Although the Eighth Amendment guarantees proportionality in noncapital criminal sentencing, federal and state courts have struggled when deciding individual cases, and the Supreme Court has failed to articulate legal rules that could promote the development of a coherent jurisprudence. Working within the governing law and building on the work already done by scholars who have focused on this problem, I propose three principles: transparency, limited deference, and a “felt sense of justice,” that could guide the process of proportionality review and contribute to defining a retributivist touchstone for proportionality judgments. Focusing on the required threshold inquiry, I also outline an analytical framework for examining offense gravity and sentence severity, and determining gross disproportionality. My proposal identifies four analytical factors for assessing offense gravity: harm, culpability, violence, and magnitude; and two for evaluating sentence severity: the offender’s “real sentence,” and likely age and life opportunities upon release from prison.

Introduction

Intuitively, the idea of proportionality between crime and punishment seems simple. There ought to be some sensible relationship between the wrong committed and the sentence imposed. The difficulty, though, lies in making normative judgments about what makes sense in this context. For example, in 2003, the Supreme Court concluded that a fifty-year sentence for stealing nine videotapes worth approximately $150 made sufficient sense to deny federal habeas relief. [FN1] The bedrock requirement is the Eighth Amendment’s prohibition against cruel and unusual punishment, [FN2] but the contours of this requirement remain unclear. Building on strands of Supreme Court precedent and the work already published in law review literature on this topic, I propose three principles: transparency, limited deference, and a “felt sense of justice,” that could contribute to the development of a more coherent jurisprudence of proportionality. I also outline an analytical framework for implementing these principles that is consistent with governing law.

In a series of six decisions over the last twenty-five years, [FN4] the Court has developed a three-part test and five principles for proportionality analysis in noncapital criminal cases. Despite their numerosity, these parts and principles do not provide practical guidance or a coherent theoretical framework for analyzing proportionality challenges. The problem lies both with application of the first part of the test, and interpretation of the principles. The Court has not expressly articulated the relationship between the three-part test and the five principles, but presumably the principles inform application of the test. The Court established its three-part test in Solem v. Helm. [FN5]

*529 The first part of the test consists of a threshold that typically bars application of the second and third parts. [FN6] The threshold requires a comparison of offense gravity and sentence severity, and a determination of whether this comparison reveals “gross disproportionality.” [FN7] The second and third parts call for an intrajurisdictional review of sentences received within the state for more and less serious crimes, and an interjurisdictional review of sentences received in other states for the same crime. [FN8] If the threshold is not met, then proportionality analysis ends. Only if the threshold is met do courts apply parts two and three.

Despite the determinative effect of the first part of the Solem test in the vast majority of cases, the Supreme Court has not established a process for making this threshold judgment, nor any substantive guideposts. Instead, shifting pluralities of the Court have posited five general principles for addressing proportionality challenges in noncapital cases. [FN9] These principles are: use of objective factors, legislative primacy, penological pluralism, federalism, and gross disproportionality. [FN10] At first blush, each principle seems reasonable if not incontrovertible. When interpreted in a blunt rather than nuanced fashion, however, the result is to substitute conclusory reiterations of these principles for rigorous analysis of individual cases.

An exhortation to rely on objective factors in assessing proportionality makes sense. The alternative is often characterized as subjective, standardless decisionmaking based on the predilections and politics of individual judges. Yet there is no process or convention for interpreting objectivity or applying the Solem test in light of an objectivity principle. To the contrary, although the second and third parts of the test could anchor proportionality assessments in fact-based determinations regarding local and national sentencing practices, they often are not employed. The first part, which is arguably the least objective, rarely permits intra- and interjurisdictional review. Rigorous application of the first Solem factor requires assessments of offense gravity and sentence severity, and then an overarching judgment regarding gross disproportionality. Courts face these tasks with little concrete guidance, and the temptation simply to conclude there is no gross disproportionality is strong.

Similarly, the principle of legislative primacy has been too easily interpreted as absolute deference to legislatively imposed sentencing protocols. This results in an abdication of judicial responsibility to review noncapital criminal sentences and uphold Eighth Amendment proportionality standards. Penological pluralism also devolves into a judicial hands-off policy since virtually any sentence can be supported under one of the traditional justifications for punishment--namely, retribution, deterrence, incapacitation, and rehabilitation. Broadly interpreted, federalism conflicts with the third Solem factor, interjurisdictional review. Although the development of standards for comparing sentences across states is possible, [FN11] invocations of federalism have substituted for engagement in this analysis. The principle of gross disproportionality is the standard for the first Solem factor and broadly governs the enterprise of analyzing proportionality in noncapital criminal sentencing.

The Supreme Court has been fractiously divided in its approach to Eighth Amendment proportionality in noncapital sentencing. [FN12] Scholars who have focused on this topic, as opposed to proportionality in capital punishment or punitive damage awards, have criticized the absence of a workable theoretical framework for assessing proportionality and proposed a variety of potential solutions. [FN13] While many of these critiques ring true, the Solem test and five principles will likely govern proportionality analysis in the foreseeable future. In the spirit of working to bridge the gap between the legal academy and the legal profession, [FN14] I theorize within three of the Court's five principles and then outline a process for applying the first Solem factor that is consistent with my interpretation of objective factors, legislative primacy, and penological pluralism. [FN15]

Building on themes revealed by Supreme Court precedent as well as the work of other commentators, I explain how the concepts of transparency, limited deference, and a felt sense of justice would operate within the Court's principles. Transparency would promote reliance on objective factors by creating a clearer framework for conducting proportionality analysis and an expectation of engagement. Transparency requires courts to articulate the objective factors employed in making the threshold gross disproportionality determination. [FN16] It would create a duty to explain how explicit offense gravity and sentence severity considerations apply to individual cases. Over time, the accrual of fact-based proportionality judgments in individual cases would lead to the development of proportionality rules. These decisions would create a database of experience that courts and commentators could interpret and use to rationalize proportionality judgments.

Limited deference would invigorate judicial review of legislative sentencing schemes and expose overreliance on the principle of legislative primacy as a substitute for judicial review. Legislatures obviously have the institutional competence to promulgate general rules in pursuit of policy goals. Limited deference does not usurp
this authority. Instead, it moderates the judicial impulse to shy away from evaluating offense gravity and sentence severity in specific cases. A strong understanding of the judiciary’s legitimate role in assessing proportionality in individual cases would counteract the near total deference courts often give to legislatures in noncapital criminal sentencing. Limited deference is the flip side of an assumption of responsibility to conduct meaningful proportionality analysis. It requires making substantive judgments about whether specific sentences for specific offenses give rise to an inference of gross disproportionality. If a sentencing challenge passes the threshold test, then intra- and *532 interjurisdictional review would further inform an analysis of Eighth Amendment proportionality.

Within the context of penological pluralism, a felt sense of justice could guide the emergence of a retributivist touchstone within the Eighth Amendment. There is a well-recognized divide in justifications for punishment between retributivism on the one hand, and utilitarian theories of deterrence and incapacitation on the other. [FN17] While some have attempted to construct proportionality guidelines under the umbrella of utilitarianism, [FN18] I am persuaded that proportionality between offense and sentence “is inherently a concept tied to the penological goal of retribution.” [FN19] A felt sense of justice could balance the legislature’s prerogative to establish criminal sentencing policy with a judicially-enforced retributivist limitation. [FN20] Regardless of how well a particular sentence may deter crime or incapacitate criminals, sentences that bear no retributivist resemblance to the offenses they purport to punish violate Eighth Amendment proportionality.

My proposed process for applying the first part of the Solem test incorporates four analytical factors for offense gravity and two for sentence severity. The offense factors call for evaluating gravity along four axes: harm, culpability, violence, and magnitude. The sentence factors require consideration of severity based on the actual sentence likely to be served rather than the imposed sentence, and on the offender’s age and life opportunities at the time of his or her likely release. [FN21] These factors are embedded within the first Solem factor and create a structure for making fact-based judgments regarding offense gravity and sentence severity.

*533 Transparency would demand that courts apply these offense and sentence factors and create a written record of their analytical processes. Limited deference and a felt sense of justice would impact the threshold assessment regarding gross disproportionality. Courts could not simply rely on legislative primacy and penological pluralism to justify a conclusion that the threshold has not been met. Instead, these principles would encourage them to adjudicate proportionality in individual cases, and give them a theoretical touchstone, retributivism, to guide determinations of gross disproportionality. The threshold test factors would establish a well-defined structure for assessing offense gravity and sentence severity, and contribute to the development of normative standards and predictability.

In Section I, I reinterpret Rummel v. Estelle and its progeny through the prism of the Supreme Court’s five principles. The standard line of six cases spans close to twenty-five years, and each decision contains contradictory elements and reasoning that appears to be based more on shifting alliances and membership on the Court than principled analysis. Apart from communicating sub rosa that Eighth Amendment proportionality in noncapital cases is so weakened as to be virtually meaningless, the Supreme Court has failed to build a stable methodology for addressing proportionality challenges. In Section II, I survey the law review literature on proportionality in noncapital criminal sentencing, highlighting aspects that could contribute to more rational and meaningful review. My proposal is situated in the space between this work and the day-to-day work of the courts. In Section III, I propose a theoretical framework for making threshold proportionality judgments, interpreting three of the Court’s principles in connection with transparency, limited deference, and a felt sense of justice. I then identify specific factors for courts to apply when making threshold proportionality decisions. In Section IV, I foreshadow how the use of my offense gravity and sentence severity factors could lead to the development of proportionality rules.

I. Governing Law and Seeds of Change

A review of Supreme Court precedent illustrates the problems embedded in its five principles and the Solem test. The cases also contain markers that can lead towards a more productive approach to proportionality in
noncapital criminal sentencing. The Court was badly split in the standard line of six cases with three 5-4 decisions, two plurality opinions, and one *534 per curiam opinion. [FN22] Parsing these cases demonstrates how invocations of the four principles of legislative primacy, penological pluralism, federalism, and gross disproportionality have substituted for real proportionality analysis. The potential for the fifth principle, reliance on objective factors, to promote the development of a rational, predictable methodology for proportionality analysis has not been realized, particularly with application of the first Solem factor.

The story of these six cases is one of jockeying Justices, topsy-turvy results, and sui generis reasoning. Presented with strong evidence of disproportionality in Rummel v. Estelle, [FN23] Justice Rehnquist, writing for a five-member majority, characterized proportionality judgments as inherently subjective and thus more appropriately the subject of legislative rather than judicial decisionmaking. The dissent, authored by Justice Powell, foreshadowed the Solem test and championed the ability and institutional competence of courts to make objective proportionality judgments anchored by a felt sense of justice. [FN24]

In Rummel, the Court affirmed a mandatory life sentence under Texas's recidivist statute following William James Rummel's three property-related felony convictions over ten years, totaling less than $230 in monetary loss. [FN25] Invoking the mantra of objectivity, the Court advised that “Eighth Amendment judgments . . . should be informed by objective factors to the *535 maximum possible extent.” [FN26] It rejected Rummel's arguments based on the nonviolent nature and low dollar value of his crime, asserting that the absence or presence of violence was not determinative, and that distinguishing between crimes of “$5,000, $50,000, or $500,000” was inherently subjective. [FN27] The Court also relied on arguments related to legislative primacy, and referred to multiple penological goals and federalism to support its conclusion. [FN28]

The Rummel dissent distilled objective factors from prior case law that would minimize the risk of constitutionalizing the personal predilections of federal judges; they included “(i) the nature of the offense, (ii) the sentence imposed for commission of the same crime in other jurisdictions, and (iii) the sentence imposed upon other criminals in the same jurisdiction.” [FN29] Applying this framework, the dissent concluded that the offense was relatively minor, and that inter- and intrajurisdictional reviews revealed unconstitutional disproportionality. [FN30]

Hutto v. Davis mirrored the result in Rummel, but represented an expansion of judicial deference in proportionality jurisprudence to a nonrecidivist sentencing context. In Hutto, virtually the same majority of five Justices, with O'Connor substituting for Stewart, reversed the circuit court's grant of habeas relief. [FN31] Justice Powell, who had dissented in *536 Rummel, switched sides and concurred in Hutto based on stare decisis. [FN32] The Court's per curiam decision granted the State's petition for a writ of certiorari, and by summary order reversed the judgment below and remanded the case with instructions to dismiss. [FN33] The result was to uphold Roger Trenton Davis's forty-year sentence for possession with intent to distribute and distribution of approximately nine ounces of marijuana worth about $200. [FN34] Linking its concern about objectivity with deference to the legislature and federalism, the Court relied heavily on Rummel in ruling against Davis's proportionality claim. [FN35] Justice Brennan, in dissent, focused on limitations to legislative deference, proposing a rule of greater deference to recidivist sentencing schemes, and less deference in reviewing individual sentences: the “general principle of deference . . . cannot justify the complete abdication of our responsibility to enforce the Eighth Amendment.” [FN36]

Having written the dissent in Rummel, and a concurrence in Hutto, Justice Powell wrote for a five-member majority in Solem v. Helm, and held that the challenged recidivist sentence was unconstitutionally disproportionate. [FN37] Solem is the only one in this line of cases to find an Eighth Amendment violation. [FN38] Justice Blackmun, who had been in the *537 majority in the two prior decisions, switched sides. The decisive factor for Powell and Blackmun appeared to be the possibility of objective assessments of offense gravity and sentence severity. [FN39] Although the triggering crime was Solem's seventh felony, [FN40] the Court held that a sentence of life without possibility of parole for the triggering offense of passing a bad check for $100 violated Eighth Amendment proportionality. [FN41] The Court revived and established an objective three-part test for analyzing proportionality
and emphasized the importance of the judiciary's role as a check on the legislature. [FN42]

Defining the first part of the test as a comparison of offense gravity and sentence severity, the Solem Court characterized evaluation of the former as an ordering task, and evaluation of the latter as a line-drawing task. [FN43] Identifying harm, culpability, and violence as relevant offense gravity considerations, the Court posited that (1) “courts are competent to judge the gravity of an offense, at least on a relative scale,” and (2) “[c]omparisons can be made in light of the harm caused or threatened to the victim or society, and the culpability of the offender.” [FN44] With respect to sentence severity, the Court relied in part on the obvious ranking of penalties based on the number of years of incarceration, and expressed confidence in the ability of courts to make these judgments just as they “draw similar lines in a variety of contexts.” [FN45] Applying this framework, the Court held that *538 Helm's triggering offense involved neither violence nor threatened violence, and a relatively small amount of money. [FN46] Additionally, Helm's life sentence without possibility of parole, unlike Rummel's, which allowed for parole within twelve years, was “the most severe punishment that the State could have imposed on any criminal for any crime.” [FN47] The Solem Court conducted an intra- and interjurisdictional review and concluded that “objective criteria” had revealed significant disproportionality. [FN48]

Eight years later in Harmelin v. Michigan, [FN49] with Justices Scalia, Kennedy, and Souter substituting for Chief Justice Burger and Justices Powell and Brennan respectively, down was up again. Justice Scalia, joined by Chief Justice Rehnquist, asserted for the first time that there is no Eighth Amendment proportionality requirement in noncapital cases. [FN50] Justice Kennedy wrote a plurality opinion upholding a legislatively mandated *539 sentence of life without parole for Ronald Allen Harmelin, a first-time offender convicted of possessing 672 grams of cocaine. [FN51] This time Justice White, who had been in the majority in Rummel and Hutto, and the dissent in Solem, switched sides and dissented along with Blackmun, Stevens, and Marshall. [FN52]

Reaffirming the existence of a proportionality principle, [FN53] Kennedy's opinion in Harmelin modified the three-part test outlined in Solem, privileging the first Solem factor such that “intrajurisdictional and interjurisdictional analyses are 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.” [FN54] Kennedy also culled five principles to guide proportionality analysis: legislative primacy, [FN55] penological pluralism, [FN56] federalism, [FN57] objective factors, [FN58] and gross *540 disproportionality. [FN59] Although life without possibility of parole was the second most severe sentence permitted by law, Kennedy ranked possession of more than 650 grams of cocaine as high on the offense gravity scale. [FN60] Since “a comparison of [Harmelin's] crime with his sentence d [id] not give rise to an inference of gross disproportionality,” no intrajurisdictional or interjurisdictional analysis was required. [FN61]

Twelve years after Harmelin, in Ewing v. California, [FN62] and Lockyer v. Andrade, [FN63] down stayed up, and the Court rejected two proportionality challenges under California's three-strikes recidivist sentencing statute. [FN64] In Ewing, Justice Scalia and Justice Thomas, who had replaced Justice Marshall, wrote separate concurring opinions maintaining there is no proportionality requirement. [FN65] Chief Justice Rehnquist remained on the same side, but switched positions, leaving Scalia and joining Justice *541 O'Connor's plurality opinion along with Justice Kennedy. [FN66] With four prior felonies, Gary Ewing received a minimum of twenty-five years to life for felony grand theft of three golf clubs worth $399 each. [FN67] Theft of these clubs was a “wobbler” offense, which meant it could have been classified as either a felony or misdemeanor, but the prosecutor and trial judge decided to treat it as a felony third strike. [FN68]

O'Connor's singular focus on legislative primacy distorted her application of the modified Solem test. [FN69] Relying on the “longstanding tradition of deferring to state legislatures” for making the difficult policy choices that underlie any criminal sentencing scheme, she failed to delineate any boundaries for such deference. [FN70] The plurality concluded that Ewing's offense gravity level was high based on the seriousness of felony grand theft of approximately $1,200 of merchandise, [FN71] and his long history of felony recidivism. [FN72] With respect to sentence severity, while recognizing *542 that twenty-five years to life is a long sentence, O'Connor reasoned that
“it reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated.” [FN73] Concluding that Ewing's sentence had failed the threshold test for gross disproportionality, the plurality held that it passed constitutional muster without conducting an inter- or intrajurisdictional review. [FN74]

Justice O'Connor wrote again in Lockyer, this time for a five-member majority. [FN75] She framed the issue narrowly as a question of the appropriate standard of review in a state habeas case: whether the court decision was “contrary to, or an unreasonable application of, clearly established federal law.” [FN76] Leandro Andrade had been sentenced as a recidivist to two consecutive terms of twenty-five years to life for stealing five videotapes on one occasion and four more videotapes two weeks later, with a total value of approximately $150. [FN77] Although the triggering crimes for the combined fifty-year sentence, two petty theft with a prior conviction offenses, were "wobbler" offenses, [FN78] the prosecutor chose to charge Andrade with two felony theft counts, and the trial court denied his motion to reduce the charges to misdemeanors. [FN79]

*543* Acknowledging the difficulty of determining what constitutes clearly established law in proportionality review, [FN80] the Court nevertheless cited the “one governing legal principle [that] emerges . . .: A gross disproportionality principle is applicable to sentences for terms of years.” [FN81] Reasoning that this principle "gives legislatures broad discretion" in fashioning sentences, and that its "'precise contours' . . . [are] 'unclear,'” it held that the state appellate court's affirmation of the sentence was not contrary to clearly established federal law nor objectively unreasonable. [FN82] In dissent, Justice Souter maintained that Andrade's offense of stealing $150 worth of children's videotapes from Kmart was closely analogous to that of the defendant in Solem who wrote a bad check for $100. [FN83] “[B]ecause Andrade was 37 years old when sentenced,” Souter concluded that “his 50-year [minimum sentence] amounts to life without parole.” [FN84] Even under an incapacitation justification, the proportionality of a second twenty-five-year sentence for stealing four videotapes worth $68.84 “does not raise a seriously debatable point on which judgments might reasonably differ.” [FN85] Souter concluded that “[t]his is the rare sentence of demonstrable gross disproportionality . . . [and] [i]f Andrade's sentence is not grossly disproportionate, the principle has no meaning.” [FN86]

*544* The Court's five proportionality principles and threshold test have allowed, and perhaps encouraged, courts to conduct a mechanical analysis, in which some principles are recited along with some facts, and the conclusions are then assumed. Instead, courts should be articulating the reasoning underlying their proportionality judgments, explicitly naming the factors they considered and the facts they found to be dispositive. This kind of transparency would help to sharpen the analytic process and would not be contrary to existing law. The silver lining to the confusion in Supreme Court precedent is that it leaves room for reinvigorating Eighth Amendment proportionality in noncapital criminal sentencing. Scholars have already begun the work of unpacking proportionality, and my proposal is predicated on their insights.

II. Distance Between Commentators and Courts

The law review literature on Eighth Amendment proportionality is vast, with scholars focusing on the topic through a variety of lenses ranging from doctrinal and historical to philosophical, from quantitative and empirical to economic, and from criminology, sociology, and psychology to comparative law and international law. Even within the relatively narrower slice of doctrinally based approaches, Eighth Amendment proportionality applies in multiple contexts, such as the death penalty, punitive damages, excessive fines and bail, modes of punishment, and proportionality between noncapital offenses and sentences in terms of years.

Critiques of the law of proportionality in noncapital sentencing also take a variety of forms that consider questions such as institutional competence to determine sentence length, the political process that results in various sentence lengths, and the theoretical justifications for punishing varying offenses with varying sentence lengths. Of the smaller subset of commentators who address proportionality in noncapital criminal sentencing, none explicitly work within the context of the modified Solem test and five principles, and none have developed concrete guidelines.
for conducting the offense gravity and sentence severity analysis required under the first part of the Solem test. I seek to work in the gap between the analytical and theoretical work done by these scholars and the work of courts, lawyers, and litigants on real cases.

The law review literature most relevant to my focus on sharpening the analytical process within the first Solem factor falls roughly into three categories: one that analyzes Supreme Court precedent and suggests remedial approaches, one that draws on the social sciences and notions of human rights for organizing precepts to guide proportionality analysis, and one that delves into the theoretical justifications for punishment to create limits on proportionality analysis. Each of the scholars whose work I discuss below has recognized the lack of coherence in the theory and practice of applying the Eighth Amendment's prohibition against cruel and unusual punishment in noncapital cases, and each has sought to clarify this area of jurisprudence. My proposal is built on their work as well as within the confines of Supreme Court precedent.

A. Court-Focused Approaches

As experienced Supreme Court litigators, Pamela Karlan and Erwin Chemerinsky both approach proportionality from a perspective that places the Court at the center of their analyses. Karlan characterizes the process of evaluating proportionality in criminal punishment as “pricking the lines,” describing the difficulty with “translating the principle into a standard for judicial oversight.” She frames the question as one of mediating between the judiciary and the legislature, and determining when courts can trump legislatures. Karlan outlines three potential categories of judicial review: low, medium, and high, but does not advocate for a particular approach. Chemerinsky calls for “a unified, coherent theory of constitutional limits on punishment,” that encompasses imprisonment as well as the death penalty, fines, and punitive damages. He seeks to bring the ends to the middle, tightening the errantly loose proportionality review of noncapital criminal sentences, and relaxing the overly stringent proportionality review of punitive damages. With respect to proportionality in noncapital criminal sentencing, Chemerinsky's specific proposal is for application of the functional equivalent of all three Solem factors in all cases.

My proposal adopts Karlan's high level of judicial proportionality review because the information and perspective that judges have about the individual costs of prison sentences has been marginalized in the public debate, and their expertise in applying general rules to specific facts underutilized. Legislatures obviously could and do on occasion obtain this information from judges, but are under no obligation to do so. Regardless of individual judges' political affiliations or subjective views on crime and punishment, multiple explanations of the justness, appropriateness, and constitutionality of sentences imposed in individual cases have value in and of themselves. Ideally, there would be a diversity of experiences and views in the judiciary that could inform and shape our nation's criminal justice system. This would be particularly true if judges were given specific guidance and addressed the same questions in multiple factual contexts.

In contrast to Chemerinsky's proposal regarding universal application of his three proportionality factors, I focus more narrowly on sharpening application of the first Solem factor. I additionally would be hesitant to discard the punitive to compensatory damages ratio analysis, as he suggests, because I believe a similar approach to examining proportionality in recidivist sentencing may be helpful. As Karlan observes, the Justices of the Supreme Court seem to be committed to a judicially enforceable proportionality principle, and yet reluctant to look outward through intra- and interjurisdictional review, or to look inward to their own understandings of offense gravity and sentence severity. My proposal is grounded in precedent requiring a threshold assessment of proportionality between offense gravity and sentence severity. I offer overarching principles that complement those identified by the Court, and concrete assessment tools that could enable courts to look inward in a more structured, and transparent way. My proposal has the potential to make the lines being pricked more clearly visible and more strongly drawn.

*548 B. Interdisciplinary Approaches

Drawing on the methodology and concepts of psychology, and of philosophy and international human rights, respectively, Paul Robinson and Markus Dubber focus more broadly on policy questions raised by proportionality in noncapital criminal sentencing. Robinson and John Darley have designed and used social science research to describe community views on punishment, which they maintain should guide sentencing policies and practices. [FN98] They maintain that punishment should be imposed in accordance with desert principles because imposing excessively long sentences, as measured by lay intuitions of justice, undermines the development of normative social values and, ultimately, crime control. [FN99] A felt sense of justice is related to desert principles, although I propose relying on courts to determine where a threshold retributivist line should be drawn in individual cases.

Robinson's structural analysis of sentencing decisions also informs my proposal. He and Barbara Spellman analyze the strengths and weaknesses of various sentencing decisionmakers (judges, juries, legislatures, sentencing commissions, and parole boards), [FN100] and segment sentencing decisions into six distinct phases, including determining punishment amount. [FN101] They assert that judges and sentencing commissioners have comparable training and expertise in applying decisional rules to facts and making normative judgments about facts, but that “the more detailed the rules, the more efficient it is to rely upon a single sentencing judge to implement them. The less detailed the rules, the greater the need for a sentencing commission to apply them in the individual case.” [FN102] My proposal outlines more detailed rules for application of the first Solem factor, but less for the purpose of efficiency than because such a system would leverage the expertise of judges in decisionmaking within individual cases. [FN103]

Where Robinson focuses on the function of sentencing, Dubber focuses on its morality. Dubber seeks to import a principle of human dignity to anchor Eighth Amendment proportionality analysis:

[C]onstitutional law of . . . punishment requires . . . recognizing this fundamental principle . . . and working out its implications for the criminal process . . . from the definition of norms (the realm of substantive criminal law) to their application (the domain of procedural criminal law) to their enforcement (the sphere of prison law). [FN104] Noting the long recognized dichotomy between the absence of meaningful constitutional constraints on substantive criminal law and the thoroughly constitutionalized procedural criminal law, [FN105] Dubber maintains that human dignity “is not a dignity that is bestowed upon persons, either by other *persons or by ‘the state’ or ‘society’ or some community or other . . . it is a moral, as opposed to an ethical or political, property.” [FN106]

Dubber posits that international human rights law and philosophy form a more solid foundation for constitutional criminal law, characterizing traditional legal analysis as a nearly senseless search for oracular signs from the U.S. Supreme Court. [FN107] He traces some of the practice and theory of human dignity from the Preamble of the 1948 Universal Declaration of Human Rights to the 1971 publication of John Rawls's A Theory of Justice. [FN108] Making the connection between human dignity and punishment, Dubber states that “the very nature of ‘governments’ as guarantors of rights both grounds, and constrains, the state's power to punish. . . . [I]t imposes upon the state a general requirement of proportionality of crime and punishment.” [FN109]

As with Robinson's desert principle, Dubber's concept of human dignity can inform a felt sense of justice: “[P]roportionality is . . . a fundamental principle of justice that emanates directly from the state's essential duty to protect the personal right of its constituents.” [FN110] Developing a normative, retributivist touchstone for proportionality judgments under this rubric demands more from courts than encouraging a judicial process that is *trans*parent and that assumes the decisionmaking responsibility required by a principle of limited deference. I propose, as a first step towards this more ambitious goal, that courts recognize the legitimacy and importance of a “felt sense of justice” and begin to name the implicit retributivist strands in their individual, contextualized decisions. The work of scholars like Robinson and Dubber could help to add substantive content to the process that I suggest.

C. Theoretical Approaches
Like the interdisciplinary approaches discussed above, the following theoretical approaches provide additional support for a variation of limited retributivism that I have framed as a felt sense of justice. The criminal law theories of retributivism, deterrence, incapacitation, and rehabilitation are axiomatic justifications for punishment. [FN111] In terms of proportionality, retributivism focuses on the past, already committed offense, and utilitarianism focuses on preventing future harm by deterring, incapacitating, and rehabilitating the offender and other potential offenders. [FN112] Retributivism assesses the offender's past actions and evaluates blameworthiness, as measured by the nature and seriousness of the harm and the offender's degree of culpability. [FN113] Utilitarianism's forward-looking perspective links punishment to predictions of future harm and values punishment based on the resulting net benefit to society. [FN114]

To counter the Supreme Court's acceptance of any one of the traditional punishment justifications as sufficient to support a prison sentence, Youngjae Lee proposes a theory of retributivism as a side constraint. [FN115] Under this theory, “multiple purposes of punishment may be pursued so long as no sentence that is undeservedly harsh is imposed.” [FN116] Retributivism *552 as a side constraint could serve as a structure that prevents trading off important proportionality rights without special justification. [FN117] Similarly, my proposal to implement a process for developing a felt sense of justice does not require that retributivism be the only legitimate justification for punishment, but that it must be one of the justifications and thus exert a limiting proportionality effect.

In contrast, Richard Frase develops two theories of nonretributive proportionality predicated on utilitarian principles. One measures proportionality relative to the ends being pursued—whether “the measure's costs and burdens . . . outweigh the likely benefits.” [FN118] The other measures proportionality relative “to other, less costly or burdensome means of achieving the same goals.” [FN119] With respect to the threshold step of the modified Solem test, Frase proposes application of a three-part analysis, examining (1) retributive proportionality, (2) ends proportionality, and (3) means proportionality. [FN120] My proposal is most similar to his in terms of seeking to work within the first Solem factor. It seems unlikely, though, that *553 courts would adopt his sophisticated, layered analysis on even a limited selection of criminal sentences. [FN121]

III. Modified Principles and Proportionality Tools

I propose using transparency, limited deference, and a felt sense of justice to supplement the Court's objective factors principle and to modify current interpretations of legislative primacy and penological pluralism. Applying my proposed principles to the comparison of offense gravity and sentence severity, and to the threshold assessment of gross disproportionality, would support the development of an explicit, predictable proportionality process. In practice, courts have adopted such a high standard for gross disproportionality and such a low standard for their own responsibility to make meaningful proportionality judgments that virtually no case requires intra- and interjurisdictional review. This practice may have developed out of uncertainty as to how to conduct a principled proportionality review, or perhaps out of skepticism that such review could be anything but subjective and thus illegitimate. Regardless, my proposal seeks to substitute a more structured and rigorous application of the threshold test for conclusory assumptions of gross disproportionality.

A. Transparency and Objectivity

Adoption of a transparency principle is predicated on the existence of a decisionmaking process that can be articulated and explained, i.e., that is transparent. Reliance on objective factors in making proportionality threshold decisions would be enhanced if courts cited the factors weighed, and explained the multiple judgments entailed in applying the threshold test. [FN122] The critique that proportionality assessments are inevitably subjective stems in part from a failure to consistently follow an established analytical process. One alternative possibility would be for courts to conduct intra- and interjurisdictional comparisons in every instance to insure that proportionality assessments are not grossly inconsistent with *554 state and national sentencing patterns. [FN123] Absent an
explicit readoption of the original Solem test, however, courts must first determine whether a given sentence meets a threshold gross disproportionality standard. Currently, comparative analysis occurs only if this threshold is met.

In contrast, a transparency principle could work within the current decisional landscape. Transparency demands that courts justify the decision that a particular sentence is not grossly disproportionate in relation to a particular offense, as opposed to concluding without explanation that the threshold has not been met. [FN124] To the extent that normative judgments cannot be avoided, requiring a court to detail why it has reached a particular conclusion given a particular factual circumstance can contribute to the development of decisional norms and predictability. Moreover, decisional line drawing is not unique to threshold proportionality assessments. In Solem, the Court referenced the line drawing entailed in adjudicating claims based on the Sixth Amendment right to a speedy trial. [FN125] Other examples where “[t]he absence of a black-letter rule” requires judges to draw lines include determining the materiality of undisclosed evidence, whether a confession was coerced, and whether criminal defense counsel was ineffective. [FN126]

Two potential objections to applying a transparency principle are that it cannot be done and that it should not be done. An examination of the Supreme Court's approach to assessing the proportionality of civil punitive damages awards undercuts the argument that a transparent process for applying the first Solem factor is not possible. Notwithstanding the differences between a legislatively established sentencing scheme and a jury verdict on punitive damages, the fact that courts can and have developed rules for making what might otherwise be considered a hopelessly subjective judgment demonstrates that such rule development is possible. [FN127] The process of making decisions in individual cases, and then explaining those decisions would provide valuable information from which to rationalize and develop rules for proportionality analysis in noncapital criminal sentencing.

Additionally, some courts have already engaged in transparent decisionmaking when faced with challenges to a criminal sentence's proportionality. Two examples are court decisions in the federal appellate courts, and in the California Supreme Court prior to Rummel. In a 1973 decision, the Fourth Circuit held that a mandatory life sentence for a defendant who wrote a $50 check on insufficient funds in 1949, transported $140 in forged checks across state lines in 1955, and then committed perjury at his son's murder trial in 1968 violated the Eighth Amendment. [FN128] The court articulated a four-part analytical process and applied this process to the facts in the case. [FN129] In the six to seven years following this decision, the Fourth Circuit upheld six state sentences against Eighth Amendment challenges, and only twice held that noncapital sentences were unconstitutionally disproportionate. [FN130] Similarly, during the period before and just after Rummel, the California Supreme Court ruled only a half a dozen times that specific sentences, such as an indeterminate life sentence for a second offense of indecent exposure, were unconstitutional. [FN131]

With respect to stewardship of judicial resources, transparency in analyzing the first Solem factor would not require a full-blown intra- and interjurisdictional review in every case. Moreover, not every transparent decisionmaking process would require a long exposition. Sentencing challenges alleging gross disproportionality will likely fall into three categories: easy cases, hard cases, and cases in the middle. Easy cases would require only some explanation about why the judge viewed the offense and sentence as well-matched. Transparency in these cases would likely yield few differences in outcomes--with the important caveat that a court must articulate why it views particular cases as easy. Hard cases would, in any event, require examination of the second and third Solem factors, and the work done analyzing the first Solem factor would be of use in determining which offenses are more and less serious for purposes of intrajurisdictional review. Cases in the middle which currently are being summarily dismissed would require more detailed analysis and thus expend more judicial resources. Requiring transparency would promote a more rigorous analysis so that courts could more accurately distinguish between easy and mid-level cases. The additional cost is warranted as a matter of principle in terms of upholding Eighth Amendment standards. Additionally, as courts gain experience making threshold proportionality decisions in a transparent manner, they will gain efficiency, and costs will decrease.

B. Limited Deference

Like transparency, limited deference addresses a judicial failure to apply the first Solem factor in a meaningful way. Whereas transparency demands explicit, written decisionmaking, limited deference is designed to counteract wholesale deference to the legislature and the abdication of responsibility by courts. From the Second Circuit, in which judicial review appears to be limited to determining whether the sentence falls within the administrative or legislative range, \[\text{FN132}\] to the Fourth Circuit, in which courts decline even to engage in proportionality review for sentences less than life without parole, \[\text{FN133}\] the record of federal appellate court proportionality review in *557 noncapital criminal cases is mixed. \[\text{FN134}\] Of the thirteen state supreme courts citing Ewing, two found sentences unconstitutionally disproportionate, \[\text{FN135}\] three did not substantively address proportionality, \[\text{FN136}\] and of the eight remaining states, two misstated the law on at least one occasion. \[\text{FN137}\] If complete deference were the appropriate standard, then the reviewing court's role would be to intervene only when a sentence fell outside the governing legislative scheme. \[\text{FN138}\] According to Rummel and its progeny, however, wholesale deference is not the articulated standard. \[\text{FN139}\]

There are several plausible reasons for the dearth of substantively reasoned decisions and the apparent lack of judicial enthusiasm for these cases. By establishing a gross disproportionality standard, limiting intra-*558 and interjurisdictional analysis with a threshold test, and articulating a principle of legislative primacy, the Supreme Court has limited, but not completely withdrawn from, reviewing proportionality in noncapital criminal sentencing. Lower courts could easily interpret the Court's pronouncements, however, as signaling a hands-off approach. \[\text{FN140}\] Alternatively, courts simply may be confused by the Supreme Court's contradictory and inconsistent treatment of proportionality challenges. A third possibility is that lower courts are reluctant to invest resources into making threshold comparisons of offense gravity and sentence severity because these assessments seem subjective and value laden as opposed to objective and neutral. \[\text{FN141}\]

Whatever the reason, adopting a perspective of wholesale deference contradicts the judiciary's duty to interpret and uphold the Constitution, and the Supreme Court's approach in the arguably analogous area of proportionality of civil fines and punitive damages. While recognizing the important and frequently determinative role of legislatures in criminal justice matters generally and with sentence length in particular, a principle of limited deference demands that courts act as a check on potential legislative excess. \[\text{FN142}\] “[N]o penalty is per se constitutional,” \[\text{FN143}\] and “the fact that a punishment has been legislatively mandated does not automatically render it legal or usual in the constitutional sense.” \[\text{FN144}\] Both in capital and noncapital contexts, the Court has adjudicated the constitutionality of legislative enactments regarding punishment. \[\text{FN145}\] It is moreover *559 "emphatically the province and duty of the judicial department to say what the law is,” and to determine whether a legislative enactment is consistent with the Constitution. \[\text{FN146}\]

Judicial abdication of responsibility under the guise of deference to the legislature is revealed by a hypothetical state sentencing scheme that penalizes offenders more or less harshly based on race, gender, or non-resident status. Article III courts obviously would have a constitutional duty to intervene under such a scenario. A sentencing scheme that violates the Eighth Amendment's proportionality requirement similarly warrants court intervention. Line drawing related to offense gravity and sentence severity is appropriately vested in the legislature in the first instance. \[\text{FN147}\] However, judicial review for Eighth Amendment proportionality should be more than a rubber stamp based on an invocation of deference to the legislature.

In addition to having a duty to review the proportionality of criminal sentences, courts are capable of making carefully considered sentencing decisions based on their experience imposing sentences and reviewing them. Congress itself recognized the judiciary's institutional competence to address questions of sentencing when it “placed the [U.S. Sentencing] Commission in the Judicial Branch precisely because of the Judiciary's special knowledge and expertise: [S]entencing is a field in which the Judicial Branch long has exercised substantive or political judgment.” \[\text{FN148}\] Reviewing noncapital sentences for gross disproportionality is a natural and necessary corollary to courts' already existing sentencing work. Courts have well-developed processes for garnering the sentencing information they need from prosecutors, defense attorneys, and probation departments. They have
experience interpreting legislatively determined sentencing ranges, mandatory minimums, and recidivist sentencing schemes. They have similar experience with calculating an offender’s term of incarceration under federal and state sentencing guidelines. A principle of limited deference would encourage courts to take a more deliberative and assertive approach to upholding constitutional proportionality.

The system of checks and balances between the judicial, legislative, and executive branches of government requires communication. [FN149] As courts impose criminal sentences and adjudicate direct appeals from and habeas challenges to these sentences, they could explicitly hone their collective proportionality judgment. Focusing more attention on the first threshold factor would enable courts to more fully develop a jurisprudence of offense gravity, sentence severity, and the relationship between the two. Over time, the experience of making explicit proportionality judgments would expose which facts tend to be material and which inconsequential. This knowledge could be shared with the legislative and executive branches through published opinions.

While not every threshold decision would require extended analysis and discussion, those that did could provide important information to legislatures as they continue to develop generally applicable rules. While legislatures have the capacity to conduct fact-gathering hearings and are generally entrusted with making broad policy decisions, courts have expertise in applying the law and in determining the fairness and constitutionality of its application in individual cases. [FN150] The legitimacy of our criminal justice system depends in part on public confidence in the fairness of sentences imposed. Courts should share with legislatures the information they have about individual cases and their approach to analyzing proportionality in sentencing. This information and perspective is an important and missing part of the public discourse.

Finally, courts' demonstrated ability to determine when punitive damages awards are grossly excessive evidences their ability to assess proportionality in criminal sentencing. While some have criticized the Supreme Court for being overly aggressive in reviewing civil punitive damage awards, [FN151] there is a long standing practice of carefully scrutinizing the proportionality of these awards. [FN152] This protection stems from the Due Process Clause of the Fourteenth Amendment which the Court has held affords substantive protection against grossly excessive punitive damages awards. [FN153] Judicial review of punitive damages is de novo and essentially constitutes a proportionality assessment in a civil context. [FN154] Like the modified Solem test, there are three guideposts for analyzing constitutional challenges to punitive damages awards: (1) reprehensibility of the misconduct (offense gravity); (2) ratio of punitive damages to compensatory damages (sentence severity); and (3) a comparison of punitive damages to civil or criminal penalties for similar misconduct (intra- and interjurisdictional review). [FN155] The fact that a meaningful proportionality review occurs in this civil context suggests the possibility of similarly meaningful review in a criminal context.

The Supreme Court's differing approach to proportionality in a criminal sentencing versus civil punitive damages context is patent. [FN156] The question is whether it is justified. The familiarity of quantifying compensatory damages may cause proportionality review to seem easier in civil punitive damages cases than in cases challenging criminal sentences. Additionally reviewing jury awards by relatively few, and far more localized, decisionmakers may seem more appealing than reviewing legislative enactments. [FN157] However, familiarity and ease do not justify anemic proportionality review in the criminal context. As Chemerinsky points out, there is no pressing social need to defer to legislative recidivist sentencing schemes on the one hand, but not to a legislature's refusal to limit punitive damages on the other. [FN158] Having determined that the Eighth Amendment contains a guarantee against grossly disproportionate sentences of incarceration, courts have a duty to uphold this protection.

C. Felt Sense of Justice

Unlike transparency and limited deference, a felt sense of justice addresses normative rather than process standards. Justice Powell's original stance in Rummel calling for a mandatory retributivist justification for all punishment seems beyond judicial reach in light of the Court's recent, explicit embrace of penological pluralism. [FN159] The development of a retributivist touchstone to ensure that sentences of imprisonment are not grossly
disproportionate does not, however, require a rejection of penological pluralism. A felt sense of justice could serve as an explanatory device for the legitimate exercise of judicial checks and balances on the legislative and executive branches under the Eighth Amendment. It would not require legislatures to jettison deterrence, incapacitation, and rehabilitation as justifications for punishment, or to redesign sentencing schemes in accordance with retributivist principles.

*563 Although any proposal for normative standards poses difficult questions about institutional competence and legitimacy, these standards are already embedded in our thinking about proportionality, and glimpses of them are visible in Supreme Court precedent. The parking hypothetical in Powell's Rummel dissent continues to resonate and provides a window for exploring the retributivist tie that is already a necessary component of constitutional punishment. [FN160] The existence of an orthodox view of the parking hypothetical is evidence of an implicit normative standard. Acknowledging the role of a felt sense of justice in proportionality assessments would aid in the development of a meaningful, as opposed to pro forma, approach to Eighth Amendment review. Discomfort with this principle can inhibit rigorous application of the first Solem factor and an overreliance on legislative primacy.

Powell's enduring hypothetical is as follows: “A statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice.” [FN161] One may readily agree that this severe a sentence for this minor an offense would be unconstitutional, but why? Imagine a legislature that articulated deterrence of unlawful behavior as the primary goal underlying its penal code, and a broken windows policy of harshly punishing small crimes in an effort to deter larger ones. [FN162] Assume that a first-time offender sentenced to life imprisonment in this jurisdiction would be parole eligible in ten years. [FN163] If the deterrence value of this tough a penalty were shown to be extremely high, then what exactly is not proportional? Why not defer to this legislative judgment?

One response to these questions is contained within the hypothetical. Although our felt sense of justice is obviously not susceptible to precise definition, court decisions demonstrate that it can be discerned on a case-by-case, fact-specific basis. [FN164] There are some normative absolutes, “extreme examples that no rational person, in no time or place, could accept.” [FN165] Herbert Packer has asserted that boiling people in oil is not irrational if the goal is deterrence, [FN166] and yet the notion of imposing such a punishment, even to deter the most heinous of crimes, is ludicrous. Although there are obvious differences between modes of punishment and proportionality of punishment, [FN167] both are subject to the Eighth Amendment prohibition against cruel and unusual punishment, [FN168] At least two Justices have recognized the connection between a retributivist, felt sense of justice and Eighth Amendment proportionality, [FN169] and there is value in acknowledging this connection, working to define its contours, and seeking to make the outcomes of a felt sense of justice analysis more predictable.

Judgments regarding proportionality are undeniably difficult to make. A normative decision that a particular type of punishment is unconstitutional requires an assessment of one factor, the punishment itself. In contrast, normative decisions about proportionality require an assessment of three factors, the offense, the sentence, and the relationship between the two. Additionally, although a determination that a particular mode of punishment is unconstitutional can be generalized and applied in subsequent cases, a determination that a particular term of imprisonment is unconstitutional must be revisited each time to examine the specific offense committed and interaction between offense and sentence. The fact that lines may be more easily drawn around unconstitutional modes of punishment than unconstitutionally disproportionate punishment does not, however, excuse courts from applying Eighth Amendment standards to terms of imprisonment.

Justice Scalia has maintained that decisions regarding the constitutionality of modes of punishment are cabined by “relatively clear historical guidelines and accepted practices,” while proportionality assessments are highly contextual and subjective. [FN170] In the former context, he seems to recognize something like a felt sense of justice that was informed by our shared values and history. Although public opinion regarding various modes of punishment, as opposed to sentencing proportionality, may be more homogenous, and the historical record more
clear, this seems like more of a difference in degree than in kind. [FN171] Judicial application of the offense gravity and sentence severity factors I propose would assist in the accretion of history regarding proportionality judgments. Even if one accepted the inevitability of clearer historical standards for types as opposed to amounts of punishment, a felt sense of justice would, and inherently must in any event, be contextualized. It is true that punishments may seem disproportionate “because they were made for other times or other places, with different social attitudes, different criminal epidemics, different public fears, and different prevailing theories of *566 penology.” [FN172] The role of the courts is to reflect these variables by applying, among other principles, a felt sense of justice in making Eighth Amendment proportionality assessments. [FN173]

Two examples that demonstrate the possibility of developing greater clarity regarding the components of a felt sense of justice can be found in the work that Robert Nozick and Joel Feinberg have done to define just punishment in accordance with retributivist principles. A survey of the philosophical literature in this area is beyond the scope of this article, and I offer these schemas as examples of what could be done, as opposed to exemplars of what should be done. As courts make transparent, explicit proportionality decisions, patterns will emerge and formulas like these can assist in explaining how and why a particular sentence is, or is not, grossly disproportionate to a particular crime. Nozick's formulation is as follows: Punishment deserved = responsibility x Harm (Pd = r x H). [FN174] The r ranges from no responsibility (0), such as where a criminal defendant is not guilty by reason of insanity, to full responsibility (1), where the defendant intentionally committed the crime. [FN175] The H is defined as the magnitude of the wrongness or harm. [FN176] Feinberg's formulation mediates between the deserving person (S) and the punishment deserved (X) with the desert basis (F), or (S <-> F <-> X). In Feinberg's words, “S deserves X in virtue of F.” [FN177] The F in this formulation is related to a felt sense of justice in terms of describing the retributivist tie between the offender and the sentence. While on their face these formulas call for an exact value for the sentence deserved, a felt sense of justice could act more as a limiting factor, prohibiting punishments that failed to meet a retributivist nexus requirement.

D. Proportionality Tools

The principles of transparency, limited deference, and a felt sense of justice provide the theoretical context in which to apply the following proportionality tools and process. These tools are designed to sharpen the initial exercise of judgment required under the first Solem factor, and to make this threshold decision more reliant on identified objective factors, more predictable, and less ad hoc. Focusing first on offense gravity, I draw on the work of Andrew von Hirsch to develop harm and culpability as two components that courts could use in evaluating offense gravity. I also set forth violence and magnitude as additional relevant considerations. Turning to sentence severity, I suggest analyzing an offender's real sentence, in terms of likely years of imprisonment, as opposed to the formal sentence imposed. Additionally, to measure the actual impact of a prison sentence, courts must consider objective measures of the offender's life prospects at the time of his or her release. An offender's age and likely health following a term of imprisonment is relevant to an evaluation of how severe an impact a given sentence will have. Although this may be viewed as unfairly disadvantaging younger, healthier offenders, and there may be exceptions, a determinate sentence generally impacts more severely on an older offender who may die in prison than on a younger offender who may have a variety of life opportunities when released. Equipped with these analytical tools for assessing offense gravity and sentence severity, a court's judgment regarding gross disproportionality can be better informed and explained.

*568 1. Offense Gravity

To summarize, there are four potential axes for evaluating offense gravity: harm scaling, culpability scaling, violence scaling, and magnitude scaling. The Solem majority identified harm and culpability as two offense gravity factors, as well as the “absolute magnitude” of the crime. [FN178] Harm was defined as the “harm caused or threatened to the victim or society,” and culpability was tied to criminal intent. [FN179] Magnitude and violence have also been discussed in Supreme Court proportionality precedent, but without the same degree of consensus. The Solem Court noted that its precepts “simply illustrate [] that there are generally accepted criteria for comparing
the severity of different crimes on a broad scale, despite the difficulties courts face in attempting to draw distinctions between similar crimes.”” [FN180]

a. Harm Scaling

Harm scaling focuses on the injury suffered by the individual and/or corporate victim. It also seeks to account for societal harm caused by a given offense. Looking beyond the label placed on a particular crime to the impact caused by that crime provides an additional information point. Legislatures have already made judgments about what constitutes a misdemeanor versus a felony, and which felonies are more serious than others. Courts are well positioned to make fact-specific assessments of the harm caused in an individual case by an individual offender.

*569 Andrew von Hirsch has theorized that individual harms fall into three categories: serious, intermediate, and lesser. [FN181] He defines serious or welfare harms as those that deprive persons of the ability “to choose and order their way of living.” [FN182] Death obviously falls within this category. [FN183] It also includes serious physical injury such as one that might prevent an athlete from competing in professional sports, or an artist from painting; a crime like rape which might derail a victim's ability to meaningfully pursue her life; and serious economic injury that takes a person's livelihood. [FN184]

Intermediate or security interests are those that provide a cushion “[b]eyond the bare minimum of health and economic well-being required to make any meaningful choices . . . . Without that margin, the person may barely be able to function but must live in acute anxiety and discomfort.” [FN185] An intermediate harm causes one's quality of life to deteriorate because there is no margin above what is minimally necessary to live. [FN186] Crimes like a residential burglary that violates one's home, or a substantial assault that violates one's personal integrity would cause intermediate harm. [FN187] The least serious harm affects accumulated interests. A crime like petty theft would cause a lesser harm, one that does not threaten one's core interests or the cushion around these interests that provide a margin of safety. [FN188]

Measuring the harm experienced by an individual victim may seem inherently subjective, but using either a reasonable or egg-shell skull victim standard explicitly and then analyzing the nature of the harm caused would develop a data set of these judgments. [FN189] This, in turn, could result in better-informed, more consistent decisionmaking about the level of harm caused. For example, the fact that an offender has committed a residential burglary would not be sufficient to determine the level of harm. If the home had been left basically intact, but for the items taken, then this crime might be deemed to cause a lesser harm. In contrast, another burglary in which similar items had been taken, but the home had also been wantonly vandalized and destroyed might be deemed to have caused an intermediate *570 level harm. Similarly, a robbery of the same amount of money, $500 for example, from a hedge fund manager on the one hand, and from an elderly retiree dependent on her social security check on the other, could be deemed to cause varying levels of harm. [FN190] The harm to corporate victims seems best measured in magnitude of monetary loss, which could incorporate reputational or good will interests.

The Harmelin and Ewing pluralities focused on threatened as well as actual or crystallized harm, at times placing great weight on the potential future harm that may result as a ripple effect of the crime committed. In Harmelin, the plurality relied heavily on the notion of future harm likely to be caused by the scourge of drug use, drug dealing, and drug-related violence on U.S. society in upholding the constitutionality of a life sentence without parole for a first-time offender convicted of drug possession. [FN191] Similarly, the plurality in Ewing weighed the defendant's prior burglary convictions more heavily because even though no one had actually been hurt at the time of these crimes, there was a possibility that someone might have been harmed and for violence to have ensued. [FN192] A related issue arises when courts consider unsuccessful attempts, or the effect that luck should have on an assessment of harm. [FN193] In the case of a residential burglary, the burglar may seek to maximize the odds that no one will be home by surveilling the home, learning when the occupants were likely to be out, and planning the crime for that window of time. Yet, whether or not someone happens to be in the home at the time of the crime is to some extent a matter of luck. Additionally, working to minimize this risk may expose the *571 offender to a longer sentence based
on premeditation, as opposed to committing a crime of opportunity.

The approach taken by the Harmelin and Ewing pluralities has the obvious, compounded difficulty of not just evaluating what happened, but predicting what could have happened and what is likely to happen in the future. It requires judgments about non-actualized and future risks of harm as well as actual harm. [FN194] To the extent that one is persuaded that assessments of actual harm are often subjective, assessments of potential past and future harm are hopelessly subjective. The simplest way in which to address these difficulties would be to evaluate more narrowly only what actually happened. Focusing on the here and now may lead to undeserved windfalls and unlucky penalties, but the possibility of devising a method of systematically addressing all possible contingencies seems low. If courts are compelled to consider threatened harm in their accounting of harm, then they should do so explicitly, explaining what they are predicting, what and how much harm could have or was likely to result, and how this impacts their final harm scaling judgment.

b. Culpability Scaling

While notions of offender responsibility are already partially accounted for in the liability judgment, such as when an offender is convicted of murder as opposed to manslaughter, culpability should nevertheless inform judicial judgments of offense gravity. Culpability is traditionally linked to levels of criminal intent. [FN195] In addition to consideration of mental states, excuses, and capacity, I propose that certain offender characteristics and criminal history should factor into culpability scaling. According to von Hirsch, an offender's culpability level is determined by four factors: (1) his or her mental state, such as purposeful, knowing, reckless, or negligent, (2) the existence or lack of an excuse, such as necessity or duress, (3) *572 diminished capacity, and (4) the offender's motives. [FN196] These factors are basic criminal law precepts with which courts adjudicating criminal prosecutions and sentencing those convicted of crimes have ample experience. [FN197]

A number of other offender characteristics may be relevant to a culpability assessment. For example, the federal sentencing guidelines note a number of specific offender characteristics that may impact sentencing within the guidelines range. These characteristics include age at the time of the offense, education level, drug dependence or alcohol abuse, and employment record. [FN198] While the guidelines generally discourage consideration of these characteristics for purposes of departing from the guideline range, courts have nonetheless considered them. For example, both the Ninth Circuit and District of Columbia Circuit considered lack of guidance as a youth as grounds for a downward departure prior to the Sentencing Commission's amendment explicitly disapproving this factor. [FN199] These courts held that youthful lack of guidance remained a valid departure ground for certain offenders because eliminating it would constitute an Ex Post Facto Clause violation. [FN200]

Finally, criminal history is also relevant to culpability. Von Hirsch has suggested that an offender should receive a desert discount for a first offense and is more deserving of punishment for a second or third offense following a term or terms of imprisonment. [FN201] The Supreme Court has held that sentencing enhancements based on criminal history do not violate double jeopardy, [FN202] and the federal sentencing guidelines create a grid with criminal history on one axis and offense level on the other. [FN203] Under the guidelines, the worse an offender's criminal history, the more determinative it is of the sentencing range. [FN204]

*573 c. Violence Scaling

Although the Supreme Court has been skeptical about the usefulness of violence scaling, it seems uncontroversial to assert that, all other things being equal, a crime committed through violent means is more grave than the same crime committed through nonviolent means. [FN205] In the same way that it had rejected the precursor to the Solem three-part test, the Rummel Court rejected the notion that characterizing a crime as violent assisted in an objective assessment of offense gravity. Justice Rehnquist supported this assertion with an example from literature. He reasoned that Claudius's murder of Hamlet's father by poisoning is arguably less violent than
Brutus's murder of Caesar by stabbing, but should not be punished more lightly. [FN206]

Another potential argument against the value of violence scaling is that it unfairly privileges white-collar nonviolent crime. Rehnquist described the following scenarios:

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. [FN207]*574 While rational people could disagree, their disagreement would not stem from the fact that violence has ambiguous significance when evaluating offense gravity. In this example, harm in terms of the numerous low-income shareholders affected, culpability in terms of the violation of a position of trust, and magnitude in terms of the dollar amount of the loss would weigh against the highly placed executive. While the bank robber would receive a higher violence rating, his magnitude rating would be lower. An assessment of the robber's harm and culpability scaling would depend on facts such as whether someone was hurt, and possibly the robber's motive for stealing the money.

As with other areas of judicial decisionmaking, the potential for rational disagreement about the significance of violence does not absolve courts of the responsibility to make individual offense gravity judgments and to explain them. In Harmelin, Justice White in a dissent joined by two other Justices asserted that the offense at issue, possession of over 650 grams of cocaine, was nonviolent. [FN208] Justice Kennedy, writing for himself and two other Justices, called this assertion of nonviolence “false to the point of absurdity.” [FN209] But, the fact that these Justices disagreed does not mean that violence scaling should not be done. As long as courts explicitly set forth the reasons for their conclusions, these varying judgments would create a database of violence assessments. Analysis of this data could lead to the development of experience-based rules for more predictable decisionmaking in the future. Currently, as reflected in legislative enactments, the U.S. Sentencing Guidelines, and in individual cases involving drug offenses, there appears to be some consensus that drug-related crimes rank high on a general offense gravity scale. Application of violence and harm scaling would require courts to do more than simply state that a drug possession crime is violent and causes great harm. Courts would be accountable for explaining the reasoning behind their conclusions, and these reasons would then be subject to testing.

d. Magnitude Scaling

The concept of magnitude scaling is straightforward. Having evaluated the consequences of the offense (harm), the blameworthiness of the offender (culpability), and the nature of the offense (violence), magnitude seeks to measure the size of the offense. One way to examine magnitude is *575 through the monetary value of the crime committed. As with violence scaling in Rummel, Rehnquist contended that the line drawing between $120.75, $5,000, $50,000, and $500,000 was hopelessly subjective. [FN210] While distinguishing between a crime of $45,000 and one of $50,000 may feel subjective, it seems indisputable that all other things being equal, a crime of $120.75 is less serious than one of $5,000. The fact that it might be more difficult to measure the difference between a crime of $120.75 and $500, or to match sentences in terms of years to specific crimes does not make the task of distinguishing between exponential differences in magnitude inherently subjective.

Rehnquist also used the concept of attempt to argue that magnitude scaling was not productive. [FN211] It is true that in a failed attempt to steal $50,000, no money is lost, but the offender would be no less blameworthy, only less skillful, than if he had succeeded. [FN212] The fact that the magnitude of the crime might not be large would be counteracted by the offender's steady culpability level, regardless of success or failure. Attempts by definition cause less tangible harm than completed crimes, and therefore, a thwarted fraud in the amount of $50,000 would score low on harm and magnitude scales. In terms of offender culpability, however, education level and trust betrayed could yield a high culpability level, and an attempt may or may not be violent. These various scales would yield an overall offense gravity score that reflects the intuition that such judgments should not depend solely on the amount of monetary damage caused. [FN213]
2. Sentence Severity

Sentence severity has been less fully theorized than offense gravity. In one sense, ranking sentences in terms of years of imprisonment is a simple arithmetical task. Two aspects of sentence severity that courts should explicitly consider, however, are actual versus imposed sentence, and the *offender's age and opportunities at the time of his or her likely release.* [FN214] Although the threshold test precedes an intrajurisdictional review, courts could additionally consider relative sentence severity within the state. Examining sentence severity alone, without connection to various offenses, would be a simple task and could reveal useful information. For example, Justice White's dissent in Harmelin noted that Michigan has no death penalty, and that the defendant's mandatory life sentence without parole was the most severe punishment possible. [FN215] This suggested analysis would entail identifying the most severe punishment available within the jurisdiction, the top of the severity range, and assessing the sentence at issue in comparison with the most severe punishment. Examining this relationship would provide additional information with which to evaluate sentence severity.

In terms of the actual sentence likely to be served, it may be significantly less severe than the sentence imposed, particularly in state systems versus the federal system. As a practical matter, the realistic probable sentence length is more relevant to sentence severity than the formal sentence. While calculating the likely period of incarceration is a more difficult task than examining the ranges set forth in sentencing statutes and guidelines, prosecutors, defense attorneys, and probation personnel could likely assist courts by providing this information. “[M]any States provide good-time credits and parole, often permitting release after say, one-third of the sentence has been served.” [FN216] Justice Breyer's analysis, in his Ewing dissent, of the challenged sentence focused in part on “the length of the prison term in real time, i.e., the time that the offender is likely actually to spend in prison.” [FN217] Breyer reasoned that Ewing's triggering conduct and criminal history were similar to that of both Helm and Rummel, whose sentences were held, respectively, to be unconstitutionally disproportionate and to pass constitutional muster. [FN218] “The one critical factor that explains the difference in the outcome is the length of the likely prison term measured in real time.” [FN219] Ewing's real sentence of at least twenty-five years without parole or good-time credits is more than double Rummel's ten-to-twelve-year real sentence, and roughly equivalent to Helm's life without parole real sentence. [FN220]

The exchange between the Solem majority and dissenting opinions regarding the possibility of executive clemency further illustrates the importance of focusing on an offender's real sentence. The Solem Court rejected the state's attempt to analogize between executive clemency and the possibility of parole in Rummel v. Estelle. [FN221] The Solem dissent asserted without citation that “a well-behaved ‘lifer’ in [Helm's] position is most unlikely to serve for life,” [FN222] analogizing to the possibility that Rummel would receive parole. [FN223] The Solem Court brushed aside this argument, stating in a footnote that: “[S]ince the Rummel Court--like the dissent today--offered no standards for determining when an Eighth Amendment violation has occurred, it is controlling only in a similar factual situation.” [FN224]

An analysis of the offender's age and life opportunities at the likely time of release is closely related to an analysis of actual sentence. One could consider the difference in sentence severity between a thirty-year sentence imposed on a twenty-year-old offender, and that same thirty-year sentence imposed on a forty-five-year-old offender. Once the sentence has been served, the prisoner released at age fifty has some possibility of building a meaningful life, of working, and of reconnecting with family and friends. The offender released at age seventy-five, [FN225] on the other hand, has little likelihood of working, may find that family and friends have died, and will distinctly be at the end of his or her life. [FN226] Although as a general matter, a sentence may impact more severely on older offenders, judicial analysis on a case-by-case basis may reveal exceptions. [FN227] Poor health may also affect* an assessment of sentence severity. To an offender with a life expectancy of three to five years, a ten-year sentence is the practical equivalent of a life sentence. One could also consider the same life without possibility of parole sentence imposed on a fifteen-year-old offender, and on a thirty-five-year-old offender. The mandatory life sentence imposed on the younger offender, as a practical matter, is twenty years more severe.

Accordingly, courts should explicitly consider the age, health, and life prospects of the offender and the effect that this might have on an assessment of sentence severity.

IV. Developing Proportionality Rules

Earlier I commented on the questionable value of having eight proportionality principles and factors, and now I have added six more tools for applying the first Solem factor. Although more is sometimes less, explicit consideration of harm, culpability, violence, and magnitude in assessing offense gravity; and of the real sentence imposed and the offender's likely age and opportunities when released would lead to the development of needed proportionality rules. Much of the current legal analysis of Eighth Amendment proportionality seems to be based on a concept I call color matching. This process entails looking at the facts of the Rummel line of cases, trying to match the facts of the case under consideration with one of these cases, and then assuming the same constitutional result. [FN228] Color matching is legal analysis by analogy as opposed to a deeper, rule-based analysis that legitimately applies principles of stare decisis. To the extent that courts are applying hidden, implicit rules, application of my proportionality tools would bring them to the surface. Following Ewing and Andrade, in which five Justices upheld twenty-five-year and fifty-year sentences for crimes that clearly would receive low harm, violence, and magnitude scores, [FN229] superficial color matching would eviscerate Eighth Amendment proportionality protection. My proposal *580 outlines a process through which courts could assume responsibility for making contextualized decisions in a manner that is transparent and that would promote reliance on objective factors. I describe below a carefully reasoned district court decision to illustrate how use of my offense gravity and sentence severity factors could lead to greater coherence and predictability in proportionality jurisprudence.

In United States v. Angelos, [FN230] the court transparently wrestled with a difficult sentencing decision. [FN231] In 2002, then twenty-two-year-old Weldon Angelos sold $350 of marijuana on three occasions to a government informant. [FN232] After he rejected an initial plea offer in which the government agreed to recommend a fifteen-year prison sentence, the government obtained two superseding indictments including charges exposing Angelos to over 105 years in prison. [FN233] Angelos went to trial, and was convicted on sixteen counts, including three under 18 U.S.C. ' 924(c), which carried mandatory minimums. [FN234] Although Angelos had no significant criminal history, the three charges with mandatory minimums plus the mandatory consecutive sentences for the other counts based on the Sentencing Guidelines totaled sixty-one and one half years. [FN235] Assuming application of the federal system's approximately 15% good behavior credit, Angelos's *581 real sentence is fifty-five years, and since he was twenty-three at the time of sentencing, he would likely be released at age seventy-eight. [FN236]

Angelos raised an Eighth Amendment challenge to this sentence, [FN237] and the court applied the Solem three-part test. In examining offense gravity under the first factor, the court reviewed "the offenses of conviction and the defendant's criminal history, as well as 'the harm caused or threatened to the victim or society, and the culpability of the offender.'" [FN238] This iteration of offenses, criminal history, harm, and culpability overlaps with my proposed offense gravity factors. I would include a consideration of criminal history in culpability scaling, and explicitly conclude that Angelo's magnitude scaling was low, based on selling a total of $1050 of marijuana. The court determined that the actual conduct was modest. [FN239] Angelos was convicted of twice possessing a handgun under his clothing while selling small amounts of marijuana without having brandished or used the handgun, and possessing handguns in his home which were used for protection while dealing drugs. [FN240] In terms of violence:

Angelos did not engage in force or violence, or threats of force or violence, in furtherance of or in connection with the offenses for which he has been convicted. No offense involved injury to any person or the threat of injury to any person. It is well-established that crimes marked by violence or threat of violence are more serious and that the absence of direct violence affects the strength of society's interest in punishing a particular criminal. [FN241] Under my rubric, the undercover agent who bought the drugs was not significantly harmed, Angelos had no
prior adult criminal convictions [FN242] and no remarkably high culpability factors, the magnitude of the crime was low, and there was no violence. This analysis “strongly suggests not merely *582 disproportionality, but gross disproportionality,” satisfying the first factor. [FN243] This case demonstrates the viability of my proposal, and suggests that even multiple drug offenses while in possession of a weapon could be rated low on an offense gravity scale if (1) no one is harmed, as opposed to injuring the agent or actual victim; (2) culpability is low, as opposed to an offender with multiple prior offenses; (3) there is no violence, as opposed to shooting someone; and (4) the drug is marijuana and the quantity is small, as opposed to dealing large quantities of heroin or cocaine. Although the court then confirmed gross disproportionality through intra- and interjurisdictional review, [FN244] it engaged in a form of color matching with Hutto v. Davis, [FN245] in which a forty-year sentence for possession of nine ounces of marijuana had passed constitutional muster, [FN246] and reluctantly imposed Angelo's fifty-five-year sentence. The Tenth Circuit upheld the sentence imposed, but criticized the district court for “fail[ing] to accord proper deference to Congress's decision to severely punish criminals who repeatedly possess firearms in connection with drug-trafficking crimes, and erroneously downplay[ing] the seriousness of Angelos's crimes.” [FN247]

*583 Conclusion

The key to resuscitating proportionality analysis in noncapital criminal sentencing lies in strengthening the rigor with which courts analyze offense gravity and sentence severity. Courts need a clear methodology for engaging in Eighth Amendment analysis and must be empowered to trust their own case-by-case conclusions. Confusion in Supreme Court case law has resulted in an overreliance on legislative primacy, penological pluralism, federalism, and gross disproportionality in place of principled application of the first Solem factor. In terms of process, transparency creates a means for capturing the analytical work entailed in deciding individual cases, and limited deference encourages courts to take responsibility for making proportionality judgments. A felt sense of justice relates to developing substantive retributivist limits on the relationship between crime and punishment. These three principles supplement and modify the Supreme Court's proportionality principles in the same way that my proposed proportionality tools outline an analytical framework within the modified Solem test. Explicitly considering offense gravity factors (harm, culpability, violence, and magnitude) and sentence severity factors (an offender's real sentence, and likely age and life opportunities upon release) is critical to better decisionmaking and the development of experience-based analytical rules. Courts' ability to make gross disproportionality judgments would be enhanced by more detailed and thoughtful assessments of offense gravity and sentence severity. Proportionality in noncapital criminal sentencing can be resuscitated by clarifying the theoretical framework already contained in Supreme Court precedent and moving beyond a color matching approach.

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[FN4]. The standard line of cases is as follows: Lockyer, 538 U.S. at 66, 77 (affirming, on habeas review, two consecutive sentences of twenty-five years to life for stealing approximately $150 of videotapes, where defendant
had three prior felony convictions); 

**Ewing v. California**, 538 U.S. 11, 18, 30-31 (2003) (affirming sentence of twenty-five years to life for stealing approximately $1,200 of golf clubs, where defendant had four prior felony convictions); 

**Harmelin v. Michigan**, 501 U.S. 957, 961, 994 (1991) (affirming sentence of life without parole for first offense of possessing 672 grams of cocaine); 

**Solem v. Helm**, 463 U.S. 277, 281-84 (1983) (reversing sentence of life without parole for uttering a no account check for $100, where defendant had six prior felony convictions); 

**Hutto v. Davis**, 454 U.S. 370, 370-72 (1982) (per curiam) (affirming two consecutive sentences of twenty years for possession with intent to distribute and distribution of nine ounces of marijuana); 

**Rummel, 445 U.S. at 265-66** (affirming life with parole sentence for felony theft of $120.75 by false pretenses where defendant had two prior convictions).


[FN6] In Harmelin v. Michigan, a plurality of the Court modified the three-part test articulated in Solem v. Helm. The Solem Court did not privilege any one part over the other two, and applied all three parts to the facts under consideration. See **Solem, 463 U.S. at 290-300**. Without fanfare, Harmelin recast the first part of the Solem test as a threshold that required an inference of gross disproportionality to warrant continued proportionality analysis via application of parts two and three. See **Harmelin, 501 U.S. at 1004-05** (Kennedy, J., concurring in part and concurring in the judgment); see also infra note 54 and accompanying text. In Ewing v. California, a plurality of the Court and the dissenters adopted the Solem test with the Harmelin threshold gloss. See **Ewing, 538 U.S. at 30-31, 42**. Chief Justice Rehnquist and Justice Kennedy joined Justice O'Connor's plurality opinion in Ewing, and Justices O'Connor and Souter joined Justice Kennedy's plurality opinion in Harmelin. **Ewing, 538 U.S. at 14;Harmelin, 501 U.S. at 959**. I will refer to the Solem test, and to the first, second, and third Solem factors as shorthand for current governing law.

[FN7] **Solem, 463 U.S. at 290-91**.

[FN8] Id. at 291-92.

[FN9] See **Ewing, 538 U.S. at 23** (citing Harmelin, 501 U.S. at 997-1001 (culling some common principles that give content to the uses and limits of proportionality review)).

[FN10] Id.

[FN11] For example, an examination of the range and density of sentences imposed for a given crime could give rise to a theory of outlier sentences. See Pamela S. Karlan, “Pricking the Lines”: The Due Process Clause, Punitive Damages and Criminal Punishment, 88 Minn. L. Rev. 880, 896-97 (2004) (discussing possible use of outlier concept). Outlier sentences imposed in one or a small minority of states, that would be considered grossly disproportionate in every other state, could be held unconstitutional under the third Solem factor. See id. Another possibility is to adapt the Supreme Court's multiplier approach to proportionality in punitive damages cases to criminal sentencing and particularly recidivist sentencing. See **State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003)** (suggesting that a 9:1 ratio for assessing proportionality between punitive and compensatory damages is almost always the maximum).

[FN12] See infra Part I.
[FN13]. See infra Part II.


[FN15]. I have focused on application of the first Solem factor and therefore do not directly address the federalism principle which is most closely related to the third Solem factor. I discuss the gross disproportionality principle, which is explicitly embedded in the first Solem factor, in the context of objective factors and legislative primacy.


[FN17]. See Joshua Dressler, Understanding Criminal Law 13-23 (3d ed. 2001). Rehabilitation has lost currency as a practicable theory of punishment, particularly in relation to proportionality. See id. at 52. Expressive theories of punishment, or denunciation, are viewed in part as a hybrid of utilitarian and retributivist thinking. See id. at 18-19; cf. Michael Vitiello, California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?, 37 U.C. Davis L. Rev. 1025, 1066-71 (2004) (describing shift in California Supreme Court jurisprudence from rehabilitation to incapacitation and deterrence).


[FN19]. Ewing v. California, 538 U.S. 11, 31 (Scalia, J., concurring); see also Harmelin, 501 U.S. at 989 (“[I]t becomes difficult even to speak intelligently of ‘proportionality,’ once deterrence and rehabilitation are given significant weight.”).


[FN21]. The offender's age at the time of the offense would not affect sentence severity, although it could be relevant to a culpability assessment. See infra Parts III.D.1.b, III.D.2.


[FN23]. 445 U.S. at 274-76. Justice Stewart joined the majority opinion, but wrote a short concurring paragraph critiquing and deferring to Texas's recidivist statute. Id. at 285 (Stewart, J., concurring). Justice Powell, joined by Justices Brennan, Marshall, and Stevens, dissented. Id. (Powell, J., dissenting). The Supreme Court affirmed an en banc decision of the Fifth Circuit Court of Appeals which vacated the panel decision and affirmed the original District Court decision denying habeas relief based on Eighth Amendment proportionality. See Rummel v. Estelle, 587 F.2d 651, 662 (5th Cir. 1978).

[FN24]. See Rummel, 445 U.S. at 285-307 (Powell, J., dissenting); see also infra notes 159-69 and accompanying text.
[FN25]. See Rummel, 445 U.S. at 264-66 (majority opinion). Rummel's two prior crimes were “fraudulent use of a credit card to obtain $80 worth of goods and services” in 1964, and “passing a forged check in the amount of $28.36” in 1969. Id. at 265. His third, and triggering, conviction was for “obtaining $120.75 by false pretenses” in 1973. Id. at 266. He had agreed to repair an air conditioner, and accepted $120.75 in payment, but failed to do so. Id. at 286 (Powell, J., dissenting). The Texas recidivist statute provided that: “...[w]hoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary.” Id. at 264 (quoting Tex. Penal Code Ann. § 12.42 (d) (Vernon 1974)).

[FN26]. Id. at 274-75 (quoting Coker v. Georgia, 433 U.S. 584, 592 (1977)); see also Rummel v. Estelle, 568 F.2d 1193, 1201-02 (5th Cir. 1978) (Thornberry, C.J., dissenting) (“No neutral principle of adjudication permits a federal court to hold that in a given situation individual crimes are too trivial in relation to the punishment imposed.” (footnote omitted)), vacated on reh'g, 587 F.2d 651 (5th Cir. 1978).

[FN27]. Rummel, 445 U.S. at 275-76.

[FN28]. See id. at 272-74, 281-84 (maintaining legislative prerogative to determine sentence length, legitimacy of punishing recidivists more severely in pursuit of deterrence and incapacitation, and federalism's abhorrence of “constitutionally imposed uniformity”); cf. Pamela S. Karlan, Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket, 82 B.U. L. Rev. 667, 695-96 (2002) (asserting that the Rehnquist Court's exit strategy approach disengages but leaves open a path for future re-engagement if circumstances warrant judicial involvement).


[FN30]. See id. (citing Tex. Penal Code Ann. ’ 31.03(3) (Vernon Supp. 1980)) (noting legislature's reclassification of Rummel's third offense as a misdemeanor); see also id. at 296-302 (reviewing other jurisdictions' habitual offender statutes, American Law Institute and American Bar Association proposals, and Texas's more lenient sentencing of murder and rape than a third-time petty theft).

[FN31]. 454 U.S. 370, 375 (1982) (per curiam). Justice Powell wrote a separate concurring opinion, and Justice Brennan, joined by Justices Marshall and Stevens, dissented. Id. at 375-88. The tortuous procedural history of this case involved a grant of habeas relief by the District Court; reversal by a panel of the Court of Appeals for the Fifth Circuit; rehearing en banc and affirmance of habeas relief by the full Court of Appeals; a grant of certiorari and decision to vacate and remand in light of Rummel by the Supreme Court; and a second affirmance by the Court of Appeals by an equally divided vote. See id. at 371-72.

[FN32]. See id. at 375, 377-80 (Powell, J., concurring) (reasoning that the instant offense was more serious and the sentence less severe than in Rummel).

[FN33]. Id. at 375. The dissent strongly objected to the majority's decision to exercise the “power of summary disposition,” sidestepping full briefing and oral argument. Id. at 381, 386-87 (Brennan, J., dissenting); cf. Erwin Chemerinsky & Ned Miltenberg, The Need to Clarify the Meaning of U.S. Supreme Court Remands: The Lessons of Punitive Damages' Cases, 36 Ariz. St. L.J. 513 (2004) (critiquing use of summary orders, granting certiorari, vacating the decision below, and remanding for further consideration in light of recently decided cases).

[FN34]. Hutto, 454 U.S. at 375; cf. Frase, supra note 18, at 633 n.275 (suggesting that Davis's racial identity as “an African American man in a rural Virginia community who had dared to date white women and marry one” may have contributed to the forty-year sentence); Grossman, supra note 20, at 120 n.80 (same).
[FN35]. See Hutto, 454 U.S. at 373-75 (asserting that Rummel had virtually conceded the subjectivity of noncapital criminal sentencing and appropriateness of deference to legislatures, and that federalism limited the usefulness of interjurisdictional review).

[FN36]. Id. at 383 (Brennan, J., dissenting); see also id. at 377 (Powell, J., concurring) (“[O]ur system of justice always has recognized that appellate courts do have a responsibility--expressed in the proportionality principle--not to shut their eyes to grossly disproportionate sentences that are manifestly unjust.”).

[FN37]. 463 U.S. 277, 303-04 (1983). Chief Justice Burger wrote the dissenting opinion and was joined by Justices White, Rehnquist, and O'Connor.

[FN38]. In 1910, the Supreme Court held that a fifteen-year sentence of cadena temporal, a punishment imposed by a Philippine Court that entailed wrist and ankle chains, hard labor, and an assortment of lifetime civil disabilities, for the crime of falsifying government documents violated the Eighth Amendment. See Weems v. United States, 217 U.S. 349, 364, 383 (1910); cf. Robinson v. California, 370 U.S. 660, 667 (1962) (holding that a state law making addiction to narcotics a crime punishable by a minimum of ninety days imprisonment “inflicts a cruel and unusual punishment”).


[FN40]. The six prior convictions were for third-degree burglary in 1964, 1966, and 1969, for a total of three third-degree burglary convictions; obtaining money under false pretenses in 1972; grand larceny in 1973; and a felony driving while intoxicated conviction in 1975. Id. The dissent maintained that Helm's actions underlying his convictions for the three burglaries and drunk driving, had the potentiality for violent outcomes. Id. at 315-16 (Burger, C.J., dissenting) (“It is sheer fortuity that the places [Helm] burglarized were unoccupied and that he killed no pedestrians while behind the wheel.”).

[FN41]. Id. at 281, 303 (uttering no account check is ordinarily punishable by a maximum sentence of five years and a $5,000 fine).

[FN42]. Id. at 292-94.

[FN43]. See id. at 292-95.

[FN44]. Id. at 292-93. “[T]here are widely shared views as to the relative seriousness of crimes.” Id. (citing Rossi, Waite, Bose & Berk, The Seriousness of Crimes: Normative Structure and Individual Differences, 39 Am. Soc. Rev. 224, 237 (1974)). Solem contradicted Rummel in terms of violence scaling, asserting that as “the criminal laws make clear, nonviolent crimes are less serious than crimes marked by violence or the threat of violence.” Id. at 292-93.

[FN45]. Id. at 294. The Court gave the following example: “It is clear that a 25-year sentence generally is more severe than a 15-year sentence, but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not.” Id.; cf. Barker v. Wingo, 407 U.S. 514, 522 (1972) (holding that Sixth Amendment right to a speedy trial permits some delay, but must be analyzed on a case-by-case basis); Baldwin v. New York, 399 U.S. 66, 69 (1970) (holding that Sixth Amendment right to a jury trial attaches when defendant faces more than six months imprisonment).

[FN46]. Solem, 463 U.S. at 296 (citing Rossi, supra note 44, at 229) (explaining that theft is “viewed by society as among the less serious offenses”). The Court compared Helm's crime of writing a $100 check against a nonexistent account to “taking $100 from a cash register, ... defrauding someone of $100, or obtaining $100 through extortion,
or blackmail, or using a false credit card to obtain $100, or embezzling $100.” Id. at 296 n.20 (citations omitted). Nevertheless, any of these other crimes would have been classified as a misdemeanor, rather than a felony. Id. “Curiously, under South Dakota law there is no distinction between writing a no account check for a large sum and writing a no account check for a small sum.” Id.

[FN47]. Id. at 297. At the time Helm was sentenced, South Dakota did not authorize capital punishment. Id. “Barring executive clemency, Helm will spend the rest of his life in the state penitentiary.” Id. (citation omitted).

[FN48]. Id. at 303 (reasoning that “Helm had received the penultimate penalty for relatively minor criminal conduct,” and a harsher sentence than “other criminals in the State who have committed more serious crimes” and than he would have received “in any other jurisdiction, with the possible exception of a single State”). But see id. at 312-14 (Burger, C.J., dissenting) (criticizing the Court's failure to follow or overrule directly controlling cases, and asserting that sentences imposed for different crimes are essentially arbitrary).

[FN49]. 501 U.S. 957 (1991). Justice Scalia wrote the opinion of the Court and was joined by Chief Justice Rehnquist. Id. at 961 (Scalia, J.). Justice Kennedy wrote an opinion concurring in part and concurring in the judgment, and was joined by Justices O'Connor and Souter. Id. at 996 (Kennedy, J., concurring in part and concurring in the judgment). There were three dissenting opinions. Justice White wrote a dissenting opinion and was joined by Justices Blackmun and Stevens. Id. at 1009 (White, J., dissenting). Justice Marshall wrote a dissenting opinion, id. at 1027 (Marshall, J., dissenting), and Justice Stevens wrote a dissenting opinion and was joined by Justice Blackmun, id. at 1027-28 (Stevens, J., dissenting).

[FN50]. See id. at 981-85 (Scalia, J.) (asserting that the Eighth Amendment prohibited particular modes of punishment, like burning at the stake, but did not require proportionality between crime and punishment). In other words, cruelty and unusualness should be determined solely with reference to the punishment at issue (“‘Is life imprisonment a cruel and unusual punishment?’”) not with reference to the crime for which it is imposed as well (“‘Is life imprisonment cruel and unusual punishment for possession of unlawful drugs?’”). Id. at 976.


[FN52]. Id. at 1018-20 (White, J., dissenting) (critiquing the Court's failure to consider “objective factors [like] ‘the historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made’” (quoting Enmund v. Florida, 458 U.S. 782, 788 (1982))).

[FN53]. See id. at 997 (Kennedy, J., concurring in part and concurring in the judgment); see also Marks v. United States, 430 U.S. 188, 193 (1977) (“[H]olding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”) (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976))).

[FN54]. Harmelin, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment). Thus, consideration of all three factors is not required in every case. Kennedy harmonized the cases, reasoning that Solem and Weems contained comparative analyses because the sentence imposed appeared to be grossly excessive in relation to the crime committed, but that Rummel and Hutto upheld the challenged sentences without conducting comparative analyses because the threshold analysis of offense gravity and sentence severity was sufficient to determine constitutionality. See id. at 1005. But cf. id. at 1020 (White, J., dissenting) (“[A]bandonment of the second and third factors set forth in Solem makes any attempt at an objective proportionality analysis futile.”).

[FN55]. See id. at 998 (Kennedy, J., concurring in part and concurring in the judgment) (“[T]he fixing of prison
terms for specific crimes involves a substantive penological judgment that, as a general matter, is "properly within the province of legislatures, not courts."” (quoting Rummel v. Estelle, 445 U.S. 263, 275-76 (1980)).

[FN56]. See id. at 999 ("[C]ompeting theories of mandatory and discretionary sentencing have been in varying degrees of ascendency or decline since the beginning of the Republic.” (citing United States v. Grayson, 438 U.S. 41, 45-47 (1978))).

[FN57]. See id. at 1000 ("[D]ifferent attitudes and perceptions of local conditions may yield different, yet rational, conclusions regarding the appropriate length of prison terms for particular crimes.”).

[FN58]. See id. at 1000 ("[P]roportionality review ... should be informed by ‘objective factors to the maximum possible extent.’” (quoting Rummel, 445 U.S. at 274-75)).

[FN59]. Id. at 1001 (citing Solem v. Helm, 463 U.S. 277, 288, 303 (1983)).

[FN60]. Id. at 1002-04 ("Possession, use, and distribution of illegal drugs represent ‘one of the greatest problems affecting the health and welfare of our population.’” (quoting Treasury Employees v. Van Raab, 489 U.S. 656, 668 (1989)). But see id. at 1025 (White, J., dissenting) (finding it troubling that the State “chose not to prosecute Harmelin under the statute prohibiting possession with intent to deliver, because it was ‘not necessary and not prudent to make it more difficult for us to win a prosecution’” (quoting Transcript of Oral Arg. 30-31, Harmelin, 501 U.S. 957 (No. 89-7272))).

[FN61]. Id. at 1005 (Kennedy, J., concurring in part and concurring in the judgment). Kennedy distinguished the Solem Court's invalidation of one jurist's decision to sentence at the top of the legislatively authorized sentencing range, see id. at 1006, from Harmelin where "the Michigan legislature has mandated the penalty and has given the state judge no discretion in implementing it." Id. ("[L]egislature has the power to define criminal punishments without giving the courts any sentencing discretion.” (citing Chapman v. United States, 500 U.S. 453, 467 (1991)); see also Mistretta v. United States, 488 U.S. 361, 363-65 (1989) (mandatory sentencing scheme)).


[FN63]. 538 U.S. 63 (2003). Justice O'Connor wrote the opinion of the Court and was joined by Chief Justice Rehnquist, and Justices Scalia, Kennedy, and Thomas. Id. at 66. Justice Souter wrote a dissenting opinion and was joined by Justices Stevens, Ginsburg, and Breyer. Id. at 77.

[FN64]. California's three strikes law requires that a defendant convicted of a felony receive double the sentence ordinarily imposed if s/he had one prior serious or violent felony conviction, and receive an indeterminate term of life imprisonment if s/he had two or more prior serious or violent felony convictions. Ewing, 538 U.S. at 15-16 (citing Cal. Penal Code Ann.” 667.5, 667(e)(1), 667(e)(2)(A) (West 1999); §§ 1192.7, 1170.12(c)(1), 1170.12(c)(2)(A) (West Supp. 2002)). Indeterminate life sentences include the possibility of parole “calculated by reference to a ‘minimum term,’” which is the greater of (a) three times the term otherwise provided for the current conviction, (b) 25 years, or (c) the term determined by the court pursuant to ’1170 for the underlying conviction, including any enhancements.” Id. (citing Cal. Penal Code Ann. § 667(e)(2)(A)(i)-(iii) (West 1999); § 1170.12(c)(2)(A)(i)-(iii) (West Supp. 2002)).

[FN65]. Id. at 31 (Scalia, J., concurring in the judgment); id. at 32 (Thomas, J., concurring in the judgment).

[FN66]. Id. at 11 (plurality opinion). Justices Stevens and Breyer wrote separate dissenting opinions and joined each other's opinions along with Justices Souter and Ginsburg. Id. at 32 (Stevens, J., dissenting); id. at 35 (Breyer, J., dissenting). By 2003, Justices White and Blackmun had also been replaced by Justices Ginsburg and Breyer.
respectively. With Chief Justice Roberts and Justice Alito substituting for Chief Justice Rehnquist and Justice O'Connor in 2005 and 2006, the future of proportionality analysis in noncapital criminal sentencing is potentially even more unstable than it has been thus far.

[FN67]. Id. at 16-20 (plurality opinion). Approximately six years before he stole the golf clubs, “Ewing committed three burglaries and one robbery at a Long Beach, California, apartment complex over a 5-week period.” Id. at 18. During the ten years prior to the Long Beach burglaries and robbery, Ewing had been convicted of theft, felony grand theft (later reduced to a misdemeanor), petty theft, battery, burglary, possessing drug paraphernalia, appropriating lost property, and unlawfully possessing a firearm and trespassing. See id.

[FN68]. See id. at 16-17, 29-30 (reasoning that felony treatment was justified in light of state court precedent and Ewing's criminal history). Although wobblers are presumptively felonies, both prosecutors and trial courts have discretion to charge or treat them as misdemeanors. Id. at 16-17 (citing People v. Williams, 163 P.2d 692, 696 (Cal. 1945)). “[T]rial courts may avoid imposing a three strikes sentence ... by reducing 'wobblers' to misdemeanors (which do not qualify as triggering offenses).” Id. at 17.

[FN69]. See id. at 24-28 (describing three-strikes law as reflective of a national sentencing “sea change” and bolstering its legitimacy by citing public referendum, State Assembly and State Senate voting margins).

[FN70]. Id. at 12, 28 (“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.'” (quoting Solem v. Helm, 463 U.S. 277, 297 (1983))).

[FN71]. See id. at 28 (noting “seriousness” of grand theft in the context of proportionality review” (citing In re Lynch, 503 P.2d 921, 936 n.20 (Cal. 1972))). “Theft of $1,200 in property is a felony under federal law, 18 U.S.C. § 641, and in the vast majority of States.” Id.

[FN72]. Id. at 29. In addition to punishing the triggering offense, the legislature had an interest in “dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law.” Id. (quoting Rummel v. Estelle, 445 U.S. 263, 276 (1980)).

[FN73]. Id. at 30.

[FN74]. See id. at 30-31. But see id. at 42 (Breyer, J., dissenting) (concluding, based on length of real sentence and objective data indicating low offense gravity, that Ewing's claim “must pass the threshold test ... [which] must permit arguably unconstitutionnal sentences, not only actually unconstitutionnal sentences, to pass the threshold”); cf. id. at 31 (Scalia, J., concurring) (“[Plurality opinion], in all fairness, does not convincingly establish that 25-years-to-life is a 'proportionate' punishment for stealing three golf clubs ....”).


[FN76]. Id. The California appellate court had upheld the sentence under Rummel, and the California Supreme Court and Federal District Court both denied Andrade's petitions for review. Id. at 68-69. The Court of Appeals for the Ninth Circuit concluded that “the state court's 'disregard for Solem result[ed] in an unreasonable application of clearly established Supreme Court law,'” and “constitut[ed] 'clear error.'” Id. (quoting Andrade v. Attorney Gen., 270 F.3d 743, 766-67 (9th Cir. 2001)).

[FN77]. Id. at 66. Prior to his arrest in November 1995 for the videotape theft, Andrade had been convicted of a misdemeanor theft, three counts of first-degree residential burglary, transportation of marijuana, another
misdemeanor petty theft, and escape from federal prison. See id. at 66-67. Andrade's presentence report revealed that he reported being addicted to heroin since 1977, approximately five years before his first criminal offense, and that he stole to buy heroin. Id.

[FN78]. Id. at 67. “Under California law petty theft with a prior conviction is a so-called ‘wobbler’ offense because it is punishable either as a misdemeanor or as a felony.” Id. (citing Cal. Penal Code § 666 (West Supp. 2002)).

[FN79]. See id. at 67-68. “[T]he jury made a special finding that Andrade was convicted of three counts of first-degree residential burglary,” meeting the requirement that a recidivist offender have at least two serious or violent felonies that serve as qualifying offenses under the three strikes regime. Id. at 68.

[FN80]. See id. at 72 (“Indeed, in determining whether a particular sentence for a term of years can violate the Eighth Amendment, we have not established a clear or consistent path for courts to follow.”); see also id. at 76-77 (recognizing that some members of the Court have expressed “uncertainty about how our cases dealing with the punishment of recidivists should apply”) (quoting Rigs v. California, 525 U.S. 1114, 1115 (1999) (Stevens, J., joined by Souter & Ginsburg, JJ., respecting denial of certiorari))).

[FN81]. Id. at 72.

[FN82]. Id. at 76 (quoting Harmelin v. Michigan, 501 U.S. 957, 998 (1991) (Kennedy, J., concurring in part and concurring in the judgment)).

[FN83]. Id. at 78 (Souter, J., dissenting). O'Connor focused on the fact that there were two triggering offenses, see id. at 74 n.1 (majority opinion), but Souter maintained that Andrade's sentence could “only be understood as punishment for the total amount he stole,” and supported this assertion with the short two-week interval between the thefts, the single corporate victim, the single motivation to purchase drugs, and the single indictment, see id. at 78-79 (Souter, J., dissenting). Both Andrade and the defendant in Solem were repeat offenders, and neither had committed violent crimes or crimes against the person. Id. at 78.

[FN84]. Id. at 79 (Souter, J., dissenting) (citing Solem v. Helm, 463 U.S. 277, 287 (1983)). But see id. at 74 n.1 (majority opinion) (asserting that Andrade's age could not be a determinative factor because “[t]wo different sentences do not become materially indistinguishable based solely upon the age of the persons sentenced”).

[FN85]. Id. at 82 (Souter, J., dissenting). In her majority opinion, Justice O'Connor noted that based on a California Supreme Court case decided after his conviction and sentence, People v. Garcia, 976 P.2d 831 (Cal. 1999), Andrade may “file another State habeas corpus petition’ arguing that he should serve only one term of 25 years to life in prison because ‘sentencing courts have a right to dismiss strikes on a count-by-count basis.’” Id. at 68 (majority opinion) (quoting Transcript of Oral Argument at 24, Lockyer, 538 U.S. 63 (No. 01-1127)).

[FN86]. Id. at 82 (Souter, J., dissenting).

[FN87]. Karlan, supra note 11, at 882-83. The uncertain pattern created by these pricks has resulted from the Rehnquist Court's “exit strategy” of “refining the constitutional test in a way that ‘preserves the Court's ability to reenter the field should circumstances or doctrine or the Justices' view of the Constitution change,’ while essentially foreclosing relief in contemporary cases.” Id. at 884 (quoting Karlan, supra note 28, at 687).

[FN88]. See id. at 889. In most circumstances, the “clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.” Id. (quoting Atkins v. Virginia, 536 U.S. 304, 312 (2002)). Not every legislated sentence, however, meets and thus defines the contours of Eighth Amendment proportionality. Courts, in their role as interpreters of constitutional limits, must on occasion check legislatures. Cf.

Packer, supra note 4, at 1074 (describing standard as “whether a legislatively prescribed proportion between crime and punishment is rationally sustainable”).

[FN89]. See Karlan, supra note 11, at 890-92. The first, modest review would be a form of statutory review, “interven[ing] to strike the balance the legislature would have intended had it been faced with a particular defendant's case.” Id. at 890. The second would check legislative enactments that had been skewed by political processes and thus did not accurately reflect contemporary values. Id. at 889-92, 890 n.64 (citing David A. Sklansky, Cocaine, Race, and Equal Protection, 47 Stan. L. Rev. 1283, 1296-98 (1995) (classic account of political pressures on legislators to ratchet up sentences)); William J. Stuntz, The Pathological Politics of Criminal Law, 100 Mich. L. Rev. 505, 529-42 (2001) (focusing on tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges, who alone are likely to opt for narrower liability rules). The third expansive review would entail a judicial trump over the legislature and community even when a particular statute provides clear or reliable evidence of a community's view. Karlan, supra note 11, at 892. This review is more common with questions of criminalizing conduct as opposed to calibrating sentences. See id. at 892-93 (citing Lawrence v. Texas, 539 U.S. 558 (2003) (consensual sodomy); City of Chi. v. Morales, 527 U.S. 41, 45-48, 64 (1999) (loitering); Loving v. Virginia, 388 U.S. 1 (1967) (interracial marriage); Griswold v. Connecticut, 381 U.S. 479 (1965) (use of contraception)).


[FN91]. See Chemerinsky, supra note 90, at 1076-79.

[FN92]. See id. (describing three factors as reprehensibility, penalties in other states, and other penalties in that state). Chemerinsky relies on the precept that: “In defining a role for the courts, there is far more need for judicial protection of prisoners, a group with no political power or influence, than of businesses.” See id. at 1066 (citing John Hart Ely, Democracy and Distrust (1980)); see also Erwin Chemerinsky, Cruel and Unusual: The Story of Leandro Andrade, 52 Drake L. Rev. 1, 4 (2003) (“It is cruel and unusual punishment, a violation of the Eighth Amendment, to sentence a person to life in prison for committing a minor offense.”).

[FN93]. See, e.g., Stuntz, supra note 89, at 540-42 (discussing the growing marginalization of judges).

[FN94]. Sentencing decisions could be sorted into easy, medium, and hard cases with the majority falling into the easy category. Cf. Frase, supra note 18, at 631 (proposing three categories of penalties, “(1) noncustodial and short to medium-length custody terms; (2) lengthy custodial terms; and (3) death sentences,” with three different proportionality tests). Thus, a detailed, articulated analysis would not be required in every case. The threshold, however, must be set low enough that some significant portion of cases are adjudicated in a transparent way. A properly applied threshold test could relieve courts of an unnecessary burden in easy cases while requiring rigorous analysis in mid-level and hard cases. Cf. Donna H. Lee, The Law of Typicality: Examining the Procedural Due Process Implications of Sandin v. Conner, 72 Fordham L. Rev. 785, 807-08 (2004) (describing Justice Breyer's categorization of easy, mid-level, and hard cases in a prisoner's due process rights context).
[FN95]. Having switched in Harmelin to a threshold test without explicitly overruling or modifying Solem, see Harmelin v. Michigan, 501 U.S. 957, 962-96 (1991), the Supreme Court could potentially switch back to a true three-part test requiring intra- and interjurisdictional review in every instance. Given the current composition of the Court, however, this seems unlikely.

[FN96]. See Chemerinsky, supra note 90, at 1077-78. Chemerinsky himself notes that the maximum sentence Andrade could have received for two counts of petty theft with one prior offense was three years and eight months, but that under California's recidivist sentencing scheme he received life with no parole eligibility for fifty years. Id. at 1063. This results in a ratio of 16:1, as compared to the 9:1 ratio endorsed in punitive damages cases. Id.

[FN97]. Karlan, supra note 11, at 898; see also Dressler, supra note 17, at 62 (“Ironically, therefore, the courts will now apply the least objective test of the three, and will only resort to the other standards, including the objective inter-jurisdictional test, in rare circumstances.”).


[FN99]. See Robinson & Darley, Utility of Desert, supra note 98, at 471-77. “Internalized moral rules and social norms that are enforced by community sanctions are important sources of compliance with the moral prohibitions of the community.” Id. at 476; see also Paul H. Robinson, Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice, 114 Harv. L. Rev. 1429, 1444 (2001) (hereinafter Robinson, Punishing Dangerousness) (“As criminal liability is increasingly disconnected from moral blameworthiness, the criminal law can exercise less moral authority to change norms or to cause the internalization of norms .... [U]sing the criminal justice system as a mechanism for preventive detention may undercut the very crime prevention goal that is offered to justify such use.”); Robinson, supra note 98, at 611-13 (explaining importance of lay intuitions of justice in the formation of social norms and prohibitions whose internalization is “what cause[s] people to obey the law”).


[FN101]. Id. at 1130-31. His six decision points are policymaking, rule articulations, factfinding, judgment-making, determining punishment amount, and determining punishment method. See id. at 1128-32.

[FN102]. Id. at 1148 (“To the extent that the task requires the exercise of judgment, a small group may have the advantage, including greater uniformity in application and access to a wider variety of views in decisionmaking.”). Paul Robinson served as a voting member of the United States Sentencing Commission from 1986-1988, resigning on February 1, 1988 before the end of his term. See U.S. Sentencing Comm'n, Former Commissioners of the United States Sentencing Commission, http://www.ussc.gov/general/Oldcomms.htm (last visited Apr. 3, 2008). Robinson was the lone dissenter when the federal sentencing guidelines were first promulgated in November 1987. See Paul H. Robinson, Dissent from the United States Sentencing Commission's Proposed Guidelines, 77 J. Crim. L. & Criminology 1112, 1112-13 (1986).

[FN103]. Whereas Robinson and Darley “envision code-drafting being done by commissions of lawyers, criminal law experts, and social scientists,” Robinson & Darley, Utility of Desert, supra note 98, at 488, I envision state and federal court judges making proportionality decisions in individual cases. I focus on common law rather than positive law, and would use the moral intuitions of the community to inform rather than direct judicial


[FN107] See id. at 528; see also id. at n.78 (“‘The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.’” (quoting *Trop v. Dulles*, 356 U.S. 86, 100 (1958))). While recognizing the value of creating an independent, affirmative account of the substantive law of proportionality as it should be, unburdened by the governing law as it is, my proposal takes a more incremental approach to try to effect change in the short term, in real cases.


[FN109] Id. at 538; see also id. at 537-38 (“‘Having principally induced men to enter into society’” by agreeing to secure enjoyment of their lives, liberties and property, government must punish those who violate this enjoyment.” (quoting Thomas Jefferson, A Bill for Proportioning Crimes and Punishments, in *The Complete Jefferson* 90-91 (Saul K. Padover ed., 1943) (1779))). Once “punish[ed] in proportion to his offence, [the offender] is entitled to ... protection from all greater pain, so that it becomes a duty in the legislature to arrange in a proper scale the crimes which it may be necessary for them to repress, and to adjust thereto a corresponding gradation of punishments.” Id. at 538 (quoting Jefferson, supra, at 91).

[FN110] Id. at 538.

[FN111] See Dressler, supra note 17, at 13-18; see also Packer, supra note 4, at 1079 (describing retribution and the utilitarian propensity to prevent or diminish the commission of offenses through deterrence, incapacitation, rehabilitation, or some combination of these as the justifications for punishment).

[FN112] See Dressler, supra note 17, at 54-55.

[FN113] Frase, supra note 18, at 590; see also Lee, supra note 20, at 700 (asserting that retributivism is based on the general intuition that the seriousness of the crime should match the harshness of the penalty).

[FN114] Dressler, supra note 17, at 54-55.
[FN115]. Lee, supra note 20, at 683. Lee coins the phrase “disjunctive theory” to describe what I have labeled penological pluralism. See id. at 682 (“[A] sentence is not unconstitutionally excessive as long as it can be justified under any one of the traditional justifications for punishment ....”).

[FN116]. Id. at 708; cf. Frase, supra note 18, at 591-92 (describing similar concept of limiting retributivism that would place “outer limits both on who may be punished ... and how hard they may be punished”). But cf. Robinson, Punishing Dangerousness, supra note 99, at 1442 (disputing vague or flexible view of “desert [that] requires no particular sentence ... merely set(ting) the outer limits of a range of just punishments”).

[FN117]. Lee, supra note 20, at 706-07. Lee explicitly places implementation of retributivism as a side constraint to the side, see id. at 714, but suggests that comparative desert is an essential element for judicial enforcement because it provides for scheme-wide and system-wide analyses: Comparative desert “asks whether the sentencing scheme sufficiently distinguishes among offenders of different levels of seriousness,” and “whether the punishment in question stands in appropriate relation to punishment for crimes that are as serious as, or more serious than, the crime at issue.” Id. at 716. Requiring an analysis of comparative desert would likely require implementation of the second and third Solem factors.

[FN118]. Frase, supra note 18, at 592. Ends proportionality seeks to compare the burdens imposed on the offender with the likely societal benefits. It looks at past harm only in connection with preventing future crime, and may “aggregate [the] harm caused by [similar acts] and the difficulty of detecting and deterring [them].” Id. at 594-95 (citing Malcolm E. Wheeler, Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment, 24 Stan. L. Rev. 838, 851-52 (1972)). Unlike retributivism, ends proportionality also considers societal crime control benefits and potential undesirable collateral consequences like a loss of public confidence in our criminal justice system. See id. at 595.

[FN119]. Id. at 592. According to “basic utilitarian efficiency values: among equally effective means to achieve a given end, those that are less costly or burdensome should be preferred.” Id. at 595 (citing Norval Morris, The Future of Imprisonment 59-60, 75, 79 (1974) (explaining the principle of parsimony)).

[FN120]. See id. at 633-34. He further suggests that gross disproportionality under any one of the three measures would trigger intra- and interjurisdictional review, and that either of these reviews could corroborate the initial inference of gross disproportionality and result in the finding of an Eighth Amendment violation. See id.

[FN121]. As noted earlier, Frase proposed creating three categories of sentences: “(1) noncustodial and short to medium-length custody terms; (2) lengthy custodial terms; and (3) death sentences,” and applying his three proportionality principles to the second and third categories only. Id. at 631-32.


[FN123]. See Chemerinsky, supra note 90, at 1076-79; cf. Harmelin, 501 U.S. at 1020 (White, J., dissenting) (arguing that abandonment of the second and third factors set forth in Solem makes any attempt at an “objective proportionality analysis futile”).


514, 522 (1972))); see also Ewing, 538 U.S. at 33-34 (Stevens, J., dissenting) (referring to punitive damages awards under the Due Process Clause).

[FN126]. See Ewing, 538 U.S. at 33, 34 n.2 (Stevens, J., dissenting).

[FN127]. The proportionality factors in punitive damages cases are the reprehensibility of the defendant's conduct, the ratio of punitive to compensatory damages, and the comparability of the punitive damages awards with possible civil or criminal sanctions for similar misconduct. See BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575-85 (1996); see also Gershowitz, supra note 90, at 1258.


[FN129]. See id. at 139-43. The court noted that if the first check had been for a penny less, $49.99, then the recidivism increase would have been an extra five years for a second serious offense added to a base of one to ten years for the perjury offense. See id. at 139-41. It then posited a framework that considered: (1) the nature of the offense and whether it was a crime of violence that posed danger to another; (2) the legislative purpose behind the punishment; (3) an interjurisdictional review of other states' sentences in similar circumstances; and (4) an intrajurisdictional review within the state of sentences for other crimes. See id. at 140-42, see also Harmelin v. Michigan, 501 U.S. 957, 1015-16 & n.2 (1991) (White, J., dissenting) (collecting four state court decisions finding sentences unconstitutionally disproportionate and asserting that the “mere handful of sentences ... [proved] reviewing courts have not baldly substituted their own subjective moral values for those of the legislature”).

[FN130]. See Rummel v. Estelle, 445 U.S. 263, 304-05 & n.23 (1980) (Powell, J., dissenting) (collecting cases). “[T]he body of Eighth Amendment law that has developed in that Circuit constitutes impressive empirical evidence that the federal courts are capable of applying the Eighth Amendment to disproportionate noncapital sentences with a high degree of sensitivity to principles of federalism and state autonomy.” Id. at 306.


[FN132]. See, e.g., United States v. Yousef, 327 F.3d 56, 163 (2d Cir. 2003) (“Lengthy prison sentences, even those that exceed any conceivable life expectancy of a convicted defendant, do not violate the Eighth Amendment's prohibition against cruel and unusual punishment when based on a proper application of the Sentencing Guidelines or statutorily mandated consecutive terms.”); United States v. Hildenbrandt, 207 F. App'x. 50, 52 (2d Cir. 2006) (same); United States v. Mafahri, 183 F. App'x. 13, 15 (2d Cir. 2005) (same). Only two Second Circuit cases even cite Ewing. See United States v. Snype, 441 F.3d 119, 152 (2d Cir. 2006); United States v. Carter, 110 F. App'x. 165, 166 (2d Cir. 2004).

[FN133]. See, e.g., United States v. Robinson, 204 F. App'x. 161, 163 n.2 (4th Cir. 2006) (“[P]roportionality review is not available for any sentence less than life imprisonment without the possibility of parole.”) (quoting United States v. Ming Hong, 242 F.3d 528, 532 (4th Cir. 2001))); United States v. Miller, 185 F. App'x. 275, 275-76 (4th Cir. 2006) (same); United States v. Bledsoe, 177 F. App'x. 311, 312 (4th Cir. 2006) (same); United States v. Bourque, 157 F. App'x. 646, 650 (4th Cir. 2004) (same).

[FN134]. For example, a review of ninety-seven cases in the Ninth Circuit that cited to Ewing revealed that Ramirez v. Castro, 365 F.3d 755, 767 (9th Cir. 2004), was the only one that conducted a full proportionality analysis. In contrast, only two cases in the Fifth Circuit cited to Ewing. Both, however, failed to engage in any substantive proportionality analysis. See United States v. Strahan, 134 F. App'x. 709, 710 (5th Cir. 2005) (asserting that in-depth analysis is not required, and relying on Harmelin and Hutto as benchmarks for gross disproportionality); Austin v.
Johnson, 328 F.3d 204, 209-10 (5th Cir. 2003) (“Cases that have found disproportionate sentences involve long-term imprisonment, so the nominal punishment of a one-day boot camp [for stealing a candy bar] cannot pass muster.”).


[FN137]. See State v. Snow, 144 P.3d 729, 746 (Kan. 2006) (“Generally, an appellate court will not interfere with a sentence that is within the statutory limits unless there are special circumstances indicating that the sentencing court abused its discretion.”); State v. Buchhold, 2007 SD 15, 727 N.W.2d 816, 825 (“The first step in establishing whether a threshold showing of gross disproportionality in sentencing exists is to determine whether the legislature had a rational basis to conclude the statutory sentencing guidelines would further the objectives of the State's criminal justice system. We then decide whether a defendant's sentence is grossly disproportionate to the crime by determining whether that sentence furthers those objectives the legislature sought to advance.” (citations omitted)).


[FN140]. See, e.g., Adaway v. State, 902 So. 2d 746, 748-50 (Fla. 2005) (carefully parsing Supreme Court precedent and correctly identifying gross disproportionality as the threshold inquiry, but then summarily concluding that “[a]lthough the penalty is harsh, we accept the Legislature's judgment about the gravity of the crime”).

[FN141]. Cf. Harmelin, 501 U.S. at 1007 (seeking to avoid perception that no clear standards are being applied and that the rule of law is imperiled by sentences imposed for no discernible reason other than the subjective reactions of the sentencing judge).

[FN142]. See Solem v. Helm, 463 U.S. 277, 290 n.16 (1983) (retaining judicial authority to review legislature's determination of types and limits of punishments for crimes, and trial court's exercise of discretion “in sentencing convicted criminals”); Hutto v. Davis, 454 U.S. 370, 377 (1982) (Powell, J., concurring) (“[L]imits of a prison sentence normally are a matter of legislative prerogative, and trial courts have the primary responsibility to determine an appropriate sentence ....”); see also United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments ....”). See generally John Hart Ely, Democracy and Distrust (1980).

[FN143]. Solem, 463 U.S. at 290.

[FN144]. Harmelin, 501 U.S. at 1016-17 (White, J., dissenting) (internal quotation marks omitted).


\[\text{[FN146]}\] See \textit{Marbury v. Madison}, 5 U.S. (1 Cranch) 137, 177 (1803); see also \textit{Rummel}, 445 U.S. at 303 (Powell, J., dissenting) (stating that it is the role of courts, under Article III of the Constitution, to judge whether “a particular legislative enactment ... runs afoul of some limitation placed by the Constitution on the authority of that body.”) (quoting \textit{Furman v. Georgia}, 408 U.S. 238, 466 (1972) (Rehnquist, J., dissenting)).

\[\text{[FN147]}\] See \textit{Rummel}, 445 U.S. at 275-76.

\[\text{[FN148]}\] \textit{Mistretta v. United States}, 488 U.S. 361, 396 (1989); see also \textit{United States v. Angelos}, 345 F. Supp. 2d 1227, 1263 (D. Utah 2004) (“This court deals with sentencing matters on a daily basis and feels in a unique position to advise Congress on such matters.”).

\[\text{[FN149]}\] \textit{Angelos}, 345 F. Supp. 2d at 1262 (“[T]he tradition of courts engaging in dialogue with legislatures is too well-established in this and other courts to disregard.”) (quoting \textit{United States v. Then}, 56 F.3d 464, 466 (2d Cir. 1995) (Calabresi, J., concurring)).

\[\text{[FN150]}\] Justice Breyer's Ewing dissent is an example of the kind of review that courts are well positioned to conduct. \textit{Ewing v. California}, 538 U.S. 11, 35-51 (2003) (Breyer, J., dissenting). Breyer analyzed California's “serious or violent” predicate requirement and statutory wobbler provisions and concluded with three other Justices that there was an inference of gross disproportionality. \textit{Id. at 49}. He noted several anomalies. First, wobblers cover a broad range of offenses from “assault with a deadly weapon ... to [s]tealing more than $100 worth of chickens, nuts, or avocados.” \textit{Id.} (citing \textit{Cal. Penal Code} § 245, 594(b)(2)(A), 487(b)(1)(A) (West Supp. 2003)). “Some of this behavior is obviously less serious, even if engaged in twice, than other criminal conduct that California statutes classify as pure misdemeanors, such as reckless driving ...” \textit{Id.} (citing \textit{Cal. Veh. Code} § 23103 (West Supp. 2003)). Additionally, an offender is more likely to receive recidivist treatment, and consequently longer sentences, based on the similarity of past crimes to the triggering crime, rather than the seriousness of the past crimes. See \textit{Id. at 50}. For example, a person “who has committed two violent offenses and then steals $200 will not fall within the ambit of the three strikes statute,” but if that same person had committed one violent offense and one petty theft, and then stole $200, she would be subject to recidivist treatment. \textit{Id.}

\[\text{[FN151]}\] See, e.g., Chemerinsky, supra note 90, at 1074-78.


Excessive Fines Clause does not protect against excessive civil punitive damages).


[FN156]. See Van Cleave, supra note 154, at 223 (discussing Supreme Court's interpretation of Cruel and Unusual Punishment Clause in three different areas of jurisprudence); Lee, supra note 20, at 692 n.102 (“[There is] tension between the Court's general reluctance in the Eighth Amendment proportionality cases and its relatively enthusiastic embrace of proportionality regulation of punitive damages under the Due Process Clause.”); cf. Timothy Zick, Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths, 82 N.C. L. Rev. 115, 177 (2003) (“[The] Court has been particularly vigilant when it comes to the supposed limits the due process guarantee places on civil monetary penalties.”).

[FN157]. See Chemerinsky, supra note 90, at 1069-70 (citing distrust of “runaway juries awarding grossly excessive punitive damages”); Karlan, supra note 11, at 903-14, 920.

[FN158]. See Chemerinsky, supra note 90, at 1065-66; see also Gershowitz, supra note 90, at 1275 (noting that the federalism concerns articulated as the rationale for minimal proportionality review of criminal sentences is completely ignored in punitive damages review).


[FN161]. Id. at 288; see also Ewing, 538 U.S. at 34 (Stevens, J., dissenting) (referring to a life sentence for overtime parking); Lockyer v. Andrade, 538 U.S. 63, 81 n.2 (2003) (Souter, J., dissenting) (referring to parking violators); Harmelin v. Michigan, 501 U.S. 957, 986 n.11 (1991) (referring to life imprisonment for overtime parking); Harmelin, 501 U.S. at 1018 (White, J., dissenting) (same); Solem v. Helm, 463 U.S. 227, 311 n.3 (1983) (Burger, C.J., dissenting) (same); Rummel, 445 U.S. at 274 n.11 (“This is not to say that a proportionality principle would not come into play ... if a legislature made overtime parking a felony punishable by life imprisonment.”); cf. Lee, supra note 20, at 711 (modifying hypothetical to one year in prison for a parking violation).


[FN163]. In Rummel v. Estelle, both the District Court and the en banc Court of Appeals for the Fifth Circuit rejected an Eighth Amendment challenge to a life sentence in part because with good time credits, Rummel would be parole eligible after serving twelve years. See 445 U.S. at 267; see also Rummel v. Estelle, 568 F.2d 1193, 1201-02 (5th Cir. 1978), vacated, 587 F.2d 651, 653, 659 (5th Cir. 1978) (en banc).

[FN164]. Cf. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [hard-core
pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.”).

[FN165]. Harmelin, 501 U. S. at 985.

[FN166]. Packer, supra note 4, at 1076; cf. United States v. Angelos, 345 F. Supp. 2d 1227, 1255 (D. Utah 2004) (“[A]lthough] mandatory life sentences for jaywalking or petty theft would, no doubt, deter those offenses ... it would be hard to view such hypothetical statutes as resting on rational premises.”).

[FN167]. See Harmelin, 501 U. S. at 976-78 (asserting that the Eighth Amendment prohibits certain modes of punishment, like burning at the stake, as opposed to requiring proportionality); cf. Dubber, supra note 104, at 559 (“[C]ruel and unusual punishments clause ‘was designed to outlaw particular modes of punishment ... the rack or the stake, or any of those horrid modes of torture, devised by human ingenuity for the gratification of fiendish passion.’” (quoting James Bayard, A Brief Exposition of the Constitution of the United States 154 (Philadelphia, Hogan & Thompson 1840))).

[FN168]. See Ewing v. California, 538 U.S. 11, 33 (2003) (Stevens, J., dissenting) (asserting that logic and constitutional structure, prohibiting excessive fines, bail, and capital punishment, indicate the existence of a proportionality principle for imprisonment); Harmelin, 501 U. S. at 1014 (White, J., dissenting) (asserting that recognizing a proportionality principle only in capital cases fails to explain why the words cruel and unusual include a proportionality requirement in some cases but not in others); Solem v. Helm, 463 U.S. 227, 289 (1983) (“It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not.”); see also Granucci, supra note 4, at 860 (asserting that prohibition against cruel and unusual punishment included a reiteration of the English policy against disproportionate penalties).

[FN169]. See Rummel v. Estelle, 445 U. S. 263, 288 (Powell, J., dissenting); Ewing, 538 U. S. at 31 (Scalia, J., concurring) (asserting that proportionality is inherently a concept tied to the penological goal of retribution); Harmelin, 501 U. S. at 989 (“[T]he concept of proportionality is given significant weight.”); cf. Ewing, 538 U. S. at 35 (Stevens, J., dissenting) (asserting that broad, multifaceted proportionality principle precludes reliance on a single sentencing rationale, like deterrence, to justify a particular punishment); Harmelin, 501 U. S. at 1014-15 (White, J., dissenting) (recognizing limitations of a purely historical analysis and advocating a flexible and dynamic approach based on evolving standards of decency).

[FN170]. Harmelin, 501 U. S. at 985.


[FN172]. Id.; see also id. at 987 (citing Mass. Gen. Laws ch 272, § 34 (1988)) (comparing states where sodomy is punishable by not more than twenty years with those in which it is not punishable at all). One could imagine, for example, that in a time and place where society uniformly viewed incarceration solely as a means to rehabilitation, life sentences might be deemed grossly disproportionate to all but the most serious of crimes.

[FN173]. Cf. id. at 987 (“[A]lthough] some offenses, involving violent harm to human beings, will always and everywhere be regarded as serious ... there is enormous variation--even within a given age, not to mention across the
many generations ruled by the Bill of Rights.”); Frase, supra note 18, at 591 (defining limiting retributivism as an approach that “allows all traditional punishment purposes to play a role but places retributive outer limits both on who may be punished (only those who are blameworthy), and how hard they may be punished (within a range of penalties which would be widely viewed as neither unfairly severe or unduly lenient”); Lee, supra note 20, at 681-87 (proposing retributivism as a side constraint as a conceptually clearer, and more robust limiting principle than the Supreme Court's disjunctive theory which provides “that a sentence is not unconstitutionally excessive as long as it can be justified under any one of the traditional justifications for punishment”).


[FN175]. Id.; see also Frase, supra note 18, at 590 (describing culpability as encompassing “degree of intent (mens rea), motives, role in the offense, and mental illness or other diminished capacity”); Lee, supra note 20, at 703 (“[T]his formulation ... concisely expresses the widely held view that crimes causing the same harm should be treated differently depending on the criminal's level of culpability.”).

[FN176]. Nozick, supra note 174, at 363-97. A complicating factor in Nozick's formula results from the distinctions that could be drawn between wrongness and harm. The amount of harm caused could be viewed as a function of the durability of the victim or value of the property. Consider, for example, if on one day, an offender attempted to mug a young woman who managed to fend off the attack, and then the next day, successfully mugged an old woman who subsequently died from injuries resulting from the mugging. The wrongdoing of what the offender did both days could be deemed comparable: in both instances, he sought to take another person's money. Nevertheless, the harm caused is undeniably worse in the second case where the victim died. In my proposed offense gravity factors, notions of wrongness would be incorporated into culpability, and both harm and magnitude would be measured separately.


[FN178]. See Solem v. Helm, 463 U.S. 277, 293 (1983). Specifically, the Court characterized magnitude as a sub-factor of harm, and listed the following harm precepts: (1) the “absolute magnitude” of the crime as evidenced by the differentiation between petty and grand theft, (2) “a lesser included offense should not be punished more severely than the greater offense,” (3) “attempts are less serious than completed crimes,” and (4) “an accessory after the fact should not be subject to a higher penalty than the principal.” Id. (citations omitted); cf. Ewing v. California, 538 U.S. 11, 40 (2003) (Breyer, J., dissenting) (concluding that Ewing scored “well toward the bottom of the criminal conduct scale” in terms of harm, magnitude, and culpability).

[FN179]. Solem, 463 U.S. at 292-93 (noting that “[m]ost would agree that negligent conduct is less serious than intentional conduct,” and the state statutory ranking of culpability, “negligent acts, reckless acts, knowing acts, intentional acts, and malicious acts,” is well established).

[FN180]. Id. at 294. In Ewing, the Solicitor General urged the following additional offense gravity factors: (1) “the ‘frequency’ of the crime's commission,” (2) “the ‘ease or difficulty of detection,’” and (3) “the degree to which the crime may be deterred by differing amounts of punishment.” 538 U.S. 11, 40 (2003) (Breyer, J., dissenting). Justice Breyer reasoned that shoplifting, like traffic offenses, were frequent, but that shoplifting was easily detectable and no evidence had been presented indicating “that the law enforcement community believes lengthy prison terms necessary adequately to deter shoplifting.” Id. The policy and administrative concerns that result from aggregating offenses and offenders and using a utilitarian analysis to measure social costs seems contrary to requiring a retributivist nexus between the offense and the sentence.

[FN181]. Andrew Von Hirsch, Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of
Criminals 67-70 (1985) (citing Joel Feinberg, Harm to Others 37-45, 185-214 (1984)).

[FN182] Id. at 67.

[FN183] See id. at 68.


[FN185] Id. at 69.

[FN186] Id.

[FN187] Id. at 70.

[FN188] See id.

[FN189] See id. at 70 (differentiating the harm in breaking the pinky finger of a stockbroker versus a concert pianist).

[FN190] Differentiating between victims with and without resources, such as economic, social, and medical resources, may exacerbate socioeconomic disadvantage among offenders. It may be that poor offenders tend to commit crimes against poor victims who tend to suffer greater harm. This skewing effect could potentially be mitigated through a culpability discount based on socioeconomic class. Cf. Richard Delgado, “Rotten Social Background”: Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?, 3 Law & Ineq. 9 (1985) (examining whether offender's life circumstances could form the basis for excusing criminal conduct).


[FN192] See Ewing v. California, 538 U.S. 11, 18-19, 29-30 (2003) (inadvertently awakening one victim and forcing another victim from building mailroom to individual apartment to steal her money and credit cards); see also Solem v. Helm, 463 U.S. 277, 316 (1983) (Burger, C.J., dissenting) (“It is sheer fortuity that the places respondent burglarized were unoccupied and that he killed no pedestrians while behind the wheel.”); cf. United States v. Angelos, 345 F. Supp. 2d 1227, 1244 (D. Utah 2004) (“[I]s it rational to punish a person who might shoot someone with a gun he carried far more harshly than the person who actually does shoot or harm someone?”).


[FN194] Cf. Harmelin, 501 U.S. at 1022-23 (White, J., dissenting) (reasoning that the harm caused or threatened by the crime of possession of a large quantity of drugs “affects the criminal who uses the drugs most directly,” and that “the ripple effect on society” often results from drug addiction as opposed to the crime of drug possession). Justice White identified tangential effects such as “related crimes, lost productivity, health problems, and the like,” but distinguished drug possession from crimes directed against the persons and property of others, and relied on Robinson v. California, 370 U.S. 660, 660-67 (1962), in asserting that these effects were the consequence of addiction which could not be criminalized. See Harmelin, 501 U.S. at 1023 (White, J., dissenting).

[FN195] See Solem v. Helm, 463 U.S. 277, 293-94 (1983) (offering as an example of the link between culpability and criminal intent, a defendant's motive in committing a crime, since a contract killing is more serious than a
passion killing).


[FN197]. For example, the excuse of provocation, if established, moves a homicide from murder to manslaughter. See id. at 72 (citing George P. Fletcher, Rethinking Criminal Law 242-50 (1978)).

[FN198]. See U.S. Sentencing Guidelines Manual § 5H (2007); cf. Robinson, Punishing Dangerousness, supra note 99, at 1439-41 (“[A]lthough one of the best predictors of future criminality is employment history ... [a] person does not deserve more punishment for an offense because he has a poor employment history.”).


[FN200]. See United States v. Clark, 8 F.3d 839, 844 (D.C. Cir. 1993); United States v. Johns, 5 F.3d 1267, 1272 (9th Cir. 1993). Obviously, an ex post facto argument is only valid for sentences imposed prior to the November 1, 1992 effective date.

[FN201]. Von Hirsch, supra note 181, at 77.


[FN204]. Id.


[FN206]. See Rummel v. Estelle, 445 U.S. 263, 282 n.27. While using only one scaling method, violence, may lead to a conclusion that seems wrong, multiple scaling methods must be employed. For example, the possibility that Brutus's crime was motivated by a misguided sense of civic duty, in contrast with Claudius's familial relationship with his victim, the premeditated nature of Claudius's crime, and the way in which he benefitted personally could warrant a higher culpability score and harsher penalty. Violence should be just one factor in the mix, not the determinative factor. See id. 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.”).

[FN207]. Id. at 282 n.27 (majority opinion). In discounting the nonviolent nature of Rummel's crimes, the Court relied on legislative primacy stating that: “The 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.” Id. at 275. It listed high level, corporate crimes in the areas of “antitrust, bribery, or clean air or water standards” as being nonviolent and yet serious. Id.


[FN209]. See id. at 1002 (Kennedy, J., concurring in part and concurring in the judgment); see also United States v. Angelos, 345 F. Supp. 2d 1227, 1247 (D. Utah 2004) (characterizing Harmelin's crime as trafficking in illegal drugs and asserting that this is, in fact, a violent crime).
[FN210]. See 445 U.S. at 275-76.

[FN211]. Id.

[FN212]. Id. at 276.

[FN213]. While drug crimes could also be quantified in monetary terms, it may make sense to use measurements of the amount and type of drug to determine magnitude, as is done under the federal sentencing guidelines. See U.S. Sentencing Guidelines Manual 1 2D1.1(c)(4) (2006) (requiring at least one kilogram of heroin, compared to five kilograms of cocaine to trigger a ten-year guidelines minimum). It may be difficult to measure the size of so-called street crimes apart from harm to the victim, but measures such as lost wages from work and the cost of medical expenses are possible.

[FN214]. The federal sentencing guidelines provide that: “Age may be a reason to depart downward in a case in which the defendant is elderly and infirm and where a form of punishment such as home confinement might be equally efficient as and less costly than incarceration.” U.S. Sentencing Guidelines Manual 1 5H1.1 (2007); see also Molly Fairchild James, The Sentencing of Elderly Criminals, 29 Am. Crim. L. Rev. 1025, 1044 (1992) (“Elderly prisoners should not be sentenced to what amounts to life sentences, if the legislature intended to impose a significantly lesser penalty for the specific crime committed.”).


[FN217]. Id. at 37.

[FN218]. Id. at 38-39. In terms of triggering conduct, Ewing's:

[O]ffense behavior ... is worse than that in Solem, but only to a degree. It would be difficult to say that the actual behavior itself here (shoplifting) differs significantly from that at issue in Solem (passing a bad check) or in Rummel (obtaining money through false pretenses). Rather the difference lies in the value of the goods obtained.

Id. “Ewing's prior record consists of four prior felony convictions (involving three burglaries, one with a knife) contrasted with Helm's six prior felony convictions (including three burglaries, though none with weapons).” Id. at 38. Rummel had only “two prior felony convictions (involving small amounts of money).” Id.


[FN220]. See Ewing, 538 U.S. at 39. “Ewing's sentence, unlike Rummel's (but like Helm's sentence in Solem), is long enough to consume the productive remainder of almost any offender's life. (It means that Ewing himself, seriously ill when sentenced at age 38, will likely die in prison.)” Id.

[FN221]. See Solem, 463 U.S. at 300-03. Parole and commutation are fundamentally different in that “[p]arole is a regular part of the rehabilitative process. Assuming good behavior, it is the normal expectation in the vast majority of cases. The law generally specifies when a prisoner will be eligible to be considered for parole, and details the standards and procedures applicable at that time.” Id. at 300 (citing Greenholtz v. Inmates of Neb. Penal Corr. Complex, 442 U.S. 1 (1979); Morrissey v. Brewer, 408 U.S. 471 (1972)). In contrast, commutation “is an ad hoc
exercise of executive clemency. A Governor may commute a sentence at any time for any reason without reference to any standards.” Id. at 301 (citing Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458 (1981)).

Under Texas's parole system at the time that Rummel was decided, a prisoner sentenced to life could become “'eligible for parole in as little as 12 years.'” Id. (citing Rummel, 445 U.S. at 280). By contrast, a prisoner sentenced to life without parole in South Dakota must first receive the unanimous vote of the board of pardons and paroles to recommend commutation, and then the Governor has unfettered discretion to accept or reject the recommendation. See id. at 302 & n.29. Furthermore, commutation merely makes a prisoner eligible for parole. Id. at 302. If Helm had his sentence commuted to forty years, he still would not have been parole eligible for twenty-one years, whereas if Rummel had been sentenced to forty years, he could have been eligible for parole in less than seven years. Id. at 303 n.31.

[FN222]. Id. at 316 (Burger, C.J., dissenting). This assertion, however, seems unlikely in light of the majority opinion's analysis of the differences between commutation in South Dakota and parole in Texas during the relevant time period.

[FN223]. Id. There was no basis for an actual comparison because Rummel “was released in connection with a separate federal habeas corpus proceeding in 1980” when a federal district court held that he had received ineffective assistance of counsel. Id. at 317 n.8 (citing Rummel v. Estelle, 498 F. Supp. 793 (W.D. Tex. 1980)). He then pled guilty and was sentenced to time served, so no one knows if or when Rummel would have been released on parole. Id.

[FN224]. Id. at 303 n.32 (majority opinion). The Solem Court viewed Rummel's holding as limited to its facts since the Rummel Court had failed to articulate a clear, generally applicable proportionality test. See id. at 300-03.


[FN226]. See Lockyer v. Andrade, 538 U.S. 63, 79 (2003) (Souter, J., dissenting). “[B]ecause Andrade was 37 years old when sentenced, the substantial 50-year period amounts to life without parole.” Id. (citing Solem, 463 U.S. at 287).

[FN227]. These exceptions may relate to what the offender is likely to lose during the years spent in prison. For example, a twenty-year-old woman who is sentenced to thirty years imprisonment may lose the opportunity to have children. Similarly, an exceptional athlete who is imprisoned during the period of his or her peak physical fitness may not be able to compete professionally upon his or her release. See D. Orlando Ledbetter, Vick Has Future in NFL After Time Served: But After Three Years Away from the Game, Teams Might Want Him to Play a Position Other Than QB, Toronto Star, Dec. 11, 2007, at S1 (discussing likelihood of former NFL quarterback Michael Vick's reentering professional football after serving his federal sentence); Juliet Macur, Vick Receives 23 Months and a Lecture, N.Y. Times, Dec. 11, 2007, at D1 (same).

[FN228]. See, e.g., Ewing v. California, 538 U.S. 11, 35 (2003) (Breyer, J., dissenting) (asserting that Solem “found grossly disproportionate a somewhat longer sentence imposed on a recidivist offender for triggering criminal conduct that was somewhat less severe”); Harmelin v. Michigan, 512 U.S. 957, 1001, 1004 (reasoning that Harmelin's crime was more serious than the crime in Hutto and “far more grave than the crime at issue in Solem”); Solem, 463 U.S. at 315 (Burger, C.J., dissenting) (“The differences between this case and Rummel are insubstantial.”).
[FN229]. Ewing and Andrade were both sentenced under California's three-strikes law, but their triggering crimes were shoplifting of $1,200 of golf clubs and $150 of videotapes respectively. See Ewing, 538 U.S. at 18; Lockyer, 538 U.S. at 66. No store security or bystanders were harmed at the time, and the property was recovered, so neither store suffered a financial loss. Ewing, 538 U.S. at 18; Lockyer, 538 U.S. at 66. Evaluating culpability is a more complex enterprise based on their prior offenses.


[FN231]. See Adam Liptak, Long Term in Drug Case Fuels Debate on Sentencing, N.Y. Times, Sept. 12, 2004, at A20 (reporting on judge's request for briefing on application of a fifty-five-year statutory mandatory minimum provision for carrying a gun while selling several hundred dollars of marijuana on three occasions); Nick Madigan, Judge Questions Long Sentence in Drug Case, N.Y. Times, Nov. 17, 2004, at A16 (reporting on judge's reluctance to impose fifty-five-year sentence and advice to defendant's attorney not only to appeal his decision but to ask President Bush for clemency once all appeals were exhausted).

[FN232]. Angelos, 345 F. Supp. 2d at 1231.

[FN233]. Id. at 1231-32. The government rebuffed Angelos's efforts to reopen plea negotiations, and the case proceeded to trial. Id. at 1232. “While it is constitutionally permissible for the government to threaten to file enhanced charges against a defendant who fails to plead guilty, there is always the nagging suspicion that the practice is unseemly.” Id. at 1254 (citing Bordenkircher v. Hayes, 434 U.S. 357 (1978)).

[FN234]. Id. at 1232.

[FN235]. Id. Angelos's three convictions under 18 U.S.C. ' 924(c) required imposition of a fifty-five-year sentence: “Section 924(c) prescribes a five-year mandatory minimum for a first conviction, and 25 years for each subsequent conviction.” Id. (citing 18 U.S.C. '924(c)(1)(A)(i), (c)(1)(C)(i) (2000)). Under the guidelines, the gun enhancement for a drug offense would have been about two years. See id. at 1239-40 & n.64 (citing U.S. Sentencing Guidelines Manual ' 2D1.1(b)(1) (2006)). The judge ultimately decided not to impose the seventy-eight to ninety-seven month consecutive sentence recommended under the guidelines, and instead imposed a sentence of one day in prison for all offenses other than the '924(c) counts. Id. at 1260-61.


[FN237]. It is noteworthy that Angelos was “joined in an amicus brief filed by a distinguished group of 29 former United States District Judges, United States Circuit Court Judges, and United States Attorneys, who draw on their expertise in federal criminal law and federal sentencing issues to urge that the sentence is unconstitutional as disproportionate to the offenses at hand.” Id. at 1256 & n.136 (listing 29 names).


[FN239]. Id. at 1257-58.

[FN240]. Id. at 1258.
[FN241]. Id. (citing Solem, 463 U.S. at 292-93; Rummel v. Estelle, 445 U.S. 263, 275 (1980)).

[FN242]. Id. at 1257-58.

[FN243]. Id. at 1258.

[FN244]. See id. at 1244-55, 1259 (comparing Angelos's sentence, 738 months, with that of an aircraft hijacker, 293 months, and a terrorist who detonates a bomb in a public place, 235 months, and noting that “Angelos’[s] sentence is longer than he would receive in any of the fifty states”).


[FN246]. The court did not, however, consider the fact that five years after Davis's conviction, the state legislature reduced the maximum penalty for his offenses to ten years. See Hutto, 454 U.S. at 377-79 (Powell, J., concurring); id. at 385-86 & nn.3-4 (Brennan, J., dissenting). Additionally, the fact that Hutto was decided by summary disposition without full briefing and argument may impact the potency of its stare decisis effect. See Kenneth F. Ripple & Gary J. Saalman, Rule 11 in the Constitutional Case, 63 Notre Dame L. Rev. 788, 812-16 (1988) (“[I]t is also clear that the Court gives far less weight to these summary dispositions than it does to cases rendered after full argument and opinion.”). Third, analysis of Davis's real sentence might have resulted in a sentence severity of significantly less than forty years after accounting for good-time credits and the possibility of parole. Finally, to the extent that the sentencing enhancement in Angelos was driven by the '924(c) gun enhancement, Hutto did not involve guns, and perhaps could have been distinguished as not analogous.

[FN247]. United States v. Angelos, 433 F.3d 738, 753 (10th Cir. 2006). With less than three years on the bench, Judge Paul Cassell noted that he had sentenced hundreds of defendants under the Guidelines and federal mandatory minimum statutes, and that the required sentences had been “tough but fair.” Angelos, 345 F. Supp. 2d at 1261. Although he had viewed a few sentences as excessive, they still “seemed to be within the realm of reason.” Id. He asserted that: “This case is different. It involves a first offender who will receive a life sentence for crimes far less serious than those committed by many other offenders—including violent offenders and even a murderer—who have been before me.” Id. He recommended that the President commute Angelos's sentence to no more than eighteen years based on the jury recommendations. See id. at 1262.

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