedy, J., dissenting).

²⁶⁷ See *supra* notes 40 and 41.

²⁶⁸ 492 U.S. 257 (1989).

²⁶⁹ *Id.* at 259. But see Calvin M. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233 (1987) (arguing that the "textual antecedents of the Eighth Amendment, the political theory that underlies the adoption of the Eighth Amendment, and the contemporary purposes served by punitive damages" support the conclusion that the Excessive Fines Clause "should apply to the imposition of punitive damages and all judicially imposed monetary sanctions in civil cases").

²⁷⁰ 499 U.S. 1, 1 (1991) (holding that the standards used at the trial and appellate level for reviewing punitive damages awards had sufficiently protected the defendant from unlimited jury discretion).

that the Due Process Clause of the Fourteenth Amendment requires that juries receive sufficient guidance regarding punitive damages awards and also requires that amounts of such awards not cross the line into unconstitutionality.²⁷¹ In *Haslip*, the plaintiff brought a fraud action after an agent of Pacific Mutual had embezzled insurance premiums rather than remitting them to Pacific Mutual.²⁷² When Pacific Mutual did not receive Ms. Haslip's premium payments, it cancelled her insurance, and her credit was adversely affected.²⁷³ The trial court found that the punitive damages award of \$840,000 was appropriate because the conduct involved "evidenced intentional malicious, gross, or oppressive fraud," and that it was necessary to deter similar conduct by insurers.²⁷⁴ The Supreme Court noted that the punitive damages award was four times the compensatory damages and thus "close to the line," but held that such an award did not "cross the line into the area of constitutional impropriety."²⁷⁵ Thus, in *Haslip*, the Court acknowledged the existence of a constitutional line over which punitive damages awards may not cross. As commentators have concluded, "The Court's proportionality requirement is, in effect, a capping of punitive damages. The Court has, in essence, entered the ideological arena of tort reform where it had no previous role."²⁷⁶

In 1993, the Court addressed another fraud claim in *TXO Production Corp. v. Alliance Resources Corp.*,²⁷⁷ and expressly stated what it had implied in *Haslip*: the Due Process Clause of the Fourteenth Amendment prohibits a State from imposing "grossly excessive" punishment on a tortfeasor.²⁷⁸ In this case, TXO had brought a frivolous declaratory judgment action as to the title of certain property in an attempt to defraud Alliance Resources.²⁷⁹ The Court upheld the punitive damages award of ten million dollars,²⁸⁰ which was over 526 times the actual damages awarded. In addition to considering the ratio of the punitive damages award to the actual damages, the Court determined that "the amount of money potentially at stake, the bad faith of [TXO], the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and [TXO]'s wealth" supported a conclusion that the punitive damages award was not "grossly excessive."²⁸¹ One year later, in *Honda*

²⁷¹ *Id.* See also *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) (emphasizing the importance of procedure, the Court held that Oregon's system for awarding punitive damages violated due process because it did not include a remittitur process by which a court could review such awards after the verdict).

²⁷² 499 U.S. at 5.

²⁷³ *Id.*

²⁷⁴ *Id.* at 23.

²⁷⁵ *Id.* at 23-24.

²⁷⁶ Michael L. Rustad & Thomas H. Koenig, *Taming the Tort Monster: The American Civil Justice System as a Battleground of Social Theory*, 68 BROOKLYN L. REV. 1, 65 (2002).

²⁷⁷ 509 U.S. 443 (1993).

²⁷⁸ *Id.* at 453-54.

²⁷⁹ See *id.* at 449.

²⁸⁰ See *id.* at 453, 466.

²⁸¹ *Id.* at 462.

Motor Co. v. Oberg, the court required states to create post-verdict review procedures of punitive damages for possible excessiveness.²⁸²

More recently, and for the first time, the Supreme Court struck a punitive damages award as “grossly excessive.” In *BMW of North America, Inc. v. Gore*, BMW failed to disclose to Dr. Gore that it had repainted the car he purchased.²⁸³ The parties presumed that the car had been damaged while being transported between the manufacturing plant and the preparation center.²⁸⁴ Gore sued BMW for fraud based on BMW’s suppression of a material fact.²⁸⁵ The jury awarded Gore \$4,000 in compensatory damages, apparently based on evidence that the repainted car was worth ten percent less than the value of a new car that had not been damaged or repainted.²⁸⁶ Gore argued that BMW had failed to disclose such information in about a thousand other instances and argued that the jury should multiply this number by the \$4,000 reduction in value to arrive at a punitive damages award of four million dollars.²⁸⁷ The jury so awarded Gore punitive damages.²⁸⁸

The Alabama Supreme Court ruled that the jury improperly included similar sales in *other states* in its calculation of punitive damages, and ordered a remittitur to two million dollars.²⁸⁹ Nonetheless, the United States Supreme Court determined that even this reduced award was grossly excessive.²⁹⁰ In reaching this conclusion, the Court stated that due process requires that a person receive fair notice of the severity of any penalty a state might impose.²⁹¹ To evaluate the constitutionality of a particular punitive damages award, the Court considered “three guideposts”: “the reprehensibility of the nondisclosure; the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases.”²⁹² First, the Court determined that as compared to the behavior of the defendants in *TXO Production Corp.* and *Haslip*, BMW’s failure to disclose was less reprehensible than the “deliberate false statements [and] acts of affirmative misconduct” present in *TXO Production Corp.* and *Haslip*, especially where BMW believed in good faith that there was no duty to disclose such information.²⁹³ In addition, the Court pointed out that the harm Gore suffered was “purely economic,” having no effect on the safety of the car.²⁹⁴ As to the ratio, or

²⁸² 512 U.S. 415, 434–35 (1994).

²⁸³ 517 U.S. 559 (1996).

²⁸⁴ *Id.* at 563 n.1.

²⁸⁵ *See id.* at 563 n.3.

²⁸⁶ *Id.* at 564–65.

²⁸⁷ *Id.* at 564.

²⁸⁸ *Id.* at 565.

²⁸⁹ *Id.* at 567.

²⁹⁰ *Id.* at 585–86.

²⁹¹ *Id.* at 574–75.

²⁹² *Id.* at 575.

²⁹³ *Id.* at 579–80.

²⁹⁴ *Id.* at 576.

proportionality, of the punitive damages award to the actual harm suffered by *Gore*, the Court held that 500 to 1 was “dramatically greater than [the ratios] considered in *Haslip* and *TXO*,” especially in the absence of any threat of additional harm.²⁹⁵

The third guidepost engages the Court in a comparative analysis, examining possible statutory sanctions for the same conduct both in the jurisdiction in question as well as in other jurisdictions. In *Gore*, the Court pointed out that the maximum fine authorized under Alabama law for a violation of the Deceptive Trade Practices Act was \$2,000. Civil penalties in other jurisdictions ranged from \$50 for a first offense to \$250 for subsequent violations. The most severe penalties ranged from \$5,000 to \$10,000. Thus, the two million dollars punitive damages award was “substantially greater than the statutory fines available in Alabama and elsewhere.”²⁹⁶ The Court acknowledged the state’s interest in “punishing unlawful conduct and deterring its repetition,” but concluded that BMW’s conduct was not sufficiently egregious to justify such a large punitive damages award.²⁹⁷

Subsequently, in *Cooper Industries, Inc. v. Leatherman Tool Group*,²⁹⁸ the Supreme Court held that the appropriate standard for reviewing punitive damages awards was the more stringent, and less deferential, *de novo* standard.²⁹⁹ In cases before *Cooper Industries* and *Gore*, the Court employed rhetoric indicating a willingness to strike down grossly excessive punitive damages awards, but had not done so until *Gore*. Commentators therefore concluded that with these two decisions, first finding a punitive damages award excessive and second applying a more scrutinizing standard of review on appeal, the Court sent a “signal to lower courts to be more aggressive in reducing punitive damage awards.”³⁰⁰ However, it is difficult to determine the extent to which federal courts have heeded this signal.³⁰¹ Nonetheless, it is certainly significant that the Court found the punitive damages award in *Gore* to be excessive, thus giving teeth to this application of the Due Process Clause.

Several salient themes emerge from the Court’s jurisprudence on punitive damages awards, especially compared to the jurisprudence on proportionality of criminal punishments. First, as in the context of forfeitures and criminal punishments, the Court confirmed that “[s]tates

²⁹⁵ *Id.* at 582.

²⁹⁶ *Id.* at 584.

²⁹⁷ *Id.* at 568, 585.

²⁹⁸ 532 U.S. 424 (2001).

²⁹⁹ *Id.* at 435.

³⁰⁰ 2001 *Leading Cases*, 115 HARV. L. REV. 356, 366 (2001). See also Gershowitz, *supra* note 26, at 1284 (“[T]here is some evidence that [*Gore*] not only provides lower courts with the opportunity to strike down punitive damages awards, but also that it encourages them to do so.”).

³⁰¹ Theodore Eisenberg & Martin T. Wells, *The Predictability of Punitive Damages Awards in Published Opinions, the Impact of BMW v. Gore on Punitive Damages Awards, and Forecasting Which Punitive Damages Awards Will Be Reduced*, 7 SUP. CT. ECON. REV. 59 (1999) (concluding that *Gore* has not resulted in a significant increase in the number of cases in which courts strike or reduce punitive damages awards).

necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case.”³⁰² The Court conceded that the State of Alabama has an interest in protecting consumers in its state from a company’s failure to disclose presale repairs to a car, yet held that the award was nonetheless excessive. Thus, the Court affirmed the importance of federalism and state sovereignty, but ultimately determined that our federalist system includes a substantive limit on punitive damages. This seems consistent with prior cases such as *TXO Production Corp.*, where the Court stated, “a judgment that [was] a product of [a fair] process [was] entitled to a strong presumption of validity,”³⁰³ but was not entitled to absolute validity and was still subject to review.

The *Gore* Court also reviewed the important purposes served by punitive damages, namely deterrence and retribution.³⁰⁴ These goals are related to the first “guidepost,” the examination of the “degree of reprehensibility” of the defendant’s conduct,³⁰⁵ and bear a remarkable resemblance to considerations involved in criminal punishments. In fact, the majority opinion cites the criminal case *Solem v. Helm*³⁰⁶ to support the “principle that punishment should fit the crime ‘is deeply rooted and frequently repeated in common-law jurisprudence.’”³⁰⁷ The Court also refers to *Solem* when it justifies considering the reprehensibility of the defendant’s conduct, noting that “some wrongs are more blameworthy than others.”³⁰⁸ Interestingly, as in the forfeiture case, *Bajakajian*,³⁰⁹ the Court does not cite to the more recent criminal proportionality case, *Harmelin v. Michigan*.³¹⁰ In examining BMW’s culpability, the Court emphasized the following: the fact that BMW failed to disclose the presale refinishing of the car inflicted “purely economic harm” on Dr. Gore, and did not pose any risk of physical harm.³¹¹ Furthermore, BMW’s conduct did not involve “deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive,” as were present in other cases.³¹² The

³⁰² *Gore*, 517 U.S. at 568.

³⁰³ *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 457 (1993). *But see Gore*, at 598 (Scalia, J., dissenting) (stating that “a state trial procedure that commits the decision whether to impose punitive damages, and the amount, to the discretion of the jury, subject to some judicial review for ‘reasonableness,’ furnishes a defendant with all the process that is due”); *id.* at 607 (Ginsburg, J., dissenting) (criticizing the majority for “unnecessarily and unwisely ventur[ing] into territory traditionally within the States’ domain”).

³⁰⁴ *Gore*, 517 U.S. at 568; *Haslip*, 499 U.S. 1, 19 (1991) (“punitive damages are imposed for the purposes of retribution and deterrence”); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

³⁰⁵ *Gore*, 517 U.S. at 575.

³⁰⁶ 463 U.S. 277 (1983) (finding that a life sentence without the possibility of parole was disproportionate to the offense of “uttering a ‘no account check,’” even though this was the defendant’s seventh offense).

³⁰⁷ *Gore*, 517 U.S. at 576 n.24 (quoting *Solem*, 463 U.S. at 284 (1983)).

³⁰⁸ *Id.* at 575.

³⁰⁹ *United States v. Bajakajian*, 524 U.S. 321 (1998), discussed *supra* notes 233, 238 and accompanying text.

³¹⁰ *Harmelin v. Michigan*, 501 U.S. 957 (1991).

³¹¹ *Gore*, 517 U.S. at 576.

³¹² *Id.* at 579.

mere failure to disclose the act, and the nature and effect of the harm, led the Court to conclude that BMW's conduct was not "egregiously improper"³¹³ enough to justify an award of two million dollars in punitive damages. Thus, the Court engaged in a rather individualized assessment of BMW's conduct.

The Court then considered the ratio between the compensatory damages and the punitive damages award. This test most closely resembles the *Solem* Court's consideration of the harshness of the criminal sentence. The Court noted that it has consistently eschewed the idea that "the constitutional limit [on punitive damages] is marked by a simple mathematical formula"³¹⁴ but stated that "exemplary damages must bear a 'reasonable relationship' to compensatory damages."³¹⁵ This inquiry thus used the size of the compensatory damages as a way of evaluating the injury inflicted and comparing this to the prior "guidepost," focusing on the culpability of the defendant. The Court concluded that in most cases "the ratio will be within a constitutionally acceptable range When the ratio is a breathtaking 500 to 1, however, the award must surely 'raise a suspicious judicial eyebrow.'"³¹⁶

In some ways, this "guidepost" resembles the threshold consideration pronounced by Justice Kennedy in *Harmelin*. After considering the seriousness of Harmelin's crime, Justice Kennedy concluded that the offense was indeed grave, thus justifying the life sentence. Justice Kennedy then stated that a comparison of the sentence to other crimes inside and outside the jurisdiction was "appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed lead to an inference of gross disproportionality."³¹⁷ Conversely, in *Gore*, the idea of reasonable proportionality was not a threshold consideration. The Court did not state that it engaged in a comparative analysis only because the punitive damages award was, as a threshold matter, "grossly disproportionate."³¹⁸

Finally, as alluded to above, the last "guidepost" considered by the *Gore* Court involved a comparison of the punitive damages award to other sanctions for comparable misconduct. The Court examined statutory fines imposed for similar conduct both within the relevant state and in other states, as well as possible criminal sanctions.³¹⁹ In *Gore*, the Court found that statutory civil penalties for deceptive trade practices run from \$2,000 to \$10,000.³²⁰ The Court was not persuaded by the argument that the two million dollars punitive damages award was necessary to deter misconduct,

³¹³ *Id.* at 580.

³¹⁴ *Id.* at 582.

³¹⁵ *Id.* at 580 (citations omitted).

³¹⁶ *Id.* at 583 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. at 481 (O'Connor, J., dissenting)).

³¹⁷ *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring).

³¹⁸ *Gore*, 517 U.S. at 574-74.

³¹⁹ *Id.* at 583-84.

³²⁰ *Id.* at 584.

finding that “there [was] no basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance.”³²¹ This rather oblique finding seems to indicate that the Court is willing to evaluate the means used by the state to achieve the goal of deterring improper conduct, not only as to punitive damage awards but also as to the size of such awards.

Although a majority of the Court agreed that the two million dollars in punitive damages was “grossly excessive,” three of the Justices joined in a concurring opinion which emphasized how the procedure used in Alabama did not sufficiently guide the jury’s discretion as to the amount of punitive damages that were appropriate.³²² Justice Breyer concluded that it was the lack of clear standards to guide the jury as to the amount of punitive damages awards, as well as the severe disproportionality of the award, that “*taken together* overcome [the] strong presumption of validity.”³²³ Thus, the concurring Justices seemed to prefer an approach that critically evaluates the process by which punitive damages are awarded in addition to the actual punitive damages a court awards. This is somewhat problematic in *Gore* because the Court had previously approved Alabama’s procedure.³²⁴

Parts I and II of this article have pointed to a number of similarities among different types of punishments—the death penalty, terms of imprisonment, forfeitures, and punitive damages awards. These sections have also demonstrated how the Supreme Court is much more deferential when evaluating terms of imprisonment than when reviewing monetary sanctions. The next part of this article argues that such an approach is not justified.

III. THE 2002–2003 SUPREME COURT TERM

During the current Supreme Court Term, the Court had an opportunity to set out a unitary standard for evaluating proportionality in the context of terms of imprisonment and punitive damages awards. As seemed likely, the Supreme Court struck the \$145 million punitive damages award in *State Farm* and, thus, continues to scrutinize monetary punishments more carefully than punishments that deprive individuals of their liberty. Just as neither the *Ewing* nor *Andrade* decisions confronted this inconsistency, Justice Kennedy’s opinion in *State Farm* does not address it either.

³²¹ *Id.* at 585.

³²² *Id.* at 588 (Breyer, J., concurring, with O’Connor, J., and Souter, J., joining).

³²³ *Id.* at 597 (Breyer, J., concurring).

³²⁴ *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 20 (1991) (“These [jury] instructions . . . reasonably accommodate [the defendant’s] interest in rational decision-making and Alabama’s interest in meaningful individualized assessment of appropriate deterrence and retribution.”).

A. THE ANDRADE AND EWING CASES

The story of these two cases begins with California's "Three Strikes and You're Out" law.³²⁵ The impetus for California's Three Strikes law is commonly traced back to a crime no one, especially no Californian can forget.³²⁶ In 1993, twelve year old Polly Klaas was kidnapped at knife-point from her suburban home³²⁷ in Petaluma by Richard Allen Davis.³²⁸ He later strangled her and left her body at an abandoned lumber mill.³²⁹ Davis was a career criminal and had been paroled after serving only half of a sixteen year sentence just three months before abducting Polly.³³⁰ Revelation of Davis' criminal history, which included two other kidnappings, spurred a cry for "three strikes" legislation—a law that would ensure long prison sentences for repeat offenders.³³¹ The legislature had recently rejected such legislation, but the Klaas abduction and murder fueled support.³³² The voters also responded by voting in favor of a three strikes initiative.³³³ While California has not been the only jurisdiction to

³²⁵ CAL. PENAL CODE § 667 (West 2003). The voters approved an initiative creating a similar statute. Proposition 184, in California Ballot Pamphlet: General Election: November 8, 1994, at 64, codified at CAL. PENAL CODE § 1170.12 (West 2003).

³²⁶ The Polly Klaas abduction and murder encouraged proponents of three strikes legislation to try again. Mike Reynolds, father of Kimber Reynolds who was gunned down at the age of eighteen, drafted the initial "Three Strikes And You're Out" legislation. See Erik G. Luna, *Three Strikes in a Nutshell*, 20 T. JEFFERSON L. REV. 1, 4 (1998).

³²⁷ See *1994 Recent Legislation: California Enacts Enhancements for Prior Felony Convictions*, 107 HARV. L. REV. 2123, 2123 (1994) (noting that the crime took place "in a quiet middle-class neighborhood—not the typical crime scene in a state numbed to violence in poor and minority communities").

³²⁸ Luna, *supra* note 326, at 4. For additional information on the history of three strikes legislation, see Michael Vitiello, *Punishment and Democracy: A Hard Look at Three Strikes' Overblown Promises*, 90 CAL. L. REV. 257, 260–67 (2002) (book review); Rebecca Gross, *The "Spirit" of the Three Strikes Law: From the Romero Myth to the Hopeful Implications of Andrade*, 32 GOLDEN GATE U. L. REV. 169, 175 (2002) (describing the involvement of the Klaas family in passing Proposition 184 and how they later attempted to defeat the initiative when they learned that it would punish burglary as harshly as assault and rape); Renee R. Ross, *Eighth Amendment: Andrade v. Attorney General of the State of California*, 32 GOLDEN GATE U. L. REV. 95, 98–99 and accompanying notes (2002); James A. Ardaiz, *California's Three Strikes Law: History, Expectations, Consequences*, 32 MCGEORGE L. REV. 1, 1–7 (2000); (discussing the history and the objectives of the three strikes legislation); Nkechi Taifa, *Violent Crime Control and Law Enforcement Act of 1994: "Three-Strikes-And-You're-Out" Mandatory Life Imprisonment for Third Time Felons*, 20 DAYTON L. REV. 717 (1995) (focusing mainly on federal three strikes legislation); Robert Heglin, *A Flurry of Recidivist Legislation Means: "Three Strikes and You're Out."* 20 J. LEGIS. 213, 214–215 (exploring other factors that spurred such legislation).

³²⁹ Gross, *supra* note 328, at 170.

³³⁰ Luna, *supra* note 326, at 4.

³³¹ California already had a habitual criminal statute. See Ilene M. Shinbein, *"Three Strikes and You're Out": A Good Political Slogan to Reduce Crime, But a Failure in its Application*, 22 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 175 (1996) (Section III A(2) discusses the provisions of Proposition 8, passed in 1982, which added section 667, entitled "Habitual Criminals," to the Penal Code).

³³² See Luna, *supra* note 326, at 5.

³³³ A discussion of the pros and cons of "three strikes" legislation is beyond the scope of this article, as is an examination of whether this legislation has been effective in reducing violent crime in California. See Mike Males & Dan Macallair, *Striking Out: The Failure of California's 'Three Strikes and You're Out' Law*, 11 STAN. L. & POL'Y REV. 65 (2000); Luna, *supra* note 326, at 12–20, 20–32

enact “three strikes” legislation, its provisions differ substantially from those of other jurisdictions.³³⁴ First, in California a defendant with one prior “serious felony”³³⁵ receives a five year enhancement for each such prior serious felony.³³⁶ In addition, after two serious or violent felonies, the third, “triggering” felony need not be either violent or serious.³³⁷

As described earlier, in *Andrade v. Attorney General of State of California*,³³⁸ the Ninth Circuit struck an indeterminate life sentence without the possibility of parole for fifty years for Andrade who was convicted of two counts of petty theft.³³⁹ Andrade shoplifted five videotapes worth \$84.70 and two weeks later shoplifted another four videotapes worth \$68.84.³⁴⁰ Although petty theft is considered a misdemeanor in California, punishable by up to six months,³⁴¹ Andrade received this sentence because he was convicted of “petty theft with a prior.”³⁴² This offense is known as a “wobbler,” which means that it can be

(setting out arguments for and against three strikes, respectively); Ardaiz, *supra* note 328, at 3–7 (arguing that three strikes deters criminals from committing further crimes and achieves the goals of rehabilitation, retribution and incapacitation); Heglin, *supra* note 328, at 215–18 (evaluating the arguments for three strikes legislation). See also Vitiello, *supra* note 328, at 268–80 (evaluating the effects of three strikes legislation based on empirical evidence in book reviewed by the author); Shinbein, *supra* note 291, at 193 (stating that California’s Three Strikes law is “more of a headache than a deterrent or remedy. . . [because it] does not distinguish between violent and non-violent felons”). But see Brian P. Janiskee & Edward J. Erher, *Crime, Punishment and Romero: An Analysis of the Case Against California’s Three Strikes Law*, 39 DUQ. L. REV. 43, 53 (2000) (critiquing the study described by Vitiello and concluding that the decline in the crime rate was sharper after Three Strikes); Bill Jones, *Why the Three Strikes Law is Working in California*, 11 STAN. L. & POL’Y REV. 23 (1999) (as the title suggests, the author, Secretary of State for the State of California, who was involved in drafting the three strikes legislation, concludes that the law has been effective in deterring crime.). For a more theoretical analysis of habitual criminal sentence enhancements in the context of theories of punishment, see Markus Dirk Dubber, *Recidivist Statutes as Arational Punishment*, 43 BUFFALO L. REV. 689 (1995).

³³⁴ Vitiello, *supra* note 328, at 261–62. See also Linda S. Beres & Thomas D. Griffith, *Habitual Offender Statutes and Criminal Deterrence*, 34 CONN. L. REV. 55 (2002) (“The harshest of the Three Strikes laws was enacted by the California Legislature in 1994.”).

³³⁵ A “violent felony” is defined at CAL. PENAL CODE § 667.5 (WEST 2003); a “serious felony” is defined at CAL. PENAL CODE § 1192.7(c) and mirrors § 667.5(c) (WEST 2003).

³³⁶ CAL. PENAL CODE § 667(a)(1)–(b) (WEST 2003).

³³⁷ CAL. PENAL CODE § 667(e)(2)(A) (WEST 2003) (“If a defendant has two or more prior felony convictions as defined in subdivision (d) [violent or serious] . . . the term for the current felony conviction shall be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence [of twenty-five years].”). This section does not state that the third felony must be violent or serious. See also *In re Cervera*, 24 Cal. 4th 1073, 1075 (2001) (“The Three Strikes law governs when a defendant is convicted of a felony or ‘strike’ of any kind.”).

³³⁸ 270 F.3d 743 (9th Cir. 2001).

³³⁹ *Id.* at 765–66.

³⁴⁰ *Id.* at 749.

³⁴¹ CAL. PENAL CODE § 487(a) (WEST 2003) (defining grand theft as theft over \$400).

³⁴² CAL. PENAL CODE § 666 (WEST 2003) (providing that where a defendant has been convicted of certain offenses, such as “petty theft, grand theft, auto theft[,] . . . burglary, carjacking, [or] robbery,” and “is subsequently convicted of petty theft” that person is “punishable by imprisonment in the county jail not exceeding one year, or in the state prison”). Punishment up to one year in the county jail is considered a misdemeanor, while a sentence to be served in state prison is a felony. CAL. PENAL CODE § 17(b) (WEST 2003); *People v. Alvarez*, 14 Cal. 4th 968 (1997) (discussing prosecutor’s discretion to treat certain offenses as misdemeanors).

tried as either a misdemeanor or a felony, in the discretion of the prosecutor or judge.³⁴³ The prosecutor elected to charge the two petty thefts with a prior as felonies. Andrade had three burglary convictions in 1983. These were charged as his first and second strikes,³⁴⁴ and the two petty thefts with a prior were his third and fourth strikes.³⁴⁵ Upon conviction, Andrade was sentenced to twenty-five years to life for each petty theft with a prior conviction, to be served consecutively.³⁴⁶ As the Ninth Circuit panel noted, “Andrade will not become eligible for parole until 2046, after serving 50 years; he will be 87 years old.”³⁴⁷ The Ninth Circuit engaged in a detailed and extensive analysis and concluded that “Andrade’s sentence is so grossly disproportionate to his crime that it violates the Eighth Amendment to the United States Constitution.”³⁴⁸

In *Ewing v. California*,³⁴⁹ Ewing received a sentence of life without the possibility of parole for twenty-five years for shoplifting three golf clubs. This crime constituted Ewing’s third strike³⁵⁰ because the prosecutor chose to charge this offense as a felony rather than as a misdemeanor, triggering California’s three strikes statute.³⁵¹ Ewing will be eligible for parole in 2025, when he is sixty-three.³⁵² His sentence has not received the type of review that Andrade’s did. The California Court of Appeals affirmed the

³⁴³ See Ardaiz, *supra* note 328, at 20; *People v. Martinez*, 71 Cal. App. 4th 1502, 1510 (Ct. App. 1999) (acknowledging that the two offenses involved in that case, possession of a small amount of methamphetamine and “attempting by threat to deter an executive office from out his or her duty” are “both wobblers” and “can be treated as either a felony of a misdemeanor”); *People v. Archie*, 2001 WL 1649290, at *4 (Cal. App. Dec. 26, 2001) (acknowledging that selling a substance in lieu of a controlled substance is a “wobbler” and that the judge could have treated the offense as a misdemeanor). A judge also has discretion to strike prior offenses that would otherwise count as “prior felonies” for purposes of the “three strikes” statute. *People v. Romero*, 13 Cal. 4th 497 (1996). However, this has been significantly narrowed by *People v. Williams*, 17 Cal. 4th 148 (1998). See Gross, *supra* note 328, at 180–81 (criticizing standard for exercise of such discretion because it involves “amorphous concepts such as ‘in the furtherance of justice’ . . . [and] ‘within the spirit of Three Strikes [law]’”); Shamica Doty, *A Trial Court’s Misunderstanding of the Scope of its Discretion to Strike Priors Under the Three Strikes Law Can Result in Cruel and Unusual Punishment*, 3 J. LEGAL ADVOC. & PRAC. 17 (2001) (lamenting the confusion surrounding the standard that trial courts are to use when deciding whether to strike a prior qualifying felony under the three strikes law).

³⁴⁴ Burglary is considered a serious felony under the three strikes statute. CAL. PENAL CODE § 667.5 (WEST 2003).

³⁴⁵ *Andrade v. Att’y Gen.*, 270 F.3d 743, 749 (9th Cir. 2001).

³⁴⁶ CAL. PENAL CODE § 667(c)(6) (WEST 2003) (“If there is a current conviction for more than one felony count not committed on the same occasion, and not arising from the same set of operative facts, the court *shall* sentence the defendant *consecutively* on each count pursuant to subdivision (e).”) (emphasis added).

³⁴⁷ *Andrade*, 270 F.3d at 750.

³⁴⁸ *Id.* at 766.

³⁴⁹ *People v. Ewing*, 2001 Cal. LEXIS 4704 (Cal. July 11, 2001).

³⁵⁰ Ewing’s prior strikes were three burglary convictions and a single robbery conviction involved in one of the burglaries. Even though two of the burglaries did not involve violence, they are considered serious or violent under the three strikes statute. Brief for Petitioner at 5, *Ewing v. California*, 2001 LEXIS 4704 (Cal App. July 11, 2001) (No. 01-6978).

³⁵¹ In contrast to the third strike in Andrade, which was a “wobbler” because of Andrade’s prior record, Ewing’s third strike, grand theft, is a “wobbler” regardless of his prior criminal record. CAL. PENAL CODE § 489 (b) (WEST 2003).

³⁵² Brief for Petitioner at 5–6, *Ewing*, 2001 LEXIS 4704.

sentence in an unpublished opinion and the California Supreme Court summarily denied his petition for review.³⁵³

These sentences are not aberrations. It is estimated that about 340–350 of the approximately 7000 inmates serving sentences under California’s Three Strikes statute committed misdemeanors that the prosecutor chose to bump up to felonies. This gave those defendants a third felony and brought them within the scope of California’s Three Strikes statute.³⁵⁴ Examples include the “cookie thief” who received a life sentence and will not be eligible for parole for twenty-five years,³⁵⁵ a “pizza thief,”³⁵⁶ a defendant who attempted to steal a steering wheel alarm worth \$25,³⁵⁷ one who shoplifted a bottle of vitamins,³⁵⁸ an inmate who shoplifted five bottles of shampoo,³⁵⁹ and another who shoplifted a roast beef worth \$19.³⁶⁰

In *Andrade*, the Ninth Circuit noted the fractured *Harmelin* decision, and that a majority of justices favored proportionality review.³⁶¹ The court also pointed out that *Harmelin* left the *Solem* opinion intact.³⁶² Applying the Kennedy approach, the court engaged in a lengthy “threshold comparison” of the severity of the punishment and the seriousness of the offense and concluded that it led “to an inference that Andrade’s sentence was grossly disproportionate.”³⁶³ According to the court, while Andrade’s sentence was essentially the same as the ones imposed on Harmelin and Solem, his offense was not as serious as that of Harmelin, but more like Solem’s offense of “uttering a no account check.”³⁶⁴ Upon satisfying the threshold evaluation of gross disproportionality, the court then applied the other factors considered in *Solem*, which are analyzed in Part I.B of this article.

The Ninth Circuit *Andrade* court pointed out that Andrade’s life sentence with the possibility of parole in fifty years was “exceeded in

³⁵³ *Id.* at 1.

³⁵⁴ *Durden v. California*, 531 U.S. 1184 (2001) (Souter, J., dissenting from denial of cert.); Tavis Smiley, *Supreme Court Looks at Constitutionality of California’s Three-Strikes Law* (National Public Radio Broadcast, November 6, 2002) (Interview with Kimberle Williams Crenshaw, Professor of Law, UCLA); Nina Totenberg, *Morning Edition* (National Public Radio Broadcast, November 5, 2002) (Interview with Erwin Chemerinsky, Professor of Law, USC); see also Ardaiz, *supra* note 328, at 16 (“It is true that 5.0% of such third-strike offenders and 9.9% of second-strike offenders fall within the Three Strikes law because their triggering offense is a crime such as petty theft with a prior.”).

³⁵⁵ Stuart Pfeifer & Jack Leonard, *Court Upholds 3-Strikes Term for Cookie Thief*, L.A. TIMES, June 19, 2001, at Part 2, B7.

³⁵⁶ *Id.* However, the judge exercised discretion in lowering the sentence.

³⁵⁷ *Brown v. Mayle*, 283 F.3d 1019 (9th Cir. 2002) (court found the sentence unconstitutional).

³⁵⁸ *Riggs v. California*, 525 U.S. 1114 (1999) (Stevens, J., explaining denial of certiorari). In some cases, the defendant was convicted of petty theft with a prior, but the court did not include the facts regarding the petty theft in its opinion. See, e.g., *People v. Murphy*, 88 Cal. App. 4th 392, 393 (Ct. App. 2001) (taking “judicial notice” of unpublished opinion as to the same defendant and conviction).

³⁵⁹ *Three-Strikes Convicts Biding Time*, THE ORANGE COUNTY REGISTER, Apr. 6, 2002, available at 2002 WL 5445372.

³⁶⁰ *Id.*

³⁶¹ *Andrade v. Att’y Gen. of Cal.*, 270 F.3d 743, 757 (9th Cir. 2001).

³⁶² *Id.* at 758.

³⁶³ *Id.* at 761.

³⁶⁴ *Id.* at 758–59.

California only by first-degree murder and a select few other crimes.”³⁶⁵ These crimes are punishable by death or by life imprisonment without the possibility of parole. The court pointed out that Andrade’s punishment was more severe than the sentences of those who committed violent offenses. For example, rape is punishable by up to eight years,³⁶⁶ and second degree murder by fifteen years to life.³⁶⁷ Even in light of Andrade’s criminal record, the court concluded that the sentence was grossly disproportionate. In particular, the court seemed concerned by the fact that the length of Andrade’s sentence was twice as long as that of other defendants with similar crimes.³⁶⁸

Comparing Andrade’s sentence with possible sentences in other jurisdictions, the court determined that Andrade’s petty theft with a prior would serve as a triggering offense under the recidivist statutes of only four other states.³⁶⁹ However, in those states, Andrade would not have received such a severe sentence.³⁷⁰ The court concluded that its intra- and inter-jurisdictional analyses “validate[d] [its] initial judgment that [Andrade’s] sentence is grossly disproportionate...to [his] crime.”³⁷¹

The United States Supreme Court reversed the Ninth Circuit in *Andrade*, allowing the life sentence with the possibility of parole in 50 years to stand.³⁷² The Court also allowed Ewing’s life sentence with the possibility of parole in 25 years to stand.³⁷³ Justice O’Connor wrote the opinions for the five-justice majority in each case. The opinions in these cases are revealing in at least two significant respects. First, in *Andrade*, the Court indicates that although it has never expressly overruled *Solem*, and has, in fact, maintained that *Solem* survived *Harmelin*, state courts may disregard it when analyzing an excessive punishment challenge.³⁷⁴ While this was in the context of concluding that Andrade failed to meet the statutory standard for federal habeas corpus review, it is nonetheless instructive of what a majority of justices think about the continued relevance of *Solem*. Second, the *Ewing* opinion confirms what many commentators have said since *Harmelin*.³⁷⁵ That is, while a majority of the Court concludes that the Cruel and Unusual Punishments Clause contains a

³⁶⁵ *Id.* at 761.

³⁶⁶ CAL. PENAL CODE § 288 (WEST 2003).

³⁶⁷ CAL. PENAL CODE § 193 (WEST 2003).

³⁶⁸ 270 F.3d at 762.

³⁶⁹ *Id.* These states are Rhode Island, West Virginia, Texas, and Louisiana.

³⁷⁰ In Rhode Island, Andrade’s theft of the videotapes would not have constituted a felony, even with his prior convictions. The West Virginia Supreme Court has held that a life sentence imposed on a non-violent recidivist offender violates the state Constitution. In Texas, even if Andrade could receive a possible sentence of forty years, he would be eligible for parole in ten years. 270 F.3d at 763–64. “Although it is possible that Andrade could have qualified for a sentence under Louisiana’s Habitual Offender Law comparable to the sentence he received under California’s Three Strikes law, there is a distinct possibility, unlike in California, that a Louisiana court might have invalidated such a sentence as excessive under its state constitution.” *Id.* at 765.

³⁷¹ *Id.* at 765 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991)).

³⁷² *Lockyer v. Andrade*, 123 S. Ct. 1166, 1173 (2003).

³⁷³ *Ewing v. California*, 123 S. Ct. 1179, 1190 (2003).

³⁷⁴ *Andrade*, 123 S. Ct. at 1173–74.

³⁷⁵ See *supra* note 207 and accompanying text.

proportionality principle, the test implementing this principle essentially guts it, resulting in no constitutional limit on the amount of time a government may lock up a criminal.

In *Andrade*, a majority of the Court implicitly concludes that *Solem*, the only recent³⁷⁶ Supreme Court decision finding a term of imprisonment unconstitutional, is tangential, if relevant at all, to proportionality review.³⁷⁷ The Court held that the state court decision analyzing proportionality is not “contrary to, or an unreasonable application of, clearly established federal law” under 28 U.S.C. § 2254(d)(1), thus foreclosing habeas corpus relief.³⁷⁸ The Ninth Circuit had determined that *Andrade* satisfied the habeas standard because the state court did not apply *Solem*. The state court concluded that *Solem* “is questionable in light of” *Harmelin*, and therefore reviewed *Andrade*’s Eighth Amendment claim under *Rummel* and not *Solem*.³⁷⁹ The Supreme Court reversed the Ninth Circuit on this point, emphasizing that the Court’s jurisprudence in the area of proportionality of criminal sentences has “not been a model of clarity.”³⁸⁰ The Court also states that the facts in *Andrade* “fall in between the facts in *Rummel* and the facts in *Solem*.”³⁸¹ Yet, the Court holds that since the facts of *Andrade* are distinguishable from *Solem*, the state court’s decision was not contrary to principles set out in Supreme Court precedent. The significance of this procedural point is that the Court condones a state court’s disregard of precedent that, while distinguishable, is nonetheless relevant. If the facts of *Andrade* fall between the facts of two Supreme Court cases, it would be reasonable for the state court to compare the *Andrade* facts to both *Rummel* and *Solem* and decide which case *Andrade* resembles the most. But the Court concludes that unless a case before the state court is materially indistinguishable from Supreme Court precedent, a state court is free to disregard it. It is difficult to see how this leaves any room for habeas corpus review of proportionality challenges.

As to the second point, Justice O’Connor concludes that Ewing’s life sentence is not grossly disproportionate and, thus, the Court need not engage in any comparative analysis. This conclusion is based on both an evaluation of the seriousness of the offense and the fact that Ewing had a criminal record. Similar to the analysis in *Harmelin*, the Court in *Ewing* determined that shoplifting \$1,200 worth of property was more serious than

³⁷⁶ See *supra* note 75.

³⁷⁷ *Andrade*, 123 S. Ct. at 1173–74.

³⁷⁸ *Id.* at 1172, 1175. A discussion of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and habeas corpus review under 28 U.S.C. § 2254 (d)(1) is beyond the scope of this article. For recent discussions of these issues see A. Christopher Bryant, *Retroactive Application of “New Rules” and the Antiterrorism and Effective Death Penalty Act*, 70 GEO. WASH. L. REV. 1 (2002); Todd E. Pettys, *Federal Habeas Relief and the New Tolerance for “Reasonably Erroneous” Applications of Federal Law*, 63 OHIO ST. L.J. 731 (2002); Adam M. Steinman, *Reconceptualizing Federal Habeas Corpus for State Prisoners: How Should AEDPA’s Standard of Review Operate After Williams v. Taylor?*, 2001 WIS. L. REV. 1493; Ronn Gehring, Note, *Tyler v. Cain: A Fork in the Path For Habeas Corpus or the End of the Road for Collateral Review?*, 36 AKRON L. REV. 181 (2002); Claudia Wilner, Note, *“We Would Not Defer to That Which Did Not Exist”: AEDPA Meets the Silent State Court Opinion*, 77 N.Y.U.L. REV. 1442 (2002).

³⁷⁹ *Andrade*, 123 S. Ct. at 1171–72.

³⁸⁰ *Id.* at 1173.

³⁸¹ *Id.* at 1174.

the “passive” offense involved in *Solem*.³⁸² It is likely that in the vast majority of proportionality challenges, a reviewing court will easily conclude that the offense is more serious than the offense at issue in *Solem*, making it difficult to conceive of a term of imprisonment that would violate the proportionality principle set out in *Ewing*. The Court emphasizes that it has consistently upheld the ability of states to impose harsher sentences on repeat offenders. *Ewing* did not challenge the general constitutionality of the Three Strikes law. Therefore, the Court’s elaboration on the constitutionality of habitual offender statutes is not an analysis of the proportionality question raised in this case. Indeed, it seems that the Court will uphold any term of imprisonment under a three strikes or other habitual offender law. Justice O’Connor’s opinion does not explain why the fact that a criminal defendant is a recidivist justifies just about any term of imprisonment. Perhaps the answer lies in the seriousness of the offense. Justice O’Connor specifically points to statistics showing that “property offenders like *Ewing* had higher recidivism rates than those released after committing violent, drug, or public-order offenses. . . . 73 percent of the property offenders released in 1994 were arrested again within three years.”³⁸³ However, these statistics do not answer the question of the seriousness of a non-violent theft offense. Rather, these statistics support the fact that recidivism among property offenders is a problem. According to this analysis, if statistics showed that there is a high recidivism rate among drivers who exceed speeding limits, or violate other traffic laws, perhaps even parking laws, any term of imprisonment would not violate the Constitution, because the state could show that recidivism among traffic law offenders is a problem. It is not clear how a non-violent property offense, one which could have been treated as a misdemeanor, is serious enough to justify a life sentence, even when it was committed by a repeat offender. Yet, the Court concludes that such a long sentence is not grossly disproportionate in such a situation, thus dispensing of any need to consider other factors relevant to proportionality. As Justice Breyer points out in his dissent, the “threshold test” set out in *Harmelin* “must permit *arguably* unconstitutional sentences, not only *actually* unconstitutional sentences”³⁸⁴ Instead, the majority’s application of this test amounts to a “determinative test” not a threshold test.³⁸⁵ Treating Justice Kennedy’s threshold inquiry in *Harmelin* as a determinative test, and finding that problems of recidivism justify practically any term of imprisonment, results in no constitutional limit on terms of imprisonment.

It is particularly interesting that Justice O’Connor wrote the decisions upholding the prison sentences in *Andrade* and *Ewing*. Justice O’Connor has been one of the most vocal members of the Court favoring greater judicial scrutiny of punitive damages awards. Beginning with her dissent in *Browning-Ferris*, Justice O’Connor has consistently written about the need to protect corporations and other entities from excessive punitive

³⁸² *Ewing v. California*, 123 S. Ct. 1179, 1189 (2003).

³⁸³ *Id.* at 1188.

³⁸⁴ *Id.* at 1197 (Breyer, J., dissenting).

³⁸⁵ *Id.*

damages awards. To support her argument she has relied on the fact that such awards “serve the same purposes—punishment and deterrence—as the criminal law.”³⁸⁶ Thus she acknowledges significant similarities between terms of imprisonment and punitive damages awards. She has cited to *Solem* to support her statement that, “[d]ue process requires, at some level, that punishment be commensurate with the wrongful conduct.”³⁸⁷ She also relied on criminal precedent to justify federal judicial review of punitive damages, stating:

Judicial intervention in cases of excessive awards also has the critical function of ensuring that another ancient and fundamental principle of justice is observed—that the punishment be proportionate to the offense. As we have observed, the requirement of proportionality is “deeply rooted and frequently repeated in common-law jurisprudence.”³⁸⁸

Justice O’Connor has even suggested that the Court should look to *Solem* in devising a method for evaluating punitive damages awards for possible excessiveness as her dissenting opinion in *Browning-Ferris* illustrates:

Determining whether a particular award of punitive damages is excessive is not an easy task. The proportionality framework that the Court has adopted under the Cruel and Unusual Punishments Clause, however, offers some broad guidelines. . . . I would adapt the *Solem* framework to punitive damages in the following manner. First, the reviewing court must accord “substantial deference” to legislative judgments concerning appropriate sanctions for the conduct at issue. Second, the court should examine the gravity of the defendant’s conduct and the harshness of the award of punitive damages. Third, because punitive damages are penal in nature, the court should compare the civil *and* criminal penalties imposed in the same jurisdiction for different types of conduct, and the civil *and* criminal penalties imposed by different jurisdictions for the same or similar conduct. In identifying the relevant civil penalties, the court should consider not only the amount of awards of punitive damages but also statutory civil sanctions. In identifying the relevant criminal penalties, the court should consider not only the possible monetary sanctions, but also any possible prison term.³⁸⁹

Thus, Justice O’Connor would include a comparative analysis in her evaluation of punitive damages awards, yet she eschewed any such analysis in *Ewing*. The same year Justice O’Connor joined Justice Kennedy’s concurrence in *Harmelin*, she once again voiced her concerns about excessive punitive damages awards. In *Haslip*, she began her dissenting opinion with the following: “Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance

³⁸⁶ *Browning-Ferris Indus. of Vt. v. Kelco*, 492 U.S. 257, 287 (O’Connor, J., dissenting).

³⁸⁷ *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (O’Connor, J., dissenting).

³⁸⁸ *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 478 (O’Connor, J., dissenting) (citing *Solem*).

³⁸⁹ *Kelco*, 492 U.S. at 300–01 (O’Connor, J., dissenting) (citations omitted).

legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm.”³⁹⁰

Certainly the harm created by disproportionate terms of imprisonment is at least as devastating as excessive punitive damages awards. In addition, Andrade’s and Ewing’s respective sentences under California’s Three Strikes law are hardly models of restraint.

In *Haslip*, as in *Browning-Ferris*, Justice O’Connor once again emphasized the similarity between punitive damages awards and criminal sanctions.

Compounding the problem, punitive damages are quasi-criminal punishment. Unlike compensatory damages, which serve to allocate an existing loss between two parties, punitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendant’s misconduct was especially reprehensible. Hence, there is a *stigma* attached to an award of punitive damages that does not accompany a purely compensatory award. The punitive character of punitive damages means that there is more than just money at stake. This factor militates in favor of strong procedural safeguards.³⁹¹

The loss of liberty associated with a term of imprisonment is at least as significant as any stigma associated with a punitive damages award. This again illustrates the need for a consistent standard for evaluating any type of punishment for excessiveness. The above quotes from Justice O’Connor’s dissenting opinions in cases reviewing punitive damages awards bolster the argument that courts should evaluate terms of imprisonment at least as carefully as they review punitive damages awards. Justice O’Connor missed an opportunity in *Ewing* to correct an inconsistency that she has relied on in the past—both terms of imprisonment and punitive damages awards are forms of punishment and serve the same goals of retribution and deterrence. Justice O’Connor silently joined the majority opinion striking the punitive damages award in *State Farm*; thus, it is impossible to know how she justifies a different and more deferential review of prison sentences.

B. THE CAMPBELL CASE

The *Campbell* case has its roots in an automobile accident, which occurred over twenty years ago, on May 22, 1981.³⁹² Curtis Campbell unsafely passed a car driven by Robert Slusher, forcing another car, driven by Todd Ospital, to veer onto the shoulder of the road and collide with Slusher’s car.³⁹³ Ospital died at the scene and Slusher was left disabled.³⁹⁴ State Farm Mutual Automobile Insurance Company insured Campbell, and his policy provided \$25,000 of coverage for each person injured in an

³⁹⁰ *Haslip*, 499 U.S. at 42 (O’Connor, J., dissenting).

³⁹¹ *Id.* at 54 (O’Connor, J., dissenting) (emphasis added).

³⁹² *Campbell v. Sate Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1141 (Utah 2001).

³⁹³ *Id.*

³⁹⁴ *Id.*

accident, up to a maximum of \$50,000 of coverage per accident.³⁹⁵ Slusher sued both Campbell and Ospital's estate, and Ospital then cross-claimed Campbell.³⁹⁶ Slusher entered into a settlement agreement with Ospital's estate.³⁹⁷ The attorneys for Slusher and for Ospital's estate offered to settle their claims against Campbell with State Farm for the policy limits.³⁹⁸ State Farm, however, refused to settle and continued to reject settlement offers made before and after the lawsuit by Slusher and Ospital began.³⁹⁹ The facts, as described by the Utah Supreme Court, indicate that one of State Farm's investigators, Ray Summers, had submitted a report with evidence that Campbell was at fault.⁴⁰⁰ State Farm rejected this report and ordered Summers to change his description of the accident and his conclusion that the claims against Campbell were strong.⁴⁰¹

State Farm hired an attorney, Wendell Bennett, who had done work for State Farm in the past, to represent the Campbells.⁴⁰² Bennett reassured both Campbell and his wife, Inez Campbell, that they did not need to seek separate counsel, that he would represent their interests, and that their assets were safe.⁴⁰³ At Campbell's trial the jury found Campbell 100% at fault for the accident and awarded Slusher \$135,000 and Ospital's estate \$50,849, awards which exceeded Campbell's policy limit of \$50,000.⁴⁰⁴ After the verdict, State Farm refused to post a bond, pending appeal, in excess of the policy limit, and Bennett suggested to the Campbells that they put "for sale" signs on their property, making it clear that State Farm would not pay the excess judgment against the Campbells.⁴⁰⁵ The Campbells then retained other counsel and entered into an agreement with Slusher and Ospital that provided, in part, that Slusher and Ospital would not seek satisfaction on their judgment against the Campbells.⁴⁰⁶ In exchange, the Campbells would pursue a bad faith action against State Farm and pay a portion of any money recovered from State Farm to Slusher and to Ospital's estate.⁴⁰⁷ After the Utah Supreme Court affirmed the judgment against Campbell,⁴⁰⁸ State Farm paid the entire award to Slusher and Ospital.⁴⁰⁹

Shortly after State Farm paid the judgments against Campbell, he and his wife filed an action against State Farm alleging bad faith, fraud, intentional infliction of emotional distress, and a claim for punitive

³⁹⁵ *Id.* at 1141 n.2.

³⁹⁶ *Id.* at 1141.

³⁹⁷ *Id.* at 1142.

³⁹⁸ *Id.* at 1141.

³⁹⁹ *Id.*

⁴⁰⁰ *Id.*

⁴⁰¹ *Id.*

⁴⁰² *Id.* at 1141-42.

⁴⁰³ *Id.* at 1142.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ *Slusher v. Ospital*, 777 P.2d 437 (Utah 1989).

⁴⁰⁹ *Campbell*, 65 P.3d at 1142.

damages.⁴¹⁰ At the request of State Farm, the trial court bifurcated the trial.⁴¹¹ In phase one, the jury determined that State Farm had acted unreasonably and in bad faith when it failed to settle the claims against Campbell because there was a substantial likelihood that a verdict against him would exceed his policy limits.⁴¹² At the conclusion of phase two, the jury awarded the Campbells \$2.6 million in compensatory damages and \$145 million in punitive damages, but the trial court ordered a remittitur of the awards to \$1 million in compensatory damages and \$25 million in punitive damages.⁴¹³ The trial court stated that it remitted the punitive damages award because it believed that state precedent placed a legal limit on the ratio of punitive damages to compensatory damages.⁴¹⁴ On appeal, the Utah Supreme Court reinstated the \$145 million punitive damages award against State Farm after reviewing the issue of excessiveness under a *de novo* standard, pursuant to *Cooper Industries, Inc. v. Leatherman Tool Group*.⁴¹⁵

The Utah Supreme Court reinstated the jury's original \$145 million punitive damages award in reliance on the trial court's detailed and extensive findings that State Farm had "engaged in a pattern of 'trickery and deceit,' 'false statements,' and other 'acts of affirmative misconduct'" against "'financially vulnerable' persons."⁴¹⁶ The evidence included nationwide conduct by State Farm that spanned more than twenty years.⁴¹⁷ There are at least two problems with such evidence. First, is the earlier criticism of Justice Kennedy's opinions in *Harmelin* and *Bajakajian* about his reliance on facts not proven by the prosecution and facts unrelated to the charges against the defendants to support the punishments imposed. Even if the proof of State Farm's other conduct meets the civil standard, the second concern remains. This concern is whether it is appropriate for a court in one state to consider, for purposes of imposing punitive damages, a defendant's conduct in another state. Recently, the Ninth Circuit struck a punitive damages award of \$150 million that had been reduced by the trial court to \$69 million.⁴¹⁸ In *White v. Ford Motor Co.*, the Ninth Circuit was particularly concerned that the plaintiffs argued the jury should consider Ford's nationwide conduct when calculating punitive damages.⁴¹⁹ The court concluded that a jury may consider extraterritorial conduct to the extent that it is relevant to the question of the degree of reprehensibility, but must not punish the defendant for out-of-state conduct.⁴²⁰

⁴¹⁰ *Id.*

⁴¹¹ *Id.*

⁴¹² *Id.* at 1142-43.

⁴¹³ *Id.* at 1143.

⁴¹⁴ *Id.* at 1146.

⁴¹⁵ 532 U.S. 424 (2001). A *de novo* standard of review does not require the reviewing court to accord any deference to the conclusion of the lower court.

⁴¹⁶ *Campbell*, 65 P.3d at 1148 (quoting *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575-67 (1996)).

⁴¹⁷ *See id.* at 1148.

⁴¹⁸ *White v. Ford Motor Co.*, 312 F.3d 998 (2002).

⁴¹⁹ *See id.* 1013-16.

⁴²⁰ *Id.* at 1020.

However, it is not exactly clear whether there is a real difference between these two. Consideration of extraterritorial evidence when calculating punitive damages awards is analogous to consideration of a criminal offender's prior history when applying a habitual criminal or "three strikes" statute. Granted, as to proving prior wrongdoing of a tortfeasor, *Campbell* did not impose the stringent beyond a reasonable doubt standard reserved for criminal convictions. However, in the context of recidivist statutes, courts are not restricted to considering only similar criminal convictions. Yet, in *Gore*, *White*, and most recently *State Farm*, evidence of other conduct included only the same conduct—failing to disclose damage or repainting of new cars in *Gore*, and a defective parking brake design and a failure to warn in *White* and bad faith with respect to third party automobile insurance claims in *State Farm*. Indeed, Justice Kennedy's opinion in *State Farm* specifies that other conduct considered for determining an award of punitive damages "must have a nexus to the specific harm suffered by the plaintiff," thus narrowing the type of conduct a plaintiff may present to the jury.⁴²¹ In the context of terms of imprisonment, in a case like *Rummel v. Estelle*,⁴²² it seems that the nature of the defendant's prior offenses is irrelevant to the issue of proportionality. Similarly, under California's Three Strikes law, the nature of the triggering offense (i.e., a "wobbler" charged as a felony) is, for the most part, immaterial to California courts. Instead, the concern is mainly with a determination that due to the defendant's criminal history, he or she comes "within the spirit" of the three strikes law and therefore must be punished severely, even though *Solem* involved careful consideration of the nature of the defendant's prior offenses. This raises the question of what justifies limiting the type of prior conduct engaged in by a tortfeasor when assessing proportionality, while permitting broad consideration of a criminal defendant's criminal history.

The Court's discussion of the "ratio guidepost" provides some guidance as to what ratio will likely be constitutional, but does little to explain how a ratio is to be calculated. Some ratios are based on the compensatory damages actually awarded, such as the one million dollars awarded to the Campbells. Sometimes ratios are based on the plaintiff's out-of-pocket expenses, which is how the Utah Supreme Court characterized the ratio in *Haslip*.⁴²³ In *TXO Production Corp.*, a ratio of ten to one was calculated based on the *potential* harm that could have resulted from the defendant's misconduct.⁴²⁴ The Campbells argue that the ratio in their case is really seventy to one once the one million dollars in compensatory damages is added to the excess verdict against Mr. Campbell, the attorneys' fees and expenses, and the special damages.⁴²⁵ Given the ease with which the ratio can be manipulated, the Court should

⁴²¹ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1522–23 (2003).

⁴²² 445 U.S. 263 (1980).

⁴²³ *Campbell*, 65 P.3d at 1153.

⁴²⁴ 509 U.S. 443, 460–62 (1993).

⁴²⁵ Brief for the Respondents at 17 n.5, *State Farm*, 123 S. Ct. 1513 (2003) (No. 01-1289).

have specified which figures should be used to calculate this number. Aside from the mathematical question involved, the issue of the ratio is analogous to the consideration of the harm created by a criminal defendant and how that harm translates into a term of imprisonment. In the context of terms of imprisonment, the consensus seems to be that courts need not determine what punishment is strictly proportionate in relation to the harm involved. Rather, courts are to ensure that a sentence is not grossly disproportionate. In *State Farm*, the Court declined “again to impose a bright-line ratio which a punitive damages award cannot exceed.”⁴²⁶ Nonetheless, the Court stated that “[s]ingle-digit multipliers are more likely to comport with due process . . .”⁴²⁷ In the context of prison terms, the Court has not indicated any type of numerical limit, other than the possibility that a life sentence for overtime parking might be unconstitutional. Again, the Court does not explain or justify this discrepancy.

Justice Kennedy does not explain in any of these three recent cases why the Court should review punitive damages awards more carefully than it reviews terms of imprisonment, even though Justice Kennedy wrote the *Harmelin* opinion imposing a threshold requirement of “gross disproportionality,” a requirement not imposed in his opinion in *State Farm*.

IV. CONCLUSION—A PLEA FOR CONSISTENCY

Recently, the Supreme Court stated, “we have read the text of the [Eighth A]mendment to prohibit *all* excessive punishments as well as cruel and unusual punishments that may or may not be excessive.”⁴²⁸ Unless there are compelling reasons for distinguishing among the sanctions of death, terms of imprisonment, forfeitures, and punitive damages awards, the method for evaluating their excessiveness or disproportionality should be consistent. Parts I and II of this article have demonstrated that, while the jurisprudence has been inconsistent, the weight of the precedent indicates that such a review requires an evaluation of the considerations set out by Justice Powell in his opinions in both *Solem* and *Rummel*, and identified earlier in this article: the nature of the offense and the defendant’s culpability as compared to the severity of the sanction, as well as a comparative analysis of the sentence imposed.

The nature or type of punishment imposed should not be determinative of whether proportionality review is required, or of which standard a court will apply. Each of these sanctions admittedly imposes a penalty on an individual, or sometimes, in the case of punitive damages, on an entity. The justifications for each of these penalties have been that they are needed to further deterrence and to punish. The fact that the punishment is in the

⁴²⁶ *State Farm*, 123 S. Ct. at 1524.

⁴²⁷ *Id.* at 1516.

⁴²⁸ *Atkins v. Virginia*, 536 U.S. 304, 231 (2002) (finding that imposing the death penalty on retarded criminals is unconstitutionally excessive) (emphasis added).

form of death, money, property, or a term of imprisonment does not justify a separate standard for each. Rather, the type of punishment imposed should be considered in the context of the crime the defendant committed or the improper behavior in which the defendant engaged. For example, while certain behavior might warrant forfeiture of a significant amount of money, similar behavior might not justify an extremely long prison sentence.⁴²⁹ Similarly, particularly egregious forms of murder can support imposition of the death penalty, while other quite serious offenses cannot.⁴³⁰

Furthermore, even when striking certain sanctions, the Court has relied on a high threshold of “gross disproportionality” or excessiveness, thereby allowing federalism and judicial deference concerns to inform the Court’s proportionality analysis, rather than imposing a requirement of strict proportionality. Nonetheless, the Court must not require such a high threshold of disproportionality as to abdicate all judicial review of the lengths of prison sentences. The Court’s most recent pronouncement on proportionality of terms of imprisonment in *Ewing* is inconsistent with the Court’s rulings in *State Farm*, *Gore*, and *Bajakajian*. First, neither *State Farm*, *Gore*, nor *Bajakajian* required a threshold determination of “gross disproportionality” before an analysis of other factors, such as inter- and intra- jurisdictional comparisons. In addition, both the *Gore* and *Bajakajian* opinions place significant emphasis on the individual culpability of the respective defendants, as well as on the magnitude of the harm they caused as compared to the sanction imposed. As discussed earlier, Justice Kennedy’s opinion in *Harmelin* considered only facts that implied greater culpability—even though the prosecution did not prove those facts beyond a reasonable doubt—yet completely ignored the reality that this was the defendant’s only offense. At the heart of concerns regarding proportionality of punishments is the notion of deservedness—the wrongdoer’s culpability.⁴³¹ Considerations of an individual’s culpability should be particularly acute where the individual faces a deprivation of liberty.

In addition to requiring a high threshold of disproportionality as to terms of imprisonment, the Court employs another mechanism out of respect for federalist concerns—substantial deference to state legislatures. In *Ewing*, a majority of the Court states, “[w]e do not sit as a ‘superlegislature’ to second-guess these policy choices. It is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons ‘advance[s] the goals of [its] criminal justice system in any substantial way.’”⁴³² However, where other

⁴²⁹ In *Bajakajian*, the majority pointed out that under the Sentencing Guidelines, the maximum prison sentence for failing to report currency is six months. 524 U.S. 321, 338 (1998). However, the dissent points out that the specific statute criminalizing a willful violation of the reporting statute authorizes a prison sentence of five years. *Id.* at 350 (Kennedy, J., dissenting).

⁴³⁰ See discussion of *Coker*, *supra* notes 71, 89 and accompanying text.

⁴³¹ See Johnson, *supra* note 26, at 496.

⁴³² *Ewing v. California*, 123 S. Ct. 1179, 1189 (2003).

constitutional rights are at issue, the Court does not always permit such a degree of deference. The area of regulatory takings provides one example. In *Nollan v. California Coastal Commission*, the Court stated, “our cases describe the condition for abridgment of property rights through the police power as a ‘substantial advanc[ing]’ of a legitimate state interest.”⁴³³ Indeed, the Court dismissed as a mere play on words the justification for the permit condition and expressed distrust of the Coastal Commission’s motives, stating, “unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but ‘an out-and-out plan of extortion.’”⁴³⁴ Subsequently, in *Dolan v. City of Tigard*, the Court added an additional layer of judicial review stating, “[i]f we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development.”⁴³⁵ The Court defines this nexus as, “rough proportionality” requiring “the city [to] make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”⁴³⁶ Despite detailed and specific findings by the city as to the need for the conditions imposed on Dolan, the Court nonetheless found an unconstitutional taking. Certainly, a property owner challenging governmental action as a taking is not deserving of any punishment. However, my point is that both the property owner and the criminal are seeking protection of important constitutional rights, protection of property and liberty, yet the Court more closely scrutinizes governmental action when property is at stake.⁴³⁷

The fact that different sections of the Constitution are implicated with respect to these different sanctions is not a compelling reason to justify the lack of any meaningful review of terms of imprisonment. Forfeitures and criminal sanctions are both covered by the Eighth Amendment, but under different clauses. While the Excessive Fines Clause is arguably explicit in its inclusion of proportionality review, as Section I.A of this article has shown, the overwhelming majority of the relevant precedent supports proportionality review of criminal sanctions.⁴³⁸ Furthermore, one commentator has made a sound argument for requiring closer scrutiny of

⁴³³ 483 U.S. 825, 841 (1987) (citations omitted) (finding a violation of the Fifth Amendment Takings Clause where Coastal Commission imposed, as a building permit condition, the grant of a public easement across a private beach).

⁴³⁴ *Id.*, at 838, 837.

⁴³⁵ 512 U.S. 374, 386 (1994) (finding a Fifth Amendment violation).

⁴³⁶ *Id.* at 391.

⁴³⁷ This analogy is similar to that made in Susan R. Estrich & Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119, 144 (1989), where the authors argue that if the Court requires the showing of an actual governmental purpose furthered through narrowly tailored regulations before denying opportunities to whites, as in *City of Richmond v. J. A. Croson Co.*, 109 S. Ct. 706 (1989), then “[s]urely . . . it can require nothing less before states burden women in the exercise of their fundamental rights.” Estrich & Sullivan, at 144.

⁴³⁸ *But see* Johnson, *supra* note 26, at 504–05.

criminal sanctions because these involve deprivations of liberty, or possibly even death, and, thus, are more serious than losses of property or money.⁴³⁹

The Supreme Court has determined that punitive damages awards are not reviewable under the Eighth Amendment, but rather come within the purview of the Due Process Clause of the Fourteenth Amendment.⁴⁴⁰ The Court's rationale was that the Eighth Amendment does not apply to damages awards between private parties.⁴⁴¹ This appears to be based on yet another civil-criminal dichotomy.⁴⁴² However, this line has begun to blur as well. In her dissenting opinion in *Gore*, Justice Ginsburg included an appendix illustrating the various types of punitive damages schemes among the states.⁴⁴³ One category identifies thirteen states with statutes that require a certain percentage of punitive damages awards be allocated to a state agency.⁴⁴⁴ For example, Missouri law allocates fifty percent of a punitive damages award, minus expenses and attorneys' fees to the Tort Victims' Compensation Fund.⁴⁴⁵ Oregon allocates sixty percent of such an award to the Criminal Injuries Compensation Account.⁴⁴⁶ Utah, the state in which the *State Farm* case took place, allocates 50% of a punitive damage award in excess of \$20,000 to the state treasury,⁴⁴⁷ and, thus, stood to gain about \$62,500 if the U.S. Supreme Court had upheld the \$145 million punitive damages award against State Farm. Punitive damages awards are no longer simply a matter between private parties; a number of state governments stand to benefit from such awards. Thus, the justification for excluding the amount of a punitive damages award from scrutiny under the Eighth Amendment is fading.

Just as state governments might benefit from punitive damages awards, they also stand to gain from forfeitures of property and money.⁴⁴⁸ Justice Scalia pointed to the difference between criminal sanctions and forfeitures to justify greater judicial scrutiny of forfeitures:

There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporeal punishment,

⁴³⁹ See Gershowitz, *supra* note 26, at 1288 (comparing the scrutiny of criminal sanctions to punitive damages awards).

⁴⁴⁰ *Browning-Ferris Indus. of Vt. v. Kelco*, 492 U.S. 257 (1989).

⁴⁴¹ *Id.* at 259–60.

⁴⁴² See generally *supra* note 218.

⁴⁴³ 517 U.S. 559, 614–17 (1996) (Ginsburg, J., dissenting).

⁴⁴⁴ *Id.* at 616–17 (Ginsburg, J., dissenting).

⁴⁴⁵ *Id.* at 617 (citing MO. REV. STAT. § 537.675 (1994)).

⁴⁴⁶ *Id.* (citing S. 482, 68th Leg. (July 19, 1995) (enacted) (amending OR. REV. STAT. §§ 18.540 and 30.925 and repealing ORE. REV. STAT. § 14.315)).

⁴⁴⁷ *Id.* at 618 (citing UTAH CODE ANN. § 78-18-1(3) (1992)).

⁴⁴⁸ See Little, *supra* note 6, at 204 (“While government agencies fill their coffers with proceeds from drug-related seizures, instances of forfeiture abuse become more routine across the country.”). See also Johnson, *supra* note 26, at 510 (quoting a former head of the Justice Department’s Asset Forfeiture Office describing that section’s approach as “Forfeit, forfeit, forfeit. Get money, get money, get money.”).

and even capital punishment cost a State money; fines are a source of revenue.⁴⁴⁹

A couple of observations follow from this quote. First, fines are no longer unique in resulting in a government's financial gain; as the above paragraph indicates, the line between such forfeitures and punitive damages awards is no longer so clear. Second, while criminal sanctions impose a monetary cost on government, it is not true that such costs serve as a sufficient check on the lengths of terms of imprisonment that exceed what is necessary to achieve accepted goals of punishment. The enactment of California's Three Strikes legislation is a good example of how public pressure and an elected politician's "tough on crime" stance can result in draconian criminal sentences. There are a couple of interesting aspects about the context in which California's Three Strikes legislation came about. First, initial efforts to pass the legislation were not effective until the nationally publicized kidnapping and murder of young Polly Klaas.⁴⁵⁰ The Klaas crime could not have changed the relevant data regarding recidivism. As one commentator has observed:

Heightened fears of increased crime may lead to a belief that society should turn its attention away from the rights of the accused and toward an emphasis on public safety. These fears, and their accompanying shift in public priorities, may carry the voters and their representatives on a wave of retributive emotion to enact laws that might otherwise have faced more intense scrutiny.⁴⁵¹

More specifically, scholars have stated that "state politicians were afraid to question the 'anti-crime fervor' that gripped the public following the Klaas murder."⁴⁵² Politicians who did question the measure "were publicly derided and vilified."⁴⁵³ Indeed, "the public's fear of the dangerous recidivist was translated into the political fear of the elected official."⁴⁵⁴ Thus, anyone with political ambitions or who wanted to remain in politics could hardly oppose Three Strikes without being labeled "soft on crime."

Justice Scalia is correct that imposing criminal sanctions is a financial burden borne by government. One study has concluded that "for the [California] prison system, Three Strikes is a crisis deferred, one for which 'Californians will pay dearly . . . on the installment plan.'"⁴⁵⁵ Even though the Three Strikes law imposes a significant financial burden on California,

⁴⁴⁹ Harmelin v. Michigan, 501 U.S. 957, 979 n.9 (1991).

⁴⁵⁰ Vitiello, *supra* note 328, at 260.

⁴⁵¹ Mark W. Owens, *California's Three Strikes Law: Desperate Times Require Desperate Measures—But Will It Work?*, 26 PAC. L.J. 881, 882 (1995).

⁴⁵² Luna, *supra* note 326, at 5 (citations omitted).

⁴⁵³ *Id.*

⁴⁵⁴ *Id.* See also Vitiello, *supra* note 328, at 280 ("Prominent politicians of virtually all political stripes who lined up behind Three Strikes do not yet seem poised to withdraw their support. If anything, the upcoming gubernatorial election will likely increase claims that Three Strikes has been effective and that the particular candidates deserve credit for the decline in crime.").

⁴⁵⁵ Vitiello, *supra* note 328, at 280 (quoting Franklin E. Zimring, Gordon Hawkins & Sam Kamin, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 138 (2001)).

this has not led to any reforms of the law, even in the context of cases like *Andrade* where a defendant receives a life sentence when the third strike is petty theft. Furthermore, as Erik Luna points out, “little political capital was at stake by advocating Three Strikes—recidivists have few defenders and no lobby.”⁴⁵⁶

This last point raises a concern Justice O’Connor emphasized with respect to punitive damages awards in her dissenting opinion in *TXO Production Corp. v. Alliance Resources Corp.*, decided just two years after *Harmelin*. Specifically, she expressed her concern that biased attitudes toward corporations can result in excessive punitive damages awards: “Courts long have recognized that jurors may view large corporations with great disfavor.”⁴⁵⁷ Further, “[c]orporations are mere abstractions and, as such, are unlikely to be viewed with much sympathy.”⁴⁵⁸ Justice O’Connor is concerned that bias and prejudice might influence the size of punitive damages awards and argues that federal courts must intervene because “[i]nfluences such as caprice, passion, bias, and prejudice are antithetical to the rule of law. If there is a fixture of due process, it is that a verdict based on such influences cannot stand.”⁴⁵⁹ Passion and bias against criminal defendants is certainly greater and impacts all criminal defendants. The events surrounding the passage of California’s Three Strikes initiative is another good example of how such passions against criminal defendants can lead to draconian criminal sentences.⁴⁶⁰ In fact, such anti-criminal passions are not limited to the Three Strikes law in California. Rather, this initiative is one in a line of pro-victim and anti-criminal voter initiatives passed in California. A number of commentators have lamented that successful voter initiatives in California are the result of passion and bias rather than careful reflection, especially when it comes to the rights of criminal defendants.⁴⁶¹ Justice O’Connor’s worry about the prejudice faced by defendant corporations who pay large punitive damages awards seems almost silly when compared to the bias against criminal defendants who may be deprived of their liberty for the rest of their lives.⁴⁶² This is especially true when, certainly as compared to criminal defendants, corporations can exert influence in the political process.

⁴⁵⁶ Luna, *supra* note 326, at 6–7.

⁴⁵⁷ *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 490 (1993) (O’Connor, J., dissenting).

⁴⁵⁸ *Id.* at 491 (O’Connor, J., dissenting).

⁴⁵⁹ *Id.* at 475–76 (O’Connor, J., dissenting).

⁴⁶⁰ See Franklin E. Zimring, Gordon Hawkins, & Sam Kamin, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU’RE OUT IN CALIFORNIA (2001).

⁴⁶¹ I do not plan to explore the issue of direct democracy and the impact this has had on the constitutional rights of criminal defendants under California’s constitution. The following articles represent a small portion of this vast literature. John H. Culver, *The Transformation of the California Supreme Court: 1977–1997*, 61 ALB. L. REV. 1461 (1998); Rachel A. Van Cleave, *State Constitutional Interpretation and Methodology*, 28 N.M.L. REV. 199 (1998); Harry N. Scheiber, *Foreword: The Direct Ballot and State Constitutionalism*, 28 RUTGERS L.J. 787 (1997); Dubber, *supra* note 333; Rachel A. Van Cleave, *A Constitution in Conflict: The Doctrine of Independent State Grounds and the Voter Initiative in California*, 21 HASTINGS CONST. L.Q. 95 (1993); Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?*, 64 WASH. L. REV. 19 (1989).

⁴⁶² In *Lockyer v. Andrade*, Justice Souter argues that *Andrade*’s sentence amounts to a life sentence. 123 S. Ct. 1166, 1176–77 (2003) (Souter, J., dissenting).

The political process is very ineffective in ensuring that the rights of criminal defendants and convicts will be protected or given adequate consideration. Adam Gershowitz makes an excellent argument that this justifies greater judicial scrutiny of criminal sanctions as compared to that of punitive damages awards.⁴⁶³ This is especially true where criminal laws are the result of public passions and perhaps even misconceptions regarding criminals and crime rates. As two commentators have pointed out, in the context of abortion, we do not leave other constitutional rights to the whims of the political process.⁴⁶⁴ While severe, or even excessive, criminal sanctions result in a financial cost to the government. Support of such sentences often results in political rewards, and these punishments should therefore be subject to the same degree of scrutiny as punitive damages awards and forfeitures. “[P]olitics should not dictate constitutional rights.”⁴⁶⁵

The Supreme Court should have taken the opportunity it had in *Ewing* and *Andrade* to implement meaningful proportionality review as to terms of imprisonment, consistent with the *State Farm*, *Gore*, and *Bajakajian* cases. Instead, the decisions of the 2002–2003 Term only highlighted the serious inconsistency of the Court’s review of different types of sanctions. This article urges a consistent approach as to all of these sanctions. I recognize arguments for making distinctions as to the level of scrutiny to apply, but I believe that these either overlook important factors, such as “the politics of crime,”⁴⁶⁶ or are simply not strong enough to justify different standards of review. Perhaps just as disturbing is the fact that the Court gives no explanation or justification for the varying standards of review, despite the three opportunities it had.

⁴⁶³ Gershowitz, *supra* note 26, at 1297–1301

⁴⁶⁴ Estrich & Sullivan, *supra* note 437, at 150–51 (discussing arguments pro-choice advocates should direct to Justice O’Connor).

⁴⁶⁵ *Id.* at 155.

⁴⁶⁶ See Susan Estrich, *Politics of Crime Skips Over Issues*, ARIZ. REPUBLIC, Mar. 10, 1994, at B7.