UCLA LAW REVIEW

Unlocking the Gates of Desolation Row

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ABSTRACT

The U.S. criminal justice system is striking in its severity. Developments in criminal sentencing practices over the past several decades make the criminal justice system not only harsher than it was at the beginning of the twentieth century, but significantly more punitive than any other Western criminal justice system. Mandatory minimums, recidivist statutes, and the war on drugs, among other factors, have caused the prison population to skyrocket, with more people being sentenced to imprisonment for longer periods than ever before.

While the U.S. Supreme Court has been active in setting limits on the imposition of capital punishment, it has maintained a hands-off approach to noncapital sentencing, allowing sentencing practices to develop almost unchecked for decades. States and the federal government are thus given significant freedom to develop criminal justice policies as they see fit, and the result has been an increasingly punitive system that has strayed beyond the boundaries imposed by the U.S. Constitution. The Eighth Amendment to the Constitution provides a protection against cruel and unusual punishments, but the doctrine as developed by the Supreme Court fails to adequately enforce this prohibition and therefore allows states to impose punishment that is cruel and unusual.

This Comment proposes a new framework for reviewing noncapital sentences to ensure that they remain within the constraints imposed by the Constitution. Specifically, this Comment argues that Eighth Amendment review of noncapital sentences must include a comprehensive analysis of the defendant's culpability to ensure that the sentence imposed is truly proportional to the crime committed. In addition to protecting against the unconstitutional imposition of criminal sentences, this culpability framework will also create a better fit between crime and punishment, which will further the goals of punishment and improve the criminal justice system.

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I would like to give special thanks to Sharon Dolovich for her invaluable guidance in developing and editing this Comment. It would not have come this far without her input. I would also like to thank the *UCLA Law Review* staff and board, especially Rachel Bressi for her thoughtful editing. Finally, I am, as always, grateful to my family, especially my parents and grandparents, for their love and support.

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INTRODUCTION

At the end of its 2009 Term, the U.S. Supreme Court—for the first time in over twenty years and the second time in its history—struck down a term-of-years sentence as violating the Eighth Amendment's prohibition on cruel and unusual punishments. The case, *Graham v. Florida*,[1] held that a sentence of life imprisonment without the possibility of parole was unconstitutional when imposed on juveniles convicted of nonhomicide crimes and was the first time the Court applied a categorical ban against the use of any noncapital sentence for any group of people. With this holding, *Graham* provided the "foundation stone"[2] upon which the Court two years later announced another categorical ban, holding in *Miller v. Alabama* that the Eighth Amendment prohibits mandatory sentences of life without parole for juveniles convicted of any crime.[3] The Court grounded its decision in these cases in the "'precept of justice that punishment for crime should be graduated and proportioned' to both the offender and the offense"[4] and expanded Eighth Amendment protections against noncapital sentences further than it had in decades, perhaps ever.

Each of these cases involved sentences of life without parole imposed on defendants who were teenagers when they committed their crimes. In *Miller*, the Court consolidated the appeals of two separate defendants who received mandatory sentences of life without parole for homicides they committed when they were fourteen years old.[5] *Graham*, too, addressed a sentence of life without parole, imposed on Terence Jamar Graham, who was seventeen when he committed the two nonhomicide crimes for which he was convicted. While on probation for previous convictions, none of which involved a homicide, Graham committed one home invasion robbery and attempted another.[6] The prosecutor recommended that Graham receive a thirty-year sentence,[7] but instead, the judge sentenced the youth to life imprisonment after determining that he was incapable of rehabilitation.[8] Because Florida has no provision for parole, Graham's sentence effectively

1. 130 S. Ct. 2011 (2010).
2. Miller v. Alabama, No. 10-9646, slip op. at 8 n.4 (U.S. June 25, 2012).
3. *Id.*, slip op. at 2.
4. *Id.*, slip op. at 6.
5. *Id.*, slip op. at 1.
6. *Graham*, 130 S. Ct. at 2020.
7. *See* Transcript of Oral Argument at 10, *Graham*, 130 S. Ct. 2011 (No. 08-7412).
8. *Graham*, 130 S. Ct. at 2020. In explaining the sentence, the judge addressed Graham, saying, "Given your escalating pattern of criminal conduct, it is apparent to the Court that you have decided

committed him to spend his entire life in prison for crimes he committed before turning eighteen or graduating high school.[9]

Graham's sentence illustrates a growing trend in the United States, where a harshly anticrime political environment has vastly expanded the scope of the criminal justice system with federal and state sentencing policies imposing harsher criminal penalties than at any time in modern history. Since 1972, the U.S. prison population has increased by nearly 700 percent—from 330,000 people incarcerated in 1972 to 2.2 million in 2010.[10] In 2006, the most recent year for which the U.S. Department of Justice has released data, 1,132,290 people were convicted and sentenced for felonies in U.S. state courts.[11] In comparison, 667,366 people were convicted and sentenced for such crimes in 1988.[12] To put these statistics in context, the population of the United States increased by less than 40 percent during that same period, and crime rates decreased.[13] The 1990s specifically saw both a dramatic increase in the number of people incarcerated, in yearly and absolute numbers, and an unprecedented decrease in crime rates, meaning that the United States incarcerated more people when it experienced fewer crimes.[14] At the same time that the U.S. prison system is incarcerating more individuals, those people are serving for increasingly lengthy periods with the average length of sentences increasing and more people serving life sentences and life sentences without the possibility of parole than ever before.[15]

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that this is the way you are going to live your life and that the only thing I can do now is to try and protect the community from your actions." *Id.* (internal quotation marks omitted).

9. *Id.*

10. RYAN S. KING ET AL., THE SENTENCING PROJECT, INCARCERATION AND CRIME: A COMPLEX RELATIONSHIP 1 (2005); *Incarceration*, SENTENCING PROJECT, http://www.sentencingproject.org/template/page.cfm?id=107 (last visited July 13, 2012).

11. SEAN ROSENMERKEL ET AL., BUREAU OF JUSTICE STATISTICS, NCJ 226846, FELONY SENTENCING IN STATE COURTS, 2006—STATISTICAL TABLES 1 (2009).

12. JODI M. BROWN ET AL., BUREAU OF JUSTICE STATISTICS, FELONY SENTENCING IN STATE COURTS (1999).

13. KING ET AL., *supra* note 10, at 1.

14. *Id.* at 1, 3. Between 1994 and 2005, the same years during which there was a significant increase in the number of people incarcerated, reported violent crimes decreased by 33 percent and reported property crimes decreased by 23 percent. *Id* at 3. Crime rates peaked in the early 1990s, with 14,872,883 crimes reported in 1991, and steadily declined through the 1990s and 2000s, reaching 10,639,369 in 2009. *Table 1: Crime in the United States by Volume and Rate Per 100,000 Inhabitants, 1990–2009*, FBI.GOV (Sept. 2010), http://www2.fbi.gov/ucr/cius2009/data/table_01.html. A similar trend emerged across offense types as well, with violent and property crimes decreasing at roughly equivalent rates. *See id.*

15. *See* Ashley Nellis, *Throwing Away the Key: The Expansion of Life Without Parole Sentences in the United States*, 23 FED. SENT'G REP. 27, 27 (2010). In 2009, 140,610 prisoners were serving life sentences, increased from 34,000 in 1984. *Id.* Of those inmates, 41,095 were serving without the possibility of parole, while 12,453 were serving such sentences in 1992. *Id.*

Recidivist statutes, which provide for increased sentences for repeat offenders, are a major factor contributing to the increasing length of prison terms. Such statutes exist in all fifty states and the federal system and are supported by the theory that harsher sentences for recidivism will reduce crime by incapacitating and deterring repeat offenders, who are also deemed to have demonstrated greater culpability by repeatedly engaging in crime.[16] The Federal Sentencing Guidelines, for example, include increased sentences for repeat offenders by requiring courts to calculate a "criminal history score" based on prior offenses. Under the federal guidelines, courts assign points to repeat offenders for previous criminal conduct, which then puts them into one of four categories with prescribed sentences for each.[17] California exemplifies another type of recidivist statute, as California's three-strikes law provides increased penalties for felony convictions when the defendant has prior violent or serious nonviolent felony convictions.[18] Many of the most striking sentences that raise concerns about proportionality are imposed under such recidivist statutes, as these laws cause courts to sentence defendants to life imprisonment for nonviolent crimes that are not serious, such as receiving stolen property.[19]

Against this background, there has been no corresponding move by the court system to ensure that these developing sentencing policies remain within the boundaries imposed by the U.S. Constitution. While the Court has developed relatively robust protections against the imposition of capital sentences, such as

16. U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 4A1.1, at 380 (2011) ("A defendant's record of past criminal conduct is directly relevant to [the four] purposes of sentencing. A defendant with a record of prior criminal behavior is more culpable than a first offender and thus deserving of greater punishment."); *see also* Julian V. Roberts, *The Role of Criminal Record in the Sentencing Process*, 22 CRIME & JUST. 303, 304–05 (1997); Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1143–46 (2010).

17. U.S. SENTENCING COMM'N, *supra* note 16, §§ 4A1.1–4B1.5, at 380–405.

18. *See* BRIAN BROWN & GREG JOLIVETTE, LEGISLATIVE ANALYST'S OFFICE, A PRIMER: THREE STRIKES—THE IMPACT AFTER MORE THAN A DECADE 1 (2005), *available at* http://www.lao.ca.gov/2005/3_Strikes/3_strikes_102005.pdf. The Legislative Analyst's Office describes how the law operates: "[C]onsider a defendant who has prior convictions for assault on a police officer and burglary of a residence, both considered serious or violent crimes. Subsequently, he is convicted for receiving stolen property, a nonserious and nonviolent felony. . . . Under the Three Strikes law, he would be sentenced to life in prison." *Id.* at 7, 9. Felonies designated as "serious" range from grand theft, carjacking, offering to sell cocaine to a minor, and criminal threats to rape, murder, and assault with a deadly weapon. *See* CAL. PENAL CODE § 1192.7(c) (West Supp. 2012).

19. BROWN & JOLIVETTE, *supra* note 18, at 9.

requiring courts to consider any mitigating evidence that suggests a defendant should not receive a death sentence and regulating the methods by which death may be administered, the Court has placed almost no restrictions on the use of noncapital sentences. Even *Graham* and *Miller*, which were a significant development in Eighth Amendment jurisprudence, do not address the vast majority of sentences imposed throughout the country as they were both narrowly focused on sentences for juveniles with little direct impact on sentences for adult defendants. This Comment focuses on noncapital sentences, which have been largely neglected by the Court, and argues that the Eighth Amendment requires courts to place stricter limits on the government's ability to impose noncapital sentences. The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."[20] The last clause, the Punishments Clause, provides a constitutional limit to the punishments that state and federal governments may impose on criminal defendants. The Court has interpreted the Punishments Clause to forbid sentences that are grossly disproportionate to the crime or crimes for which they are imposed, where proportionality is measured by weighing the gravity of the offense against the severity of the punishment.[21] In practice, however, the Eighth Amendment has done very little to limit the government's imposition of noncapital sentences. The Eighth Amendment's gross disproportionality standard is so high that it allows extremely lengthy sentences for low-level offenses to pass constitutional muster, making it prohibitively difficult for prisoners to prove that their sentences violate the Eighth Amendment, even when their claims demonstrate strong indicators of gross disproportionality. Moreover, to the extent that the Court has used the Punishments Clause to review noncapital sentences, it has not provided a clear doctrine for lower courts, plaintiffs, and attorneys to follow in dealing with challenges to noncapital sentences. In each of the rare cases in which the Court has confronted an Eighth Amendment challenge to a noncapital sentence, it has applied a different rubric for analyzing the gravity of the offense. While some of the modes of analysis vary only slightly, in other cases the approach is completely different from anything the Court has done in the past. As a result, it is not clear how a court will review a given noncapital sentence to determine if it is grossly disproportionate, making it exceedingly difficult for prisoners to bring successful claims. There is thus a huge set of punishments—by far the vast majority of criminal sentences imposed

20. U.S. CONST. amend. VIII.
21. *See infra* Part I.

in the United States[22]—for which the Court has provided no clear standard of review. While many of these sentences fall within constitutional bounds, many others do not, and there is currently no meaningful rubric for distinguishing between the two categories meaning that the current doctrine allows many individuals to receive unconstitutionally severe sentences.

Exacerbating the weak and inconsistent state of Eighth Amendment jurisprudence is the Court's failure both to take responsibility for creating such a doctrine and to make any meaningful moves to provide clarity. Throughout its Eighth Amendment jurisprudence, the Court refers to its own inconsistency as though it is neither responsible for the confusing state of affairs nor in a position to clarify the doctrine. The Court makes an almost-comical reference in *Lockyer v. Andrade*[23] to its Eighth Amendment doctrine as a "thicket,"[24] which demonstrates this hands-off attitude in the noncapital sentencing context. The Court further comments that the doctrine has "not been a model of clarity," but then fails to provide any such clarity.[25] The Court's attitude in *Andrade* echoes comments it made years earlier in *Trop v. Dulles*,[26] in which the Court adopted a similar tone in addressing its confusing treatment of the term "unusual." The *Trop* Court passively states that "precise distinctions between cruelty and unusualness do not seem to have been drawn," as though the Court itself were not the one doing the imprecise drawing.[27] As in *Andrade*, the Court notes the imprecision, but does not go on to provide any much-needed clarity. While the Court may appropriately direct its irritation at previous inconsistencies toward earlier Courts, it should be held accountable for its continuing failure to clarify the doctrine that even it recognizes as inadequate.

The Court's failure to develop a meaningful Eighth Amendment doctrine in the noncapital context has left a doctrinal vacuum in which the Court's articulation of the proportionality test is both so inconsistent that it fails to provide guidance to lower courts addressing prisoners' challenges and so weak that it fails to adequately limit unconstitutional sentences. The Court should modify its

22. Since 1973, a total of 8115 people have been sentenced to death in the United States, with approximately 100 to 300 people sentenced per year. TRACY L. SNELL, BUREAU OF JUSTICE STATISTICS, NCJ 231676, CAPITAL PUNISHMENT, 2009—STATISTICAL TABLES 20 tbl.19 (2010). In comparison, millions of people are serving noncapital sentences and over one million are sentenced each year. ROSENMERKEL, *supra* note 11, at 3.

23. 538 U.S. 63 (2003).

24. *Id.* at 72.

25. *Id.*

26. 356 U.S. 86 (1958).

27. *Id.* at 100 n.32.

treatment of the Eighth Amendment to allow for a meaningful, consistent evaluation of the great number of sentences that are now virtually exempt from such review. This Comment argues that the doctrine should be revised to include a comprehensive and clear analysis of the individual defendant's culpability as a means of measuring the gravity of the offense to be weighed against the severity of the sentence, which would protect defendants from unconstitutionally disproportionate sentences.

To argue for a more robust culpability analysis, however, is in no way to argue that individuals who commit lower-level offenses should be exempt from punishment. Nor is it to argue that very lengthy prison sentences—fifty years, life imprisonment, life imprisonment without parole—are never appropriate. There certainly are defendants for whom life imprisonment without parole is an appropriate—in other words, proportionate—punishment for their crimes. However, the disproportionality principle[28] as it currently stands does not adequately differentiate between those defendants who deserve such lengthy sentences and those who do not. As a result, the Eighth Amendment doctrine permits lengthy sentences that are grossly disproportionate to the crimes for which they are imposed and thus not warranted by the gravity of the offense. This Comment proposes that the final Eighth Amendment analysis in noncapital cases should include a more robust culpability analysis that considers the nature of the crime committed, the actual harm caused and intended, the defendant's motive, the circumstances of the crime, the defendant's personal background, and the defendant's emotional and mental states. Throughout its Eighth Amendment jurisprudence, the Court has gestured to many of these factors but has thus far failed to draw them together in a consistent, meaningful way, leaving lower courts with a doctrine that is unclear and difficult to administer. This culpability analysis, therefore, would promote fairer sentencing practices by ensuring that courts assign sentences that are commensurate with each defendant's blameworthiness while also bringing clarity and consistency to the doctrine.

Part I of this Comment explains and critiques the current Eighth Amendment doctrine as it applies to noncapital sentences. It then discusses *Graham* and *Miller*, addressing how these cases may change the landscape of Eighth Amendment law. In addition to demonstrating increased concern with culpability, the *Miller* and *Graham* decisions may suggest a new willingness to expand the Eighth Amendment

28. This Comment uses the term "proportionality principle" to refer to the prohibition against *grossly* disproportionate punishments, which is consistent with the Court's language. For ease, I will not use "gross" each time I refer to the proportionality principle.

doctrine. Part II then specifically discusses the extremely limited nature of the doctrine, which sets a standard that is so high that excessively harsh sentences relative to the crimes for which they are imposed are upheld against Eighth Amendment challenges. In addition to explaining how narrowly the Supreme Court has dealt with Eighth Amendment challenges to noncapital punishments, Part II also surveys how lower courts have addressed challenges to such sentences. It then applies theories of constitutional underenforcement to the Eighth Amendment Punishments Clause to show that the limited application of the Clause is not appropriate. Part III proposes a comprehensive culpability analysis that considers the nature of the crime, the actual harm caused and intended by the defendant, the defendant's mental state and motive in committing the crime, the circumstances of the crime, and the defendant's personal background, which provide important context for a complete understanding of culpability. Finally, this Comment concludes by gesturing to the other side of the proportionality equation: the severity of the sentence. A meaningful evaluation of the severity of the sentence is as significant as the examination of the gravity of the offense and requires a more complex analysis than a mere recitation of the number of years to be served—just as a meaningful evaluation of the severity of the sentence requires a more thorough and nuanced analysis than the Court has yet provided.

I. A MUDDLED PROPORTIONALITY PRINCIPLE

The common thread throughout the Supreme Court's Eighth Amendment sentencing jurisprudence is a proportionality principle, which prohibits sentences that are grossly disproportionate to the crime or crimes for which they are imposed.[29] As articulated by the Court, the proportionality principle initially requires an appellate court to weigh the gravity of the offense against the severity of the sentence.[30] If this weighing raises an inference of gross disproportionality, the court will then look at the sentences imposed for other crimes within the same jurisdiction. The imposition of the same or a similar penalty for more serious crimes will

29. *See Andrade*, 538 U.S. at 72 ("A gross disproportionality principle is applicable to sentences for terms of years."); Ewing v. California, 538 U.S. 11, 30–31 (2003) ("We hold that Ewing's sentence . . . is not grossly disproportionate and therefore does not violate the Eighth Amendment's prohibition on cruel and unusual punishments."); Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring) ("The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime."); Solem v. Helm, 463 U.S. 277, 303 (1983) ("We conclude that [the petitioner's] sentence is significantly disproportionate to his crime, and is therefore prohibited by the Eighth Amendment.").

30. *See Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring); *Solem*, 463 U.S. at 290–91.

suggest that the sentence may be excessive.[31] Finally, the court will look to the sentences imposed for the same crime in other jurisdictions. This comparison will support an inference of gross disproportionality if other jurisdictions impose significantly more lenient penalties for similar crimes.[32]

This unifying proportionality principle, however, has done little to bring clarity or certainty to the doctrine. One source of uncertainty is a consistent thread of pluralities, concurrences, and dissents that have pushed back against the presence of *any* proportionality requirement in the noncapital context, suggesting that the principle could lose the support of a majority of the Court in the future. Most notably, in *Harmelin v. Michigan*,[33] a plurality of the Court unequivocally states that "the Eighth Amendment contains no proportionality guarantee."[34] The *Harmelin* plurality expended considerable ink explaining that the history of the Punishments Clause demonstrates that proportionality has no place in Eighth Amendment doctrine.[35] Later dissents and concurrences echo the *Harmelin*

31. *See Solem*, 463 U.S. at 291.
32. *See id.* at 291–92.
33. 501 U.S. 957.
34. *Id.* at 965 (plurality opinion). Justice Scalia wrote the *Harmelin* plurality, which was joined by then–Chief Justice Rehnquist. Though the Court's membership has shifted in the twenty years since it decided *Harmelin*, the balance in favor of proportionality review remains potentially precarious. *Graham* and *Miller* stand as the most current indicators of where the Roberts Court, with seven additions since the 1991 *Harmelin* decision, stands on proportionality. Three of the post-1991 appointees—Justices Ginsburg, Breyer, and Sotomayor—joined Justices Kennedy and Stevens in applying a proportionality principle to Graham's sentence. *See* Graham v. Florida, 130 S. Ct. 2011, 2016 (2010). Chief Justice Roberts, who replaced Rehnquist as Chief in 2005, also articulated a proportionality principle in his *Graham* concurrence. *See id.* at 2036–42 (Roberts, C.J., concurring). On the other side of the balance, Justice Thomas, appointed in the Term following *Harmelin*, has clearly joined Scalia in opposing the proportionality principle for noncapital sentences. *See id.* at 2043–58 (Thomas, J., dissenting). Finally, though Justice Alito was present for *Graham* and wrote a separate dissent in that case, he did not come out clearly for or against the proportionality principle. While he did not join the majority opinion and he did join Thomas's dissent in part, he did not join the portion of Thomas's dissent that rejected the proportionality principle in general, nor did he make such an argument in his own dissent. Rather, regarding proportionality, Alito argued that the proportionality question was not properly before the Court and so the Court should not have reached that question. *Id.* at 2058–59 (Alito, J., dissenting). His status as a dissenter in *Graham* and his decision to join Thomas's dissent, at least in part, suggest he may be hostile to the application of the proportionality principle to noncapital cases, but the ultimate stance he would take on proportionality if and when he is required either to support or to reject the principle is not clear. The lineup of the justices was similar in *Miller*, with Justice Elena Kagan replacing Stevens and writing for the majority in applying a proportionality principal. Scalia and Thomas again argued against the application of a proportionality principal and both Roberts and Alito dissented but did not directly challenge the proportionality principal.
35. *See Harmelin*, 501 U.S. at 975–81. For example, regarding the English Declaration of Rights, on which the Eighth Amendment was based, the plurality wrote, "[W]e think it most unlikely that the English Cruell and Unusuall Punishments Clause was meant to forbid 'disproportionate'

plurality's position. In separate concurrences in *Ewing v. California*,[36] Justices Scalia and Thomas reiterate the argument that the Eighth Amendment does not guarantee against disproportionate sentences, attacking the doctrine on the basis that courts cannot apply it intelligently.[37] Scalia argues that proportionality cannot be coherently applied to review sentencing practices because the concept is inherently grounded in desert, a concept inextricably tied to retribution and inapplicable to other goals of punishment, specifically incapacitation, deterrence, and rehabilitation, all of which legislatures may rely on in developing criminal justice policies. In Scalia's view, the proportionality principle cannot be used to review prison sentences because it will inappropriately limit legislatures to using the retributive theory of punishment. As recently as *Miller*, Scalia and Thomas again argued that proportionality review of noncapital sentences is inappropriate under the Eighth Amendment.[38] As a result, although the presence of a proportionality principle has gained support by a majority of the Court, the consistent line of opinions objecting to such a doctrine suggests that the principle is not set in stone, especially given that the Court was closely divided in many of its seminal decisions articulating the proportionality doctrine: *Harmelin* and *Ewing* were decided by pluralities, while *Solem v. Helm*[39] and *Rummel v. Estelle*[40] were decided by slim five-to-four majorities.

To the extent that a majority of the Court has articulated a proportionality principle within Eighth Amendment doctrine, the principle has been problematic in practice because it is so inconsistently applied that it fails to protect against grossly disproportionate sentences.[41] A key aspect of the proportionality test is

punishments." *Id.* at 974. The plurality further stated that "[t]he law books of the time are devoid of indication that anyone considered these newly enacted penalties unconstitutional by virtue of their disproportionality." *Id.* at 981.

36. 538 U.S. 11 (2003).

37. *Id.* at 31–32 (Scalia, J., concurring); *id.* at 32 (Thomas, J., concurring) ("[T]he proportionality test . . . is incapable of judicial application. . . . In my view, the Cruel and Unusual Punishments Clause of the Eighth Amendment contains no proportionality principle.").

38. Miller v. Alabama, No. 10-9646, slip op. at 3 (U.S. June 25, 2012) (Thomas, J., dissenting) ("The clause does not contain a 'proportionality principal.' . . . [I]t does not authorize courts to invalidate any punishment they deem disproportionate to the severity of the crime or to a particular class of offenders." (citation omitted)).

39. 463 U.S. 277 (1983).

40. 445 U.S. 263 (1980).

41. *See* Tom Stacy, *Cleaning Up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 476–77 (2005) ("The Court's jurisprudence under the Eighth Amendment's Cruel and Unusual Punishment Clause stands in disarray. . . . [T]he Court's work fails to satisfy minimal demands of doctrinal coherence."). The Court's discussion of the proportionality principle as applied to noncapital sentences is one example of this pervasive inconsistency. However, the Court has also addressed the Eighth Amendment's proscriptions in other contexts, with little more consistency. For example,

an examination of the gravity of the offense, which a court then weighs against the severity of the sentence. The test is problematic, however, because the Court has provided only nebulous guidance on how to evaluate gravity. To be of any use, a balancing test requires a clear articulation of what courts should consider on each side of the balance. Thus, a coherent standard for examining the gravity of the offense is vital to the meaningful application of the balancing test the Court has promulgated and, therefore, to an effective limit on grossly disproportionate sentences.

A. Proportionality Before *Graham*

The Court has considered few Eighth Amendment challenges to term-of-years sentences. The Court's Eighth Amendment jurisprudence contains only seven cases addressing whether a term-of-years sentence violates the Eighth Amendment.[42] Narrowing that number further, only five of those cases analyzed the sentence specifically as applied to an individual defendant.[43] Even within this small sample, the Court exhibits considerable inconsistency in applying the proportionality principle, seeming to develop a new standard for examining proportionality each time it

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the Court has in some cases specifically analyzed the meaning of the crucial terms in the Punishments Clause, but those discussions have failed to coherently define and apply those terms. Specifically, Stacy notes that the Court has developed a standard of cruelty in which a punishment is cruel if it lacks any penological justification but then goes on to overturn sentences that are in fact supported by some arguable penological justification. *Id.* at 481–82. Similarly, legal scholars have noted that the Court's treatment of the term "unusual" in the Clause has been almost nonexistent and inconsistent where it does exist. *See* Joshua L. Shapiro, *And Unusual: Examining the Forgotten Prong of the Eighth Amendment*, 38 U. MEMPHIS L. REV. 465, 468–69 (2008).

42. The cases are, in chronological order, *Rummel v. Estelle*, 445 U.S. 263 (1980), *Hutto v. Davis*, 454 U.S. 370 (1982), *Solem v. Helm*, 463 U.S. 277 (1983), *Harmelin v. Michigan*, 501 U.S. 957 (1991), *Ewing v. California*, 538 U.S. 11 (2003), and *Graham v. Florida*, 130 S. Ct. 2011 (2010). The Court's precedent contains a few other isolated, early examples of challenges to noncapital sentences, but each of those included punishments in addition to or instead of a term-of-years sentence. In *Weems v. United States*, 217 U.S. 349 (1910), for example, the Court struck down a sentence that, in addition to a term of years, included *cadena temporal*, which required the defendant to wear chains on his ankles and wrists and do hard and painful labor. *Id.* at 364. Similarly, the court addressed a noncapital sentence in *Trop v. Dulles*, 356 U.S. 86 (1958), but in that case the sentence was expatriation rather than a term of years. *Id.* at 101–02. The Court also dealt with an Eighth Amendment challenge in *Lockyer v. Andrade*, 538 U.S. 63 (2003), but was not actually required to engage in a proportionality review under the Eighth Amendment. *Andrade* was heard as a habeas petition, requiring the Court only to determine whether the lower court's decision was "contrary to" or involved an "unreasonable application of" existing law, rather than examining whether the Eighth Amendment in fact forbade the sentence in question. *Id.* at 73.

43. *Graham* and *Miller* both involved categorical bans against the use of the sentence of life without parole for juveniles and therefore did not center on a specific analysis of the defendant's offense and sentence. *See Miller*, slip op. at 1–2; *Graham*, 130 S. Ct. at 2022–23.

confronts the issue. In particular, in each case the Court used a different method for analyzing the gravity of the offense, thus failing to articulate a clear way to analyze that side of the equation. In other words, the Court has proclaimed that sentences must not be grossly disproportionate, but the question remains: grossly disproportionate to what?

While the Court has neither articulated a standard that should be applied in all cases nor demonstrated which factor or factors should be determinative in the analysis, the holdings and dicta in its limited case law exhibit three considerations for evaluating the gravity of the offense: (1) the state's interest in deterring the conduct at issue and imposing the sentence in question, which does not include a consideration of culpability; (2) the actual harm the specific defendant challenging his sentence caused and intended by his own conduct; and (3) the harm threatened to society generally by the type of activity in which the defendant engaged, irrespective of the harm intended or caused by the defendant in the particular case.

In examining proportionality in terms of a state's interest in imposing certain sentences, the Court has given significant weight to deterrence, especially when considering challenges to sentences imposed under recidivist statutes. The Court first used this approach in *Rummel v. Estelle*, in which it addressed a mandatory sentence imposed under a Texas recidivist statute: life imprisonment for a defendant's third felony, obtaining $120.75 by false pretenses.[44] In upholding the sentence, the Court deferred to the legislature's determinations about the seriousness of the crime and the appropriate punishment.[45] This mode of analysis does not include an examination of the nature or circumstances of the crime based on the Court's conclusion that sentencing decisions should be solely the prerogative of the legislature, not the courts. Under this deferential approach, courts do not examine even certain markers that typically indicate whether a sentence is appropriate. For example, in *Rummel*, the Court specifically discounted the relevance of the nature of the defendant's offense as nonviolent and involving a small sum of money, noting that the presence or absence of violence was not an indicator of the severity of an offense.[46]

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

45. *Id.* at 275.

46. *Id.* ("[T]he presence or absence of violence does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular criminal."). The Court followed the *Rummel* approach in *Hutto v. Davis*, 454 U.S. 370 (1982), and again in *Ewing v. California*, 538 U.S. 11 (2003). In *Hutto*, the Court reiterated *Rummel*'s holding that courts should be reluctant to overturn sentences established by the legislature and affirmed a sentence of forty years in prison and a $20,000 fine for possession with intent to distribute nine ounces of marijuana when the defendant had a

In other cases, the Court focuses on the nature of the crime the defendant committed, rather than on the state's interest, without explaining any reason for the shift. Though the Court has not stated as much explicitly, these cases suggest that there are two ways to approach the analysis of the nature of the crime: Courts may focus on either the individual's particular conduct or the aggregate effect of such crimes. In *Solem v. Helm*, to date the only successful individual challenge to a term-of-years sentence in the Supreme Court, the Court focused on the specific nature of the crime the defendant committed, noting that it was nonviolent and not "a crime against a person."[47] The consideration of the offense's nonviolent nature marks a departure from earlier cases, where, as noted above, the Court specifically discounted the absence or presence of violence as a determinative factor.[48] In *Solem*, the Court also intimated that the defendant's personal circumstances are a relevant consideration, commenting that "alcohol was a contributing factor in each case."[49] Thus, reading between the lines, *Solem*—which admittedly stands as an outlier as the only successful individual challenge—suggested that the proportionality analysis includes an individualized examination of the defendant's conduct and the harm caused by his actions rather than a focus on the state's goals.

The Court about-faced again in *Harmelin*, its next significant consideration of an Eighth Amendment challenge to a term-of-years sentence, adopting what this Comment will refer to as the "nature of the offense approach." This approach is conceptually similar to the approach used in *Solem* but looks at the nature of the offense more broadly. As articulated by the *Harmelin* concurrence, which became the controlling precedent,[50] the nature of the harm approach does

previous drug conviction. *Hutto*, 454 U.S. at 370–71; *id.* at 374 ("*Rummel* stands for the proposition that federal courts should be 'reluctan[t] to review legislatively mandated terms of imprisonment' and that 'successful challenges to the proportionality of particular sentences' should be 'exceedingly rare.'" (quoting *Rummel*, 445 U.S. at 272) (citations omitted)). In *Ewing*, the Court was most concerned with the state's goal of deterring and punishing crime. The *Ewing* Court upheld a sentence of twenty-five years to life, imposed under California's three-strikes law, for a repeat felon whose triggering offense was the theft of three golf clubs worth approximately $1200. *Ewing*, 538 U.S. at 14, 28. The Court gave significant consideration to the policy behind California's three-strikes law and ultimately concluded that it was the role of the legislature, not the Court, to establish punishments. *Id.* at 24–28.

47. Solem v. Helm, 463 U.S. 277, 280 (1983). In *Solem*, the defendant was sentenced under a recidivism statute to life imprisonment without the possibility of parole for his seventh nonviolent felony of uttering an invalid check in the amount of one hundred dollars. *Id.* at 279–81.

48. *See Rummel*, 445 U.S. at 275.

49. *Solem*, 463 U.S. at 280.

50. *See* Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 693 (2005) ("[T]he opinion that eventually came to assume the status of law was Justice Kennedy's

not look at the actual harm caused by the defendant's conduct nor at his particular actions and circumstances, but at the threat to society from the type of crime he committed and society's interest in deterring such crimes.[51] So in *Harmelin*, the focus of the analysis was on the threat to society from drug trafficking generally, not on any conduct of the defendant himself.[52] Furthermore, this approach differs from the earlier analysis used in *Rummel* because it requires courts to conduct an independent analysis of the harm caused by the type of crime the defendant committed, while *Rummel* leaves such considerations solely to legislatures.[53] Thus, *Harmelin* suggested a third way to look at culpability, directing the focus away from *Solem*'s concern with the individual defendant's actions and toward the potential for harm and the harm caused by that type of offense generally.[54]

Thus, the Court has approached the review of noncapital sentences from three different angles, providing conflicting approaches that lower courts may adopt in examining the gravity of a defendant's offense in a noncapital Eighth Amendment challenge. The Court itself has acknowledged that lower courts may adopt any of these methods[55] and that this contradictory doctrine has caused confusion. The Court has noted that its "precedents in this area have not been a model of clarity"[56] and that it has "not established a clear or consistent path for courts to follow" in evaluating the gravity of defendants' offenses and thus in determining

concurring opinion . . . ."). While seven members of the *Harmelin* Court agreed that the Eighth Amendment contained some proportionality guarantee, Justice Kennedy's opinion became controlling because he articulated the most narrow proportionality principle. Justice Scalia's plurality opinion failed to become controlling because he was joined by only one other justice in arguing that the Eighth Amendment contains no proportionality principle outside of the death penalty context. Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (plurality opinion).

51. *Harmelin*, 501 U.S. at 1001–03 (Kennedy, J., concurring).

52. *Id.* In *Harmelin*, the defendant was convicted of possession with intent to distribute 672 grams of cocaine, for which he received a sentence of life imprisonment without parole. *Id.* at 961 (plurality opinion).

53. *See supra* notes 44–46 and accompanying text.

54. In affirming the sentence, Kennedy devotes significant space to an analysis of the threat drug trafficking poses to society. Kennedy notes that "[p]ossession, use, and distribution of illegal drugs represent 'one of the greatest problems affecting the health and welfare of our population,'" concluding that "petitioner's crime threatened to cause grave harm to society." *Id.* at 1002 (Kennedy, J., concurring) (quoting Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 668 (1989)).

55. Lockyer v. Andrade, 538 U.S. 63, 73–74 (2003) ("Because *Harmelin* and *Solem* specifically stated that they did not overrule *Rummel*, it was not contrary to our clearly established law for the California Court of Appeal to turn to *Rummel* in deciding whether a sentence is grossly disproportionate. . . . And while this case resembles to some degree both *Rummel* and *Solem*, it is not materially indistinguishable from either. Consequently, the state court did not 'confron[t] a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arriv[e] at a result different from our precedent.'" (quoting Williams v. Taylor, 529 U.S. 362, 406 (2000)) (citations omitted)).

56. *Andrade*, 538 U.S. at 72.

whether a term-of-years sentence violates the Eighth Amendment under the proportionality principle.[57]

Harmelin created confusion in another respect as well. As noted in Part I, the proportionality principle first requires courts to weigh the gravity of the offense against the severity of the punishment. The second and third prongs of the analysis require an intrajurisdictional comparison and then an interjurisdictional comparison. In *Solem*, the Court articulated the test as having three prongs, so all three prongs are relevant to the proportionality principle and must be addressed in each case.[58] However, *Harmelin* modified that analysis by requiring that courts conduct the inter- and intrajurisdictional comparisons only if the sentence at issue gives rise to an inference of gross disproportionality.[59]

B. A Split in Circuit Courts' Interpretation of the Doctrine

A sampling of circuit court rulings on Eighth Amendment challenges to noncapital sentences demonstrates that the relationship between *Solem* and *Harmelin* has caused some confusion among courts. Lower courts, like the Supreme Court, have largely upheld lengthy sentences against Eighth Amendment challenges, but different circuits have adopted divergent interpretations of the controlling mode of analysis. One major point of disagreement is how *Harmelin* affects *Solem*: Some circuits continued to apply all three steps of the *Solem* analysis after *Harmelin*, while other circuits have concluded that in light of *Harmelin* they should only consider the second and third steps of the analysis if a comparison between the crime and the sentence leads to an inference of gross disproportionality. Circuits have also disagreed about how certain factors—such as the availability of parole—bear on the analysis of disproportionality and about which case or cases govern the method of evaluating proportionality.

The Third, Ninth, and Tenth Circuits have concluded that *Harmelin* modifies the *Solem* analysis such that they need only conduct an inter- and intrajurisdictional comparison if the initial comparison between the crime and the

57. *Id.*

58. *See* Solem v. Helm, 463 U.S. 277, 292 (1983) ("[A] Court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdictions; and (iii) the sentences imposed for commission of the same crime in other jurisdictions.").

59. *Harmelin*, 501 U.S at 1005 (Kennedy, J., concurring) ("A better reading of our cases leads to the conclusion that intrajurisdictional and interjurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.").

sentence leads to an inference of gross disproportionality. In a rare federal case overturning a noncapital sentence, the Ninth Circuit applied the *Harmelin* approach, conducting the inter- and intrajurisdictional comparisons only after concluding that the initial comparison between the offense and the sentence led to an inference of gross disproportionality. In *Ramirez v. Castro*,[60] the court held that a sentence of twenty-five years to life without the possibility of early parole was grossly disproportionate to the crime of shoplifting a VCR worth $199 from a Sears department store.[61] In addition to emphasizing the minor nature of the crime itself by characterizing it as petty theft, the court also noted that the defendant immediately surrendered to the authorities when caught and that the offense involved no violence.[62] In doing so, the Ninth Circuit seems to have adopted the individualized assessment approach to evaluating the gravity of the offense, by highlighting the lack of violence and noting specific details of the defendant's behavior. After concluding that the sentence was grossly disproportionate in comparison to the crime the defendant committed, the *Ramirez* court then compared the sentence to those imposed for other crimes in the same jurisdiction and for the same crime in other jurisdictions, finding it disproportionate under both prongs.[63] The Ninth Circuit's 2004 decision stands as one of the only federal examples of a court striking down a defendant's term-of-years sentence.

The Third and Tenth Circuits similarly concluded that the second and third prongs need only be addressed if the initial weighing leads to an inference of gross disproportionality.[64] However, even those circuits that follow *Harmelin's* approach by conducting the inter- and intrajurisdictional analysis only if the sentence fails on the first prong demonstrate divergent ways to approach the examination of the gravity of the offense. While the Tenth Circuit, like the Ninth Circuit in *Ramirez* and the Supreme Court in *Solem*, has demonstrated willingness to

60. 365 F.3d 755 (9th Cir. 2004).
61. *Id.* at 756, 775.
62. *Id.* at 756.
63. *Id.* at 770–73.
64. For example, in *United States v. Walker*, 473 F.3d 71 (3d Cir. 2007), the Third Circuit upheld a fifty-five-year sentence for charges relating to use of a firearm during an armed robbery by conducting only the first prong of the analysis and concluding that the sentence did not raise an inference of gross disproportionality. *Id.* at 82–83. For other examples of how the Third Circuit has treated Eighth Amendment challenges to noncapital sentences, see *United States v. MacEwan*, 445 F.3d 237 (3d Cir. 2006), and *United States v. Salmon*, 944 F.2d 1106 (3d Cir. 1991). Like the Third and Ninth Circuit, the Tenth Circuit has used a more individualized approach. *See* Hawkins v. Hargett, 200 F.3d 1279 (10th Cir. 1999) (noting the violent and repeated nature of defendant's crime, as well as his age, in upholding a sentence of one hundred years with parole after thirty-five imposed on a thirteen-year-old boy who broke into a woman's home and repeatedly raped her).

examine closely the defendant's particular crime and actions, the Third Circuit has examined the nature of the crime generally rather than the specific conduct at issue.[65]

In contrast, the Fourth[66] and Fifth[67] Circuits have conducted the full three-part analysis of *Solem* even after concluding that a sentence failed to raise an inference of gross disproportionality. Some courts have expressly noted the confusion, indicating that they are unsure of the controlling paradigm, especially in cases that they decided shortly after *Harmelin* came down, and thus are perhaps taking the safest option by conducting the full three-part analysis while suggesting that doing so may not be necessary. Before conducting all three *Solem* steps in examining a sentence of life without parole for conspiracy and possession with intent to distribute cocaine, the Fourth Circuit in *United States v. Kratsas*[68] commented on the uncertainty wrought by the Court's *Harmelin* decision. The *Kratsas* court stated that *Harmelin* "may have cast some doubt upon . . . *Solem*" and added that it "may be somewhat unclear, in light of the Supreme Court's decision in *Harmelin*, whether *Solem*'s three-part proportionality test is still relevant in noncapital cases."[69] The court then went on to comment that it made "[t]he doctrinal choice in favor of applying the three-part *Solem* test."[70]

There is also some disagreement between circuits regarding which noncapital sentences are subject to Eighth Amendment review at all. While it is clear that the Eighth Amendment extends to noncapital sentences, some courts have concluded that proportionality review is available only for sentences of life imprisonment without parole. The Fourth and Sixth Circuits have adopted this view, summarily dispensing with Eighth Amendment claims that are based on any sentence

65. *See, e.g.*, *Walker*, 473 F.3d at 83 (discussing the threat to society caused by the use of firearms during felonies); United States v. Angelos, 433 F.3d 738, 752 (10th Cir. 2006) (concluding that the threat to society caused by illegal use of firearms is "'momentous enough to warrant the deterrence and retribution' of lengthy consecutive sentences").

66. *See* United States v. D'Anjou, 16 F.3d 604 (4th Cir. 1994); United States v. Kratsas, 45 F.3d 63, 68 (4th Cir. 1995).

67. *See* United States v. Lemons, 941 F.2d 309 (5th Cir. 1991).

68. 45 F.3d 63.

69. *Id.* at 66–67.

70. *Id.* at 68 n.4. The Fifth Circuit, too, has continued to conduct all three steps of the *Solem* analysis, though its decision to do so does not seem as self-conscious as the Fourth Circuit's. *See Lemons*, 941 F.2d. 309, 319-20 (articulating the proportionality principle by stating that a "proportionality analysis involves an examination of (1) the gravity of the offense and the harshness of the penalty . . . ; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions.").

less than life without parole.[71] The Tenth Circuit, however, has expressly addressed and rejected other circuits' decisions to treat the possibility of parole as a determinative factor in weighing the gravity of the offense against the severity of the sentence.[72]

The split among circuits and evidence of confusion among lower courts beg for more clarity, both in terms of the doctrinal framework and in how to balance the gravity of the offense against the severity of the sentence. The balancing is especially important because courts decide most cases based on the initial comparison of gravity of the offense and the severity of the sentence, treating this balance as a threshold consideration and often failing to reach the second and third prongs. Moreover, those courts that do conduct the full three-pronged analysis treat the second and third prongs as merely supplementing the conclusion already drawn from the initial balancing. Given the importance of this first prong, it is especially important that the Supreme Court clarify how lower courts should conduct the comparison.

C. Enter *Graham*

In *Graham v. Florida*,[73] the Court held that the sentence of life imprisonment without parole imposed on juvenile defendants convicted of nonhomicide crimes violates the Eighth Amendment's prohibition on cruel and unusual punishments.[74] The Court based its holding on the conclusion that juveniles who commit nonhomicide crimes have "twice diminished moral culpability": Their youth makes them less culpable than adult offenders and the nonhomicide nature of their crime makes them less culpable than defendants who kill.[75] The Court also concluded that the sentences imposed on juveniles nationwide indicate a consensus against the use of life without parole for juvenile offenders.[76] In reaching this notable conclusion, *Graham* demonstrated several striking features that may change the Eighth Amendment landscape, but its place in the doctrinal framework

71. *See* United States v. Lockhart, 58 F.3d 86, 89 (4th Cir. 1995) ("It is well settled that proportionality review is not appropriate for any sentence less than life imprisonment without the possibility of parole."); United States v. Thomas, 49 F.3d 253, 261 (6th Cir. 1995) ("Federal courts will not engage in a proportionality analysis except in cases where the penalty imposed is death or life in prison without possibility of parole."); United States v. Polk, 905 F.2d 54, 55 (4th Cir. 1990).
72. Hawkins v. Hargett, 200 F.3d 1279, 1284 (10th Cir. 1999) ("Allowing the analysis to turn on the single factor of parole focuses solely on the punishment side of the equation. We are not persuaded the Supreme Court intended this threshold analysis to be further abbreviated.").
73. 130 S. Ct. 2011 (2010).
74. *See id.* at 2034.
75. *Id.* at 2027.
76. *See id.* at 2023.

is far from clear, and it has certainly not yet precipitated a sea change in lower courts. In *Graham*, the Court placed personal culpability at the center of the analysis for a noncapital sentence for the first time, suggesting a new way to approach Eighth Amendment challenges and perhaps suggesting that the Court will be more likely to analyze culpability in other cases. The case may also demonstrate the Court's increased willingness to extend the reach of the Eighth Amendment beyond previously set boundaries, even if this increase was only slight.

Another notable feature of *Graham* was the Court's use of cases decided in the death penalty context to support its conclusion that Graham's noncapital sentence was unconstitutional.[77] In the death penalty context, in which the Court recognizes that the offense alone does not fully capture a defendant's blameworthiness, the Court requires an individualized assessment of the defendant's culpability in order to measure whether the defendant truly deserves the death penalty.[78] Prior to *Graham*, however, the Court had vehemently drawn a thick line between the doctrine applied in the death penalty context and that applied in noncapital cases—death, it declared again and again, is different.[79]

77. The Court requires that states regulate capital punishment by providing a specific list of aggravating circumstances that may make a defendant eligible for the death penalty in order to prevent the arbitrary and capricious imposition of the sentence. *See* Rachel Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1151–53 (2009). Additionally, the Court requires an individualized culpability assessment, where "the character and record of the individual offender and the circumstances of the particular offense [are] a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* at 1154 (quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion)). Moreover, this individualized assessment may include as mitigating evidence any aspect of the defendant's character or of the circumstances of the crime that the defendant offers to show that he does not deserve the death penalty, with no limits on the type of evidence he may submit. *Id.* Thus, while states must provide specific guidance on what aggravating factors may make a defendant eligible for the death penalty, juries must be allowed to consider any mitigating evidence the defendant chooses to submit. The culpability assessment proposed by this Comment bears some similarity to the approach in capital cases because it too would require an individualized assessment of the defendant's guilt. However, this Comment's proposal differs from the capital assessment in several respects. First, the individualized assessment in the capital context specifically addresses whether the defendant should be sentenced to death, while this proposal provides a way for courts to determine the appropriate sentence from a range of options. Furthermore, the culpability assessment in the capital context requires a limited list of aggravating factors on the one hand and places no restraints on the court's ability to consider mitigating circumstances. In contrast, this Comment proposes a framework in which a finite number of factors may be considered and each of these may weigh as either mitigating or aggravating factors.

78. *See id.* at 1156.

79. *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 306 (1972) (Stewart, J., concurring) ("The penalty of death differs from all other forms of criminal punishment, not in degree but in kind."); *see also* Harmelin v. Michigan, 501 U.S. 957, 995 (1991) (plurality opinion) ("Our cases creating and clarifying the 'individualized capital sentencing doctrine' have repeatedly suggested that there is no

Accordingly, the Court repeatedly refused to apply its reasoning in death penalty cases to challenges to noncapital sentences, and lower courts followed suit.[80] In light of this history, the *Graham* Court's reliance on capital cases is a striking and significant departure from precedent. Early in its opinion,[81] the Court stated that in reviewing Graham's sentence of life without parole the appropriate analysis was the one used in *Atkins v. Virginia*,[82] *Kennedy v. Louisiana*,[83] and *Roper v. Simmons*[84]—all cases that focused on the culpability of the offender and all decided in the capital context. By applying these capital cases to Graham's sentence, the Court may have indicated that the line between capital and noncapital cases is not as thick as it seemed. At least in regard to sentences of life without parole—which, like the death penalty, condemn the defendant to die in a state-controlled facility—the enhanced culpability analysis used for the death penalty may be available. Moreover, the Court's extension of the culpability analysis to noncapital sentences indicates its belief that culpability is a good measure of the appropriateness of a criminal punishment.

The *Miller* Court relied directly on *Graham* in its reasoning, and the opinion echoed many of *Graham's* noteworthy themes.[85] Like *Graham*, *Miller* relied on capital cases, comparing sentences of life without parole to the death penalty in a way that it had never done before *Graham*.[86] Furthermore, the opinion focused on culpability and condemned the mandatory sentencing scheme at issue in the

comparable requirement outside the capital context . . . ."). For a comprehensive discussion of the death-is-different doctrine and an argument for uniformity, see Barkow, *supra* note 77. Scholar Eileen Scarry provides insight into the human understanding of pain that may provide an explanation for the greater focus on sentences of death than on prison terms. Scarry's scholarship argues that humans are able to understand pain only through its physical manifestation—suggesting that the pain imposed by the death penalty is better understood and so more easily addressed than the nonphysical pain associated with extremely lengthy prison sentences. ELAINE SCARRY, THE BODY IN PAIN 4–19 (1985).

80. *See, e.g.*, *Harmelin*, 501 U.S. at 995; United States v. Lafoon, 145 F. App'x 964, 965 (5th Cir. 2005) (determining that the conclusions in *Atkins v. Virginia*, 536 U.S. 304 (2002), regarding the diminished culpability of mentally retarded defendants had no application to noncapital sentences).

81. *Graham*, 130 S. Ct. at 2022–23.

82. 536 U.S. 304 (2002).

83. 554 U.S. 407 (2008).

84. 543 U.S. 551 (2005).

85. Miller v. Alabama, No. 10-9646, slip op. at 10 (U.S. June 25, 2012) ("*Graham*'s reasoning implicates any life-without-parole sentence imposed on a juvenile, even as its categorical bar relates only to nonhomicide offenses.").

86. *Id.*, slip op. at 12–13 ("*Graham*'s [t]reat[ment] [of] juvenile life sentences as analogous to capital punishment . . . makes relevant here a second line of our precedents, demanding individualized sentencing when imposing the death penalty." (alterations in original) (citation and internal quotation marks omitted)).

case because it "prevents those meting out punishment from considering a juvenile's 'lessened culpability' and 'greater capacity for change.'"[87] While *Graham* focused on the reduced culpability of all juvenile offenders, the *Miller* Court expressed greater concern with individualized culpability, discussing the specific crime and circumstances of each defendant and how these factors reflected on his personal blameworthiness.

With respect to defendant Kuntrell Jackson, the Court considered both his level of involvement in the crime and his background. Jackson participated in an armed robbery of a video store, during which a member of his cohort shot and killed the store clerk. Jackson had been outside the store at the beginning of the robbery, but entered shortly before the shooting.[88] The Court noted that Jackson did not himself "fire the bullet" that killed the victim, and the evidence at trial was ambiguous regarding whether, when he entered the store, he intended to threaten the victim or dissuade his cohorts from escalating the crime.[89] As to Jackson's personal background, the Court noted an "immersion in violence: Both his mother and his grandmother had previously shot other individuals."[90] The Court concluded that "[a]t the least, a sentencer should look at such facts before depriving a 14-year-old of any prospect of release from prison."[91]

The *Miller* Court was similarly concerned with the personal culpability of defendant Evan Miller, who was convicted for killing a man (his neighbor) whom he had met after the man sold drugs to his mother. Miller and a friend spent some time drinking and smoking with the man, before attempting to steal his wallet, beating him, and setting fire to his trailer.[92] Because the man died from his injuries and smoke inhalation, Miller was convicted of murder in the course of arson, which in Miller's home state of Alabama carries a mandatory minimum penalty of life without parole.[93] While not diminishing the seriousness of Miller's crime, calling it a "vicious murder," the Court stated that "if ever a pathological background might have contributed to a 14-year-old's commission of a crime, it

87. *Id.*, slip op. at 1.
88. *Id.*, slip op. at 2.
89. *Id.*, slip op. at 15. At trial, the parties introduced conflicting evidence of Jackson's actions immediately before the shooting. Jackson initially waited outside while his cohorts entered the store. The parties disputed whether, upon entering, he warned the victim, "[w]e ain't playin'" or told his friends, "I thought you all was playin'," and the appellate court affirmed the conviction, finding that the jury could have plausibly believed either version. *Id.*, slip op. at 2, 15.
90. *Id.*, slip op. at 16.
91. *Id.*
92. *Id.*, slip op. at 4–5.
93. *Id.*, slip op. at 5.

is here."[94] At the time that Miller committed his crime, he had attempted to kill himself four times, the first when he was six years old. He had been in and out of foster care during his childhood, as he had been chronically neglected by his alcoholic and drug-addicted mother and physically abused by his stepfather.[95] The Court concluded that, though Miller deserved a severe punishment, the sentencer needed to examine these circumstances of Miller's childhood before condemning him to a life without parole.[96] With this specific concern regarding the individual culpability of each of the defendants, the *Miller* Court went further than *Graham* in emphasizing the importance of culpability in the Eighth Amendment context.

Though *Graham* and *Miller* were both significant doctrinal advances, the application for other noncapital sentences may be limited for several reasons. First, *Graham* and *Miller* were both specifically focused on juveniles' diminished culpability, with both holdings narrowly addressing the Eighth Amendment's application to juveniles. Second, the reasoning in both cases relied heavily on juveniles' mental immaturity, so the cases may have limited application to adult sentences. Moreover, both dealt with categorical challenges rather than individual challenges.[97] They are therefore more in line with the cases establishing categorical prohibitions against the use of the death penalty for certain types of defendants than with the cases examining specific sentences for their proportionality.[98] Categorical challenges will inevitably be few in number as there are a limited number of categories of defendants with inherently diminished culpability, and so viewing *Graham* as strictly a response to a categorical challenge would limit its scope. *Graham* also implicated three significant factors in the proportionality analysis: (1) Graham was a juvenile, a less culpable offender; (2) Graham committed a nonhomicide crime, a less blameworthy offense; and (3) the sentence was life imprisonment without parole, an extremely harsh sentence that the Court regarded as unique in its renunciation of any "hope of restoration."[99] These factors created a uniquely strong case that may limit its application for challenges that do not similarly involve all these concerns. Furthermore, *Graham* and *Miller* relied heavily on the Court's recent cases concluding that juvenile offenders are

94. *Id.*, slip op. at 16.
95. *Id.*, slip op. at 4, 16.
96. *Id.*, slip op. at 16.
97. Graham v. Florida, 130 S. Ct. 2011, 2022–23 (2011).
98. *See id.*
99. *Id.* at 2027; Rachel E. Barkow, *Categorizing* Graham, 23 FED. SENT'G REP. 49, 50 (2010) ("In *Graham*, then, the offender, the crime, and the sentence all raised red flags of disproportionality. If these three factors must all be present to challenge a non-capital sentence successfully, it is hard to envision many candidates likely to win under this framework.").

generally less culpable than adult offenders[100] and that less culpable offenders and crimes are not deserving of the harshest punishments the state may impose.[101] *Graham* and *Miller* may thus have presented particularly compelling cases that aligned closely with the Court's recent Eighth Amendment rulings and that are unlikely to be repeated.

In the year after *Graham* was decided, lower courts have consistently rejected attempts to apply *Graham*'s reasoning beyond nonhomicide crimes, juvenile defendants, and sentences of life imprisonment.[102] For example, several courts declined to extend *Graham*'s prohibition on sentences of life without parole to youth aged fourteen to seventeen who were convicted of murder, including second-degree murder.[103] Courts have also concluded that *Graham* has no application for adults[104] or for sentences less than life without parole.[105] These early cases seem to indicate that *Graham*'s application will be constrained in lower courts to the

100. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 560 (2005) (holding that the Eighth Amendment forbids sentencing juveniles to death).

101. *See, e.g.*, *id.* at 568–69; Atkins v. Virginia, 536 U.S. 304, 321 (2002) (forbidding the use of the death penalty against mentally retarded defendants based on the conclusion that they are not culpable enough to deserve such a harsh punishment); Thompson v. Oklahoma, 487 U.S. 815, 838 (1988) (holding that the death penalty cannot be imposed on defendants who were fifteen or younger when they committed the crime for which they were sentenced because they are not sufficiently culpable to deserve the harshest punishment).

102. *See* Scott R. Hechinger, *Juvenile Life Without Parole: An Antidote to Congress's One-Way Ratchet*, 35 N.Y.U. REV. L. & SOC. CHANGE 408, 424 (2011).

103. *See, e.g.*, Commonwealth v. Ortiz, 17 A.3d 417 (Pa. Super. Ct. 2011) (concluding that a sentence of life imprisonment was not unconstitutional for a defendant who was convicted of second-degree murder committed at age sixteen and stating that *Graham* did not apply because the defendant committed a homicide crime); Miller v. State, 63 So. 3d 676 (Ala. Crim. App. 2010) (affirming a sentence of life imprisonment for murder that the defendant committed at age fourteen because "[u]nlike Graham, Miller committed capital murder and thus does not have 'twice diminished moral culpability'" (quoting Graham v. Florida, 130 S. Ct. 2011, 2028 (2010))); *see also* Hechinger, *supra* note 102, at 424–27 (surveying lower courts' application of *Graham* in the year following its release).

104. *See, e.g.*, United States v. Scott, 610 F.3d 1009, 1017–18 (8th Cir. 2010) (concluding that *Graham* had no application to a sentence of life without parole for a crime the defendant committed when he was twenty-five even though his sentence was enhanced based on crimes he committed as a juvenile).

105. *See, e.g.*, Angel v. Commonwealth, 704 S.E.2d 386, 401–02 (Va. 2011) (concluding that *Graham* has no application to a sentence of three consecutive life terms and one twenty-year term with no possibility of parole, given that state sentencing statutes provided the possibility of release when the defendant reached age sixty). At least one court, however, has concluded that *Graham* may be applicable to sentences that technically provide the possibility of parole but do not realistically provide such a possibility in the defendant's lifetime. *See* People v. Nuñez, 125 Cal. Rptr. 3d 616, 627 (Ct. App. 2011) (reversing sentence for a juvenile convicted of a nonhomicide offense and sentenced to five consecutive life terms and five consecutive twenty-year terms because he would not be eligible for parole for 175 years, which had the effect of "denying him a meaningful opportunity for release within his lifetime" and thus was unconstitutional under *Graham*).

case's literal parameters. They certainly do not, however, represent the final word on the interpretation of *Graham*, given that it was the Supreme Court that made the initial move in *Graham* and will continue to hear petitions from attorneys seeking to broaden the holding's scope. *Graham* left open many questions that lower courts have only begun to answer and that attorneys at all levels of the court system should continue to ask: How broadly does the holding apply? Will the Court's approach be applied to individual as well as categorical provisions? To adult as well as juvenile offenders? These questions create another layer of ambiguity in current Eighth Amendment doctrine. While *Graham* is a significant move in that it has expanded the reach of the Eighth Amendment's Punishments Clause and may demonstrate the Court's willingness to apply the Clause more broadly than before, it has opened new questions that lower courts will now address.

II. A LIMITED DOCTRINE

Despite the lack of clarity over what standard to apply, the Court has made it clear that whatever the appropriate standard, its application should be very limited. The gross disproportionality standard is incredibly high, meaning that a sentence must be very extreme when compared to the crime to amount to a violation of the Eighth Amendment. The Court has been explicit that reviewing courts should be very reluctant to overturn a state's sentencing decision, and its decisions on challenges to such sentences have borne out this reluctance. Not surprisingly, federal and state courts have largely followed the Supreme Court's lead, overturning noncapital sentences only in rare and extreme cases.

A. In the Court's Own Words: Supreme Court Cases Addressing Eighth Amendment Challenges to Noncapital Sentences

Throughout its treatment of challenges to noncapital sentences, the Court has reiterated that the bar set by its Eighth Amendment doctrine is very high and courts should defer to state sentencing decisions, overturning such sentences only in rare cases. In his controlling *Harmelin*[106] concurrence, Kennedy began by noting eighty years of Eighth Amendment jurisprudence recognizing that "the Cruel and Unusual Punishments Clause encompasses a narrow proportionality principle," prohibiting "grossly disproportioned" sentences.[107] Kennedy went on to say that the

106. Harmelin v. Michigan, 501 U.S. 957 (1991).
107. *Id.* at 997 (Kennedy, J., concurring) (internal quotation marks omitted).

Eighth Amendment's proportionality principle forbids "only *extreme* sentences."[108] The Court's subsequent cases repeated the language of extremity and narrowness.[109] Even in the one case in which the Court overturned an individual term-of-years sentence, it noted that "[o]utside the context of capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare."[110] The Court has also been clear that it and other reviewing courts should grant substantial deference to state sentencing policies and thus be very wary of overturning their decisions. The current doctrine allows a noncapital sentence or sentencing scheme to survive an Eighth Amendment challenge if the reviewing court concludes that the government had some rational basis for believing that its decision advanced one or more of the goals of punishment—specifically, deterrence, incapacitation, retribution, and rehabilitation.[111]

The doctrine is so narrow and forbids only such extreme sentences that it allows relief in a vanishingly small number of cases and allows almost any sentence to pass constitutional muster. The combination of an extremely high doctrinal standard and an extremely deferential treatment of state decisions allows the Court to conclude that sentences that are extremely harsh in comparison to the crime committed—sentences that should be viewed as grossly disproportionate—do not violate the proportionality principle. The sentences that the Court has upheld against Eighth Amendment challenges demonstrate the weakness of the doctrine in practice. For example, the Court upheld Terrell Don Hutto's sentence of forty years for possession of less than nine ounces of marijuana.[112] The Court similarly upheld Ronald Allen Harmelin's sentence of life imprisonment without the possibility of parole, although he had no prior convictions when he was convicted of possession with intent to distribute cocaine;[113] William James Rummel's sentence of life imprisonment for three crimes of fraud that totaled under $250, though the Court noted that Rummel would likely, though not certainly, be eligible

108. *Id.* at 1001 (emphasis added).
109. *See, e.g.*, Ewing v. California, 538 U.S. 11, 20 (2003); Hutto v. Davis, 454 U.S. 370, 383 (1982) (Brennan, J., dissenting).
110. Solem v. Helm, 463 U.S. 277, 289–90 (1983) (alterations in original) (quoting Rummel v. Estelle, 445 U.S. 263, 272 (1980)) (internal quotation marks omitted). It is worth nothing that *Solem* modified the language from *Rummel* slightly, making it prescriptive rather than descriptive or retrospective. The original quoted language from *Rummel* stated that successful challenges "*have been* exceedingly rare," *Rummel*, 445 U.S. at 272 (emphasis added), while *Solem* changed the language to state that such successful challenges "[*will be*] exceedingly rare," *Solem*, 463 U.S. at 290 (alteration in original) (emphasis added).
111. *Ewing*, 538 U.S. at 28.
112. *Hutto*, 454 U.S. at 371–72.
113. *Harmelin*, 501 U.S. at 961 (plurality opinion).

for parole after serving only twelve years;[114] Leandro Andrade's sentence of two consecutive terms of twenty-five years without the possibility of parole for theft of $150 worth of videotapes;[115] and Gary Albert Ewing's sentence of twenty-five years to life, imposed under a recidivist statute, for theft of three golf clubs worth a total of $1200, though the Court noted that Ewing's sentence included consideration of his prior felony convictions.[116]

These offenses are not each of equal magnitude, and so the defendants in each case do not have the same moral culpability—distribution of cocaine weighs more heavily on the culpability scale than petty theft of videotapes. However, none of these offenses bears the markers of those crimes that are the most serious and that indicate the highest degree of culpability:[117] In none of these cases did the defendant engage in violence, though in the cases involving drug convictions, the Court gave significant weight to the potential for violence caused by the drug trade;[118] in none of these cases did the defendant commit a crime against a person or cause specific harm to an individual; and in none of these cases did the crime result in death. Furthermore, with the exception of Harmelin's cocaine possession, the amount of drugs or money involved in these crimes was small—Hutto's fewer than nine ounces of marijuana would have sold for approximately $200,[119] and Rummel and Andrade's offenses of fraud and theft, respectively, were for petty sums.[120] Even Ewing's theft of three golf clubs was relatively minor when measured against other crimes for which defendants receive sentences of twenty-five years to life. While some of these offenses are not the most minor that can be committed, they fall far short of the most serious crimes—murder, rape, assault, and other such violent crimes. Yet each of these defendants received extremely lengthy sentences, two of them receiving the harshest penalty available short of death.[121]

114. *Rummel*, 445 U.S. at 273.

115. Lockyer v. Andrade, 538 U.S. 63, 65–66 (2003). The Court reviewed Andrade's sentence as a habeas petition, which required it to evaluate whether the trial court's judgment was "clearly erroneous" rather than whether the sentence violated the Eighth Amendment. As a result, the Court did not directly confront the question of whether Andrade's sentence was grossly disproportionate to his crime. *See id.* at 75.

116. *Ewing*, 538 U.S. at 18, 20–21.

117. For a discussion of the relative ranking of crimes, see *infra* notes 241–246 and accompanying text.

118. *See, e.g.*, *Harmelin*, 501 U.S. at 1002–03 (Kennedy, J., concurring).

119. Hutto v. Davis, 454 U.S. 370, 375 (1982) (Powell, J., concurring).

120. Rummel was convicted of obtaining $120.75 by false pretenses, Rummel v. Estelle, 445 U.S. 263, 266 (1980), while Andrade's sentence was for shoplifting $150 worth of goods, *Andrade*, 538 U.S. at 70.

121. *See Andrade*, 538 U.S. at 66; *Harmelin*, 501 U.S. at 961 (plurality opinion).

These examples from the Supreme Court's docket demonstrate that under the current rubric, extremely lengthy sentences are upheld for relatively minor crimes.

B. Following the Supreme Court's Lead: Lower Courts' Treatment of Eighth Amendment Challenges

Hutto, *Harmelin*, and *Ewing* represent the few noncapital prison sentences that have been subject to review by the Supreme Court. An examination of lower courts' treatment of noncapital Eighth Amendment challenges yields similar results. In a survey of over one hundred federal appellate court cases addressing Eighth Amendment challenges to noncapital sentences, chosen at random and including cases from all circuits, there was only one case in which a court overturned the sentence in question. In that case, *Ramirez v. Castro*,[122] the Ninth Circuit struck down a sentence of twenty-five years to life for attempted theft of a $199 VCR from a department store, a misdemeanor that on its own would be punishable by no more than six months in county jail.[123] Ramirez's sentence was elevated under California's three-strikes law[124] based on two prior convictions for attempted shoplifting. The two prior attempts were categorized as serious felonies for the purposes of the repeat offender statute because Ramirez pushed a guard while escaping from one attempt and another security guard received minor injuries when someone, not the defendant, drove over his foot during the course of the second attempt.[125] The *Ramirez* court concluded that given the nature of both the offense for which he was charged and his two prior convictions, the sentence was grossly disproportionate to the crime and thus unconstitutional.[126] *Ramirez*, however, is the exception, and it is far more common for states to uphold sentences than to overturn them. Penalties that have been upheld at the circuit level include fifty-five years for possession of a firearm during a robbery,[127] life imprisonment without the possibility of parole for conspiracy to distribute cocaine,[128] and life without parole for drug trafficking.[129] Among the roughly one hundred–case

122. 365 F.3d 755 (9th Cir. 2004).
123. *Id.* at 767–68.
124. CAL. PENAL CODE §§ 667, 1170.12 (Deering 2008).
125. *Ramirez*, 365 F.3d at 768.
126. *Id.* at 775.
127. United States v. Walker, 473 F.3d 71, 83 (3d Cir. 2007). Walker was also sentenced to ten years for his participation in the robbery itself, but the additional fifty-five years were for his possession of a firearm during the offense. *Id.*
128. *See* United States v. Kratsas, 45 F.3d 63, 64, 68 (4th Cir. 1995).
129. *See* United States v. Long, 268 F. App'x 832, 833 (11th Cir. 2008); United States v. D'Anjou, 16 F.3d 604, 606, 613 (4th Cir. 1994).

sample, several courts also categorically refused to conduct any Eighth Amendment review for sentences less than life without parole.[130]

A survey of over two hundred state court cases demonstrates similar trends to those in federal courts: Lengthy sentences imposed for drug crimes and habitual offenders are consistently upheld against Eighth Amendment challenges. Not surprisingly, a recitation of sentences upheld at the state court level echoes the examples from Supreme Court and circuit court cases cited above: twenty-five years to life for theft of two cassette players and three bottles of cologne totaling $70 when the defendant had prior criminal convictions;[131] twenty-five years to life for theft of a $149 MP3 player from Target;[132] twenty-five years to life for possession of a firearm by a felon;[133] twenty-five years to life for housebreaking.[134] Finally, sentences imposed by state and federal courts throughout the United States that do not receive appellate review contain similar stories of long sentences imposed for relatively minor crimes. Pursuant to a Washington recidivism statute, Paul Rivers was sentenced to life imprisonment without the possibility of parole for stealing $340 from an espresso bar employee, apparently threatening the employee with a finger in his pocket that was meant to look like a weapon.[135] In California, Brian Smith, a thirty-year-old recovering crack addict who was previously convicted of unarmed robbery and burglary was sentenced to twenty-five years to life for aiding and abetting two others in shoplifting bed sheets from a department store.[136] The list of such sentences continues: a life sentence for stealing pizza;[137] twenty-five years to life for a third-strike offense of stealing running shoes with two prior nonviolent burglary convictions;[138] twenty-five years to life for attempting to break into a church kitchen with two prior nonviolent offenses

130. *See supra* notes 71–72 and accompanying text.
131. *See* People v. Rodriguez, 52 Cal. Rptr. 2d 34, 35–36 (Ct. App. 1996).
132. *See* People v. Pena, No. F058840, 2010 Cal. App. Unpub. LEXIS 7863, at *2 (Cal. Ct. App. Oct. 1, 2010).
133. *See* People v. Osuna, No. F059937, 2011 Cal. App. Unpub. LEXIS 3326, at *1–2 (Cal. Ct. App. May 2, 2011).
134. *See* Minor v. State, 546 A.2d 1028, 1028–29 (Md. 1988).
135. State v. Rivers, 921 P.2d 495, 497–98 (Wash. 1996).
136. *See* Carl M. Cannon, *Petty Crime, Outrageous Punishment: Why the Three-Strikes Law Doesn't Work*, READER'S DIG., Oct. 2005.
137. *See* Eric Ruder, *Maximum Sentence for the Minimum Crime*, SOCIALISTWORKER.ORG (Mar. 16, 2010), http://www.socialistworker.org/2010/03/16/maximum-sentence-minimum-crime.
138. *See* Cannon, *supra* note 136.

from a decade earlier;[139] a life sentence for theft of three track suits following two felony convictions for robbery with a knife.[140]

There is only one area in which state courts' jurisprudence has diverged from that of federal courts and Eighth Amendment claims have gained some traction. Several state courts have heard challenges to sentences relating to state sex offender statutes, an area that is in the unique province of state courts. For example, state courts have struck down lengthy sentences for failure to comply with procedures for registering as a sex offender[141] and for offenses relating to consensual sex with a minor.[142] These cases are consistent with the trend in state and federal courts in which only the most extremely disproportionate sentences are overturned. The extremity in these cases comes primarily from the minor nature of the offenses: The sentences relating to registration were not imposed for the underlying sex offense but for failure to comply with technicalities of the registration statutes, while the age-related offenses were for consensual sex in which there was no element of force or coercion. These cases, however, represent the only area of law in which noncapital sentences are overturned as violating the Eighth Amendment with anything approaching regularity. For all other categories of noncapital sentences, successful Eighth Amendment challenges are an anomaly.

C. The Eighth Amendment as an Underenforced Constitutional Norm

Sentences imposed and upheld at all levels of the court system, state and federal, demonstrate what the Court has clearly noted: The Eighth Amendment's ability to constrain criminal sentences is extremely limited and only allows relief in rare cases. It may be that the Court has struck the correct balance. Perhaps Eighth Amendment noncapital doctrine has developed to be so narrow because this is the

139. *See id.*

140. *See* Solomon Moore, *Number of Life Terms Hits Record*, N.Y. TIMES, July 22, 2009, http://www.nytimes.com/2009/07/23/us/23sentence.html.

141. *See* Bradshaw v. State, 671 S.E.2d 485, 491–92 (Ga. 2008) (finding unconstitutional under the Eighth Amendment a mandatory sentence of life without parole for a second offense of failing to register as a sex offender); People v. Carmony, 26 Cal. Rptr. 3d 365, 369 (Ct. App. 2005) (finding a sentence of twenty-five years to life for failing to provide duplicate registration as required by state sex offender statutes grossly disproportionate and so violative of the Eighth Amendment). *But see* People v. Meeks, 20 Cal. Rptr. 3d 445, 455–56 (Ct. App. 2004) (finding that defendant's sentence of twenty-five years to life for willfully failing to register as a sex offender was not unconstitutional, especially given his numerous prior offenses).

142. *See* State v. Davis, 79 P.3d 64, 66–67, 75 (Ariz. 2003) (en banc) (striking down a sentence of fifty-two years without the possibility of parole imposed on a twenty-year-old defendant who on four separate occasions had consensual sex with two girls aged thirteen, where the sentence was comprised of four consecutive mandatory thirteen year sentences).

most appropriate reading of the prohibition, especially in light of other factors that limits judicial review of sentences, and the clause should not limit the types of sentences outlined above. One external restraint on courts' ability to apply the Eighth Amendment is federalism. The Court has repeatedly noted that within the federalist structure, legislatures are free to choose to construct criminal sentences in pursuit of one or more of the penological goals of retribution, deterrence, incapacitation, or rehabilitation, and that it is not the role of the federal courts to set sentencing policy. Under this view, the Court must recognize a range of sentences as constitutional because limiting the states' sentencing choices would violate federalism.[143] A more strict application of the Punishments Clause would thus be inappropriate because it would represent an overreaching of the Court's role in our system.

Yet even if these concerns do support a somewhat narrow application of the Eighth Amendment, the doctrine is still problematic because of the Court's failure to articulate a consistent standard. Furthermore, though it may be appropriate to limit the reach of the Eighth Amendment to a certain extent, the doctrine is currently too limited—the Court has gone too far in allowing states and the federal government to set sentencing as they see fit.

The doctrine is so limited that it amounts to underenforcement because there is a gap between the normative requirements of the provision and the test the Court has developed for enforcing them. A disconnect between the normative requirements of constitutional provisions and the enforcement of those provisions is evident throughout constitutional law, given the ambiguity in many clauses of the Constitution.[144] In regard to the Eighth Amendment Punishments Clause, the meaning of each of the three key words—cruel, unusual, punishments—is open to reasonable disagreement and has been the subject of vigorous debate.[145] Indeed,

143. *See* Harmelin v. Michigan, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring) ("[M]arked divergences both in underlying theories of sentencing and in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure.").

144. *See, e.g.*, Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275 (2006) (arguing that courts develop standards that are practical and predictable in order to apply otherwise vague or ambiguous provisions, even if they do not fully encompass the scope of the provision itself); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1219–20 (1978) (arguing that the Fifth Amendment's prohibition on takings, the Fourteenth Amendment's Privileges and Immunities and Equal Protection Clauses, and the Due Process Clause of the Fifth Amendment are all underenforced).

145. There is significant scholarship examining the meaning of "cruel," "unusual," and "punishments." For a discussion of cruelty, see Paulo D. Barrozo, *Punishing Cruelly: Punishment, Cruelty, and Mercy*, 2 CRIM. L. & PHIL. 67 (2008), Tom Regan, *Cruelty, Kindness, and Unnecessary Suffering*, 55 PHILOSOPHY 532, 533–35 (1980), and Judith N. Shklar, *The Liberalism of Fear*, *in* LIBERALISM AND THE MORAL LIFE 21, 29–37 (Nancy L. Rosenblum ed., 1989). For a discussion of the Court's

even the seemingly unambiguous "and" has generated divergent understandings.[146] When confronted with an ambiguous prohibition, the Court—which, for better or worse, is the final arbiter on constitutional questions—creates a test or tests that make it possible to apply a broad prohibition to specific problems. Underenforcement results when the standard the Court develops fails to give the provision sufficient legal force.

Lawrence Sager proposes a framework for analyzing underenforcement that is useful in understanding the Court's approach to the Eighth Amendment.[147] Sager focuses specifically on the Equal Protection Clause of the Fourteenth Amendment as an example of constitutional underenforcement but also notes that the Takings and Due Process Clauses of the Fifth Amendment and the Privileges and Immunities Clause of the Fourteenth Amendment are underenforced.[148] Sager posits that indicia that a constitutional norm is underenforced include, first, a disparity between the most plausible understanding of the constitutional clause and the scope of review under the Court's doctrine and, second, the presence of institutional concerns in the Court's formulation of the doctrine, which are concerns not directly related to textual interpretation.[149] Sager also argues that a clause is underenforced when the vast majority of plausible claims are dismissed without receiving serious consideration by courts.[150] Sager provides a detailed application of these theories to the Equal Protection Clause of the Fifth Amendment, arguing that outside of a few suspect classifications, the vast majority of Equal Protection claims are "dismissed out of hand."[151] For example, Sager notes that Equal Protection challenges to classifications fashioned in formulating taxation, business, and economic regimes are consistently rejected, with significant emphasis on concerns not directly related to Equal Protection, such as the state legislature's

treatment of the term "unusual" within the clause, see Shapiro, *supra* note 41, and John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739 (2008). For more on the interpretation of the word "punishment," see Duckworth v. Franzen, 780 F.2d 645, 652 (7th Cir. 1985) ("[P]unishment is a deliberate act intended to chastise or deter."), Johnson v. Glick, 481 F.2d 1028, 1032 (2d Cir. 1973) ("The thread common to [Eighth Amendment] cases is that 'punishment' has been deliberately administered for a penal or disciplinary purpose . . . ."), and Thomas K. Landry, *"Punishment" and the Eighth Amendment*, 57 OHIO ST. L.J. 1607 (1996).

146. *See* Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel* and *Unusual?*, 87 WASH. U. L. REV. 567 (2010).
147. Sager, *supra* note 144.
148. *Id.* at 1215–19 & nn.22–24.
149. *Id.* at 1218–19.
150. *Id.* at 1217.
151. *Id.* at 1216.

expertise in a specific area, the benefits of permitting state experimentation with new laws, and federalism.[152]

Sager's theory of constitutional underenforcement applies with equal force to the Eighth Amendment, as the vast majority of claims are rejected and the Court expresses significant concern with considerations that do not bear directly on whether a particular punishment is cruel and unusual, such as the question of which government body has the most expertise in criminal law and the advantages of allowing states to experiment with sentencing regimes. Moreover, Sager's framework makes sense. It is logical that a clause is being underenforced if it is being applied to only a small portion of the claims to which it could apply, as this indicates that it is not operating to constrain behavior (or confer rights) to the extent that it should. A constitutional provision need not apply to all plausible claims. A provision is not necessarily being underenforced if it fails to constrain conduct or confer rights in cases that fall on the edges of the doctrine, where the line between constitutional and unconstitutional provisions is difficult to assess. Due to the nature of interpreting a broad and ambiguous document, constitutional provisions cannot provide a clear answer to every potential case. Under a constitutional test, there will inevitably be some situations that fall clearly on one side. For example, a sentence of supervised parole for the crime of murder would clearly not be grossly excessive. On the other end of the spectrum, as the Court likes to point out, life without parole for overtime parking would clearly be unconstitutional as grossly disproportionate.[153]

However, there are many cases that are not as extreme as the fanciful unpaid parking scenario but nonetheless raise serious questions about excessiveness. The Tenth Circuit heard just such a case: A thirteen-year-old boy was sentenced to one hundred years with the possibility of parole for breaking into his neighbor's home and raping her.[154] The penalty was undoubtedly severe, especially given the defendant's youth, but so was his crime. This is just such a case where the Eighth Amendment does not provide a clear answer, as many factors bear on the analysis: the

152. *Id.* at 1218.

153. *See* Harmelin v. Michigan, 501 U.S. 957, 963 (1991) (plurality opinion); Rummel v. Estelle, 445 U.S. 263, 274 n.11 (1980) ("This is not to say that a proportionality principle would not come into play in the extreme example [of] a legislature ma[king] overtime parking a felony punishable by life imprisonment.").

154. *See* Hawkins v. Hargett, 200 F.3d 1279, 1280, 1285 (10th Cir. 1999). In *Hawkins*, the defendant would be eligible for parole after thirty-five years, which was a significant consideration for the court in upholding his sentence. *Id.* at 1284. However, as this case is simply used to illustrate a point rather than as an example of how lower courts deal with Eighth Amendment challenges, I will treat the sentence as one hundred years.

defendant's youth, the violent nature of his crime, the harm caused to the victim, and the availability of parole, to name a few. This is a case for which even the clearest test would not provide a definitive answer given the conflicting facts of the case and the failure of the Eighth Amendment to limit sentences for crimes and defendants like these does not raise an inference of underenforcement. However, the failure to constrain conduct or confer rights does rise to the level of underenforcement when, as with the Eighth Amendment, the application of the clause is so limited that it is in practice doing no work at all—such as when it allows sentences of twenty-five years to life and similar sentences for petty crimes involving small sums.[155]

Similarly, the focus on concerns far distant from the meaning of the text itself indicates that the Court is not faithfully interpreting the text but is doing something else, such as supporting a particular policy or rationalizing a particular holding. As discussed in more detail below, an example of such institutional considerations is the Court's discussion of who should make decisions on criminal policy, which is evident throughout its Eighth Amendment jurisprudence.[156] In sum, the Eighth Amendment's Punishments Clause fits into Sager's rubric because the scope of review is more limited than a plausible understanding of the clause would allow, institutional concerns figure prominently in the Court's analysis, and the vast majority of claims heard at all levels of the U.S. state and federal court system are rejected.

In light of the limited scope of the Punishments Clause,[157] and using the Court's own doctrine of disproportionality as a normative basis, the application of the principle demonstrates that there is a gap between a plausible understanding of the Punishments Clause doctrine and its application. While the current doctrine ostensibly forbids gross disproportionality, in practice it allows sentences that are grossly excessive in comparison to the crimes for which they are imposed. The excessiveness of these sentences is evident both from an examination of the severity of the offense compared to the severity of the sentence and from a comparison of sentences imposed for other crimes. Leandro Andrade's sentence of fifty years without the possibility of parole for theft of $150 in videotapes provides an illustration of both points. As the dissent in *Andrade* notes, Andrade's sentence in practice amounted to life without parole, as he was thirty-seven when he was sentenced and would thus be almost ninety by the time he was released, if he lived to reach

155. *See supra* notes 112–130 and accompanying text.
156. *See infra* notes 221–227 and accompanying text.
157. *See supra* Part II.A.

that age.[158] As to the first point, excessiveness in comparison to the crime, Andrade's offense was minor by almost any calculation. On two occasions, Andrade attempted to shoplift a total of seven videotapes worth less than $150.[159] The offense lacked the attributes of offenses that are widely seen to be the most serious: it was nonviolent, it was not a crime against the person nor did it result in physical injury or death, and it was for a relatively small sum of money.[160] For this offense, Andrade received one of the most severe punishments a court may impose as it sentenced him to spend the rest of his life or nearly the rest of his life in prison without the possibility of parole.

Moreover, given his age, Andrade received essentially the same sentence imposed on offenders who have committed much more serious crimes. Patrick Kennedy and Christopher Simmons also received sentences of life imprisonment without parole, yet they both committed crimes that contained the attributes of the most serious offenses: both were violent and resulted in severe harm to the victim. Kennedy was sentenced to life imprisonment without parole for violently raping his eight-year-old stepdaughter, causing her severe physical injuries and psychological harm.[161] After raping his stepdaughter, Kennedy cleaned off her blood and blamed the injuries on neighborhood boys.[162] Simmons planned and executed a murder in which he broke into the victim's house, bound and gagged her with duct tape and wire, drove her to a bridge, and threw her into a river to drown.[163]

158. Lockyer v. Andrade, 538 U.S. 63, 79 (2003) (Souter, J., dissenting). I acknowledge the limited usefulness of this argument, given that many shorter sentences may amount to life without parole when imposed on very old defendants. However, in this case, the sentence of fifty years was lengthy in its own right, and highlighting the reality that the defendant would likely spend the rest of his life in prison brings attention to a particularly stark contrast between sentence and crime.

159. *Id.* at 66 (majority opinion).

160. *See* Rajeev Ramchand et al., *A Developmental Approach for Measuring the Severity of Crimes*, 25 J. QUANTITATIVE CRIMINOLOGY 129, 145–47 (2009).

161. Kennedy v. Louisiana, 554 U.S. 407, 413–16 (2008) (vacating and remanding death sentence, after which the state court entered a new sentence of life without parole, *see* State v. Kennedy, 994 So. 2d 1287, 1288 (La. 2008)). In *Kennedy*, the Supreme Court recounted the defendant's crime in significant detail, noting that his "crime was one that cannot be recounted in these pages in a way sufficient to capture in full the hurt and horror inflicted on his victim." *Kennedy*, 554 U.S. at 413. Kennedy dragged his stepdaughter "from the garage to the yard, pushed her down, and raped her," causing injuries that an expert in pediatric forensic medicine described as "the most severe he had seen from a sexual assault in his four years of practice." *Id.* at 413–14. After the rape, Kennedy brought the girl into the house and upstairs to the bedroom, where he wiped away her blood. *Id.* at 413.

162. *Id.* at 413–16.

163. Roper v. Simmons, 543 U.S. 551, 556–57, 560 (2005). The *Roper* Court noted that Roper instigated the crime, which he committed with two cohorts, and discussed the plan in "chilling, callous terms." *Id.* at 556. Following this plan, Roper broke into his victim's house, covered her eyes and mouth with duct tape, bound her hands, dragged her out of her home, and drove her to a railway bridge. The perpetrators then "tied her hands and feet together with electrical wire, wrapped her

Viewed in contrast to Kennedy and Simmons's offenses, the petty nature of Andrade's theft of videotapes comes into focus, yet all three defendants were sentenced to spend all or nearly all of the remainder of their lives in prison. Thus, by this second criterion of understanding the gap between the plausible interpretation of the Clause and its application, Andrade's sentence was excessive and grossly disproportionate because it is the same sentence imposed for much more serious crimes—violent, calculated crimes against an individual that caused severe harm or death to a specific victim. Andrade's story provides a particularly striking example of a problem in noncapital sentencing throughout the country: The harshest noncapital sentences are imposed and upheld for crimes that are relatively minor, and the same or similar sentences are imposed for vastly different kinds of crimes.[164] Moreover, each of these sentences was specifically approved by the Court under its current doctrine. Members of the Court have expressed a similar critique of the proportionality doctrine. In regards to Andrade's sentence, Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, concluded that "[i]f Andrade's sentence is not grossly disproportionate, the principle has no meaning."[165] This disparity demonstrates the first prong of Sager's analysis: a disconnect between a plausible interpretation of the disproportionality doctrine and its application in practice.

The Eighth Amendment noncapital doctrine also exhibits the second feature of Sager's underenforced constitutional norm: institutional concerns play a prominent, even decisive, role in the Court's analysis of the issue. Institutional concerns include considerations of policy and pragmatism. In the sentencing arena, institutional concerns include the policy behind certain sentencing decisions, considerations of who should make such decisions, and practical questions concerning how sentences should be reviewed and by whom. Throughout its Eighth Amendment noncapital jurisprudence, the Court has given significant weight to such institutional concerns. A common thread throughout its cases is a concern with

whole face in duct tape and threw her from the bridge." *Id.* at 556–57. Roper admitted that he resolved to murder the victim due to her involvement in a car accident and told his codefendants that they would "get away with it" because they were juveniles. *Id.* at 556.

164. For other examples of this phenomenon, see *supra* notes 122–140 and accompanying text.

165. Lockyer v. Andrade, 538 U.S. 63, 83 (2003) (Souter, J., dissenting). While courts typically review Eighth Amendment claims de novo, the Court heard *Andrade* as a habeas petition, so it was required to uphold the sentence unless it was "contrary to, or an unreasonable application of, clearly established federal law." *Id.* at 66 (majority opinion). However, that does not undermine the conclusion that the clause is underenforced, as it still demonstrates that Eighth Amendment doctrine allows such a sentence to stand despite bearing the markers of gross disproportionality. The mere fact that Andrade's sentence was not contrary to established law demonstrates that the established law is detrimentally flawed.

who should make sentencing decisions, in which the Court repeatedly concludes that the legislature is the appropriate body to establish sentencing policy.[166] The Court also spends significant time analyzing the policy behind certain sentencing choices. For example, in *Ewing v. California*,[167] the majority of the opinion is devoted to a consideration of California's three-strikes law and recidivism statutes generally. The Court did not conduct a close analysis of the specific sentence at issue and barely mentioned the normative requirements of the Eighth Amendment.[168] The *Ewing* opinion discussed the rationale behind such recidivism statutes, focusing on the state's goal of deterring and incapacitating repeat offenders.[169] The Court also considered the effectiveness of recidivist statutes like California's, noting that recidivism rates of parolees returning to prison for new crimes dropped 25 percent in the four years after the passage of the law.[170] The Court does not clarify where in the text of the Eighth Amendment it finds the mandate to consider legislative policy in defining the scope of the constitutional prohibition against cruel and unusual punishments. The Court's reasoning in its Eighth Amendment cases thus suggests that it is using institutional explanations to develop its Eighth Amendment doctrine rather than conducting a faithful analysis of how the Punishments Clause should apply to specific sentences.

Lastly, the Eighth Amendment bears the final identifier of an underenforced norm as identified by Sager: Courts reject the vast majority of claims.[171] The small number of successful claims, especially in light of the excessive and harsh sentences that are consistently upheld, suggests that the amendment is not being applied to its full conceptual limits. As a result, the current Eighth Amendment

166. *See, e.g.*, Solem v. Helm, 463 U.S. 277, 290 (1983) ("Reviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes . . . ."). In the prison conditions and use-of-force contexts, which are outside the scope of this Comment, the Court exhibits a similar focus on institutional concerns by noting that prison administrators are the actors with the expertise and experience necessary to make decisions regarding the adoption and implementation of practices within prison. *See* Whitley v. Albers, 475 U.S. 312, 321–22 (1986) ("Prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." (alteration in original) (quoting Bell v. Wolfish, 441 U.S. 520, 547 (1979)) (internal quotation marks omitted)); *see also* Hudson v. McMillan, 503 U.S. 1, 4–6 (1992) (noting the appropriateness of such deference in a case relating to a prisoner who claimed that his Eighth Amendment rights were violated when he was beaten by a correctional officer).

167. 538 U.S. 11 (2003).

168. *See id.* at 24–31.

169. *Id.* at 25–27.

170. *Id.* at 27.

171. *See supra* Part II.A.

doctrine fails to adequately protect against cruel and unusual punishments and must be revised to ensure that punishments imposed do not violate the mandates of the Constitution.

III. A COMPREHENSIVE CULPABILITY ANALYSIS

To ensure that punishments remain within the realm of sentences that are not grossly disproportionate, the Court should adopt a comprehensive factor test that measures individual culpability. This culpability test includes an examination of the specific circumstances of the crime itself as well as the defendant's personal background, in order to determine both the harm caused by the defendant's conduct and how factors unique to his life bear on his level of culpability. Reviewing courts will then weigh that culpability against the severity of the punishment to determine if a given sentence is grossly disproportionate to the offense for which it was imposed. As the doctrine currently stands, the Court prescribes that the Eighth Amendment requires a balancing between the gravity of the offense and the severity of the sentence. But in its current form, the doctrine provides no clear rubric for evaluating the gravity of the offense, impeding the meaningful application of the test. A comprehensive culpability analysis is essential in bringing meaning to the proportionality doctrine because it is central to determining the true gravity of the offense and the fair desert of the individual defendant.

To conduct a meaningful proportionality assessment, as required by the Constitution, the analysis of the gravity of the offense must include an evaluation of the defendant's culpability. Blameworthiness is an essential element of the constitutional proportionality test because it is central to measuring the gravity of the offense. The argument that culpability is relevant in conducting a proportionality test is not novel: The Court has treated culpability as an element in the Eighth Amendment doctrine throughout its sentencing jurisprudence, with significant emphasis on culpability in the death penalty context and intermittent references to culpability in noncapital cases.[172] Though it has not consistently relied on culpability in the noncapital context, the Court's Eighth Amendment jurisprudence overall demonstrates a concern with culpability. What is novel, however, is the proposed method of measuring culpability in the noncapital context and the argument that culpability should be considered consistently in noncapital Eighth Amendment challenges. This Comment argues that to faithfully conduct a proportionality assessment as mandated by the Constitution, courts must look

172. *See, e.g.*, Graham v. Florida, 130 S. Ct. 2011, 2026–27 (2010).

beyond the moment of the crime to a variety of other factors in order to fully and accurately capture culpability and proportionality.

A. Proportionality as an External Constraint

Proportionality is an indispensible aspect of criminal justice schemes because considerations of individual desert are central to our society's view of punishment and thus have an appropriate role to play in analyzing criminal sentences. Even when utilitarian goals such as incapacitation and deterrence assume prominence above retribution, individual desert is relevant in determining the extent of punishment that should be inflicted based on societal norms that place responsibility on each individual for his own actions and forbid punishing an individual more harshly than he deserves based on his own actions.[173] The Supreme Court itself recognized this principle in its earliest case dealing with an Eighth Amendment challenge to a noncapital sentence: In *Weems v. United States*,[174] the Court stated that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense."[175] So, while states are not required to adopt only retribution as the theory underlying sentencing practices, proportionality sets limits on states' sentencing choices, and these limits are grounded in retribution. States may impose a wide range of sentences supported by incapacitation, deterrence, or rehabilitation, but those sentences must not go beyond the bounds of gross disproportionality.

One concern that members of the Court have expressed about the proportionality principle, including the culpability analysis, is that it is too grounded in retributive theory and so limits states to using only the retributive justification for punishment in crafting sentencing schemes. Under the federal system, such constraints are inappropriate, as states must be free to adopt any or all of the penological theories in their criminal justice systems.[176] Justices Scalia and Thomas have taken this argument so far as to conclude that the Punishments Clause contains no proportionality principle,[177] while the majority of the Court has

173. *See* Lloyd L. Weinreb, *Desert, Punishment, and Criminal Responsibility*, 49 LAW & CONTEMP. PROBS. 47 (1986) (arguing that concepts of desert are pervasive throughout criminal law and inform penalties imposed under various theories of punishment).

174. 217 U.S. 349 (1910).

175. *Id.* at 367.

176. *See* Ewing v. California, 538 U.S. 11, 25 (2003); Harmelin v. Michigan, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring).

177. *See Harmelin*, 501 U.S. at 961–96 (plurality opinion) (concluding that the Eighth Amendment contains no proportionality principle).

concluded that the proportionality principle simply must be a narrow one. In *Ewing*, Scalia argues that proportionality only accounts for retribution because it is grounded in desert, which is irrelevant to the other goals of punishment, namely incapacitation and deterrence. Of the goals of punishment, only retribution is concerned with imposing a sentence that is relative to the defendant's desert. Scalia argues that a prohibition on gross disproportionality therefore effectively mandates that states adopt sentences for retributive purposes and precludes consideration of incapacitation, deterrence, and rehabilitation. Scalia thus concludes that a prohibition on gross disproportionality is inappropriate.[178] However, the Court's longstanding conclusion that the Eighth Amendment requires a proportionality consideration in some form may demonstrate that it has accepted that retribution underlies punishment schemes, even if other goals may also play a significant role. Moreover, notions of proportionality and desert have historically and consistently been central to our society's understanding of criminal law, belying the notion that proportionality has no place in evaluating sentences under the Eighth Amendment.

Proportionality can also be characterized as an external restraint on punishment independent of any of the penological theories. That is, the proportionality principle would not limit states' use of the various goals of punishment at all. Under this characterization, deterrence, incapacitation, retribution, and rehabilitation are not the only considerations that should factor into sentencing decisions. Rather, penological theories may be used in crafting appropriate punishments, while proportionality sets limits that protect other interests, namely liberty and equality.[179] The idea that government power is not absolute is central to the Constitution, which both establishes and limits the government's authority.[180] The government does not have free rein to infringe on liberty or equality in the pursuit of its desired goal, in the criminal justice sphere or in any other area. Proportionality, as an idea separate from retributive punishment, emerges throughout constitutional law as a constraint on government action and has a significant role to play in constraining criminal punishments.[181] The state cannot simply declare that it is pursuing incapacitation, deterrence, or rehabilitation and have that be the end of the discussion; it is instead constrained in its ability to punish by the

178. *See Ewing*, 538 U.S. at 31–32 (Scalia, J., concurring). In *Harmelin*, Scalia, joined by Chief Justice Rehnquist, also argues that the Eighth Amendment does not include a proportionality principle but bases his conclusion on the history of the Punishments Clause. *See Harmelin*, 501 U.S. at 961–96.

179. *See* Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 268–69 (2005).

180. *Id.*

181. *See* K.G. Jan Pillai, *Incongruent Disproportionality*, 29 HASTINGS CONST. L.Q. 645, 648–55 (2002).

Constitution, which acts as an outside restraint on state behavior.[182] Proportionality may be appropriately used as this constraint to ensure that in promoting the various goals of punishments, the state does not go too far and in so doing infringe on liberty or equality.

Whether proportionality is viewed as a retributive concept or as an external limitation arising from the Constitution that is independent of the penological theories does not affect whether it is appropriate for the Court to impose a proportionality requirement—in neither interpretation does its use in the Eighth Amendment doctrine represent an inappropriate exercise of the Court's power. Under either of these characterizations of proportionality, the principle may set limits on sentencing choices without dictating that states adopt a particular penological goal or set particular sentences for particular crimes. Rather, proportionality sets a ceiling (and, theoretically, a floor, though sentences being so short that they are grossly lenient when compared to the crime does not currently appear to be a widespread problem in the criminal justice system). Beneath this ceiling of gross disproportionality, states will still be given significant freedom to set sentencing regimes that further various political goals.

B. Culpability's Place in Shaping Criminal Law and Policy

This formula may be criticized for undermining states' legitimate goals of reducing crime and protecting communities. Supporters of harsh criminal penalties like those allowed by the current Eighth Amendment doctrine point to both the deterrent and incapacitation values of such punishments in decreasing crime and making communities safer.[183] As to the deterrent effect, those who support harsher sentencing regimes argue that more severe punishments act as incentives for potential criminals to avoid crime or for those who do commit crime to avoid committing the most heinous crimes, as those offenses bear harsher punishments.[184] Sentences are aimed at the "large segment of the population that refrains from crime out of fear of the consequences . . . and the size of that segment naturally depends on the severity of the consequences."[185] Advocates of harsh sentencing policies as a means to deter crime also point to examples of those criminals for whom deterrence has worked. In a response to *Graham*, Robert

182. *See* Ristroph, *supra* note 179, at 292.
183. *See, e.g.*, Kent Scheidegger & Michael Rushford, *The Social Benefits of Confining Habitual Criminals*, 11 STAN. L. & POL'Y REV. 59 (1999).
184. *See id.* at 60.
185. *Id.*

Blecker recites the story of one inmate who was deterred by the threat of the harshest sentence: the death penalty.[186] Blecker recounts a conversation with the inmate, who recalls making a split-second decision not to kill his robbery victims when an image of the electric chair flashed in his mind. The inmate, who Blecker calls "Joe," contrasted this decision to a choice he made during an earlier crime in a state that does not use the death penalty. In that case, Joe recalls that he killed his victims because he knew he would not be sentenced to death. The consequence of imprisonment was insufficient to deter him, but the threat of the death penalty stayed his hand.[187] Blecker himself comments, however, that "[t]his anecdote shows only how the death penalty deterred this one killer at this one moment."[188] It is also significant that Blecker's example compares capital with noncapital cases rather than longer term-of-years sentences with shorter ones, which are the sentences with which this Comment is concerned. However, his observations represent an example of the attitude behind the harsh sentencing laws: More severe punishments better deter criminals and so better prevent crime.

The second safety-based rationale for harsh punishments, incapacitation, is quite straightforward: "[R]emoving a criminal from the street to prison prevents him from committing crimes against the general public."[189] These harsh sentences—imprisoning people for more crimes and for longer periods—may thus be justified and appropriate because they promote safety by creating disincentives for committing crime and by confining those who continue to threaten society.

The bare statistics suggest a connection between increasing criminal penalties and decreasing rates of crime. The tough-on-crime policies that began in the late 1970s preceded a decrease in crime: after peaking in the early 1990s crime rates have steadily decreased for nearly twenty years.[190] From 1994 through 2005, incarceration rates increased 24 percent while violent crime decreased 33 percent and property crime decreased 23 percent.[191] These statistics may suggest that these sentencing schemes are having the desired effect: decreasing crime and protecting communities from criminals. Thus, it may not be clear that reining in these

186. Robert Blecker, *Less Than We Might: Meditations on Life in Prison Without Parole*, 23 FED. SENT'G REP. 10, 16 (2010).
187. *Id.*
188. *Id.*
189. Scheidegger & Rushford, *supra* note 183, at 60.
190. *See Uniform Crime Reports*, FBI.GOV, http://www.fbi.gov/about-us/cjis/ucr/ucr (last visited July 14, 2012); *see also* Scheidegger & Rushford, *supra* note 183, at 61.
191. KING ET AL., *supra* note 10, at 3.

lengthy sentences is a valid or appropriate goal. It may, rather, be perfectly appropriate to impose these harsh sentences in furtherance of the legitimate goal of protecting society.

The relationship between increased sentences and reduced crime, however, is by no means universally accepted. There is significant scholarship suggesting that there is not a direct connection between harsh sentences and crime reduction and that other factors explain the drop in crime that has accompanied the anticrime movement.[192] The criminal justice system is much more complicated, with many more subtle factors at work, than can be accounted for with a simple view that harsher sentences equal less crime.[193] There may be other factors contributing to the reduction in crime since the early 1990s, suggesting that increasingly lengthy sentences are not the sole or main cause of reduced crime rates. For example, the economy grew in the 1990s, which created more employment opportunities and less incentive to commit crime; drug habits changed, in part as people reacted negatively to the high rates of drug use and associated violence in the early 1990s by moving away from drug use; and community policing increased during the same period.[194] These factors all contributed to the decrease in crime noted by supporters of harsher sentencing. Thus, the view that harsher penalties are justified as a means to reduce crime is overly simplistic and does not sufficiently capture the role sentencing policies play in the complex criminal justice system.

Accepting that deterrence and incapacitation are effective at reducing crime in at least some degree, it is not clear that the relationship is as strong as proponents would suggest. One problem with the theory of deterrence is that it assumes rational actors—that potential criminals will consider their actions with a rational mind and refrain from acting due to the potential consequences.[195] In practice, this is often not the case. Crimes often are not the result of rational decisionmaking, so in many cases, the threat of criminal sanctions plays no or a very small part in the defendant's ostensible "choice" to commit a crime.[196] Furthermore, effective deterrence requires knowledge of the sentence that is likely to result from a given

192. *See* VALERIE WRIGHT, SENTENCING PROJECT, DETERRENCE IN CRIMINAL JUSTICE: EVALUATING CERTAINTY VS. SEVERITY OF PUNISHMENT (2010).

193. *See generally id.*

194. *See* KING ET AL., *supra* note 10, at 4–5.

195. *See* WRIGHT, *supra* note 192, at 2.

196. *Id.* Wright notes that half of the inmates in state prison were under the influence of drugs or alcohol when they committed the offense for which they were convicted. Because of their diminished capacity at the time of their crimes, they likely did not engage in the rational decisionmaking that is necessary for deterrence to be effective. *Id.*

crime, which is often lacking among potential offenders.[197] To the extent that deterrence is effective at reducing crime, it is also not clear that longer sentences are responsible. One school of thought argues that it is the likelihood of punishment rather than the severity of punishment that determines whether deterrence will be effective.[198] Thus, effective deterrence might not be achieved with increasingly lengthy sentencing but with reform in other areas, suggesting that the move toward harsher sentencing does not actually promote deterrence or enhance community safety.[199]

A final problem with deterrence as a means of reducing crime is that it rests on the assumption that individuals will be deterred from committing the most heinous crimes because those crimes will carry the harshest sentences.[200] In the current sentencing climate, the connection between the crime committed and the harshness of the penalty imposed is not so clear. Current sentencing policy allows for the imposition of the same sentences for vastly different crimes. This suggests that even to the extent that deterrence may factor into criminal behavior, it will not deter the most heinous crimes if those crimes carry the same or similar sentences as lesser crimes carry. In the current system, sentences are extremely harsh, but the relationship between the offense committed and the sentence imposed can seem arbitrary, reducing the deterrent effect. For example, Blecker's inmate "Joe" was deterred from his conduct because killing his victim in addition to robbing him would have carried a harsher sentence. However, when defendants may be sentenced to life imprisonment both for robbery and for murder, the incentive to refrain from the murder is decreased or eliminated, undermining the effectiveness of deterrence. The proposed test may thus make deterrence more

197. *Id.*

198. *See, e.g.*, *id.*

199. For example, deterrence may be increased by focusing on increasing the likelihood of being punished for a crime, rather than increasing the length of the sentence received. Policies that reduce the length of sentences in favor of diverting resources toward increasing detection of crime through more efficient policing measures and greater community involvement may improve community safety by making deterrence more effective. Similarly, education and treatment campaigns that target high-risk individuals can increase safety by preventing crimes before they are committed. Reducing sentencing and thus reducing the cost of incarceration would increase the funds available for these more effective ways of increasing community safety.

200. *See* MONTESQUIEU, THE SPIRIT OF LAWS 161 (David Wallace Carrithers ed., Univ. of Cal. Press 1977) (1748) ("It is an essential point that there should be a certain proportion in punishments, because it is essential that a great crime should be avoided rather than a lesser, and that which is more pernicious to society rather than that which is less."); *see also* David W. Carrithers, *Montesquieu and the Liberal Philosophy of Jurisprudence*, *in* MONTESQUIEU'S SCIENCE OF POLITICS: ESSAYS ON *THE SPIRIT OF LAWS* 291, 316 (David W. Carrithers et al. eds., 2001).

effective by creating a more direct relationship between the gravity of the crime and the severity of the punishment.

Incapacitation is similarly an insufficient justification for many of the extremely lengthy sentences imposed under current criminal justice policies. The arbitrary relationship between the length of a sentence and the severity of the crime undermines the incapacitation rationales, just as it undermines the deterrence rationales. Incapacitation arguments are significantly weaker for defendants such as Andrade, who shoplifted several videocassettes,[201] or Ewing, who stole golf clubs, than for defendants who murder, rape, or commit other violent crimes.[202] While incapacitation may justify many sentences, it does not justify the lengthy incarceration of all criminals. A true analysis of a defendant's culpability, including the circumstances of his crime and other factors contributing to his conduct, will allow courts to better differentiate between those criminals who truly need to be incapacitated and those for whom lengthy incapacitation is not necessary.

More importantly, even to the extent that sentencing regimes are effective at reducing crime, they must be imposed within constitutional limits. Reducing crime is certainly a legitimate and important policy goal, and this proposal does not seek to abrogate the state's ability to do so. But the state's ability to impose sentencing regimes cannot be unfettered. This is a concept central to the U.S. system of government and to principles underlying the Constitution—even if a sentence, or indeed a policy in any area of government, furthers a goal, it still may be prohibited for going too far in infringing on personal liberty.[203] The Eighth Amendment, with the specific aim to act as a check on criminal punishments, requires that sentencing decisions be kept within constitutional bounds, notwithstanding their efficacy.

Another critique of this formula may be that it is too forgiving of criminals, who have committed crimes that society deems worthy of punishment. In the balance between the rights of criminal defendants and the safety of society, the current balance, harsh as it is, may be appropriate—the safety of the community should be foremost, especially when weighed against the well-being of criminals. If punishments are harsh, so be it. This argument relates closely with the final justification for punishment: retribution. Simply put, those members of society

201. Lockyer v. Andrade, 538 U.S. 63, 70 (2003).
202. Ewing v. California, 538 U.S. 11, 14 (2003).
203. *See* Ristroph, *supra* note 179, at 331.

who commit crime, and thus harm others, deserve to be punished.[204] The retributive argument gains particular traction in regard to prisoners who have committed the most violent and heinous crimes; those who have committed assault, rape, murder, and other such crimes deserve to be punished by being separated from society for a significant period of their lives.[205]

The argument that criminals deserve the punishment they receive is inadequate, however, as it does not account for the significant differences between inmates serving the same sentences. Returning to cases discussed earlier, Ronald Allen Harmelin, Patrick Kennedy, and Christopher Simmons all received sentences of life imprisonment without parole, but Harmelin's crime was of a significantly different nature than the others': Harmelin was convicted for possession with intent to distribute cocaine;[206] Kennedy was convicted for brutally raping his eight-year-old stepdaughter;[207] and Roper was convicted for murdering a woman by breaking into her home, binding her with wire and duct tape, and throwing her off a bridge.[208] Moreover, the Supreme Court approved all of these sentences under its current doctrine.[209] Defendants like Harmelin—and Paul Rivers, sentenced to life without parole as a recidivist for stealing $340,[210] or Leandro Andrade, sentenced to fifty years without the possibility of parole for theft of $150 worth of videotapes[211]—cannot reasonably be placed in the same category as defendants like Kennedy and Roper, who commit the most heinous crimes. These cases represent fundamental failures in retribution because they fail to graduate punishment proportionally based on desert and thus fail to impose the harshest sentences on the most deserving criminals, which is a central aspect of retribution. Such disparity in sentencing is also constitutionally

204. *See* Blecker, *supra* note 186 (discussing punishment as fundamentally grounded in notions of retribution, where criminals who commit the most serious crimes against society deserve the most severe punishment).
205. *See id.*
206. Harmelin v. Michigan, 501 U.S. 957, 961 (1991) (plurality opinion).
207. Kennedy v. Louisiana, 554 U.S. 407, 413–17 (2008).
208. Roper v. Simmons, 543 U.S. 551, 556–57, 559 (2005).
209. *See Kennedy*, 554 U.S. at 447 (overturning Kennedy's sentence of death and remanding for reconsideration consistent with its opinion, which resulted in the Louisiana Supreme Court reducing the sentence to life imprisonment at hard labor without the possibility of parole, *see* State v. Kennedy, 994 So. 2d 1287, 1288 (La. 2008)); *Roper*, 543 U.S. at 578–79 (affirming the Missouri Supreme Court's reduction of Roper's death sentence to life imprisonment without the possibility of parole); *Harmelin*, 501 U.S. at 996, 1009 (affirming Harmelin's sentence in both the plurality and the concurrence).
210. State v. Rivers, 921 P.2d 495, 497 (Wash. 1996).
211. Lockyer v. Andrade, 538 U.S. 63, 65–66 (2003).

problematic because, under the proportionality principle, such disparate treatment between defendants is an indicator of gross disproportionality.[212]

In addition to meaningfully enforcing the Eighth Amendment, as required by the Constitution, the culpability analysis proposed by this Comment would also allow for a more reasoned assessment of crimes that could make the criminal justice system more effective. The culpability analysis will allow courts to differentiate between classes of criminals—those who truly require incapacitation and deserve punishment and those who do not—and impose appropriate sentences accordingly. A closer, more reasoned relationship between the crime and sentence will also make deterrence more effective, as it will more consistently make the price criminals pay for their actions related to their crimes. This culpability analysis will bring greater consistency to cases, as it will impose similar sentences for similar crimes and criminals, which this Comment argues would actually improve the criminal justice system and enhance safety, rather than undermining it.

C. A Simple Twist of Fate: How Environmental Factors Affect Behavior and Choice

A complete evaluation of culpability requires a test that goes beyond a simple recitation of the crime for which a defendant was convicted. The manner in which a crime is committed also bears on the gravity of the offense. But even the specific offense and conduct do not completely capture the gravity of the offense because not all defendants are similarly situated.[213] External and internal characteristics bear on a defendant's culpability. Therefore, it is necessary to consider these factors to conduct a fair measurement of the gravity of a defendant's offense and thus the proportionality of his sentence.

There are two general categories of influences beyond an individual's control that bear on his culpability: external environmental influences that both increase the pressure to engage in crime and diminish an individual's ability to

212. *See Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring); Solem v. Helm, 463 U.S. 277, 298 (1983).

213. I recognize that this claim is contentious, as it implies that under this formula two defendants who commit the exact same offense and engage in identical behavior may receive different sentences. However, as discussed in the text, I believe this is defensible because of the powerful environmental forces that shape individual development and the internal influences, such as mental retardation, youth, and addiction, that reduce an individual's ability to make reasoned decisions for which he should be held accountable. Furthermore, such disparate sentencing is already occurring in the form of habitual offender statutes and sentencing enhancements for repeat offenders, as individuals with criminal records are given harsher sentences than defendants convicted of the same or similar crimes with no such criminal history.

resist the temptation;[214] and internal characteristics[215] that impair an individual's decisionmaking.[216] In both of these cases, specific influences constrain defendants' capacities to refrain from criminal activity. Regarding the first and more contentious claim, environmental factors beyond the individual's control create pressures that make it more difficult for that individual to conform to societal expectations, including refraining from crime, than for someone who is not subject to such pressures.[217]

One such pressure that is highly relevant in influencing an individual's behavior is poverty, especially when experienced in conjunction with early and pervasive exposure to crime as a perceived alternative to poverty and normal behavior. Individuals cannot control whether they are born into poverty, yet this increases the incentive to engage in criminal activity as a means of accessing financial resources that are otherwise unavailable.[218] However, the relationship between poverty and crime is much more complex than simply asserting that people who are poor will commit crime to make money or acquire possessions to which they otherwise

214. *See* Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. 9, 10, 23–37 (1985) (arguing that individuals exposed to economic and social deprivation are more prone to engaging in crime because their environment plays a significant role in shaping their values and behavior and because such disadvantages are also tied to other factors decreasing opportunity to avoid crime, such as inadequate access to education); Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 369–74 (2004) (arguing that several aspects of poverty and exposure to crime impede an individual's opportunity to develop material skills necessary to engage in productive alternatives to crime and deprive children raised in such conditions of the moral guidance necessary to resist temptation to engage in crime).

215. *See* Graham v. Florida, 130 S. Ct. 2011, 2026 (2010) (recognizing a defendant's age as a characteristic affecting his decisionmaking capacity); Roper v. Simmons, 543 U.S. 551, 574 (2005) (same); Atkins v. Virginia, 536 U.S. 304, 306 (2002) (recognizing mental disability as a characteristic affecting a defendant's decisionmaking capacity).

216. Some pressures may be difficult to fit into this rubric, as they may fit into both categories. Addiction, for example, has both external and internal implications, as the state of addiction is often related to environmental factors but the addiction itself directly affects the functioning of the brain. *See* Peter W. Kalivas & Nora D. Volkow, *The Neural Basis of Addiction: A Pathology of Motivation and Choice*, 5 J. LIFELONG LEARNING PSYCHIATRY 208, 216 (2007). For the purpose of this Comment, I will categorize addiction as an internal influence, as it is more similar to mental retardation than to more subtle and nuanced influences such as exposure to crime or a violent upbringing because it has measurable physiological effects on brain functioning that can impair decisionmaking capacity. *Id.*

217. *See* Delgado, *supra* note 214, at 23 ("[P]ressures often beyond the actor's control may increase the difficulty of conforming to social rules and behavior expectations, sometimes to the point of impossibility."); *see also* David P. Farrington, *Families and Crime*, *in* CRIME AND PUBLIC POLICY 130, 132, 147 (James Q. Wilson & Joan Petersilia eds., 2011).

218. *See* Delgado, *supra* note 214, at 30 ("Because of the lack of opportunity available to the inner-city poor, the rewards from crime often exceed those offered by work."); Dolovich, *supra* note 214, at 372 ("[O]ne might find—through no fault of one's own—that illegal activities provide the only means for economic security or structured occupation.").

would not have access. Chronic poverty leads to various other pressures and deprivations that both increase the temptation to engage in crime and reduce the individual's moral resources to withstand such temptation. One notable connection between poverty and crime is education: Substandard education in low-income communities decreases opportunities for positive escape from poverty, such as higher education and employment.[219] In addition to creating substantive opportunities, education also is a means by which youth learn societal values and gain the moral resources to resist the temptation to defy such values.[220]

The connection between poverty and crime is exacerbated for those who are exposed to crime at an early age either because they have family members who engage in crime or because they are victimized by crime.[221] In addition to the pressures produced by poverty, early and pervasive exposure to crime may diminish an individual's ability to avoid engaging in criminal behavior. According to some studies, children who have parents or siblings that have been convicted or are incarcerated are significantly more likely to be convicted themselves.[222] Again, the early exposure to crime is a circumstance that is entirely outside the individual's control, as he has no control over the choices his family members make. There are a variety of interconnected explanations for this relationship. One factor contributing to the increased crime rates among those exposed to crime as youths is that crime becomes normalized, both for children who see others' criminal conduct or who are victimized themselves: Youth learn crime as the expected and normal, and in some cases even positive, behavior.[223] Another factor contributing to this relationship includes parental involvement: Parents who are absent because of

219. *See* Delgado, *supra* note 214, at 28–29; Lance Lochner & Enrico Moretti, *The Effect of Education on Crime: Evidence From Prison Inmates, Arrests, and Self-Reports*, 94 AM. ECON. REV. 155, 157 (2004) (drawing conclusion based on data from arrests and incarceration that there is a relationship between education and crime rates and that increasing education would reduce crime rates). Lochner and Moretti note, however, that other studies have suggested there is no such connection between crime and lack of education. *Id.* at 156. For the purposes of this Comment, it is not necessary to conclude that there is a direct connection between crime and lack of education. Rather, it is sufficient to conclude that inadequate education, a social factor outside of an individual's control, contributes to the pressures that increase the temptation to engage in criminal activity and deprive individuals of the moral tools to resist such temptation.

220. *See* Delgado, *supra* note 214, at 157.

221. *See id.*; Farrington, *supra* note 217, at 131–32.

222. *See* Farrington, *supra* note 217, at 132 ("A convicted parent up to age 10 was the strongest predictor of convictions up to age 50: 62 percent of boys with convicted parents were themselves convicted, compared with 34 percent of the remainder." (citation omitted)).

223. *See* Delgado, *supra* note 214, at 31.

incarceration fail to provide a stable environment in which children learn the social values that will give them the resources to resist pressures to engage in crime.[224]

Early and consistent exposure to violence also bears on future conduct. Various studies have concluded that youth who are exposed to violence are significantly more likely to engage in violence themselves.[225] The reasons that have been posited for this connection are similar to the explanations for the connection between exposure to crime and future criminal conduct. Youth who are exposed to or are victims of violence learn aggressive behaviors, view such behavior as normal, and lose inhibitions that would dissuade them from engaging in violence themselves.[226] Children who grow up in homes where violence is used as a means of expression may also learn to express themselves through violence—they are more likely to respond to feelings of anger and frustration through violence because they never learned mature, nondestructive ways of responding to such emotions.[227] Thus, a defendant who engaged in violent behavior and was consistently exposed to violence as a child may be less culpable for his conduct because he failed to develop the moral and emotional tools to refrain from this behavior.[228]

The above examples—poverty, exposure to crime, and early experience with violence—represent external factors outside of an individual's control that make him less able to operate within societal norms and so less responsible for his conduct than an individual who was not exposed to these circumstances.[229] Various internal characteristics can also impair an individual's ability to make reasoned decisions and so are relevant to measuring his responsibility for his actions and hence his culpability. The Court has recognized internal impairments in both the capital and the noncapital contexts.[230] Conditions such as mental retardation, insanity, and youth impair an individual's cognitive functioning, making him

224. *See* Farrington, *supra* note 217, at 136–37 (providing a comprehensive analysis of the relationship between familial incarceration and juvenile crime).

225. *See* Richard Spano et al., *Are Chronic Exposure to Violence and Chronic Violent Behavior Closely Related Developmental Processes During Adolescence?*, 37 CRIM. JUST. & BEHAV. 1160, 1162–63 (2010) (discussing various studies that have linked exposure to violence to violent behavior).

226. *See id.* at 1162.

227. *See* Dolovich, *supra* note 214, at 371.

228. For a more comprehensive study on the relationship between childhood exposure to violence and violent behavior, see Spano et al., *supra* note 225.

229. *See* Dolovich, *supra* note 214, at 370–71.

230. *See* Graham v. Florida, 130 S. Ct. 2011 (2010); Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002). The Court has additionally held that the Eighth Amendment bars the execution of defendants who are insane at their trial or sentencing, but has not yet addressed whether the Eighth Amendment may apply to limit the sentences for people who were mentally ill when they committed their crimes. *See* Ford v. Wainwright, 477 U.S. 399, 401 (1986).

less able to make reasoned decisions and control his impulses.[231] Similarly, drug and alcohol addiction are physical conditions that impair an individual's mental capacity and thus reduce an individual's ability to make reasoned decisions and control his actions.[232] Furthermore, there is significant scholarship suggesting that susceptibility to addiction is a genetic trait. Therefore, in cases where family history or circumstances suggest a genetic predisposition to addiction, drug or alcohol dependence may be similar to other factors outside of an individual's control.[233] Thus, people who suffer from these mental impairments, like people with certain childhood experiences, have a reduced ability to make decisions and regulate their behavior because of factors beyond their control.

Drawing on these theories on the effect of environment and mental impairment on individuals' decisionmaking, an Eighth Amendment test that allows courts to gauge accurately a defendant's culpability by examining a variety of relevant factors that bear on his ability to make reasoned decisions, specifically the decision to engage in or refrain from criminal behavior, is appropriate. As noted elsewhere in this Comment, this discussion is not meant to imply that individuals who engage in crime that is in some part attributable to environmental or cognitive factors are free from blame and should be exempt from punishment entirely. Nor should the above discussion suggest that all individuals who are exposed to crime, poverty, and violence will in turn engage in criminal activity. Rather, this Comment argues that these environmental influences affect an individual's responsibility for his actions and hence bear on his culpability, making them relevant considerations in the proportionality analysis. Moreover, this Comment does not argue that every individual who has one or more of the attributes of diminished culpability will receive or should receive a reduced sentence. There may well be some defendants for whom the harshest noncapital sentence is appropriate even if some of these factors diminish culpability. For example, a defendant who

231. *See Graham*, 130 S. Ct. at 2026; *Roper*, 543 U.S. at 569–71 (relying on various studies and previous cases to conclude that due to their immaturity, vulnerability, and underdeveloped sense of responsibility, juveniles have diminished criminal culpability); *Atkins*, 536 U.S. at 318 (citing various studies and scholarship on people with mental retardation to conclude that "[b]ecause of their impairments, . . . by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others").

232. *See* Kalivas & Volkow, *supra* note 216, at 216; *see also* Eric J. Nestler & George K. Aghajanian, *Molecular and Cellular Basis of Addiction*, 278 SCIENCE 58 (1997).

233. *See* Mary Jeanne Kreek et al., *Genetic Influences on Impulsivity, Risk Taking, Stress Responsivity and Vulnerability to Drug Abuse and Addiction*, 8 NATURE NEUROSCIENCE 1450 (2005) (discussing genetic factors that contribute to an individual's susceptibility to drug and alcohol addiction); Nestler & Aghajanian, *supra* note 232, at 62–63.

comes from a disadvantaged background and suffers from drug addiction but commits a particularly heinous, violent, and harmful crime may still be sentenced to life without parole if other circumstances suggest that this is a proportionate punishment, so long as personal factors that may diminish his culpability were meaningfully considered.

Furthermore, the claim that a sentence should reflect more than the individual's conduct at the moment he committed the crime is not as contentious as it may initially seem. In fact, consideration of a defendant's prior behavior as relevant to his punishment for a present crime is pervasive throughout criminal law. Habitual offender statutes provide perhaps the clearest example of the criminal justice system's concern with an individual's past conduct as a relevant consideration in meting out punishment: As discussed above, defendants with prior criminal convictions receive harsher sentences than similar defendants with no such record. Pursuant to these sentencing statutes, two defendants who engaged in identical conduct and are convicted of the exact same crime may already receive different sentences based on the conclusion that their past conduct is relevant in determining the appropriate sentence for their crimes. Notably, in the Eighth Amendment context, this concern with past behavior primarily cuts in only one direction: Past behavior is consistently used to support the conclusion that a defendant deserves harsher punishment, but rarely, if ever, is past behavior used as a basis for reducing punishment. In *Harmelin*,[234] the Court declined to consider the defendant's lack of prior felonies as relevant to reducing the gravity of his offense,[235] though its other opinions contain repeated recitations of the conclusion that past criminal convictions are an appropriate and highly relevant factor in increasing an individual's sentence.[236] It is thus not such a leap to conclude that courts should account for more than the specific conduct in which the defendant engaged in the moment for which he is being punished. However, past conduct should be available to reduce an individual's culpability, not only to increase it, and more factors than criminal conduct alone are necessary to gauge culpability thoroughly.

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

235. *See id.* at 994 (plurality opinion) (rejecting petitioner's claim that his lack of prior felony convictions was a relevant mitigating factor in examining the proportionality of his sentence).

236. *See* Ewing v. California, 538 U.S. 11, 17–18 (2003) (giving significant consideration to the petitioner's extensive criminal record in upholding his sentence). *But see* Wilson v. State, 830 So. 2d 765, 768, 778 (Ala. Crim. App. 2001) (giving significant weight to the defendant's lack of prior convictions in overturning her sentence of life without parole for distributing morphine).

D. A Factor Test Measuring Culpability

The proposed factor test is designed to recognize that each defendant and each crime is unique, so only a nuanced totality test can appropriately capture the gravity of an offense that is weighed against the severity of the punishment. In his defense of an individualized assessment rather than a categorical prohibition, Chief Justice Roberts notes in his *Graham* concurrence the significant differences among criminal defendants that militate against a one-size-fits-all approach.[237] Roberts identifies the difference between Graham, who was sentenced for burglary and for whom life without parole was an excessive punishment, and other juveniles who committed more heinous crimes and deserved such a harsh punishment. Roberts argues that a categorical approach is inappropriate because there are some defendants who, despite their juvenile status, commit such heinous crimes—for example, rape or assault that could have resulted in the death of the victim—that they may deserve life imprisonment without parole. The proposed test operates under a similar premise, applying not only to juveniles, but to all criminal defendants: An individualized assessment is necessary to differentiate accurately between those for whom an extremely harsh sentence is appropriate and those for whom such a sentence is grossly disproportionate and therefore unconstitutional.

The totality test must include a comprehensive list of factors that reflect both the specific circumstances and details of the crime and the individual characteristics of the defendant. Chief Justice Roberts's concurrence in *Graham* provides a starting point for developing a comprehensive culpability analysis. But the doctrine should expand on Roberts's ideas to include a broader analysis that includes a full examination of the harm caused and intended in the context of the defendant's personal history. In *Graham*, Roberts states that the comparison of the gravity of the offense and the severity of the sentence can include a consideration of "a particular offender's mental state and motive in committing the crime, the actual harm caused to his victim or to society by his conduct, and any prior criminal history."[238] These factors are all relevant in determining an individual's culpability. However, before reaching these more complex culpability considerations, perhaps the most important consideration is the nature of the offense itself.

The factor test should begin by assessing the nature of the crime, specifically investigating whether it involved violence and measuring the magnitude of the actual harm caused. In examining the crime, courts should also consider the

237. *See* Graham v. Florida, 130 S. Ct. 2011, 2041 (2010) (Roberts, C.J., concurring).
238. *Id.* at 2037.

defendant's mental state at the time of the offense and his motive for committing the crime. For the second part of the analysis—an evaluation of the characteristics of the defendant—courts should consider the defendant's background and life circumstances. Given the unique nature of each individual person and his or her life, this portion of the analysis necessarily should cover a variety of factors and may be different for each individual, so courts should have some discretion in their review. However, some recurrent factors that courts should consider include childhood circumstances, economic status, and mental impairment, which may be affected by mental retardation, emotional or psychological disorders, and insanity, among other conditions. In light of *Graham*, courts should also consider age in assessing mental state, although that will inevitably be relevant in fewer cases.

In examining the nature of the offense, violent crimes against a person lead to an inference of greater culpability than nonviolent crimes. While members of the Court have argued that violent crimes are not necessarily more serious than nonviolent crimes,[239] there is widespread support for classifying individuals who commit violent crimes as more blameworthy than those who commit nonviolent ones. The *Solem*[240] Court, for example, noted that "as the criminal laws make clear, nonviolent crimes are less serious than crimes marked by violence or the threat of violence."[241] Studies of public perceptions of crime also demonstrate that violent crimes are consistently viewed as more blameworthy than nonviolent offenses.[242] For example, a 1974 study found: "Crimes against persons, especially murder, receive very high seriousness ratings. Crimes against property in which no action is taken against a person are rated significantly lower . . . ."[243] The first consideration in a culpability analysis should thus be whether the crime was violent or nonviolent, and a violent offense would lead to an inference of greater culpability.

Another factor in considering the nature of the crime is the absolute magnitude of the crime, where crimes that cause quantitatively more harm suggest that an individual offender is more culpable. Within violent offenses, a line of magnitude that distinguishes between the blameworthiness of offenders is whether the

239. *See, e.g.*, Rummel v. Estelle, 445 U.S. 263, 275 (1980) ("[T]he presence or absence of violence does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular criminal.").

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

241. *Id.* at 292–93.

242. *See* Peter H. Rossi et al., *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 AM. SOC. REV. 224, 228 tbl.1 (1974); *see also* MONTESQUIEU, *supra* note 200, at 218–20 (describing four levels of crime, of which crimes that "deprive, or attempt to deprive another man of his life" are the most serious and hence deserve the most serious penalty).

243. Rossi et al., *supra* note 242, at 227.

crime resulted in the death of the victim. The Court has consistently made clear that "defendants who do not kill, intend to kill, or foresee that life will be taken are categorically less deserving of the most serious forms of punishment than are murderers."[244] The Court has drawn this line throughout its Eighth Amendment jurisprudence.[245] Furthermore, across studies, homicide consistently ranks as the most blameworthy offense.[246] Therefore, in addition to evaluating the presence or absence of violence, courts examining an individual's culpability should consider whether the crime resulted in death. For property crimes, courts can measure magnitude by the amount of goods or money involved. Measuring magnitude in financial terms, theft of a million dollars is more serious and therefore more blameworthy than theft of one hundred dollars. The factors discussed above—violence, death, and the value of property—all are instructive and indicate the actual harm caused by an individual's conduct.[247] Defendants who cause more harm—homicide, battery or rape, theft of a million dollars—are more blameworthy than those that cause less harm in absolute terms.

After the threshold inquiry into the nature of the offense, the culpability analysis should include an examination of the defendant's mental state. The individual's mental state may be affected by a variety of factors, any of which a court should be able to consider in determining blameworthiness in a given case. Courts should consider the presence of a mental disorder, such as schizophrenia, insanity, or mental retardation, when evaluating an individual's mental state, and courts should consider people whose actions may be attributable to such conditions to be less

244. Graham v. Florida, 130 S. Ct. 2011, 2027 (2010); *see also* Enmund v. Florida, 458 U.S. 782, 798 (1982).

245. *See, e.g.*, *Graham*, 130 S. Ct. at 2027; Kennedy v. Louisiana, 554 U.S. 407 (2008); *Enmund*, 458 U.S. at 798.

246. *See* John Henderson Gorsuch, *A Scale of Seriousness of Crimes*, 29 J. CRIM. L. & CRIMINOLOGY 245, 247–48 (1938); Rossi et al., *supra* note 242, at 228 tbl.1. For the purposes of the magnitude prong of this test, the circumstances that differentiate between different types of homicide—first degree, second degree, manslaughter—are not relevant. Those considerations, primarily intent, come into play in other portions of the test, but here, the primary focus should be on whether a life was taken, not how it was taken.

247. Another factor bearing on the actual harm is the situation of the victim—theft of a large amount from a very wealthy person may cause less actual harm than theft of a smaller amount from a very poor individual. However, such considerations may make the analysis too complex and stray outside widely held views of the relative magnitude of a crime, especially absent a finding that the defendant knew the economic status of his victim or other factors bearing on the actual harm. Furthermore, considerations of the victim's individual circumstances may introduce too much ambiguity into the factor test. For example, someone may be more severely psychologically harmed by an assault if she has previously been assaulted, but there is no clear rubric for measuring this. Courts should limit the consideration of the harm caused to demarcations of culpability that focus on the defendant to prevent the test from becoming too unwieldy and because the circumstances of the victim have only a tenuous connection to the defendant's culpability, which is at the heart of the analysis.

blameworthy.[248] In light of *Graham* and *Roper*,[249] the culpability analysis should also include a consideration of the defendant's age, and courts should deem a juvenile offender less blameworthy. While the Court has made clear that juvenile defendants are categorically less culpable than adult offenders, this conclusion should be brought into consideration of sentences other than death and life imprisonment without parole. Finally, chemical addiction has a similar effect of reducing an individual's ability to make reasoned judgments and so courts should consider it in measuring a defendant's culpability.[250]

The defendant's motive in committing a crime, also suggested by Roberts, is another factor that courts should weigh in determining an individual's culpability. Within crimes of a similar nature, premeditated crimes are more blameworthy than impulsive ones, so a defendant who plans to kill would be more culpable than one who does not.[251] In evaluating the defendant's culpability in *Roper*, the Court made note of the "chilling, callous" terms defendant used in planning the crime, that he expected to get away with it because he was a juvenile, and that seeing the victim "confirmed his resolve to murder her."[252] The Court also noted that the defendant killed his victim over a traffic incident in which the two were previously involved.[253] In comparison, a defendant who committed a crime without forethought or in an impulsive moment of passion would be less blameworthy. Though courts already address motive and intent through determining mens rea when a defendant is convicted, these considerations are also relevant at the sentencing stage to differentiate between different grades of culpability within a particular offense. For example, mens rea may reduce a sentence from first-degree murder to second-degree murder, but once convicted of second-degree murder, there are further degrees of culpability that should be evaluated under the Eighth Amendment, meaning that some defendants convicted of second-degree murder will deserve more severe sentences than others.

Courts should give the most weight to the circumstances of the crime itself in analyzing proportionality, as the defendant's conduct in the moment has the most direct bearing on his culpability. Courts should treat the actions, motive, and intent in committing the crime as setting a baseline of culpability. However, as discussed above, a defendant's background may have created pressures that

248. *See* Atkins v. Virginia, 563 U.S. 304 (2002); Ford v. Wainwright, 477 U.S. 399, 401 (1986).
249. Roper v. Simmons, 543 U.S. 551 (2005).
250. *See supra* notes 232–233 and accompanying text.
251. *See* Rossi et al., *supra* note 242, at 228 tbl.1.
252. *Roper*, 543 U.S. at 556.
253. *Id.*

reduce his ability to make a reasoned choice to avoid criminal conduct. For this reason, beyond the facts and moment of the specific crime, the culpability analysis should also include an examination of the individual's background and life circumstances. Drawing on the scholarship discussed above, factors that should be given primary weight include exposure to violence, financial circumstances throughout the defendant's life, parental involvement, including parental incarceration, and early exposure to crime and drugs. Such considerations reflect "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse."[254] Courts should treat the analysis of circumstances beyond the moment of the crime as a second prong: After evaluating the criminal conduct itself, an examination of personal circumstances may require increasing or decreasing a defendant's culpability from the level that was determined in the initial consideration.

The defendant in *Graham* provides an illustration of the kind of life circumstances that are relevant in shaping culpability. The Court notes that Graham's parents were addicted to crack cocaine when he was born and continued to use drugs throughout his childhood. Graham himself began drinking alcohol and using tobacco when he was nine and began using marijuana when he was thirteen. Graham was also diagnosed with attention deficit hyperactive disorder when he was in middle school.[255] These life circumstances—the early exposure to and use of drugs—suggest that Graham's conduct is at least in part attributable to his difficult childhood circumstances and so he is less blameworthy. While this does not remove all blame from Graham's conduct, it puts his actions in a context that informs the analysis of his personal culpability.

The life circumstances of the defendant in *Andrade*[256] suggest another way in which personal background informs the conclusions about an individual's culpability. When Andrade was convicted in 1997 for theft at age thirty-seven, he had been addicted to heroin for almost twenty years—since he was a teenager.[257] Andrade admitted to committing the offense, saying he did so to buy heroin and that his addiction controls his life.[258] Like Graham, Andrade's circumstances do not make his conduct morally blameless, but they do provide a context that makes his conduct less blameworthy than if it had been committed with a clear head and

254. California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).
255. Graham v. Florida, 130 S. Ct. 2011, 2018 (2010).
256. Lockyer v. Andrade, 538 U.S. 63 (2003).
257. *Andrade*, 538 U.S. at 67.
258. *Id.*

without a history of drug addiction that undermined his opportunity to engage in positive alternatives to crime.

A potential problem that is inherent in any factor test of this kind is that it may not provide enough guidance to judges for how actually to apply the analysis. As a result, this proposal may raise concerns about wide disparity in application between judges. However, in order to manage this potential risk, this proposal intentionally does not include a conclusive list of factors. The proposal identifies factors that have the most significant bearing on individual culpability and argues that courts should consider those factors.[259] There may be room in the future to expand the proposed culpability analysis to include additional factors if those factors can be shown to bear directly on the defendant's culpability and not render the test excessively difficult to apply. Moreover, judges should exercise restraint in applying the test, as not all the factors should be considered equally. Rather, the factors should be weighed roughly in the order in which they were discussed, where the nature and details of the crime itself is given the greatest weight and the circumstances more distant from the crime are used to tip the balance in one direction or the other. The primary focus should be on the nature of the crime and the harm caused. After establishing a base level of culpability based on that factor, judges may examine the other factors discussed to evaluate further the individual's culpability. Finally, even the broadest factor of the proposal, life circumstances, is not limitless. This factor does not suggest that a judge will be free to examine all personal life circumstances of a defendant, giving weight to whatever facts that judge deems important. Rather, this factor has identified specific facts of an individual's life that bear more closely on culpability, such as income level and education opportunities, and gives judges discretion to determine which of those are most relevant to a particular defendant. These restraints give the test form and workability that will allow judges to apply it coherently.

259. This culpability test does not include some other factors that may bear on culpability because they have a more tenuous or complicated connection with an individual's moral blameworthiness. For example, intoxication or influence of drugs at the moment the crime was committed may be a relevant consideration in determining culpability. However, it may be problematic to reduce an individual's culpability based on his voluntary choice to become intoxicated. Furthermore, the consideration of addiction sufficiently accounts for an individual's reduced culpability due to use of drugs or alcohol. Thus, an additional consideration of intoxication at the moment of the crime likely does not add enough to the analysis to overcome the concern with potentially rewarding defendants for voluntarily becoming intoxicated and subsequently engaging in risky or criminal conduct.

CONCLUSION

This Comment has focused on the gravity-of-the-crime side of the proportionality analysis rather than on the severity of the punishment. In part, this is because the gravity side has been more neglected and erratic, to the point where the doctrine currently fails to account adequately for a defendant's culpability. This Comment proposes a means by which the Court can bring a defendant's culpability to the center of the analysis and by doing so give meaning to the proportionality principle, create a doctrine that more fairly punishes defendants based on their blameworthiness, and bring consistency to a muddled area of constitutional law.

By focusing on the culpability analysis, this Comment has not addressed the other side of the balancing equation: the severity of the sentence. As a final thought, it bears noting that the proportionality doctrine should recognize the severity of the sentence that is actually imposed, which cannot be captured with a simple recitation of the number of years that a defendant will serve. Conditions in many U.S. prisons are very poor, with rampant overcrowding, widespread violence, inadequate sanitation, and limited access to medical facilities, in addition to a range of other problems.[260] Furthermore, a prison sentence carries with it significant physical and psychological hardship during the period served and lasting consequences upon release.[261] As a result, the severity of the sentence may be greater than a detached look at the number of years and the overall sentencing scheme would suggest. While these prison conditions may not themselves be cruel and unusual under the Court's current prison conditions jurisprudence, they are relevant in determining the severity of the punishment and should inform the proportionality analysis.

260. *See* Barkow, *supra* note 77, at 1167–68; *see also* Brown v. Plata, 131 S. Ct. 1910, 1923–28 (2011) (finding an Eighth Amendment violation in the "severe overcrowding" of California's prisons).

261. For comprehensive discussions of the psychological effects of incarceration, see Craig Haney, *The Psychological Impact of Incarceration: Implications for Post-Prison Adjustment*, *in* PAPERS PREPARED FOR THE "FROM PRISON TO HOME" CONFERENCE 77, 79 (2002), *available at* http://www.urban.org/url.cfm?ID=410624, and Doris Layton MacKenzie & Lynne Goodstein, *Long-Term Incarceration Impacts and Characteristics of Long-Term Offenders: An Empirical Analysis*, 12 CRIM. JUST. & BEHAV. 395 (1985).