LIMITING EXCESSIVE PRISON SENTENCES UNDER FEDERAL AND STATE CONSTITUTIONS

Richard S. Frase[*]

INTRODUCTION

The Supreme Court's disappointing holdings in the California Three Strikes cases have probably led many observers to conclude that there are no effective constitutional limits on excessively long prison sentences. This Article argues the contrary, and makes three main points.

First, any judgment of excessiveness (or disproportionality) requires a normative framework—"excessive" relative to what? The Court's opinions have been very unhelpful in this regard, but three distinct proportionality principles are implicit in Eighth Amendment cases (and in many other areas of American, foreign, and international law). Litigators, courts, and scholars need to clearly state and make explicit use of these principles. As summarized below, and more fully discussed in my previous writings,[1] three of the most important and widespread examples of such principles are what I have called the limiting retributive, ends-benefits, and alternative-means proportionality principles. The second and third principles are grounded in utilitarian philosophy; thus, they apply even if a jurisdiction (with the Court's apparent blessing) rejects retributive limits on lengthy prison terms designed to achieve crime control and other practical goals.

Second, excessiveness, in one or more of the three senses discussed in Part I, is the common theme which underlies all three clauses of the Eighth Amendment.[2] Litigators, courts, and scholars should explicitly recognize and apply this theme in prison-duration cases applying the Cruel and Unusual Punishments Clause, drawing

---

* Benjamin N. Berger Professor of Criminal Law, University of Minnesota.

1 *See, e.g.*, E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS (forthcoming); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571 (2005).

2 These are the Excessive Bail Clause, the Excessive Fines Clause, and the Cruel and Unusual Punishments Clause.

on standards and practice under the other two clauses so that the Amendment achieves its essential goal—the protection of citizens from excessive government power.

Third, the Eighth Amendment is not the only source of constitutional limits on excessive prison terms. Litigators in state court (as well as the judges of those courts and scholars) must consider the broader protections which may apply under the state constitution, particularly when (as is true in well over half of the states) state and federal constitutional sentencing provisions are worded differently. Indeed, even when these provisions are worded identically, many state courts have recognized their power to interpret state constitutional law more favorably to offenders.

I. EXCESSIVE RELATIVE TO WHAT? DEFINING CONSTITUTIONAL PROPORTIONALITY PRINCIPLES

Excessiveness and disproportionality are meaningless concepts in the absence of a clearly defined and defensible normative framework. It is therefore rather surprising that courts, when called upon to determine constitutional limits on excessive punishments, have rarely stated, let alone sought to justify, any such framework. Justice Scalia has repeatedly asserted that proportionality is inherently tied to retributive theories of punishment,[3] a concept that the majority of the Court has thus far refused to expressly endorse. But in fact, there are at least two well-established non-retributive proportionality doctrines, which will be discussed after an initial clarification of the applicable retributive principles. As discussed below, each of these three proportionality principles has strong historical and academic support. And as will be shown in Part II, the same three principles are also implicit in many of the Court's Eighth Amendment decisions.

A. Limiting Retributive Proportionality

There is extensive literature on retributive (or "just deserts") punishment theories.[4] For present purposes, the most important and

---

3 *E.g.*, Ewing v. California, 538 U.S. 11, 31 (2003) (Scalia, J., concurring) ("Proportionality—the notion that the punishment should fit the crime—is inherently a concept tied to the penological goal of retribution."); Harmelin v. Michigan, 501 U.S. 957, 989 (1991) (opinion of Scalia, J.) (describing proportionality as a retributive concept in part of an opinion joined only by Chief Justice Rehnquist).

4 *See, e.g.*, JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 16–17 (4th ed. 2006) (discussing retributivism as a theory of punishment); JOEL FEINBERG, DOING & DESERVING: ESSAYS

widely accepted principles of these theories may be summarized as follows. Unlike utilitarianism or other consequentialist theories, retributive theories ignore the offender's probable future conduct or the effects that the punishment might have on crime rates or otherwise. Instead, the retributive theory focuses on the actor's degree of blameworthiness for his or her past actions, and in particular, on both the nature and seriousness of the harm foreseeably caused or threatened by the crime, and the offender's degree of culpability in committing the crime—namely, his or her intent (mens rea), motive, role in the offense, possible diminished capacity to obey the law, and so forth. Some retributive scholars believe that prior convictions are irrelevant to this assessment, while other such scholars accept that prior crimes modestly increase an offender's blameworthiness.[5]

Some scholars believe desert principles should define the degree of punishment severity as precisely as possible. As elaborated by writers such as Andrew von Hirsch, this precise-desert theory permits crime-control, budgetary, or other non-retributive values to affect the choice among penalties of more or less equal severity, as well as the overall scale of punishment severity, as determined by the most and least severe penalties.[6] But within that scale, this theory requires strict "ordinal" retributive proportionality in the relative severity of penalties imposed on different offenders.[7] This version of retributive theory is clearly too narrow for constitutional purposes, since it leaves little room for the operation of non-retributive values and goals in individual cases. The Supreme Court has repeatedly held that the Eighth Amendment permits state and federal governments to pursue a variety of non-retributive sentencing goals.[8]

A more modest theory, often referred to as "limiting retributivism," allows non-retributive punishment purposes to be applied

---

IN THE THEORY OF RESPONSIBILITY 217–21 (1970) (explaining strong and weak retributivism).

5 *Compare* ANDREW VON HIRSCH, PAST OR FUTURE CRIMES: DESERVEDNESS AND DANGEROUSNESS IN THE SENTENCING OF CRIMINALS 88–91 (1985) (arguing that repeat offenders deserve somewhat greater punishment), *with* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 460–66 (1978) (questioning whether a prior record should increase an offender's culpability to any degree). *See generally* Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, *in* 22 CRIME AND JUSTICE: A REVIEW OF RESEARCH 303, 317–20 (Michael Tonry ed., 1997) (discussing the issue of criminal record in theories of punishment).

6 *See, e.g.*, ANDREW VON HIRSCH, CENSURE AND SANCTIONS (1993).

7 *See, e.g.*, *id.*

8 *See, e.g.*, *Ewing*, 538 U.S. at 25 (opinion of O'Connor, J.) (listing permissible non-retributive sentencing goals in an opinion joined by Chief Justice Rehnquist and Justice Kennedy, who provided the necessary votes to affirm, albeit on the narrowest grounds).

within a range defined by upper and lower desert-based limits—penalties must not be clearly too severe nor clearly too lenient, relative to the offender's just deserts.[9] One widely cited version of this theory was proposed by Norval Morris, who viewed retributive assessments as imprecise and therefore posited a range of "not undeserved" penalties.[10] Other writers have proposed flexible retributive limits on different grounds, emphasizing the special importance of avoiding unfairly severe penalties. For example, the philosopher K.G. Armstrong wrote that justice grants

> the *right* to punish offenders up to some limit, but one is not necessarily and invariably *obliged* to punish to the limit of justice. . . . For a variety of reasons (amongst them the hope of reforming the criminal) the appropriate authority may choose to punish a man less than it is entitled to, but it is never just to punish a man more than he deserves.[11]

As shown in the cases discussed in Part II of this Article, the Supreme Court's implicit invocations of desert principles are consistent with a limiting retributivism theory, especially one which emphasizes the prevention of excessively severe penalties. This approach finds support in the text of two of the three Eighth Amendment clauses

---

9 Limiting retributive principles also apply to issues of criminal liability, as well as the severity of punishment; only blameworthy persons may be convicted and made eligible for punishment. *See generally* SULLIVAN & FRASE, *supra* note 1, at ch. 6.

10 NORVAL MORRIS, THE FUTURE OF IMPRISONMENT (1974). Morris's theory is elaborated in Richard S. Frase, *Limiting Retributivism*, *in* THE FUTURE OF IMPRISONMENT 83–119 (Michael Tonry ed., 2004). *See also* Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court's Tortured Approach to Cruel and Unusual Punishment*, 84 KY. L.J. 107, 168–72 (1996) (arguing that Eighth Amendment proportionality should be construed in accordance with Morris's theory); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677 (2005) (proposing Eighth Amendment retributive limits). Morris's limiting retributive theory has been adopted as the theoretical framework for the revised Model Penal Code sentencing provisions. *See* MODEL PENAL CODE § 1.02(2)(a) cmt. b (Tentative Draft No. 1, 2007) ("Subsection (2)(a) . . . borrows from the theoretical writings of Norval Morris."). *But see* Alice Ristroph, *Desert, Democracy, and Sentencing Reform*, 96 J. CRIM. L. & CRIMINOLOGY 1293 (2006) (arguing that the concept of deserved punishment is too elastic, opaque, and non-falsifiable to provide meaningful limits on punishment severity; however, Ristroph recognizes that crime-control sentencing goals are also rather elastic and opaque, and that such goals have often been used to justify severe penalties, notwithstanding the greater potential, in theory at least, for using empirical evidence to falsify such claims).

11 K.G. Armstrong, *The Retributivist Hits Back*, *in* THE PHILOSOPHY OF PUNISHMENT: A COLLECTION OF PAPERS 138, 155 (H.B. Acton ed., 1969); *see also* H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 237 (1968) ("[M]any self-styled retributivists treat appropriateness to the crime as setting a *maximum* within which penalties [are chosen on crime-control grounds] . . . ."). *See generally* Frase, *supra* note 10, at 92–94 (stating that numerous authors and model codes emphasize strict desert limits on maximum severity, with looser requirements of minimum sanction severity).

(forbidding excessive bail and excessive fines), and is also consistent with the essential role of constitutional guarantees as protectors of human rights, and as bulwarks against unfairness and abuse of governmental power.

B. Non-Retributive Proportionality

Utilitarian (or consequentialist) purposes of punishment focus on the desirable effects (mainly, future crime reduction) which punishments have on the offender being punished, or on other would-be offenders, and on the costs and undesired consequences of punishments.[12] The most widely accepted of these purposes are the following: special (or individual, or specific) deterrence, incapacitation, and rehabilitation of the offender (because he is thought likely to commit further crimes); general deterrence of other would-be violators through fear of receiving similar punishment; and a more diffuse, long-term form of deterrence (sometimes referred to as expressive or denunciation purposes) which focuses on the norm-defining and norm-reinforcing effects that penalties have on the public's views about the relative seriousness, harmfulness, or wrongness of various crimes.[13]

From a utilitarian perspective, a penalty can be disproportionate (or excessive) in two distinct and independent ways corresponding to the ends-benefits and alternative means proportionality principles described below: 1) the costs and burdens of the sentence (or the added costs and burdens, compared to a lesser penalty) may outweigh the likely benefits (or added benefits) produced by the sentence; or 2) the sentence may be disproportionate (that is, unnecessary and therefore excessive) when compared to other, less costly or less burdensome means of achieving the same goals. Each of these utilitarian proportionality principles has ancient roots, as discussed more fully below.

---

12 *See generally* DRESSLER, *supra* note 4, at 14–16 (providing a general background on the utilitarian justifications behind criminal punishment); Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67 (2005) (explaining how judges should consider the purpose of punishment determining sentences).

13 *See* Kent Greenawalt, *Punishment*, *in* 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 1282, 1286–89 (Joshua Dressler ed., 3d ed. 2002) (explaining utilitarian justifications for punishment). *See generally* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997) (providing utilitarian arguments for punishments based on desert).

1. Ends-Benefits Proportionality

This principle has been recognized by utilitarian philosophers since the eighteenth century. Cesare Beccaria maintained that criminal penalties should be proportional to the seriousness of the offense, as measured by the social harm caused or threatened by the offense.[14] Jeremy Bentham elaborated several more specific utilitarian arguments for punishing in proportion to the seriousness of the crime.[15] First, he argued that "[t]he greater an offence is, the greater reason there is to hazard a severe punishment for the chance of preventing it"—that is, greater social harm justifies greater preventive effort and expense.[16] Second, Bentham argued that a scale of penalties proportionate to social harm would give offenders "a motive to stop at the lesser" crime.[17] Third, he argued that "the evil of the punishment [should not exceed] the evil of the offence."[18] In addition to public costs, punishments impose suffering on offenders (and also often on their families), and such suffering should not be disproportionate to the seriousness of the crime(s) which the punishment hopes to prevent.

The utilitarian ends-benefits principle and retributive proportionality both require proportionality relative to an offense's severity, but the two theories measure such severity differently. Utilitarian theory punishes in proportion to the harm caused or threatened by the offense, but only when and to the extent that such punishment will prevent future crimes by this offender or others. On the other hand, utilitarian theory considers not only the harm associated with a particular act similar to the defendant's, but also the aggregate harm caused by all such actions, and the difficulty of detecting and deterring such actions. As for the second retributive element of offense severity, offender culpability (as determined by intent, motive, etc.),

---

14 *See, e.g.*, CESARE BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 21–28 (Adolph Caso ed., Int'l Pocket Library 4th ed. 1992) (1764).

15 *See, e.g.*, JEREMY BENTHAM, THEORY OF LEGISLATION (R. Hildreth trans., Trübner & Co. 4th ed. 1882) (1789).

16 *Id.* at 326 (emphasis omitted).

17 *Id.* (emphasis omitted); *see also* BECCARIA, *supra* note 14, at 28 ("If an equal punishment be ordained for two crimes that injure society in different degrees, there is nothing to deter men from committing the greater, as often as it is attended with greater advantage."); ANDREW VON HIRSCH ET AL., CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH 41–43 (1999) (discussing the marginal deterrent benefits of penalties proportioned to harms associated with different crimes).

18 BENTHAM, *supra* note 15, at 323; *see also* HART, *supra* note 11, at 173 n.20 (describing the "simple Utilitarian ground that the law should not inflict greater suffering than it is likely to prevent").

utilitarians consider culpability factors only when and to the extent that they are related to the likely future benefits of punishment (for example, the dangerousness and deterrability of this offender or others). Finally, in choosing the proper sentence for a particular offender or group of similar offenders, utilitarian theory considers not only the actual crime control or other benefits produced by sanctions, but also any undesirable consequences of the sanction. Such consequences might include perverse incentives produced by harsh penalties (such as when such penalties encourage offenders to kill potential witnesses or arresting officers). Another example would be the tendency for disproportionate penalties to undermine the public's sense of the relative gravity of different crimes, and cause a public loss of respect for, and willingness to obey and cooperate with, criminal justice authorities. As the philosopher H.L.A. Hart said, "[if] the relative severity of penalties diverges sharply from this rough scale [of proportionality], there is a risk of either confusing common morality or flouting it and bringing the law into contempt."[19]

2. Alternative-Means Proportionality

Utilitarian efficiency values require that, among equally effective means to achieve a given end, those that are less costly or burdensome should be preferred. This has sometimes been referred to as the principle of parsimony,[20] and like the ends-benefits principle discussed above, it has been recognized since the eighteenth century. Cesare Beccaria argued that all punishments should be "necessary; the least possible in the case given."[21] Jeremy Bentham similarly held that punishment itself is evil and should be used as sparingly as possible; in particular, a penalty should not be used "in cases where the same end may be obtained by means more mild."[22] In modern times,

---

19 HART, *supra* note 11, at 25. *See generally* Robinson & Darley, *supra* note 13 (arguing for a criminal law system based on the community's ideas of desert); MODEL PENAL CODE § 1.02(2)(a), reporter's n.o (Tentative Draft No. 1, 2007) (addressing the concern for moral legitimacy in sentencing).

20 *See, e. g.*, MORRIS, *supra* note 10, at 60–61, 75, 78 (describing parsimony as the "least restrictive—least punitive—sanction necessary to achieve defined social purposes").

21 BECCARIA, *supra* note 14, at 99.

22 BENTHAM, *supra* note 15, at 323. Similar means proportionality principles were endorsed in the French Declaration of the Rights of Man and Citizen, Aug. 26, 1789, *reprinted in* FRANK MALOY ANDERSON, THE CONSTITUTIONS AND OTHER SELECT DOCUMENTS ILLUSTRATIVE OF THE HISTORY OF FRANCE: 1789-1901, at 15, 58–60 (1904). Article 8 of the Declaration limited punishments to those that are "strictly and obviously necessary." *Id.* at 59. Article 9 specified that, to protect the presumption of innocence, "if it is

alternative-means proportionality principles have frequently been endorsed by scholars and model code drafters.[23] And as will be shown in Part II, unnecessarily severe penalties and other criminal justice measures have been condemned in numerous federal and state court opinions.

3. Distinguishing and Applying Proportionality Principles

Ends and means proportionality assessments are conceptually distinct, but some cases might seem to incorporate elements of both. Although ends proportionality evaluates the excessiveness of a measure relative to the benefits likely to be achieved, rather than alternative means of achieving those benefits, some ends proportionality assessments also involve comparisons to alternative means. This is the case when an allegedly excessive measure adds *some* additional net benefit, but also produces additional net costs or burdens relative to an alternative measure. The ends-benefits proportionality question in such a case is whether the greater costs or burdens of the challenged measure (compared to the alternative measure) exceed (or grossly exceed) the likely added benefits of the challenged measure. For example, if a court were to conclude that, in a given category of cases, life without parole ("LWOP") does add some constitutionally recognized net benefit that would not be achieved by the alternative of life with parole, the court would then need to ask whether the

---

thought indispensable to arrest him, all severity that may not be necessary to secure his person ought to be strictly suppressed by law." *Id.*

23 *See, e.g.*, MORRIS, *supra* note 10, at 60–61 ("The principle of parsimony infuses the recommendations of the two national crime commissions of the past decade."); FRANKLIN E. ZIMRING ET AL., PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 189–91 (2001) (describing classes of excessive punishment claims); Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1043–56 (1978) (discussing dignity and excessiveness in light of utilitarian theories of punishment); Richard G. Singer, *Sending Men to Prison: Constitutional Aspects of the Burden of Proof and the Doctrine of the Least Drastic Alternative as Applied to Sentencing Determinations*, 58 CORNELL L. REV. 51, 72–89 (1972) (explaining the least drastic alternative doctrine); Michael Tonry, *Parsimony and Desert in Sentencing*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY & POLICY 202 (Andrew von Hirsch & Andrew Ashworth eds., 2d. ed. 1998) ("[J]udges should be directed to impose the least severe sentence consistent with the governing purposes at sentencing." (emphasis omitted)). Notably, "[t]he Model Penal Code and all three editions of the [American Bar Association] sentencing standards explicitly or implicitly recognized the principle of parsimony." Frase, *supra* note 10, at 94–95. The principle is also endorsed in the proposed revisions of the Model Penal Code sentencing provisions. MODEL PENAL CODE § 1.02(2)(a)(iii) cmt. f (Tentative Draft No. 1, 2007) ("[T]he rule of parsimony states a logical truism—punishments beyond those 'necessary' are by definition gratuitous.").

added costs and burdens of LWOP exceed the added benefits. On the other hand, if the court concluded that LWOP adds *no* net benefit that could not be achieved by means of less severe penalties, it would then need to engage in alternative-means analysis.

It should be stressed that each of the two utilitarian proportionality principles described above can be tailored to the particular legal context. This could involve varying the form in which the principle is applied (as a broad standard, a simpler decision rule, or some mix of these). Each principle's strictness of application can also be varied. For example, alternative-means principles need not require the identification of the least costly or burdensome option; in some contexts it may be appropriate to only forbid options which are clearly or significantly more costly or burdensome.

Eighth Amendment litigators, courts, and scholars must further recognize important differences between public policy and constitutional proportionality analysis when applying the two utilitarian proportionality principles described above. In public policy analysis, the costs of a measure are very important elements; in proportionality analysis, measures should not cost more than the benefits they are expected to produce (including public as well as privately borne costs and burdens), or more than equally effective alternative measures. But when defining a defendant's constitutional right to not be subjected to an excessive sentence, the crime control and other benefits of the sentence should probably be weighed only against the burdens that the sentence imposes on the defendant (ends proportionality), and alternative measures should be examined only in terms of their respective burdens on the defendant (means proportionality). The constitutional argument is that it is fundamentally unfair to impose severe burdens that greatly outweigh the expected public benefits, or to impose such burdens when effective alternative measures are much less burdensome. As a matter of sound public policy, it is also unwise, but probably not fundamentally unfair to the defendant, to impose a sentence which costs taxpayers more than the expected benefits are worth, or more than an effective alternative.

Even with this adjustment, some critics might argue that utilitarian principles do not provide a proper basis for deriving constitutional rights. But as I have argued in previous writings,[24] utilitarian ends

---

24 *See, e.g.*, SULLIVAN & FRASE, *supra* note 1; Frase, *supra* note 1; *see also* Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in* Atwater v. City of Lago Vista, 71 FORDHAM L. REV. 329, 389–94 (2002) [hereinafter Frase, *Unreasonableness*] (analyzing the

and means proportionality principles are implicit in much of the Court's constitutional jurisprudence. For example, the factors underlying the Court's Fourth Amendment "balancing" test incorporate both of these principles, and a violation of one or both principles makes a search or seizure "unreasonable" and thus unconstitutional. Nor does it seem plausible to argue that the textual and contextual differences between the Fourth and Eighth Amendments require exclusion of utilitarian proportionality principles from the latter—especially since, as will be shown in Part II, these principles are implicit in many Eighth Amendment cases.

Another difference between public policy and constitutional proportionality analysis relates to the inherent limits of constitutional limit-setting. Public policy strives for as close a fit as possible between costs and benefits, and as efficient a choice as possible among alternative means. But when courts seek to enforce constitutional proportionality limits on sentencing (or on other government measures), they should only intervene if the burdens on the defendant are clearly excessive relative to the benefits, or if alternative sanctions or other measures are clearly less burdensome and equally effective.[25] These inherent limits on judicial review decisions are reflected (but to a very exaggerated degree)[26] in the Supreme Court's requirements of "gross disproportionality" under the Eighth Amendment.

On the other hand, the appropriate deference courts should pay to policy decisions and case-specific assessments made by legislatures, executive officials, and lower courts must not be used as an excuse for total abdication of judicial responsibility to protect defendants from

---

Fourth Amendment reasonableness analysis used by the Supreme Court in numerous cases).

25 *Cf.* Roy G. Spece, Jr., *Justifying Invigorated Scrutiny and the Least Restrictive Alternative as a Superior Form of Intermediate Review: Civil Commitment and the Right to Treatment as a Case Study*, 21 ARIZ. L. REV. 1049, 1054–56 (1979) (noting the difference between requiring choice of the "least" versus a "significantly less" burdensome alternative).

26 See Frase, *supra* note 1, at 574, which notes that the Supreme Court's cases leave great doubt as to when—if ever—a severe prison sentence will be found to violate the Eighth Amendment. An analogous, but less extreme, disconnect between the Court's standards and decisions applying those standards can be found in Fourth Amendment cases. In this context, the Court says it is "balancing" the invasion of the citizen's privacy, property, or liberty interests against the government's interest in searching or seizing. The balancing framework implies the pursuit of an optimum balance which, as suggested in text, is more appropriate for sub-constitutional public policy analysis. But in practice, the scales often seem tipped in the government's favor so that a search or seizure is unlikely to be found "unreasonable" unless the balance weighs very strongly in the citizen's favor. *See generally* Frase, *Unreasonableness*, *supra* note 24 (providing specific examples of how the Court has conducted its Fourth Amendment "balancing" in recent decisions).

abuse of governmental power. All three of the proportionality principles described above (limiting retributive, ends-benefits, and alternative-means) are well established in Anglo-American jurisprudence,[27] and courts should not hesitate to apply them. Nor should courts be deterred by the seeming subjectivity of the qualifying language suggested above, reflecting the inherent limits of judicial review. A standard of "clear" excessiveness, relative to retributive, ends-benefits, and/or alternative-means proportionality principles, is no more subjective than other standards commonly applied by reviewing courts, such as "reasonableness," "compelling state interest," "fair notice," and "abuse of discretion."

II. THE EIGHTH AMENDMENT'S COMMON THEME: PREVENTING EXCESSIVE GOVERNMENT MEASURES

Although some justices on the Court continue to argue that the Cruel and Unusual Punishments Clause only prohibits barbarous penalties, such as burning convicts alive,[28] the majority of the Court has long agreed that, like the Excessive Bail and Excessive Fines Clauses, the Cruel and Unusual Punishments Clause limits excessiveness despite the absence of that word in the constitutional text.[29] This view has historical support,[30] and reflects the idea that the clauses of

---

27 *See* SULLIVAN & FRASE, *supra* note 1; Frase, *supra* note 1.

28 *See, e.g.*, Ewing v. California, 538 U.S. 11, 31 (2003) (Scalia, J., concurring) (arguing that the Eighth Amendment bans types of punishments, not excessive sentences); Harmelin v. Michigan, 501 U.S. 957, 965–86 (1991) (opinion of Scalia, J.) (examining the Eighth Amendment's origins to conclude that it did not ban excessive punishment, in an opinion joined on this point only by Chief Justice Rehnquist).

29 *See, e.g.*, *Ewing*, 538 U.S. at 14–31 (opinion of O'Connor, J.) (reviewing the Court's past decisions and analyzing the case before them in light of the sentence's proportionality); *Harmelin*, 501 U.S. at 996–1008 (Kennedy, J., concurring) (recognizing that the Eighth Amendment includes a "proportionality principle"); Weems v. United States, 217 U.S. 349, 367 (1910) (holding that the Eighth Amendment requires punishments to be "graduated and proportioned to [the] offense"); Solem v. Helm, 463 U.S. 277, 284 (1983) ("The final clause prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed.").

30 *See, e.g.*, LARRY CHARLES BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT (1975) (reviewing numerous types of punishment held to be cruel and unusual, and the analyses behind them); Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1063–65 (2004) ("The idea that grossly excessive punishments are cruel and unusual punishment is not new; it was part of the English law for hundreds of years before the founding of the United States."); Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839 (1969) (exploring the historical relationship between the Eighth Amendment's prohibition against cruel and unusual punishment and the English Bill of Rights of 1689). *But see Harmelin*, 501 U.S. at

the Eighth Amendment share a common theme. It is therefore useful to briefly examine principles established under the Excessive Bail and Excessive Fines Clauses to see how "excessive" has been defined in those contexts. Of course, even a common theme or concept can appropriately be applied differently in different contexts. But if the applications are dramatically different, the burden is on those who favor such widely differing applications to justify them. The starting point is to examine the extent of the differences, as well as the standards being applied.

A. Excessive Bail

The Eighth Amendment's Bail Clause would seem to have very little to do with the other two clauses of the Eighth Amendment, since bail issues arise prior to conviction and the resulting pretrial detention is not intended—or even constitutionally permitted—as a form of punishment.[31] But it turns out that the constitutional standards defining excessive bail clearly reflect one of the utilitarian proportionality principles described above.[32]

The prohibitions of "excessive" bail found in the Eighth Amendment and in many state constitutions imply some sort of proportionality limit, but courts have had few occasions to interpret the meaning of these provisions. The sole Supreme Court ruling to date to address the issue was *Stack v. Boyle*,[33] wherein the Court, having stated that the purpose of bail is to assure the presence of the accused at trial and other hearings, concluded that "[b]ail set at a figure higher than an amount reasonably calculated to fulfill this purpose is 'excessive' under the Eighth Amendment."[34] This standard implicitly in-

---

965–86 (opinion of Scalia, J.) (containing an extended, contrary analysis of the Amendment's original meaning that is joined only by Justice Rehnquist).

31 *See* United States v. Salerno, 481 U.S. 739, 746–52 (1987) (holding that pre-conviction preventive detention would violate substantive due process if it was intended as punishment or was excessive relative to all valid non-punitive purposes).

32 Utilitarian proportionality principles are also implicit in a number of other constitutional limitations on pretrial and trial criminal procedures. *See, e.g.*, SULLIVAN & FRASE, *supra* note 1, at ch. 5; Frase, *supra* note 1, at 611–17. In particular, as was noted previously, both ends and means proportionality principles are implicit in Fourth Amendment cases defining "unreasonable" searches and seizures. And the latter measures, like bail and pretrial detention, are imposed prior to conviction and are not permissible forms of punishment.

33 342 U.S. 1 (1951).

34 *Id.* at 5. *But see Salerno*, 481 U.S. at 754–55 (holding that the Eighth Amendment does not require setting bail at all, and that the state's legitimate interests include prevention of further crime and/or threats to witnesses, as well as prevention of flight).

vokes alternative-means proportionality: a bail amount is "excessive" if it is unnecessarily high, in the sense that a lower bail would have achieved all of the government's legitimate interests.

B. Excessive Fines

Prohibitions on excessive fines can be traced to the Magna Carta (1215),[35] and were included in the English Bill of Rights (1689),[36] Founding Era state bills of rights,[37] and the Eighth Amendment.[38] But the Supreme Court did not have occasion to interpret the Eighth Amendment provision until the end of the twentieth century, and even then only in the context of civil and criminal forfeitures, not cases involving actual fines (which, at this writing, still have never come before the Court). Limiting retributive proportionality principles are fairly well-defined in Supreme Court and lower court cases, but courts have failed to recognize and articulate proportionality principles suitable for defining constitutional excessiveness relative to the non-retributive (deterrent) purposes served by fines, forfeitures, and civil penalties.

In *United States v. Alexander*[39] and *Austin v. United States*,[40] the Court held that criminal, in personam forfeitures (*Alexander*) and civil, in rem forfeitures (*Austin*) might, under some circumstances, constitute excessive fines. Although in rem forfeiture actions are, at least in form, directed at property rather than persons, and do not require the property's owner to have been criminally convicted, prosecuted, or even charged, the Court held in *Austin* that the key issue is not whether a forfeiture is classified as civil/in rem or criminal/in personam, but rather whether the measure constitutes "punishment," at least in part, as opposed to being purely "remedial."[41] The Court further held that a measure imposes punishment if it serves retributive

---

35 MAGNA CARTA §§ 20–21 (Eng. 1215), *reprinted in* WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 284–98 (2d ed. 1914) (providing that fines should be graded according to offense seriousness, and also should not deprive the offender of his livelihood).

36 English Bill of Rights, 1689, 1 W. & M. sess. 2, c. 2 (Eng.).

37 *See* Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc., 492 U.S. 257, 264 (1989) (noting that at least eight states ratifying the Constitution had some equivalent of the Excessive Fines Clause in their state constitutions or declarations of rights).

38 U.S. CONST. amend. VIII.

39 509 U.S. 544, 558–59 (1993).

40 509 U.S. 602, 609–10, 621–23 (1993).

41 *Id.* at 609–10 ("[T]he question is not . . . whether forfeiture . . . is civil or criminal, but rather whether it is punishment.").

or deterrent purposes;[42] purely remedial measures are designed to compensate the government for enforcement costs and/or lost revenues. The Court then remanded the case without attempting to define a standard for determining the excessiveness issue.[43]

In *United States v. Bajakajian*,[44] the Court did provide such a standard and used it, in an in personam criminal forfeiture case, to hold that the Excessive Fines Clause would be violated by full forfeiture of $357,144 in cash which the defendant had failed to report when attempting to take it out of the country.[45] Justice Thomas's majority opinion applied a "grossly disproportional" standard to the gravity of the offense the forfeiture is designed to punish, citing *Solem v. Helm*, but not the more recent case of *Harmelin v. Michigan* (both cases are discussed in Part II.C.3, below).[46] Applying this standard, Justice Thomas stressed several aspects of Bajakajian's offense: (1) the technical nature of the crime (in this case, the non-reporting of a cash transport which, itself, was perfectly legal); (2) the trial court's finding that the crime was unrelated to any other illegal activities; (3) the fact that the defendant did not fall into any of the groups targeted by the statute (money launderers, drug traffickers, tax evaders); (4) the defendant's recommended sentence under the Sentencing Guidelines (six months incarceration and a $5,000 fine), which the Court viewed as a better measure of his culpability relative to other violators of the statute than the much higher statutory maximum penalties; and 5) the minimal harm to the government caused by defendant's non-reporting.[47]

The harm and culpability factors stressed in *Bajakajian* correspond to the two traditional elements of blameworthiness, suggesting a theory of limiting retributive proportionality.[48] But as noted above, for-

---

42 *Id.* at 621–22 (holding that a civil sanction that "can only be explained as . . . serving either retributive or deterrent purposes [in addition to any remedial purpose], is punishment, as we have come to understand the term" (quoting United States v. Halper, 490 U.S. 435, 448 (1989)).

43 *Id.* at 622–23 ("[Petitioner] asks that we establish a multifactor test for determining whether a forfeiture is constitutionally 'excessive.' We decline that invitation." (citation omitted)).

44 524 U.S. 321 (1998).

45 *Id.* at 334–40.

46 *Id.* at 337.

47 *Id.* at 337–40.

48 *See* Barry L. Johnson, *Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeitures After* United States v. Bajakajian, 2000 U. ILL. L. REV. 461, 492–98 (contrasting the *Bajakajian* majority's desert-based approach with the dissent's utilitarian one); Pamela S. Karlan, *"Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 901 (2004) (noting the

feitures may constitute "punishment" if they serve deterrent purposes. So unless the Court is going to impose retributive limits on deterrent purposes (which it has refused to do in the context of prison sentences, discussed below in Part II.C.3), the Court needs to develop standards of utilitarian "excessiveness." It can be argued that some severe forfeitures impose burdens out of proportion to the law enforcement benefits achieved (ends-benefits proportionality), and are also excessive in their unnecessary severity and overinclusiveness (alternative-means proportionality).[49]

Subsequent forfeiture cases in federal and state courts have usually distinguished *Bajakajian* and upheld the forfeiture,[50] but a few cases have found an excessive fines violation.[51] As a number of scholars have noted,[52] courts have seemed more willing to invalidate excessive forfeitures than excessive prison terms. Some have argued that differences between these contexts support stricter constitutional review of forfeitures. But the differences cut in both directions.[53]

---

majority's retributivist focus); Rachel A. Van Cleave, *"Death Is Different," Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages—Shifting Constitutional Paradigms for Assessing Proportionality*, 12 S. CAL. INTERDISCIPLINARY L.J. 217, 251–52 (2003) (contrasting the majority and dissenting opinions in *Bajakajian* in their interpretation of the same standard).

49 *See, e.g.*, Susan R. Klein, *The Discriminatory Application of Substantive Due Process: A Tale of Two Vehicles*, 1997 U. ILL. L. REV. 453, 482 (1997) (providing the example of a Michigan law that was overinclusive in its goal of deterring crime).

50 *See, e.g.*, United States v. Heldeman, 402 F.3d 220, 223 (1st Cir. 2005) (finding that forfeiture of defendant's $900,000 equity in his apartment following fraud and drug convictions was not excessive); *see also* United States v. Betancourt, 422 F.3d 240, 250 (5th Cir. 2005) (upholding a forfeiture of $5.4 million in lottery winnings from a ticket purchased with drug proceeds after noting that the Excessive Fines Clause does not apply to contraband, fruits, or proceeds of illegal activity). *But see* United States v. 3814 NW Thurman St., 164 F.3d 1191, 1197–98 (9th Cir. 1999) (seeming to adopt a narrow view of which fruits of criminal activity are excluded from Excessive Fines protection).

51 *E.g.*, *3814 NW Thurman St.*, 164 F.3d at 1198 (invalidating forfeiture of a $200,686 increase in the property owner's equity when a fraudulently obtained loan was partly used to reduce liens on the property); One Car, 1996 Dodge X-Cab Truck v. State, 122 S.W.3d 422 (Tex. App. 2003) (invalidating forfeiture of a truck worth $11,000 that contained trace amounts of methamphetamine); People v. Malone, 923 P.2d 163, 166 (Colo. Ct. App. 1995) (holding that the statutory maximum $100,000 fine imposed for an offense involving $400 of property damage violated Colorado and federal excessive fines provisions).

52 *E.g.*, Van Cleave, *supra* note 48.

53 Karlan, *supra* note 48, at 903–14, argues that punitive damages awards justify stricter constitutional scrutiny than prison sentences because the former cannot be reviewed by lower federal courts; they are imposed by untrained local juries, not judges and legislators; and they can be objectively compared to the compensatory damages award in the same case. It might also be argued that all sentencing issues assume a culpable, convicted offender, whereas forfeitures do not. On the other hand, damages do not involve physical liberty,

C. Cruel and Unusual Punishments

This clause has been applied to a wide variety of issues: death penalty eligibility; execution methods; length of prison terms; and the treatment of convicted prisoners (prison conditions, use of force, discipline). The standards applied in different contexts within this clause vary almost as much as the standards applied across the three Eighth Amendment clauses.

1. Death Penalty Eligibility

Like forfeitures, the use of capital punishment appears to be limited by retributive principles which trump crime-control goals. In a number of cases, the Court has held that capital punishment would be "grossly out of proportion to the severity of the [defendant's] crime."[54] This standard appears to invoke limiting retributive principles, since the Court's decisions focus on traditional retributive sentencing factors: harm and culpability.[55]

A second standard, supposedly independent of the first, invalidates the death penalty when it "makes no measurable contribution

---

and typical, well-financed civil defendants can better defend themselves than most criminal defendants. Moreover, trial judges can set aside excessive damages awards, but criminal defendants often have no effective appellate review or other sub-constitutional remedies against excessive prison terms. It is therefore striking that in at least three respects—de novo review, more frequent use of comparative analysis, and more lenient treatment of recidivists (only violations of a similar nature, committed in the same state, may be used to justify a punitive damages award)—the Court seems to be much more protective of a civil defendant's bank account than it has been of a criminal defendant's liberty. *See generally* Frase, *supra* note 1.

54 Coker v. Georgia, 433 U.S. 584, 592 (1977).

55 *Compare* Kennedy v. Louisiana, 128 S. Ct. 2641, 2646 (2008) (holding that the Eighth Amendment prohibits capital punishment for the rape of a child where the rapist did not cause or intend to cause the child's death), Roper v. Simmons, 543 U.S. 551, 570–71 (2005) (finding that offenders who were under age eighteen at the time of the offense should not face the death penalty because they cannot be held to the same standards as adults), Atkins v. Virginia, 536 U.S. 304, 319 (2002) (holding that mentally retarded offenders are less culpable and therefore should not be executed), Enmund v. Florida, 458 U.S. 782, 800–01 (1982) (finding that a felony murder accomplice's limited intent and minor role in the offense prevented application of the death penalty), *and Coker*, 433 U.S. at 598 ("[I]n terms of moral depravity and of the injury to the person and to the public, [the rape of an adult woman] does not compare with murder [in determining punishment] . . . ."), *with* Tison v. Arizona, 481 U.S. 137, 158 (1987) (holding that an accomplice's major participation in a felony resulting in death, combined with reckless indifference to human life, made him constitutionally eligible to receive the death penalty). Scholars have also emphasized retributive principles. *See, e.g.*, Radin, *supra* note 23, at 1056 ("[A] punishment is excessive and unconstitutional . . . if it inflicts more pain than the individual deserves . . . .").

to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering."[56] The "acceptable goals" recognized by the Court include retribution and deterrence.[57] This standard might only invoke a minimal rational basis standard,[58] but given the number of cases in which the Court has struck down penalties based in part on this standard, and the importance which the Court clearly attaches to Eighth Amendment review of death penalties, the Court seems to intend something more than rational basis review.

The second standard may implicitly incorporate an alternative-means proportionality concept. The argument would be that the death penalty is unnecessary and therefore excessive relative to the next-most-severe alternative penalty (i.e., LWOP) whenever death adds no additional deterrent or other benefit.[59] This interpretation finds some support in the Court's earliest death penalty standards,[60] and in its decisions invalidating the death penalty for certain offenders (felony accomplices who played a limited role in the crime, the mentally retarded, and offenders under eighteen years old at the time of the crime).[61] In each of the latter cases, doubt was expressed about whether the specified group of offenders was at all deterred by the threat of capital punishment, but the Court did not assert that

---

56 *Coker*, 433 U.S. at 592.

57 *See Roper*, 543 U.S. at 571.

58 *See* Bruce W. Gilchrist, Note, *Disproportionality in Sentences of Imprisonment*, 79 COLUM. L. REV. 1119, 1147 (1979) (describing a New York Court of Appeals decision that relied on rational basis review).

59 Several justices and scholars have taken this view of the death penalty generally. *E.g.*, Furman v. Georgia, 408 U.S. 238, 300–02 (1971) (Brennan, J., concurring); *id.* at 331–32, 342–59 (Marshall, J., concurring); Margaret R. Gibbs, *Eighth Amendment—Narrow Proportionality Requirement Preserves Deference to Legislative Judgment*, 82 J. CRIM. L. & CRIMINOLOGY 955, 976 (1992) ("'If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted,' then this would also contribute to a conclusion of disproportionality." (quoting *Furman*, 408 U.S. at 279)); Michael Herz, *Nearest to Legitimacy: Justice White and Strict Rational Basis Scrutiny*, 74 U. COLO. L. REV. 1329, 1355 (2003) ("[W]hat matters in determining whether capital punishment for a particular offense is 'needless' is the *incremental* deterrent effect of capital punishment as opposed to lengthy, or life-long, imprisonment.").

60 *See* Gregg v. Georgia, 428 U.S. 153, 173 (1976) (plurality opinion) ("[P]unishment must not involve the unnecessary and wanton infliction of pain."). The *Gregg* opinion also stated, "we cannot 'invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology.'" *Id.* at 182–83 (quoting *Furman*, 408 U.S. at 451 (Powell, J., dissenting)). However, the Court's later cases (*Enmund*, *Atkins*, and *Roper*) imply a "less-would-do-just-as-well" approach, at least for certain offenders.

61 Enmund v. Florida, 458 U.S. 782, 798–800 (1982) (accomplices); Atkins v. Virginia, 536 U.S. 304, 319–20 (2002) (mentally retarded offenders); *Roper v. Simmons*, 543 U.S. 551, 572–73 (2005) (offenders under eighteen).

there was no deterrent effect (which would be a no-rational-basis argument). If the Court meant to concede the possibility of some deterrent effect, its decisions could be justified on a theory of alternative-means proportionality—the minimal deterrence these offenders would experience from the threat of receiving the death penalty is no greater than that provided by the threat of the lesser penalty of LWOP. One of these cases, *Roper v. Simmons*, contains language strongly suggesting this alternative-means rationale: "[t]o the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person."[62]

2. Execution Methods

In recent years there have been numerous constitutional challenges to the procedures used to carry out the most common method of execution, lethal injection.[63] The principal objection to these procedures is that the three drugs commonly employed and the procedures used to inject them risk causing excruciating pain to offenders who are still conscious. In evaluating this objection, courts appear to assume that the Eighth Amendment categorically prohibits modern execution methods known to involve extreme pain (just as it prohibits painful ancient methods such as burning a convict at the stake), without regard to the offender's desert, net benefits achieved, or possible alternative ways of causing death—such methods are banned simply because it is wrong to ever treat a person in such a barbaric way. Some courts have further assumed that the Eighth Amendment also bars methods which, in operation, involve a risk of inflicting severe pain that is both substantial and unnecessary in light of feasible modifications of injection procedures.[64]

The prohibition of avoidable risk of severe pain is a form of alternative-means proportionality analysis. It is consistent with the lan-

---

62 *Roper*, 543 U.S. at 572.

63 For an example, see *Morales v. Tilton*, 465 F. Supp. 2d 972 (N.D. Cal. 2006), and cases cited therein. *See also* Note, *A New Test for Evaluating Eighth Amendment Challenges to Lethal Injections*, 120 HARV. L. REV. 1301 (2007) (analyzing recent challenges to the constitutionality of lethal injections and proposing a new standard for method-of-execution claims).

64 *E.g.*, *Morales*, 465 F. Supp. 2d at 974, 981 ("The Eighth Amendment . . . has been construed by the Supreme Court to require that punishment for crimes comport with 'the evolving standards of decency that mark the progress of a maturing society.'" (quoting *Roper*, 543 U.S. at 561)).

guage in *Coker v. Georgia*, discussed above, condemning "purposeless and needless . . . pain and suffering," and also with language in the small number of Supreme Court decisions involving execution methods.[65]

In *Baze v. Rees*,[66] the Supreme Court upheld Kentucky's use of the three-drug procedure. However, five of the seven opinions (written or joined by seven of the nine justices) agreed that, at least under some circumstances, the Eighth Amendment bans procedures involving a risk of substantial and unnecessary pain. The least protective version of this test is contained in Chief Justice Roberts's plurality opinion, joined by Justices Kennedy and Alito; that test would invalidate a method of execution if the state, "without a legitimate penological justification," refused to adopt an alternative procedure that is shown to be "feasible, readily implemented, and in fact [will] significantly reduce a substantial risk of severe pain."[67]

3. Prison Sentences

As is well known, the Court has been very reluctant to invalidate lengthy prison terms on Eighth Amendment grounds. Only one prisoner, in *Solem v. Helm*, has won such a claim in modern times.[68] And in recent years the Court has upheld sentences of shocking severity—life without parole for a first-time offender charged with cocaine possession (admittedly, involving a very large quantity),[69] and a mandatory minimum prison term of twenty-five years to life for the crime of shoplifting several golf clubs.[70]

---

65 433 U.S. 584, 592 (1977); *see also* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947) (holding that the Eighth Amendment bans "unnecessary pain" during execution); Wilkerson v. Utah, 99 U.S. 130, 135–36 (1878) (stating that the Eighth Amendment prohibits "punishments of torture . . . and all others in the same line of unnecessary cruelty").

66 128 S. Ct. 1520 (2008).

67 *Id.* at 1532. At several points, Chief Justice Roberts also suggested that the risk of pain must be found to be "objectively intolerable." *Id.* at 1531, 1532, 1535, 1537. Justices Scalia and Thomas concurred in the judgment, but appeared to reject any consideration of unnecessary risk of pain; these two justices maintained that the Eighth Amendment only bans methods of execution that are "deliberately designed to inflict pain." *Id.* at 1556 (Thomas, J., concurring).

68 *See* 463 U.S. 277 (1983) (involving a man convicted of writing a check from a fictitious account who received life imprisonment due to a South Dakota habitual offender statute).

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

70 *See* Ewing v. California, 538 U.S. 11 (2003); *see also* Lockyer v. Andrade, 538 U.S. 63 (2003) (upholding a three-strikes sentence of fifty years to life on two minor shoplifting charges,

The Court's disappointing holdings are matched by equally disappointing reasoning—it is very unclear which proportionality principles the Court is applying in these cases.[71] The closest the Court has come to articulating one or more specific theories of proportionality was in *Solem*. In his majority opinion in that case, Justice Powell implicitly adopted retributive principles when he stated that the gravity of offenses, for Eighth Amendment purposes, depends on two factors: the harm caused or threatened to victims or society, and the defendant's culpability, including his intent and motives.[72] In analyzing the facts of that case, Powell also stated that the defendant's record included no instance of violence, that a life-without-parole sentence eliminated any incentive to address his clear need for alcoholism treatment, and that the sentence thus was "unlikely to advance the goals of our criminal justice system in any substantial way."[73] There is at least a hint of utilitarian proportionality analysis in these comments—either the burdens of the sentence outweigh its probable crime-control effects (ends-benefits proportionality), or the same or better effects could be achieved with a less severe penalty (alternative-means proportionality).

Proportionality principles have also not been well-articulated in the numerous dissenting opinions in Supreme Court cases upholding severe prison sentences. But at least two of the three proportionality principles identified in this Article are implicit in several of these dissents. Justice White's dissent in *Harmelin v. Michigan* (joined by Justices Blackmun and Stevens) emphasized the majority's focus on the potential harm that a large amount of drugs could cause, with little or no attention to issues of culpability, particularly intent and motive. This implies a limiting retributive proportionality analysis.[74] Justice Stevens's separate dissent in *Harmelin* objected to the mandatory nature of the life-without-parole sentence, because it conclusively presumed the offender and all such offenders to be incorrigible, or that society's interests in deterrence and retribution outweighed rehabilitative purposes.[75] Stevens felt that any such presumption would be irrational, and that the sentence was therefore capricious; he might, instead, have argued that such a severe mandatory penalty is inher-

---

but not directly ruling on Eighth Amendment issues due to the special standards applicable in federal habeas corpus review of state cases).

71 *See generally* Frase, *supra* note 1 (identifying the different proportionality principles).

72 *Solem*, 463 U.S. at 292–94.

73 *Id.* at 297 n.22.

74 501 U.S. at 1009–27 (White, J., dissenting).

75 *Id.* at 1028–29 (Stevens, J., dissenting).

ently very overbroad—a violation of alternative-means proportionality.

In later cases, several dissenting justices have also implicitly invoked the concept of alternative-means proportionality. In *Ewing v. California*, Justice Breyer questioned the need for California's very broad three-strikes law.[76] The legislature's goal was to prevent "serious" and "violent" crimes through deterrence and incapacitation, but *any felony* could constitute a third strike, including many property crimes that would not qualify as first or second strikes;[77] Breyer thus concluded that "Ewing's 25-year term amounts to overkill" relative to the legislature's goals.[78] Similarly, in *Lockyer v. Andrade*, Justice Souter's dissenting opinion attacked the defendant's two consecutive prison terms, totaling fifty years to life.[79] According to the State's briefs, the California law was based on the legislature's finding that a three-strikes offender's danger to society justified a sentence of twenty-five years to life. Souter argued that it was irrational to assume that Mr. Andrade became *twice as dangerous* when he committed the second shoplifting offense that raised his minimum term from twenty-five to fifty years. In other words, the state could not show that a twenty-five-year sentence, or at least, a sentence much shorter than fifty years, would be inadequate to achieve the state's asserted incapacitation goals.

4. Prisoners' Rights Cases

The Court has been only a bit more generous when hearing Eighth Amendment claims attacking prison conditions, excessive force used to control unruly prisoners, and prison or jail disciplinary measures. In an early case, *Estelle v. Gamble*, the Court cited language from a death penalty case and stated that the Eighth Amendment is violated by the "unnecessary and wanton infliction of pain" on inmates, involving measures lacking any valid penological purpose.[80] However, subsequent prisoners' rights cases rarely have relied so directly on Eighth Amendment sentencing standards. Some lower

76 538 U.S. 11, 52 (2003) (Breyer, J., dissenting).

77 *See id.* at 51.

78 *Id.* at 52.

79 538 U.S. 63, 77–83 (2003) (Souter, J., dissenting).

80 429 U.S. 97, 102–04 (1976) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.)); *see also* Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (stating that the Eighth Amendment bans "inflictions of pain . . . that are 'totally without penological justification'" (quoting *Gregg*, 428 U.S. at 183)).

court cases from the 1970s used the "unnecessary and wanton" standard, or a generalized Eighth Amendment "necessity" principle, to find certain inmate restraint measures unconstitutional because they were much more severe or lasted much longer than they needed to.[81] The emphasis on necessity in these early cases strongly suggested a concept of alternative-means proportionality. A few 1970s cases also appeared to apply limiting retributive principles, finding the challenged prison disciplinary measures to be excessive relative to the seriousness of the infractions being punished.[82]

In later prisoners' rights cases, the Supreme Court developed two sets of standards specifically designed for inmate mistreatment claims. Each includes both an objective and a subjective component, and neither of the standards strongly emphasizes proportionality.[83] Inmate claims of inadequate medical care, failure to protect against assault or suicide, harsh prison conditions, and severe disciplinary measures require a showing of "deliberate indifference"[84] to the inmate's health or safety on the part of prison officials—a standard akin to "recklessness" in the criminal law.[85] In *Rhodes v. Chapman*, the Court held that the objective component for such claims requires deprivation of "the minimal civilized measure of life's necessities," and added that many unpleasant or even harsh prison conditions will fail to meet this standard[86]—harsh treatment is deemed to be a legitimate part of the penalty. In a later case, the Court stated that the objective component requires deprivation of an "identifiable human need such as food, warmth, or exercise," and the deprivation must lack "penological justification."[87]

A different subjective standard applies to claims of excessive force by prison officials in restoring order or subduing an unruly inmate. According to the Court, a more deferential standard is appropriate because the state must balance competing interests—safeguarding

---

81 *E.g.*, Spain v. Procunier, 600 F.2d 189 (9th Cir. 1979) (use of tear gas and neck chains); Stewart v. Rhodes, 473 F. Supp. 1185, 1193 (S.D. Ohio 1979) (lengthy chaining of inmates to beds).

82 *E.g.*, Wright v. McMann, 460 F.2d 126, 132–34 (2d Cir. 1972) (extending segregation as a punishment for refusing to sign a "safety sheet"); Adams v. Carlson, 368 F. Supp. 1050 (E.D. Ill. 1973) (extending segregation as a punishment for work stoppage).

83 *See* Wilson v. Seiter, 501 U.S. 294, 298–99 (1991) (discussing the prisoners' rights cases).

84 *See* Farmer v. Brennan, 511 U.S. 825, 834 (1994) ("In prison-conditions cases [the] state of mind is one of 'deliberate indifference to inmate health or safety . . . .'" (citations omitted)).

85 *Id.* at 839, 847.

86 452 U.S. 337, 347 (1981) (upholding double-celling of prison inmates).

87 *Wilson*, 501 U.S. at 304, 308.

the inmate versus protecting staff and other inmates—and officials must often act quickly.[88] The subjective standard in these cases is higher than the recklessness sufficient under the deliberate indifference rule: in excessive force cases, the officials must have acted "maliciously and sadistically for the very purpose of causing harm."[89] On the other hand, the objective component in this context is lower because, when the "malicious and sadistic" standard is met, "contemporary standards of decency always are violated. This is true whether or not significant injury is evident," provided the injury is not de minimis.[90]

The current standards summarized above are unsatisfactory. It is not clear why a separate subjective element is required in this context, given that Eighth Amendment limits on sentencing and forfeitures do not include any such element. It can be argued that the subjective element is needed in order to transform administrative prison measures into "punishment," but this element is also required for prison disciplinary measures clearly intended as (further) punishment. Another function of this element might be to emphasize the need to defer to decisions by prison officials, intervening only when such officials act culpably. But this rationale does not explain why the objective standards applied to the treatment of prisoners differ not just in degree but in kind from those applied to sentences and forfeitures. Explicit proportionality analysis seems particularly appropriate when evaluating claims of alleged excessive force used to subdue or transport an inmate, or unduly severe prison disciplinary measures, since the essence of these claims is the alleged excessiveness of government measures.[91] Application of proportionality principles to inmate claims of excessive force and excessive discipline would also serve to harmonize excessiveness standards in these cases with those applied in analogous, non-prison contexts (i.e., the excessive-force standards applied to seizures of the person under the

88 *See* Whitley v. Albers, 475 U.S. 312, 320 (1986) ("[P]rison administrators are charged with the responsibility of ensuring the safety of the prison staff, administrative personnel, and visitors, as well as the 'obligation to take reasonable measures to guarantee the safety of the inmates themselves.'" (quoting Hudson v. Palmer, 468 U.S. 517, 526–27 (1984)).

89 *Id.* at 320–21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973)); *see also* Hudson v. McMillian, 503 U.S. 1, 4–7 (1992) (establishing that judges must look at the prison official's motives in punching and kicking a prisoner who was cuffed and shackled and being led to the lockdown area).

90 *Hudson*, 503 U.S. at 9–10 (citation omitted).

91 Non-proportionality standards may be more appropriate when applied to certain claims (e.g., inadequate medical care, failure to protect, or harsh prison conditions) involving measures that are banned as inhumane and a violation of human dignity.

Fourth Amendment, and excessive-penalty standards applied to sentences and forfeitures).

Notwithstanding the formal standards currently applied, many examples of implicit means proportionality analysis can be found in recent Supreme Court and lower court cases. In *Hope v. Pelzer*,[92] the Supreme Court found an Eighth Amendment violation when an inmate who had been disruptive at a chain gang work site was taken back to the prison and painfully handcuffed for seven hours to a tall "hitching post" without adequate water, unprotected from sunburn on his shirtless body, and with no bathroom breaks.[93] Citing the lack of any continuing emergency situation or safety concerns, the Court found that this treatment violated the inmate's dignity and imposed "wanton and unnecessary pain."[94] In *Delaney v. DeTella*,[95] involving confinement in a tiny segregation cell for six months with no out-of-cell exercise, the Seventh Circuit found that periodic exercise is an essential human need and that no legitimate concerns (such as the inmate's extreme dangerousness) justified such extended and total denial of exercise.[96] In other words, such denial was unnecessary. Similarly, in *Anderson-Bey v. District of Columbia*,[97] the district court found the allegations sufficient to state a claim because the very tight handcuffs placed on the plaintiffs for their all-day transport to another prison imposed more pain than was necessary to maintain security.[98]

Explicit proportionality language, as well as implicit means proportionality analysis, was applied in *Trammell v. Keane*,[99] however, in that case the Second Circuit concluded that in light of the inmate's many disciplinary violations, the admittedly severe measures were warranted by the need to strongly deter and reform the inmate, and that these measures "directly and proportionally targeted [his] misconduct."[100] The measures were therefore deemed necessary and thus not excessive relative to less severe alternatives.

As these cases show, courts have often emphasized the "unnecessary" or "gratuitous" use of force or discipline, but under the Court's

---

92 536 U.S. 730 (2002).

93 *Id.* at 737–45.

94 *Id.* at 738.

95 256 F.3d 679 (7th Cir. 2001).

96 *Id.* at 683–84.

97 466 F. Supp. 2d 51 (D.D.C. 2006).

98 *Id.*

99 338 F.3d 155 (2d Cir. 2003).

100 *Id.* at 163, 166.

current, two-pronged standards, proportionality principles are at most implicit. Since the gist of many of these claims is excessiveness, it would sharpen and improve the analysis if courts explicitly invoked proportionality principles, which could still be tailored to reflect context-specific needs.

5. Summary

Of all the government measures subject to Eighth Amendment scrutiny, excessively long prison sentences seem to receive the least favorable treatment, and are governed by the most opaque standards. But in cases from other Eighth Amendment contexts, clear examples can be found of the application of implicit limiting retributive, ends-benefits, and alternative-means proportionality principles. When litigators, courts, and scholars seek to place meaningful limits on prison sentences, they should explicitly invoke these proportionality principles. And in response to opposing arguments—that such principles invade the prerogatives of the legislative and executive branches, are anti-democratic, or are unworkable in practice—proponents of these principles should cite the many examples of their application in other Eighth Amendment contexts (and elsewhere in United States law, as well as in foreign and international law).[101]

III. THE STATE CONSTITUTIONAL DIMENSION

In other areas of constitutional litigation, it is now well-established that courts can and do grant broader protections to citizens under state constitutional provisions than are required by the federal constitution. The "New Federalism" movement has been especially noticeable in areas, such as the Fourth Amendment, where the U.S. Supreme Court has in recent years cut back or refused to recognize modest extensions of federal civil rights. It is very appropriate for state courts to recognize broader protections under state law, since the decisions of these courts confront no issues of federalism. Moreover, since state court judges are either directly elected or appointed by locally elected officials, decisions invalidating excessive legislative and executive actions under state law raise fewer issues of democratic legitimacy than when federal judges engage in constitutional review. In addition, state constitutions are often worded differently than the Eighth Amendment, which gives state courts more leeway to adopt a

101 *See generally* SULLIVAN & FRASE, *supra* note 1; Frase, *supra* note 1.

different interpretation. Indeed, some state constitutions explicitly prohibit disproportional or "excessive" penalties.

Nevertheless, state court rulings invalidating criminal penalties on state constitutional grounds have thus far been rather infrequent. This may be at least partly due to defense attorneys being unaware of relevant state constitutional provisions and case law; the summaries below are an effort to begin to address that problem, and encourage litigators, courts, and scholars to be less "Fed-centric."

A. Survey of State Constitutional Provisions Limiting Punishment Severity

All fifty states have constitutional provisions related to sentencing. All but two states, Connecticut and Vermont, have provisions specifically limiting severe punishments of all kinds. But both of those states have provisions limiting severe fines, and Vermont courts interpret that state's "proportioned" fines clause to apply to all types of penalties.[102]

The forty-nine states with express or implied all-penalties provisions fall into five categories:

(1) Ten states have constitutions which either explicitly or by interpretation require proportionate penalties. The eight states with explicit provisions are Indiana, Maine, Nebraska, New Hampshire, Oregon, Rhode Island, Vermont, and West Virginia. Of these states, all but Vermont also have constitutional provisions falling into one of the four categories listed below. A ninth state, Illinois, has a provision requiring punishment "according to the seriousness of the offense" which is commonly referred to as the "proportionate penalties clause"[103] (see further discussion in Part III.C, below). Finally, the Washington Supreme Court has interpreted that state's constitutional ban on cruel penalties (category (3), below) in light of proportionality principles recognized in state statutes.[104]

(2) Nineteen state constitutions prohibit cruel *or* unusual penalties, including two states, Maine and New Hampshire, with proportionate-penalty clauses (category (1), above). The

---

102 State v. Venman, 564 A.2d 574, 581–82 (Vt. 1989).

103 ILL. CONST. art. I, § 11.

104 *See* State v. Fain, 617 P.2d 720, 725 (Wash. 1980) (noting that one purpose stated in the state penal code is "[t]o differentiate on reasonable grounds between serious and minor offenses, and to prescribe proportionate penalties for each" (quoting WASH REV. CODE § 9A.04.020(1)(d) (1980))).

other seventeen states are Alabama, Arkansas, California, Hawaii, Kansas, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, Texas, and Wyoming.

(3) Six state constitutions prohibit cruel penalties (omitting the "unusual" element), including one state, Rhode Island, with a proportionate-penalty clause. The other five states are Delaware, Kentucky, Pennsylvania, South Dakota, and Washington.

(4) Twenty-two state constitutions prohibit cruel and unusual penalties, including eight states (Alaska, Georgia, Indiana, Nebraska, Oregon, Tennessee, Utah, and West Virginia), which also have a proportionate-penalty clause and/or one of the provisions in category (5), below.

(5) Nine states, all of which are included in one of the four categories above, have additional state constitutional provisions related to excessive penalties or treatment. Five states—Indiana, Oregon, Tennessee, Utah, and Wyoming—prohibit "unnecessary rigor" in the treatment of persons arrested or held in custody;[105] Georgia prohibits such persons from being "abused"; Louisiana's constitution prohibits "euthanasia, . . . torture, or . . . cruel, excessive, or unusual punishment";[106] South Carolina prohibits "corporal" as well as cruel or unusual punishment;[107] and Alaska recognizes that inmates have a right to rehabilitation pursuant to a state constitutional provision requiring all criminal administration to be based on "the principle of reformation" (as well as on public protection, community condemnation, victims rights, and restitution).[108]

To summarize: thirty-five states have constitutional provisions or case law standards that differ from the Eighth Amendment—expressly banning disproportionate penalties, cruel *or* unusual punishments, cruel punishments, and/or one of the forms of mistreatment described in category (5), above.

---

105 *See, e.g.*, Sterling v. Cupp, 625 P.2d 123 (Or. 1981) (applying the provision to a search by an opposite-sex guard).

106 LA. CONST. art. I, § 20.

107 S.C. CONST. art I, § 15.

108 *See, e.g.*, Abraham v. State, 585 P.2d 526, 530 (Alaska 1978) (remanding for hearings to effectuate defendant's constitutional right to rehabilitative treatment of his alcoholism; defendant spoke only Yupik (Eskimo) and alleged there were no prison programs for such people); *see also* ALASKA CONST. art I, § 12.

Utilitarian proportionality principles are clearly implied by the wording of several state constitutional texts. The five state constitutions prohibiting "unnecessary rigor" in the treatment of persons in custody have thereby recognized an implicit means proportionality limitation. Ends proportionality principles are endorsed in Article 18 of the New Hampshire Constitution (Part 1), which provides:

> All penalties ought to be proportioned to the nature of the offense. No wise legislature will affix the same punishment to the crimes of theft, forgery, and the like, which they do to those of murder and treason. Where the same undistinguishing severity is exerted against all offenses, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do the lightest offenses.[109]

The fear that the people will "forget the real distinction" of crimes and commit greater crimes with no greater "compunction" invokes the norm-reinforcing and marginal deterrent values of penalties proportionate to social harm, both of which are implicit ends-benefits proportionality arguments.[110]

B. State Constitutional Case Law Favorable to Defendants

Cases construing the state constitutional provisions surveyed above are as varied as the provisions themselves, and do not always track differences in the constitutional text. Some courts cite such differences as grounds for recognizing broader state constitutional protection, while other courts ignore textual differences and apply federal constitutional standards. Courts in states from the first two categories above (those with proportionate-penalty clauses, or those that prohibit cruel *or* unusual punishment) seem to be somewhat more likely to grant broader protection, but many states in each category do not do so. The reluctance of state courts to grant broader protection against excessive penalties under state constitutions is surprising given the frequency with which expanded criminal procedure rights are recognized by state courts in other contexts. For example, many courts have given citizens greater protection from searches and seizures under state provisions worded similarly or even identically to the Fourth Amendment.[111]

---

109 N.H. CONST. pt. 1, art. 18.

110 *See* discussion *supra* Part I.B.1.

111 *See, e.g.*, Ascher v. Comm'r of Pub. Safety, 519 N.W.2d 183, 187 (Minn. 1994) (rejecting the Fourth Amendment rule permitting suspicionless sobriety checkpoint stops of drivers, despite the identical wording of the Minnesota and federal constitutional search-and-seizure provisions). *See generally* CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN,

Whether or not the state constitution is worded differently, or is deemed more protective, numerous cases across a diverse group of states have invalidated sentencing provisions or specific sentences under state constitutional law.[112] Although most courts merely apply the *Solem* framework, some state courts have developed more precise proportionality analysis or state-law principles.[113] The following are examples of some of these state court decisions.

The California Supreme Court has strongly implied a focus on limiting retributive proportionality. *In re Rodriguez* held that under the state cruel or unusual punishment clause, "the measure of the constitutionality of punishment for crime is individual culpability."[114]

In *Conner v. State*,[115] the Indiana Supreme Court held that the state's proportionate penalties clause grants more protection than the Eighth Amendment.[116] The court further held that the defendant's six-year sentence for selling a harmless substance represented to be marijuana was unconstitutionally disproportionate because it was twice as severe as the three-year maximum penalty applicable to the sale of real marijuana. The court therefore vacated the sentence and remanded with instructions to impose a sentence of no more than three years.[117]

The Kentucky Court of Appeals, applying that state's ban on "cruel punishment" in *Workman v. Commonwealth*,[118] invalidated sen-

---

CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 1027–43 (4th ed. 2000) (reviewing state law expansions of constitutional rights related to search and seizure, interrogation, and other procedural issues).

112 *See generally* Howard J. Alperin, *Length of Sentence as Violation of Constitutional Provisions Prohibiting Cruel and Unusual Punishment*, 33 A.L.R.3d 335 (2008).

Some state cases have struck down sentences under the Eighth Amendment, without separate discussion of state constitutional provisions. *E.g.*, Crosby v. State, 824 A.2d 894 (Del. Super. Ct. 2003); Wilson v. State, 830 So. 2d 765 (Ala. Crim. App. 2001); People v. Gaskins, 923 P.2d 292 (Colo. Ct. App. 1996); *see also* State v. Davis, 79 P.3d 64 (Ariz. 2003) (invalidating mandatory consecutive sentences totaling fifty-two years without possibility of release for statutory rape). *But see* State v. Berger, 134 P.3d 378 (Ariz. 2006), *cert. denied.*, 127 S. Ct. 1370 (2007) (distinguishing *Davis* and upholding mandatory consecutive terms totaling 200 years without release for first-offense possession (downloading) of child pornography).

113 *See supra* notes 68–73 and accompanying text.

114 537 P.2d 384, 394 (Cal. 1975) (invalidating life sentence given to child molester after defendant had served twenty-two years in prison without release).

115 626 N.E.2d 803 (Ind. 1993).

116 *Id.* at 806. The defendant was charged under a law, IND. CODE § 35-48-4-4.6 (1993), which provided a sentence of up to eight years for sale of any simulated controlled substance, regardless of the drug being simulated.

117 *Id.*

118 429 S.W.2d 374 (Ky. Ct. App. 1968).

tences of life without parole given to two fourteen-year-old rape offenders. The court's decision was based in part on the principle, akin to alternative-means proportionality, that a punishment is unconstitutionally excessive if it "[goes] beyond what is necessary to achieve the aim of the public intent as expressed by the legislative act [or] . . . . exceeds any legitimate penal aim."[119]

In *State v. Hayes*, the Louisiana Court of Appeal vacated a mandatory sentence of life without parole under that state's cruel or unusual punishment clause (but without emphasizing the differences between state and federal constitutional texts).[120] The court found the sentence constitutionally excessive in light of the following facts: Hayes's current offense involved theft of approximately $1,000 from his employer; he admitted the crime and returned the $693 still in his possession; he had a second job, and that employer thought highly of Hayes and believed he could be rehabilitated; his prior crimes were mostly minor property offenses; his one "crime of violence" (required, to impose the life sentence) was a strong-armed robbery and theft of a bicycle committed when Hayes was a juvenile; and the presentence report recommended a sentence of ten years.[121]

The general standards invoked in *Hayes* were that penalties must be "meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case" and must not be "'disproportionate' to the harm done [or] shock[] 'one's sense of justice.'"[122] This language suggests the application of both implicit limiting retributive principles and ends-benefits proportionality. Alternative-means proportionality principles were implicit in the court's statement that the trial court's sentence "imposes an undue burden on the taxpayers of the state" in a case where "a severe sentence, for example, between twenty and forty years, would have met all of the societal goals of incarceration."[123]

In *People v. Bullock*, the mandatory life-without-parole penalty upheld by the Supreme Court in *Michigan v. Harmelin*[124] was found to

---

119 *Id.* at 378. Holding that the aim of a life without parole sentence is to incapacitate incorrigible offenders and that no court could reasonably find that a fourteen-year-old offender will remain incorrigible for the rest of his life.

120 739 So. 2d 301 (La. Ct. App. 1999).

121 *Id.* at 302–03.

122 *Id.* at 303–04 (quoting State v. Young, 663 So. 2d 525, 531 (La. Ct. App. 1995); State v. Chaisson, 507 So. 2d 248, 250 (La. Ct. App. 1987)).

123 *Id.* at 303. However, a sentence of thirty years hard labor without parole, imposed on remand, was upheld on appeal. State v. Hayes, 845 So. 2d 542 (La. Ct. App. 2003).

124 *See* discussion *supra* Part II.C.3.

violate the Michigan Constitution, in part because that state's constitution forbids cruel *or* unusual punishments.[125] The Michigan Supreme Court implicitly adopted a retributive theory, stressing the defendant's limited culpability in the absence of any proof of sale or intent to sell. Contrary to Justice Kennedy's analysis in *Harmelin*, the Michigan Court refused to hold the defendant responsible for the potential harms that might be caused if the large quantity of drugs he possessed were converted into individual doses. The Court held that proportionate punishment under the Michigan Constitution "must be tailored to a defendant's personal responsibility and moral guilt"; anyone who obtained some of these drugs and caused harm "can and should be held individually responsible" for such harm.[126]

Sometimes courts cite the state constitution and reach results seemingly more generous than what would be expected based on the most recent U.S. Supreme Court decisions, but without expressly holding that the state constitution grants additional protection. For example, the Georgia Supreme Court has, in a series of cases, invalidated severe penalties under both the Eighth Amendment and the cruel and unusual punishment clause of the Georgia Constitution, based in large part on post-offense legislative changes substantially lowering penalties for the crime in question. In the most recent case, *Humphrey v. Wilson*,[127] the defendant was a seventeen-year-old high school student charged with having oral sex with a fifteen-year-old student. Applying the penalties in effect at the time of the crime, the trial court imposed a mandatory minimum sentence of ten years with no possibility of parole, along with required life-long sex-offender registration and public notification of the defendant's status. One year after the crime, the law was changed, making this offense a misdemeanor and eliminating the sex-offender registration requirement. In striking down these penalties, the state supreme court did not hold that the legislative change was retroactive, but rather treated it as an important factor in applying the federal and state "evolving standards of decency" and gross disproportionality criteria.[128]

---

125 485 N.W.2d 866, 872, 876 (Mich. 1992); *see also* People v. Lorentzen, 194 N.W.2d 827, 831–34 (Mich. 1972) (invalidating a mandatory twenty-year minimum sentence). *But see* People v. Fluker, 498 N.W.2d 431 (Mich. 1993) (holding that *Bullock* applies to possession, not drug delivery).

126 *Bullock*, 485 N.W.2d at 876.

127 652 S.E.2d 501 (Ga. 2007).

128 *Id.* at 507–09.

C. *Illinois Constitutional Sentencing Standards and Cases*

State constitutional sentencing jurisprudence is particularly well developed in Illinois. Article I, section 11 of the Illinois Constitution declares that "[a]ll penalties shall be determined . . . according to the seriousness of the offense."[129] The Illinois Supreme Court has concluded that no change in meaning was intended in 1970 when this language was substituted for the provision in the prior (1870) constitution which called for penalties to be "proportioned to the nature of the offense."[130] Like its predecessor, the current provision is commonly known as the state's "proportionate penalties clause."[131]

A penalty violates the proportionate penalties clause if either of the following tests is met:

(1) the penalty "is a cruel or degrading punishment not known to the common law, or is a degrading punishment which had become obsolete in the State prior to the adoption of its constitution, or is so wholly disproportioned to the offense committed as to shock the moral sense of the community";[132] or
(2) the offense has a higher penalty than another offense with identical substantive elements.[133]

Neither of these tests bears a close resemblance to any of the federal factors recognized by the U.S. Supreme Court in *Solem v. Helm*. The first test is both narrower and broader than the first *Solem* factor (gross disproportionality between the gravity of the offense and the severity of the sentence), and neither of the Illinois tests involves intra- or inter-jurisdictional comparisons (the second and third *Solem* factors). It should also be noted that, unlike the modified *Solem* standards adopted by the plurality opinion in *Ewing v. California*, the Illinois constitutional provision and interpretive case law focus entirely on the defendant's current offense, without consideration of the seriousness of his or her prior record.

Several proportionality principles may be implicit in the Illinois standards. The final clause of the first Illinois test appears to be based on a limiting retributive theory; the language used—"so wholly disproportionate as to shock the moral sense of the community"—

129 ILL. CONST. art. I, § 11.

130 People v. Sharpe, 839 N.E.2d 492, 500 (Ill. 2005).

131 *Id.*

132 People v. Miller, 781 N.E.2d 300, 307–09 (Ill. 2002) (quoting People *ex rel.* Bradley v. Ill. State Reformatory, 36 N.E. 76, 79 (1894)).

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

suggests a criterion based on blameworthiness, and cases interpreting this standard do seem to emphasize offender culpability.[134]

The second Illinois test may be based on due process concerns (lack of rational basis; potential for abuse of prosecutorial discretion) rather than on proportionality, but this test could also incorporate all three proportionality principles identified in this Article. If crimes with identical substantive elements receive different penalties, it seems very likely that offenders who receive the more severe penalty are being punished in excess of their deserts (limiting retributive proportionality), and/or that the benefits achieved by the more severe penalty are not worth the greater burdens on defendants (ends-benefits proportionality), and/or that the lesser penalty is sufficient to achieve all relevant sentencing purposes (alternative-means proportionality).

State constitutional proportionality review has grown steadily over time, but sometimes it devolves. For many years the Illinois Supreme Court recognized a third type of state constitutional disproportionality, applicable when two or more offenses have "related" legislative purposes, and where "conduct that creates a less serious threat to the public health and safety than other conduct is punished more harshly."[135] This so-called "cross-comparison test" involved a more limited form of intra-jurisdictional comparison than the U.S. Supreme Court's second factor in *Solem*—only offenses reflecting related legislative purposes were compared, and the relative severity of crimes was tied explicitly to the social harms caused by each crime. The focus on harm suggested a theory of utilitarian ends-benefits proportionality (which, unlike retributive proportionality, does not give substantial weight to offender culpability[136]).

After two decades of experience with the cross-comparison proportionality test, the Illinois Supreme Court abandoned that test in *People v. Sharpe*.[137] The court concluded that judicial application of both prongs of this standard ("related" legislative purposes, and "less

---

134 *See, e.g.*, *Miller*, 781 N.E.2d at 307–09 (invalidating life-without-parole sentence given to a fifteen-year-old who became an accomplice to murder moments before the shooting, noting that "this case presents the least culpable offender imaginable"). The other two clauses of the first test appear to prohibit severe punishments based on the original meaning of the constitutional provision and desuetude.

135 People v. Davis, 687 N.E.2d 24, 28–29 (Ill. 1997) (invalidating a penalty for failure to have a firearm owner's card that was greater than the penalty for unlawful use of a weapon by a felon).

136 *See* discussion *supra* Part I.A.

137 839 N.E.2d 492 (Ill. 2005).

serious threat to the public health and safety") was unworkable and invaded the legislative prerogative to define criminal punishments.[138] Perhaps another, unstated reason why cross-comparison review seemed too "legislative" is that most of the cases invoking this standard were, in essence, facial attacks on statutory penalties by means of a pretrial motion to dismiss, rather than "as applied" attacks on a particular sentence imposed.

As I have argued at greater length elsewhere,[139] the *Sharpe* decision is poorly reasoned, broader than necessary, and perhaps of limited practical importance (given that the court not only explicitly retained the other two Illinois proportionality theories described above, but also revived an earlier doctrine, based on due process principles, which invalidates any penalty not "reasonably designed to remedy the particular evil that the legislature was targeting"[140]). Whatever the problems that may have arisen in the cases applying the cross-comparison test, they do not seem insuperable; there were many ways in which the Illinois Supreme Court could have modified that test, without totally discarding it. The Indiana Supreme Court seemed to have applied, and been quite satisfied with, a similar test in *Conner v. State*, discussed above.[141] It is unfortunate that neither of these state supreme courts cited any cases from the other state.

CONCLUSION

Eighth Amendment litigators, courts, and scholars should resist the defeatist assumption that lengthy prison terms cannot be successfully attacked on constitutional grounds. Constitutional sentencing proportionality analysis is not dead, even in prison cases; it is only beginning! Litigators and courts should pay particular attention to the possibility of invalidating the sentence on state constitutional grounds. Wider familiarity with state constitutional holdings around the country, and with the many ways in which proportionality principles have been recognized in American (and foreign) law,[142] will also serve to underscore the broad support for these fundamental precepts, and the variety of ways in which they can be applied.

---

138 *Id.* at 504–05.

139 *See* SULLIVAN & FRASE, *supra* note 1, at ch. 7.

140 *Sharpe*, 839 N.E.2d at 517–18.

141 *See supra* notes 115–117 and accompanying text.

142 *See* SULLIVAN & FRASE, *supra* note 1.