2004

"Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment

Pamela S. Karlan

Follow this and additional works at: <https://scholarship.law.umn.edu/mlr>

Part of the [Law Commons](#)

Recommended Citation

Karlan, Pamela S., "'Pricking the Lines': The Due Process Clause, Punitive Damages, and Criminal Punishment" (2004). *Minnesota Law Review*. 721.
<https://scholarship.law.umn.edu/mlr/721>

This Article is brought to you for free and open access by the University of Minnesota Law School. It has been accepted for inclusion in Minnesota Law Review collection by an authorized administrator of the Scholarship Repository. For more information, please contact lenzx009@umn.edu.

Lecture

“Pricking the Lines”: The Due Process Clause, Punitive Damages, and Criminal Punishment^{*}

Pamela S. Karlan[†]

[Courts] have said, we will not define due process of law. We will leave it to be “pricked out” by a process of inclusion and exclusion in individual cases. That was to play safely, and very likely at the beginning to play wisely. The question is how long we are to be satisfied with a series of *ad hoc* conclusions. It is all very well to go on pricking the lines, but the time must come when we shall do prudently to look them over, and see whether they make a pattern or a medley of scraps and patches.¹

What limits does the Constitution set on the punishment of wrongdoers? The Supreme Court has recently devoted a substantial amount of attention to this question as it relates to the length of prison sentences in criminal cases and the size of punitive damages awards in civil ones. This past Term, in *Ewing v. California*² and *State Farm Mutual Automobile Insurance Co.*

^{*} This essay is based on the 2003 William B. Lockhart Lecture, delivered by Professor Karlan at the University of Minnesota Law School on November 4, 2003. The lectureship honors William B. Lockhart, who served as dean of the University of Minnesota Law School from 1956 to 1972.

[†] Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School. I presented earlier versions of this essay at faculty workshops at Virginia, Harvard, and Stanford and received many helpful comments, particularly from Barbara Fried. Many of the ideas in this essay grew out of a series of conversations with Bill Stuntz and Bob Weisberg. As always, their ideas were invaluable. I also thank Viola Canales for her suggestions and the participants in the ABA Appellate Judges’ Seminar on *Apprendi* and *Cooper* for prompting me to think about these issues.

1. Benjamin N. Cardozo, *THE PARADOXES OF LEGAL SCIENCE* 96 (1928) (footnote omitted).

2. 123 S. Ct. 1179 (2003). *Ewing* concerned a challenge to California’s “three-strikes” law and was decided along with a companion case, *Lockyer v. Andrade*, 123 S. Ct. 1166 (2003), which raised the same challenge in the context of a federal habeas action.

v. Campbell,³ the Court offered answers that were simultaneously predictable and in interesting tension with one another.

In its sentencing decisions, the Court has identified substantive and procedural constraints that are doctrinally independent of one another. In the substantive line of cases, the Court has announced a relatively deferential principle of proportionality: the Eighth Amendment's prohibition of cruel and unusual punishment forbids a sentence that is grossly disproportionate to the defendant's crime.⁴ The Court has also identified a gross disproportionality principle under the Excessive Fines Clause of the Eighth Amendment.⁵ In a more recent and procedural line of cases, the Court has emphasized the central role of the jury: the Due Process Clauses of the Fifth and Fourteenth Amendments require that a jury find, by proof beyond a reasonable doubt, all the facts necessary to authorize a particular criminal punishment.⁶ Thus, a defendant's eligibility for a longer sentence cannot be the result of judicial fact-finding. Not only are the substantive and procedural lines of cases doctrinally independent, but they may stand in some tension with one another.⁷

By contrast, the punitive damages decisions have taken a more doctrinally integrated approach. Substantively, the Court has again adopted a test that centers on proportionality, this time locating the requirement within the Due Process Clauses.⁸

3. 123 S. Ct. 1513 (2003).

4. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring); *Solem v. Helm*, 463 U.S. 277, 288 (1983).

5. See *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

6. See *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (holding that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"); see also *Ring v. Arizona*, 122 S. Ct. 2428, 2443 (2002) (applying *Apprendi* to aggravating factors and capital sentencing).

7. Indeed, Justice Breyer's dissent from the *Apprendi* line of cases is based to some extent on his sense that leaving important aspects of sentencing to juries is likely to produce inconsistent sentences. See *Apprendi*, 530 U.S. at 556-57 (Breyer, J., dissenting).

8. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). The Court earlier rejected the argument that punitive damages in cases involving private parties could violate the Excessive Fines Clause of the Eighth Amendment. *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 264 (1989); see *infra* text accompanying notes 128-69 (describing the path of recent doctrinal development) and text accompanying notes 106-27 (discussing the articulation of a proportionality requirement un-

But with respect to damages, the Court's procedural solution takes power *away from* juries: it provides for de novo review of the jury's decision.⁹ Leaving the power to assess punitive damages entirely with the jury, the Court has held, risks arbitrary and disproportionate awards.

This essay looks at the sentencing and punitive damages decisions in tandem.¹⁰ Here, as in several other areas, the Court's approaches to similar questions in the civil and criminal arenas take very different turns. Part I considers the Court's articulation of proportionality tests under the Eighth Amendment (for criminal sentences and fines) and the Due Process Clauses of the Fifth and Fourteenth Amendments (for punitive damages). The sentencing decisions have a head start of roughly a decade on the punitive damages ones. So it's interesting that, having sharply cut back on proportionality review of criminal sentences, the Court has identified a proportionality principle for criminal fines and enthusiastically embarked upon a similar enterprise with respect to punitive damages.

The excessive punishment cases show that proportionality is both an inherently alluring and an inevitably unsatisfactory measure of constitutionality. The problem is not the content of the principle: the Constitution certainly provides sufficient support for concluding that punishment cannot be excessive or arbitrarily unrelated to a defendant's misdeeds, and even in the absence of a constitutional command, it is hard to imagine an argument in favor of arbitrariness. Rather, the problem lies in

der the Excessive Fines Clause).

9. See *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 432-43 (2001).

10. Surprisingly, with the exception of a single student note, Adam M. Gershowitz, Note, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249 (2000), there is virtually no scholarship that discusses the relationship of the substantive proportionality standards under the Eighth Amendment and the Due Process Clauses. The few commentators who notice a connection either focus on the permissibility of overlapping criminal and civil sanctions for the same misconduct, see, e.g., Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101 (1995), or mention the issue only in passing, see, e.g., Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1421 n.167 (1993) (noting Justice O'Connor's perhaps inconsistent hostility to Eighth Amendment review of criminal sentences and enthusiastic support for due process review of punitive damages awards). And there is little or no discussion in the literature of the relationship of the substantive and procedural decisions.

translating the principle into a standard for judicial oversight. For all the Court's invocation of objective factors, it turns out that a key aspect of proportionality review remains fundamentally subjective. Unless they are prepared to adopt a mechanical rule,¹¹ appellate courts can do little more than "prick the lines," and even those lines do little to create a clear pattern for other actors to follow.

Part II looks at the Court's procedural decisions regarding criminal sentences and punitive damages. Given the convergence of substantive constitutional principles in the sentencing and damages cases, what accounts for the sharp divergence in the role the Supreme Court accords juries, reallocating authority to them and away from judges in criminal cases, while doing exactly the opposite in civil ones? At first blush, it may seem puzzling that the Supreme Court thinks not only that juries provide criminal defendants with an important constitutional protection but also that juries threaten to impose unconstitutionally excessive damages awards on civil defendants. The answer, I suggest, is not simply that the Court thinks that juries are systematically more biased against civil defendants than criminal ones. Instead, the Court's reaction may rest on institutional factors. Juries in criminal cases are circumscribed by statutory boundaries on their ability to authorize particular punishments and by centralized prosecutorial decisions. By contrast, the determination of punitive damages amounts is so much less constrained by the political branches that judicial oversight seems more important and justifiable.

I. THE ALLURE AND INTRACTABILITY OF PROPORTIONALITY REVIEW

Although the principle that a punishment should be proportionate to the defendant's crime "is deeply rooted and frequently repeated in common-law jurisprudence,"¹² its status as a judicially enforceable constitutional command is a relatively

11. Several states have taken this approach. *See infra* note 138 (describing legislation that either caps the permissible amount of punitive damages expressly or that limits the amount of punitive damages to some multiplier of the amount of compensatory damages awarded). Beyond rules that simply foreclose a particular kind of punishment for a category of crime, *e.g.*, *Coker v. Georgia*, 433 U.S. 584, 593-600 (1977) (essentially ruling out the death penalty for crimes not involving a homicide), there is no mechanical rule available in the Eighth Amendment context.

12. *Solem v. Helm*, 463 U.S. 277, 284 (1983).

recent offshoot. The cases in which the Supreme Court announced and refined this constraint show both the appeal and the complexity of judicial proportionality review.

A. GRAVITY'S RAINBOW: THE IMPOSSIBLE QUEST FOR OBJECTIVITY IN THE EIGHTH AMENDMENT CASES

It is relatively rare for the Supreme Court to acknowledge, as it did last Term with respect to its decisions regarding proportionality and the Eighth Amendment, that its "precedents in this area have not been a model of clarity . . . [and] have not established a clear or consistent path for courts to follow."¹³ In fact, the Rehnquist Court has been engaged in an implicit "exit strategy,"¹⁴ refining the constitutional test in a way that "preserves the Court's ability to reenter the field should circumstances or doctrine or the Justices' view of the Constitution change,"¹⁵ while essentially foreclosing relief in contemporary cases.

Consider, for example, the shift from *Solem v. Helm*¹⁶ to *Harmelin v. Michigan*.¹⁷ The two cases involved the same sentence—life in prison without possibility of parole—but very different crimes, defendants, and rules of institutional authority. Not surprisingly, particularly given the shift in the Court's membership, they produced different outcomes in the Supreme Court.

Jerry Helm was a habitual petty criminal who passed a bad check for \$100.¹⁸ Normally, under South Dakota law, the

13. *Lockyer v. Andrade*, 123 S. Ct. 1166, 1173 (2003). Indeed, the Court found its prior decisions so murky that it essentially foreclosed federal habeas review of sentence length because, under the Antiterrorism and Effective Death Penalty Act of 1996, habeas relief can be granted only if the state courts' treatment of a petitioner's claim involves "an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (2000). Given the Court's prior decisions, which reached different outcomes on the basis of relatively small differences in the facts, it is probably always possible to show why the instant case is more like one case than another, and thus does not represent an "unreasonable" application of law.

14. I develop the concept of exit strategies more fully in Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch Out of the Political Thicket*, 82 B.U. L. REV. 667 (2002).

15. *Id.* at 687.

16. 463 U.S. 277 (1983).

17. 501 U.S. 957 (1991).

18. The facts of Helm's criminal history and the legal structure of South Dakota law are laid out in *Solem*, 463 U.S. at 279–83.

maximum sentence for Helm's crime, which was graded as a Class 5 felony, would have been five years of imprisonment.¹⁹ But because Helm had been convicted of six prior felonies (each of them also graded as a relatively minor crime), South Dakota law enhanced the penalty for this offense, authorizing the judge to sentence Helm as a Class 1 felon.²⁰ State law authorized a maximum possible penalty for a Class 1 felony of life in prison (which, under state law, eliminated the possibility of parole).²¹ The judge in Helm's case, convinced that he was an incorrigible recidivist, gave him that maximum.²²

By contrast, Ronald Harmelin was a first-time offender.²³ But his offense involved possession of a massive amount (672 grams—about a pound and a half) of cocaine.²⁴ Harmelin's sentence was not the result of a single judge's choice within a broad range. Michigan law provided a mandatory life sentence for anyone possessing more than 650 grams of a mixture containing a controlled substance like cocaine.²⁵ So the judge in Harmelin's case imposed that mandatory minimum.

By a 5-4 vote, the Supreme Court struck down Helm's sentence, holding that it violated the Eighth Amendment because it was "significantly disproportionate to his crime."²⁶ To reach this conclusion, the Court articulated a test that relied on what it described as three "objective factors":²⁷

First, we look to the gravity of the offense and the harshness of the penalty. . . . Second, it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive. . . . Third, courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions.²⁸

Helm's offense, the Court concluded, was relatively minor, since it involved only a small sum of money and no violence or

19. *Id.* at 281 (citing S.D. CODIFIED LAWS § 22-6-1(7) (Michie 1982)).

20. *Id.* (citing S.D. CODIFIED LAWS § 22-7-8 (Michie 1981)).

21. Life imprisonment was the maximum possible penalty. Apparently, there was no required minimum penalty. *See id.* at 281 n.6.

22. *Id.* at 282-83.

23. *Harmelin v. Michigan*, 501 U.S. 957, 1021 (White, J., dissenting).

24. *Id.* at 961.

25. *See* MICH. COMP. LAWS ANN. § 333.7403(2)(a)(i) (West Supp. 1990-91).

26. *Solem*, 463 U.S. at 303.

27. *Id.* at 290.

28. *Id.* at 290-92.

threat of violence.²⁹ By contrast, his sentence was the most severe authorized by South Dakota law.³⁰ As to the second factor, the other crimes that exposed a defendant in South Dakota to a life sentence were far more serious—for example, murder, treason, and kidnapping.³¹ At the same time, other far more serious crimes—for example, first-degree rape and aggravated assault—exposed perpetrators to far lower sentences.³² Finally, with respect to the third factor, the Court observed that only one other state apparently even authorized the amount of punishment imposed on Helm and that no defendant had actually received such a sentence.³³ Thus, “[i]t appear[ed] that Helm was treated more severely than he would have been in any other State.”³⁴ The Court recognized that Helm’s recidivism was a “complicat[ing]” factor,³⁵ but decided that, even so, Helm’s crime did not justify so severe a penalty.

Eight years later, again by a 5-4 vote, the Court held that Harmelin’s life sentence did not violate the Eighth Amendment. Justice Kennedy’s controlling opinion³⁶ confirmed the existence of a proportionality requirement and reiterated that

29. *Id.* at 296.

30. *Id.* at 297.

31. *See id.* at 298.

32. *Id.* at 299.

33. *Id.* at 299–300.

34. *Id.* at 300.

35. *Id.* at 298.

36. There was no opinion for the Court. The Chief Justice and Justice Scalia would have abandoned proportionality review altogether, *see Harmelin v. Michigan*, 501 U.S. 957, 962–65 (1991), while Justices White, Marshall, Blackmun, and Stevens in dissent would have applied the *Solem* three-part test and struck down Harmelin’s sentence, *see id.* at 1009, 1015–16, 1027. Justice Kennedy, joined by Justices O’Connor and Souter, took an intermediate position: he thought that the Eighth Amendment contained a judicially enforceable proportionality principle, but that the principle was less stringent than *Solem v. Helm* suggested. *See Harmelin*, 501 U.S. at 996–1001. Thus, five Justices preferred a narrower rule than the one announced in *Solem v. Helm*. *Cf. Marks v. United States*, 430 U.S. 188, 193 (1977) (“When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” (internal quotation marks and citations omitted)). Most of the courts of appeals that addressed the issue applied the *Marks* holding to *Harmelin* and concluded that Justice Kennedy’s opinion states the current rule. *See, e.g., Hawkins v. Hargett*, 200 F.3d 1279, 1282 (10th Cir. 1999); *McCullough v. Singletary*, 967 F.2d 530, 535 (11th Cir. 1992); *United States v. Bland*, 961 F.2d 123, 128–29 (9th Cir. 1992); *McGruder v. Puckett*, 954 F.2d 313, 316 (5th Cir. 1992).

"proportionality review by federal courts should be informed by objective factors to the maximum possible extent,"³⁷ but it recast the first factor into a threshold inquiry. Justice Kennedy described Harmelin's crime as a particularly serious one, not only because of the direct dangers posed to individuals who ingest illegal drugs but because of drugs' threat to public safety more generally.³⁸ Justice Kennedy pointed to studies and statistics showing that drug-induced physical, mental, or emotional changes might make it more likely that a user would commit serious and violent crimes; that drug users might commit property crime in order to finance their purchase of drugs; and that the drug trade itself involved violent crime.³⁹ "Given the serious nature of petitioner's crime," it was unnecessary even to consider the second or third factors identified in *Solem*: "intra-jurisdictional 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."⁴⁰ Harmelin's was not such a case.

After *Harmelin*, then, the linchpin of constitutional proportionality review seemed to be a judgment about the gravity of the defendant's offense. In its most recent decision, *Ewing v. California*,⁴¹ although the Court purported to rely on the principles "distilled in Justice Kennedy's concurrence [to] guide our application of the Eighth Amendment,"⁴² the Court shifted gears yet again, treating gravity not just as a question of the offense for which a defendant is convicted but, more broadly, as a question of the future danger he poses to the community.⁴³ Gary Ewing was convicted of shoplifting golf clubs worth roughly \$1200.⁴⁴ Under California law, this behavior was treated as felony grand theft,⁴⁵ a crime for which the maximum

37. *Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring) (internal quotation marks omitted).

38. *See id.* at 1002-03.

39. *Id.*

40. *Id.* at 1005.

41. 123 S. Ct. 1179 (2003).

42. *Id.* at 1187.

43. *See id.* at 1189-90.

44. *See id.* at 1183.

45. *See id.* at 1184. More precisely, Ewing's offense was a "wobbler," an offense that may be punished in the discretion of the prosecutor or the court alternately as a misdemeanor or as a felony. The prosecutor chose to charge Ewing with felony grand theft. *Id.* at 1184.

usual sentence is three years.⁴⁶ But because of his prior criminal record, Ewing was sentenced under California's "three-strikes" law, which provided that a defendant with two or more prior "serious" or "violent" felonies must receive "an indeterminate term of life imprisonment."⁴⁷ By a 5-4 vote,⁴⁸ the Court upheld Ewing's sentence. In weighing the gravity of Ewing's offense, the Court began by declaring that "[e]ven standing alone, Ewing's theft should not be taken lightly."⁴⁹ But the heart of the Court's analysis lay in how it recast the nature of the gravity inquiry, "plac[ing] on the scales not only [the defendant's] current felony but also his long history of felony recidivism."⁵⁰ Quite clearly, this latter factor was what tipped the balance against Ewing's claim of gross disproportionality.

All along, the Court has treated gross disproportionality as an objective factor. But what does it mean for the Court to call this factor "objective"? Surely the seriousness of an offense is not a universal, timeless fact. The *Solem* Court may have thought that, "as the criminal laws make clear, nonviolent crimes are less serious than crimes marked by violence or the threat of violence,"⁵¹ but it was just mistaken. Dante, after all, put forgers in a lower circle of hell than violent criminals—a sentiment apparently shared by the contemporary criminal codes that punish multimillion-dollar frauds more severely than simple assaults.⁵² And Chief Justice Burger's notorious concurrence in *Bowers v. Hardwick* relied on a passage from Blackstone that described even consensual sodomy "as an offense of 'deeper malignity' than rape."⁵³ The fact that, three months after it decided *Ewing*, the Supreme Court held that the Constitution forbids the criminalization of private, consen-

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

47. CAL. PENAL CODE §§ 667(e)(2)(A), 1170.12(c)(2)(A) (West 1999 & Supp. 2004).

48. The Chief Justice and Justice Kennedy joined in Justice O'Connor's opinion. *Ewing*, 123 S. Ct. at 1181. Justices Scalia and Thomas filed opinions concurring in the judgment. *See id.* at 1190-91.

49. *Id.* at 1189.

50. *Id.* at 1189-90.

51. *Solem v. Helm*, 463 U.S. 277, 292-93 (1983).

52. In *The Divine Comedy*, Dante put the former, along with other "falsifiers," in the eighth circle of hell, whereas people who were violent against their neighbors were relegated to only the seventh circle. *See DANTE ALIGHIERI, THE DIVINE COMEDY* (Geoffrey L. Bickersteth trans., Harvard University Press 1965).

53. *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986) (Burger, C.J., concurring) (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *215-16).

sual sodomy between adults⁵⁴ provides an especially pointed demonstration of the problem with treating the gravity of an offense as an eternal verity.

A more modest definition of "objective" would require simply that a judgment about offense gravity reflect more than "the subjective views of individual Justices."⁵⁵ It would rest on the more general Eighth Amendment principle that the definition of excessive punishments "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society."⁵⁶

This raises immediately a central question: when is the imposition of an authorized sentence not conclusive evidence of contemporary standards? In a variety of contexts, the Court has stated that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures."⁵⁷ Proportionality review has real bite, however, only when it overturns sentences that some law authorizes.⁵⁸ So the central question is under what circumstances a court can look behind the "statutes passed by society's elected representatives."⁵⁹

I see at least three possible answers that a court might give. The most modest depends on the observation that the sentence imposed on a particular defendant may fit the letter, but not the spirit of the law. Statutes almost by necessity sweep broadly.⁶⁰ In authorizing a particular punishment, legislators may have a paradigmatic example of a given crime in mind. The particular details of a defendant's case may take him far outside this "heartland." Perhaps because legislators are aware of this problem, they often delegate to individual decision makers, such as judges or juries or executive branch officials (prosecutors or parole boards), the power to shape a particular defen-

54. See *Lawrence v. Texas*, 123 S. Ct. 2472, 2484 (2003).

55. *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (plurality opinion).

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

57. *Atkins v. Virginia*, 122 S. Ct. 2242, 2247 (2002) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)).

58. If a court imposes a sentence not authorized by statute, then the basis for overturning the sentence is that the judge exceeded his authority, and not that the sentence is disproportionate.

59. *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989).

60. That's not to say that statutes need to be as broad as many criminal provisions are. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 512-23 (2001). It is only to say that a statute almost certainly covers some range of behavior.

dant's sentence. But sometimes those individual decision makers may themselves reach idiosyncratic conclusions, conclusions that seem at odds with the general consensus. In such case, proportionality review may intervene to strike the balance the legislature would have intended had it been faced with a particular defendant's case. This first justification is, in essence, a form of statutory, rather than constitutional, interpretation.

The Supreme Court treated Helm's case this way. The central appeal of Helm's claim was that he was the victim of a draconian judge. The fact that no other defendant in South Dakota with a record similar to Helm's had received a similar punishment underscored the likelihood that Helm's sentence was not one the legislature would have anticipated and approved.⁶¹ A judge more attuned to the overall structure of South Dakota law would have concluded that someone whose record involved a string of Class 5 felonies should be thought a career *petty* criminal. Even if he should be punished more harshly as a recidivist than as a first-time offender, he should not be punished as if he were the most heinous of Class 1 felons. In short, the *Solem* Court "[d]id not question the legislature's judgment";⁶² rather, it rejected the judgment of a single judge.

A second, more far-reaching response turns on the idea that while legislation may be the "clearest" evidence of contemporary values, it is not always entirely "reliable."⁶³ There are good reasons to think that the legislative process may produce statutes that systematically exaggerate a crime's seriousness. Legislators face powerful political pressures that lead them to ratchet up sentences.⁶⁴ Even a legislator who thinks a particular sentence is unwarranted or believes that her constituents, on reflection, would view a sentence as unduly harsh (either categorically or with respect to some of the acts that fall within its scope) may fear being tarred as soft on crime if she votes

61. See *Solem v. Helm*, 463 U.S. 277, 298 (1983).

62. *Id.* at 298 n.26 (emphasis added).

63. Cf. *Atkins v. Virginia*, 122 S. Ct. 2242, 2247 (2002) (describing legislation as the "clearest and most reliable" evidence of community values); *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) (same).

64. For a classic account of this dynamic, see David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1296-98 (1995). See also *Atkins*, 122 S. Ct. at 2249 (pointing to "the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime" and suggesting that this should make examples of legislation reducing or limiting criminal punishment especially probative evidence of contemporary values).

against a crime bill.⁶⁵ This problem may be exacerbated when legislation disables other mechanisms that might bring a sentence more into line with contemporary standards. Mandatory sentences may be particularly susceptible to this kind of criticism, since they make it impossible for sentencing judges or juries to fine-tune a defendant's punishment.

Harmelin's challenge fell within this second category and therefore demanded a higher degree of judicial intervention than Helm's. Harmelin could scarcely claim that he was the victim of an idiosyncratic judge: after all, he was subject to a mandatory sentence specified clearly by the Michigan Legislature for all defendants convicted of the crime of which he was found guilty.⁶⁶ Nor could he plausibly claim that a life sentence was invariably excessive for the crime of which he had been convicted: surely some defendants convicted of possessing 672 grams of cocaine merited such a punishment.⁶⁷ Thus, he was left with the argument that the constitutional flaw in the Michigan scheme was its mandatory nature, which denied him a sentencing determination tailored to the circumstances of his case.

The *Harmelin* Court squarely rejected the idea of an

65. The statute at issue in *Ewing* may be an illustration of this point: Opinion polls show that the majority of Californians favor changing the [three-strikes] law to require that the third strike be a serious or violent felony. But elected officials don't want to appear soft on crime, even when the crime is shoplifting. No politician wants to be vulnerable to a story of a shoplifter who was released and then committed a much worse crime.

Erwin Chemerinsky, *3 Strikes: Cruel, Unusual and Unfair*, L.A. TIMES, Mar. 10, 2003, at B11.

66. See *People v. Bullock*, 485 N.W.2d 866, 874 n.17 (Mich. 1992) (noting that the actions of a trial judge in imposing a mandatory sentence of life without parole under the Michigan statute are not to be reviewed under the normal abuse of discretion standard because the judge "lacks any discretion to abuse"). In *Bullock*, the Michigan Supreme Court used the Michigan Constitution's prohibition on cruel or unusual punishment, MICH. CONST. art. 1, § 16, and applied a three-part test that it saw as "striking[ly]" similar to the *Solem* test, 485 N.W.2d at 873, to strike down the no-parole feature of the Michigan statute. This holding made all defendants convicted of simple possession (and *Bullock* involved defendants arrested in possession of fifteen kilograms of cocaine) eligible for parole in ten calendar years. See *id.* at 878.

67. The *Bullock* court suggested, as a matter of Michigan constitutional law, that to justify such a punishment, the defendants might have to be charged with, and convicted beyond a reasonable doubt of, possession with intent to distribute. See *id.* at 875 n.19. In a sense, the court's analysis incorporates an *Apprendi* sensibility. See *infra* text accompanying notes 186-204 (discussing *Apprendi*).

across-the-board "individualized sentencing doctrine"⁶⁸ for non-capital cases. Thus, mandatory sentences are not inherently suspect. But there are some circumstances in which courts might be skeptical of whether a particular mandatory sentence in fact reflects contemporary values: when mandatory sentences are coupled with expansive definitions of the triggering conduct or when the lawmaking process foreclosed more accurate tailoring. The California three strikes law illustrates these problems. The sentencing regime was enacted in part as a result of direct lawmaking.⁶⁹ Voters faced an up-or-down question whether repeat felons were to be sentenced to life in prison; they were not given a more targeted set of felonies that should trigger life terms.⁷⁰ Thus, the "three-strikes" law as it actually operates may demand life sentences for a number of defendants—the hungry, homeless man who stole a bottle of vitamins from a supermarket⁷¹ or the nonviolent recidivist who shoplifted merchandise worth a total of \$153.54 from a K-mart⁷²—whose situations were not within the contemplation of the voters.

The third and most expansive justification does not deny that a particular statute provides clear or reliable evidence of a community's view, but nonetheless denies the community's right to impose such a sentence for the behavior involved. This rationale is squarely substantive. It crops up more often with respect to the question whether a particular activity can be criminalized at all. Consider, for example, the Chicago anti-gang ordinance case,⁷³ *Loving v. Virginia*,⁷⁴ *Griswold v. Con-*

68. *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991).

69. The legislature adopted a statute essentially identical to the act passed as a ballot proposition. See generally *In re Cervera*, 16 P.3d 176, 177 (Cal. 2001) (describing the statutory scheme).

70. Cf. *Lucas v. Forty-Fourth Gen. Assembly*, 377 U.S. 713, 731–32 (1964) (suggesting that it may not be "factually justifiable" to assume that an initiative indicates precisely what the voters want when all available choices are not before them). For a discussion of the difficulty in interpreting the intent behind popular lawmaking, see SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 988–90 (rev. 2d ed. 2002).

71. *Riggs v. California*, 525 U.S. 1114, 1114 (1999) (Stevens, J., respecting the denial of certiorari) (recounting Riggs's crime).

72. *Lockyer v. Andrade*, 123 S. Ct. 1166, 1169 (2003).

73. *City of Chicago v. Morales*, 527 U.S. 41, 45–48, 64 (1999) (holding unconstitutional an ordinance that prohibited certain kinds of loitering because it was impermissibly broad).

74. 388 U.S. 1 (1967) (striking down a statute that criminalized interra-

necticut,⁷⁵ or *Lawrence v. Texas*.⁷⁶ If it is to be extended to acts that can be prohibited, but simply not punished too severely—the proverbial legislative decision to make “overtime parking a felony punishable by life imprisonment,”⁷⁷ rather than a citation offense punishable by a small fine—then courts need some yardstick for gauging when punishment goes over the admittedly fuzzy line.

If that yardstick is to be objective—rather than a shocks-the-conscience-of-the-Justices test—it is hard to imagine how the second or third prong of the *Solem* test does not creep back into the inquiry. Surely, the clearest and most reliable evidence of contemporary standards *other than* the authorized sentence is likely to involve how the defendant’s offense fits into the structure of the state’s penal code or how defendants convicted of similar offenses, either within or without the state, are being treated. In short, the second and third prongs of the *Solem* test may be particularly useful pieces of evidence about the gravity of a defendant’s offense and there is something disconcerting about trying to answer the question of how serious a defendant’s crime is without looking at them.

But even if there were an objective measure of offense gravity, proportionality review of *sentences* would face a serious difficulty. Ironically, this problem is illustrated by the very evidence on which the *Solem* Court relied for its assertion that it was simple “to judge the gravity of an offense, at least on a relative scale”⁷⁸—an empirical study that showed “widely shared views as to the relative seriousness of crimes.”⁷⁹

The study involved a survey in which respondents were asked to rate a series of acts on a nine-point scale, with “9” re-

cial marriage as violations of the Equal Protection and Due Process Clauses).

75. 381 U.S. 479 (1965) (striking down a statute that criminalized the use of contraceptives as a violation of the Due Process Clause). Ironically, in an earlier challenge, the Court had declined even to reach the merits because it thought the statute was essentially a derelict on the waters of the law. See *Poe v. Ullman*, 367 U.S. 497, 501–02 (1961) (Frankfurter, J., plurality opinion); DAVID J. GARROW, *LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE* (1994) (discussing what an outlier the State of Connecticut was by the 1960s in criminalizing all forms of contraception).

76. 123 S. Ct. 2472 (2003) (striking down a statute that criminalized sodomy).

77. *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980).

78. *Solem v. Helm*, 463 U.S. 277, 292 (1983).

79. *Id.* (citing James Rossi et al., *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 AM. SOC. REV. 224 (1974)).

flecting the most blameworthy.⁸⁰ While there was a fair amount of agreement on the ordinal ranking of the 140 acts, the respondents' *cardinal* rankings varied wildly.⁸¹ One particularly salient example: passing a worthless check for less than \$100 (an offense almost identical to Helm's) was ranked 104th out of 140 offenses.⁸² Its cardinal ranking was 5.339, but the variance was 5.921.⁸³ So large a variance is a sign that, although the respondents might share a view of how serious crimes are relative to one another, they disagree profoundly about how serious crimes are in a more absolute sense. Indeed, the authors noted that "[t]he distribution of ratings tended to be more dense on the high serious end of the nine point scale: the most popular rating was '9,' with the lower ratings decreasing in popularity."⁸⁴ Widely shared views about relative seriousness may suggest that a crime with a lower ordinal rank should not be punished more harshly than a crime with a higher rank—for example, that someone who passes a bad check should not receive a higher sentence than someone who kills a stranger in a bar fight⁸⁵—but they do not tell us very much about the question whether, if the latter crime warrants a sentence of up to life in prison, the former can be punished by a sentence of fifty years. That is, the ordinal rankings cannot readily be translated into a scale, which is, after all, what proportionality challenges to terms of imprisonment are really about. Put more concretely, even if a particular respondent gave passing a bad check a score essentially halfway between killing someone in a bar room free-for-all and refusing to answer a census taker's questions,⁸⁶ that does not mean that she thinks that passing a bad check can be punished by twice as severe a sentence as refusing to answer a census taker's questions but only half as long a sentence as killing someone. An individual's view about

80. James Rossi et al., *The Seriousness of Crimes: Normative Structure and Individual Differences*, 39 AM. SOC. REV. 224, 225–26 (1974).

81. *Id.* at 227. And that ranking provided "few surprises." *Id.*

82. *Id.* at 229.

83. *Id.* The three-decimal-place ranking reflects the large number of responses. The authors explain that a standard error for a particular score would be between 0.1 and 0.3. *Id.* at 227. About 20 of the 140 offenses are scored between 5.7 and 5.0. *Id.* at 229.

84. *Id.* at 226–27.

85. In the Rossi study, the mean for the former was 5.339, while the mean for the latter was 7.392. *Id.* at 228–29.

86. Respondents in the Rossi study ranked the three crimes in that order. See *id.*

the relationship among appropriate punishments may not be linear at all.

Moreover, as the Court recognized in its discussion of offense gravity in *Ewing v. California*, agreement about offense seriousness may be only one component in thinking about appropriate punishment, particularly once the theory of sentencing extends beyond retribution.⁸⁷ Consider a theory of sentencing in which deterrence plays a role. Imagine two offenses that are thought of, in the abstract, as causing a similar amount of harm—for example, passing a worthless check for less than \$100 and bribing a public official.⁸⁸ If the former crime is easily detected and prosecuted, while the latter is hard to detect or prosecute, there may be widespread consensus that the second offense should be punished more severely, as in fact most criminal codes do. Thus, without knowing more than simple views of offense gravity, it might be difficult to say that the punishment for the second offense is unduly severe.

Of equal significance, the question the respondents were asked did not take into account the central factor that was involved in Helm's case, as well as Ewing's: recidivism. To say that people do not think passing one bad check is a serious crime says relatively little about whether they would consider someone a serious criminal if he were to commit that crime, or an array of similarly serious crimes, repeatedly. Oddly enough, although researchers continue to do studies designed to rank particular crimes, there is still no good study to determine whether there are widely shared views about how recidivism should be viewed.⁸⁹

87. 123 S. Ct. 1179, 1189–90 (2003). Justice Kennedy's opinion in *Harmelin v. Michigan* recognizes the presence of a variety of permissible penological theories, but does not explore the reasons why different theories might generate different punishments even if legislators agreed on the gravity of a particular act. See 501 U.S. 957, 997–99 (1991) (Kennedy, J., concurring). The Court's opinion in *Ewing* reiterated this point, but again left the analysis implicit. See 123 S. Ct. at 1187–89.

88. In the Rossi study, the mean for the former was 5.339 and the mean for the latter was 5.394—scores that the authors tell us are in actuality indistinguishable. Rossi, *supra* note 80, at 227, 229.

89. The fact that during the 1990s there was "a sea change in criminal sentencing throughout the Nation" that resulted in far harsher treatment of recidivists, *Ewing*, 123 S. Ct. at 1187, at least suggests a contemporary consensus that recidivism justifies harsher punishments. For reasons I have already suggested, however, the consensus may break down when it comes to the degree of enhancement that is appropriate. See *supra* notes 80–86 and accompanying text.

Suppose, as seems entirely plausible, that there is a widely shared consensus that people who have demonstrated a propensity to commit offenses are more blameworthy than first-time offenders.⁹⁰ Looking at “the gravity of the offense” disconnected from the history of particular offenders will not pick up that consensus. Even under a purely retributive view of punishment, then, the data on which the Court relied may not indicate how seriously Helm’s offense would be viewed.

Here, too, once one gets beyond retributive theories of sentencing, recidivism may complicate the question of proportionality. For example, the standard sentence for a given crime may reflect a judgment that most individuals will be deterred by that punishment. But recidivists reveal themselves to be insensitive to that level of sanction. Thus, deterrence theory could authorize confronting potential recidivists with a higher sentence. Similarly, if incapacitation is one of the purposes of punishment, then there may be good reasons for thinking that recidivists should be given longer sentences than first-time offenders.

The cases suggest that when it comes to recidivism, scaling is the key issue. There is no real controversy about the constitutionality of punishing recidivists more severely than first-time offenders: the question is *how much* more severely. Is doubling the maximum penalty permissible?⁹¹ What about squaring it or raising the maximum sentence in “three-strikes” cases to the third power?⁹² Is raising the authorized penalty by one grade permissible? What about by two grades, or one additional grade for each additional conviction?⁹³ There really seem to be only three ways to answer the question of how much more severely recidivists can be punished. The first is to leave it entirely to the political process—the tack taken by the Justices who reject proportionality review altogether. The second is to look to “the legislation enacted by the *country’s* legislatures,”⁹⁴

90. See *Witte v. United States*, 515 U.S. 389, 400 (1995); *Gryger v. Burke*, 334 U.S. 728, 732 (1948).

91. Doubling the maximum penalty would have authorized a ten-year sentence in Helm’s case, since the maximum sentence authorized for a Class 5 felony, such as passing a worthless check, was five years. See S.D. CODIFIED LAWS § 22-6-1(7) (Michie 1998).

92. These rules would permit imposition of a twenty-five-year sentence—or a 125-year sentence in Helm’s case.

93. Under this rule, given his prior number of convictions, Helm could have been treated as a Class 1 felon.

94. *Atkins v. Virginia*, 122 S. Ct. 2242, 2247 (2002) (emphasis added).

and to reject outliers as not reflecting the national standard embodied in the Eighth Amendment—the tack suggested by the last prong of the *Solem* test,⁹⁵ and relegated to a subsidiary position by *Harmelin*.⁹⁶ The third is for judges simply to make the decision themselves, which, whatever they call it or however mechanical the test they announce, involves judges applying their own views to the question of when a punishment is excessive.

In its recent decision forbidding execution of mentally retarded individuals, *Atkins v. Virginia*, the Court acknowledged using a blend of the second and third approaches.⁹⁷ The Court pointed to what it saw as an emerging national consensus, reflected in recent legislation, as one objective indicator of current standards of decency.⁹⁸ Still, "objective evidence" does not "wholly determine" the controversy, "for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."⁹⁹ But capital cases are different in ways that matter to proportionality review. The punishment itself is so undeniably harsh that most bad acts never even raise the question: the Supreme Court's holding in *Enmund v. Florida*¹⁰⁰ combined with legislative, prosecutorial, and juror decisions means that relatively few defendants are even eligible for the death penalty. Even fewer receive it and thereby raise questions of proportionality on appeal. Moreover, the punishment is indivisible: either a defendant will be executed or he won't; there is no question whether, although *some* execution is acceptable, he is being executed "too much."¹⁰¹ But that is almost always the question in cases involving imprisonment, and

95. See *Solem v. Helm*, 463 U.S. 277, 291 (1983).

96. See *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991).

97. 122 S. Ct. at 2247.

98. See *id.*

99. *Id.* (quoting *Coker v. Georgia*, 433 U.S. 584, 597 (1977)).

100. 458 U.S. 782, 797 (1982) (holding that the death penalty is unconstitutionally excessive with respect to defendants who neither took life, attempted to take life, nor intended to take life).

101. To the extent that question is raised, it is raised in the context of methods of execution. Even those Justices who think capital punishment is constitutional agree that some methods would violate the Eighth Amendment. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 176–87 (1976) (plurality opinion); *In re Kemmler*, 136 U.S. 436, 447 (1890). See generally Julian Davis Mortenson, *Earning the Right to Be Retributive: Execution Methods, Culpability Theory, and the Cruel and Unusual Punishment Clause*, 88 IOWA L. REV. 1099 (2003) (discussing the constitutionality of execution methods).

perhaps even life imprisonment.¹⁰² The Supreme Court could simply *Redrup* sentences,¹⁰³ that is, overturn those that struck the Justices as excessive without providing extensive, or perhaps any, explanation. This would leave to the lower courts the job of determining inductively which sentences pass or fail constitutional proportionality review.¹⁰⁴ But that route will expose the Court to withering criticism and will essentially concede the subjective nature of proportionality review. Better not to undertake the inquiry at all.

Ultimately, proportionality review demands a judgment about the seriousness of a defendant's crime. Either the Supreme Court can look outward—to “the work product of legislatures and sentencing jury determinations”¹⁰⁵—to see whether a particular case is an outlier or it can look inward—to the Justices' own understandings about the gravity of particular conduct. There is something ironic, then, about a Court committing itself to a judicially enforceable proportionality principle while ostensibly forswearing both strategies.

Although *Harmelin* and *Ewing* marked a retreat from pro-

102. The difference between a life sentence and a sentence of fifty years may be entirely semantic: both will result in a middle-aged defendant spending the rest of his life in prison. Thus, a formal rule that applies proportionality review to life sentences or to life sentences without possibility of parole, but does not apply proportionality review to term sentences, may have no real effect. Prosecutors and judges could keep the defendants in jail for the rest of their lives by the simple expedient of seeking and imposing term sentences so long that defendants would never reach eligibility for parole. See, e.g., *Moncada v. Gibson*, 17 Fed. Appx. 831, 831 (10th Cir. 2001) (noting that the defendant had been sentenced to concurrent terms of 999 and 979 years for two crimes).

103. In the six years between *Redrup v. New York*, 386 U.S. 767 (1967) (per curiam), and *Miller v. California*, 413 U.S. 15 (1973), the Supreme Court decided at least thirty-one obscenity cases by summary disposition, often simply reversing convictions with no opinion whatsoever. See *Paris Adult Theater I v. Slaton*, 413 U.S. 49, 82–83 n.8 (1973) (Brennan, J., dissenting) (listing the cases). *Redrupping* “offer[ed] only the most obscure guidance to legislation, adjudication by other courts, and primary conduct [and it] deliberately and effectively obscured the rationale underlying the decisions.” *Id.* at 83. Thus, it was hardly surprising “that judicial attempts to follow [the Court’s] lead conscientiously . . . often ended in hopeless confusion.” *Id.* For an extensive discussion of *Redrupping*, see Karlan, *supra* note 14, at 667–85.

104. For a classic effort at inductive reasoning by a lower court during the *Redrup* era, see *Huffman v. United States*, 470 F.2d 386 (D.C. Cir. 1971), *rev’d on rehearing en banc*, 502 F.2d 419 (D.C. Cir. 1974) (en banc) (reversing the panel decision in light of *Miller v. California*, 413 U.S. 15 (1973)).

105. *Atkins v. Virginia*, 122 S. Ct. 2242, 2253 (2002) (Rehnquist, C.J., dissenting) (describing these as “the only objective indicia of contemporary values firmly supported by our precedents”).

portionality review of *sentences*, the Supreme Court did not abandon the idea of Eighth Amendment proportionality review altogether. In *United States v. Bajakajian*,¹⁰⁶ the Court, for the first time, struck down a criminal penalty as a violation of the Excessive Fines Clause.

The case involved the interaction of two federal statutes. The first required individuals who transported more than \$10,000 in currency out of the United States to file certain reports.¹⁰⁷ The second directed courts sentencing individuals for willful violations of the reporting requirements to order the forfeiture of any property involved in the offense.¹⁰⁸ Hosep Bajakajian tried to leave the country with \$357,144 in unreported cash.¹⁰⁹ The statutory maximum fine was \$250,000,¹¹⁰ but under the federal sentencing guidelines, the fine for Bajakajian's conduct would have been only \$5000.¹¹¹ After Bajakajian pleaded guilty to willfully failing to report the currency, the government moved to forfeit the entire amount. The district court denied the government's motion, concluding that complete forfeiture would be "extraordinarily harsh" and "grossly disproportionate to the offense in question."¹¹² Instead, it sentenced Bajakajian to three years' probation, fined him \$5000, and ordered him to forfeit \$15,000, "because the court believed that the maximum Guidelines fine was 'too little' and that a \$15,000 forfeiture would 'make up for what I think a reasonable fine should be.'"¹¹³

Ultimately, by a 5-4 vote, the Supreme Court agreed that requiring forfeiture of the full \$357,144 would violate the Eighth Amendment. Justice Thomas's opinion for the Court identified the "touchstone of the constitutional inquiry under the Excessive Fines Clause [as] the principle of proportionality: The amount of the forfeiture must bear some relationship to

106. 524 U.S. 321 (1998).

107. 31 U.S.C. § 5316(a)(1)(A) (1994); *see also Bajakajian*, 524 U.S. at 325.

108. 18 U.S.C. § 982(a)(1) (1994); *see also Bajakajian*, 524 U.S. at 324.

109. *Bajakajian*, 524 U.S. at 325.

110. Under 31 U.S.C. § 5322(a), "a person willfully violating [the reporting requirement provision] . . . shall be fined not more than \$250,000, or imprisoned for not more than five years, or both."

111. The sentencing guidelines provided that the maximum fine for a base six-level offense is \$5000. *See* U.S. SENTENCING GUIDELINES MANUAL § 5E1.2(a) (1996). For a discussion of how the district court calculated Bajakajian's base offense level, *see United States v. Bajakajian*, 1996 U.S. App. LEXIS 15527, *3-4 (9th Cir. 1996).

112. *Bajakajian*, 524 U.S. at 326 (quoting the district court).

113. *Id.* (quoting the district court).

the gravity of the offense that it is designed to punish.”¹¹⁴ In trying to articulate “just how proportional to a criminal offense a fine must be,”¹¹⁵ the Court recognized that judicial determinations of offense gravity “will be inherently imprecise.”¹¹⁶ Thus, relying on the Cruel and Unusual Punishment Clause cases, the Court adopted a standard of “gross disproportionality,” rather than a requirement of “strict proportionality.”¹¹⁷

Applying that standard, the Court concluded that forfeiture of \$357,144 was grossly disproportionate because Bajakajian’s crime reflected only a “minimal level of culpability.”¹¹⁸ His sole transgression was failing to report the wholly legal act of taking currency out of the country. The only injury he inflicted was depriving the government of information about an otherwise innocuous movement of money.

As support for its conclusion that Bajakajian’s culpability was relatively minor, the Court relied on the disparity between the punishment inflicted by the forfeiture provision—the loss of \$357,144—and the punishments imposed under other aspects of the statutory scheme: “In considering an offense’s gravity, the other penalties that the Legislature has authorized are certainly relevant evidence.”¹¹⁹ But although the *legislatively authorized* penalties were perhaps not grossly disproportionate to the forfeiture—after all, the statute provided for a maximum fine of \$250,000 plus up to five years’ imprisonment, not to mention forfeiture itself—the Court declared that “any argument based solely on the statute” was “undercut” by the fact that “the maximum fine and Guideline sentence to which respondent was subject were but a fraction of the penalties authorized.”¹²⁰ This “show[ed] that respondent’s culpability relative to other potential violators of the reporting provision—tax evaders, drug kingpins, or money launderers, for example—is small indeed.”¹²¹

Ironically, *Bajakajian* seems to revive, for cases where the criminal punishment is a fine, the very sort of inquiry that the *Harmelin* and *Ewing* Courts rejected with respect to cases

114. *Id.* at 334.

115. *Id.* at 335.

116. *Id.* at 336.

117. *See id.* at 336–37.

118. *Id.* at 339.

119. *Id.* at 339 n.14.

120. *Id.*

121. *Id.*

where the criminal punishment is a prison sentence. In deciding how culpable Bajakajian was, the Court looked to the harshness of other punishments imposed for the same conduct in other parts of the U.S. Code and contemplated by the sentencing guidelines—a species of intrajurisdictional analysis. The Court straddled the line between a normative and a descriptive view of proportionality: on the one hand, the majority announced that being stripped of \$357,144 was grossly disproportionate to the degree of Bajakajian's wrongdoing; on the other, it treated the forfeiture as grossly disproportionate to other punishments imposed for Bajakajian's conduct.¹²²

Bajakajian departs from *Harmelin* and *Ewing* in another significant respect: the Court seems to analyze the gravity of Bajakajian's offense solely from a retributivist perspective—asking how much harm his particular violation of the statute caused. Justice Kennedy treated *Harmelin*'s offense more categorically, finding that "drugs relate to crime" at least in part because "violent crime may occur as part of the drug business or culture."¹²³ Thus, although there was no evidence that *Harmelin* himself had been involved in violence, either as a result of taking drugs, in order to obtain money to buy drugs, or as part of his participation in drug trafficking, he had nonetheless committed a serious crime. Similarly, Justice O'Connor treated *Ewing*'s sentence as "justified by the State's public-safety interest in incapacitating and deterring recidivist felons."¹²⁴ Had Justice Kennedy treated Bajakajian as a participant in the larger enterprise of currency smuggling, he might have viewed his crime quite differently. The dissenters, after all, thought forfeiture proportionate because "secret exports of money were being used in organized crime, drug trafficking, money laundering, and other [serious] crimes."¹²⁵

Moreover, *Bajakajian* retreats from *Harmelin* and *Ewing*'s expansive treatment of the purposes of punishment. While the Court recognized that "[d]eterrence . . . has traditionally been

122. The dissent, by contrast, saw Bajakajian's conduct as far more culpable. Among other things, it suggested that the money itself might well have been tainted. See *id.* at 352–53 (Kennedy, J., dissenting). And it noted that the reporting requirement was part of a larger regime designed to deal with money laundering, drug trafficking, and the like. See *id.* at 351 (Kennedy, J., dissenting).

123. *Harmelin v. Michigan*, 501 U.S. 957, 1002 (1991) (Kennedy, J., concurring).

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

125. *Bajakajian*, 524 U.S. at 351 (Kennedy, J., dissenting).

viewed as a goal of punishment," it brushed that point aside, concluding the same sentence with the observation that "forfeiture of the currency here does not serve the remedial purpose of compensating the Government for a loss."¹²⁶ But surely the prospect of being required to forfeit the entire amount of currency not reported would create a powerful deterrent to failing to report. If forfeiture is intended to deter future violations, rather than simply to compensate the government for the injury caused by the defendant, then presumably *some* multiplier of the actual harm caused could nonetheless be an appropriate punishment.

The procedural posture of the case spared the Supreme Court from having to decide the constitutionality of the \$15,000 forfeiture ordered by the district court.¹²⁷ But to the extent that the *Bajakajian* Court would not have struck down a more limited forfeiture—and it seems hard to imagine the Supreme Court holding that Congress could not authorize *any* forfeiture—the Court transferred the decision about the appropriate punishment from Congress, which had commanded full forfeiture of the currency involved, to individual trial courts, which would determine the appropriate level of forfeiture given the details of a particular defendant's case. Thus, *Bajakajian*, like *Solem*, seems to contemplate a regime of discretionary, rather than mandatory sentencing decisions, and provides relatively little guidance to lower courts about where to prick the lines

126. *Id.* at 329.

127. As the *Bajakajian* Court stated:

The only question before this Court is whether the full forfeiture of respondent's \$357,144 as directed by § 982(a)(1) is constitutional under the Excessive Fines Clause. We hold that it is not. The Government petitioned for certiorari seeking full forfeiture, and we reject that request. Our holding that full forfeiture would be excessive reflects no judgment that [forfeiture of some lesser amount] . . . would have suffered from a gross disproportion, nor does it affirm the reduced \$15,000 forfeiture on *de novo* review. Those issues are simply not before us. Nor, indeed, do we address in *any* respect the validity of the forfeiture ordered by the District Court, including whether a court may disregard the terms of a statute that commands full forfeiture: As noted, . . . respondent did not cross-appeal the \$15,000 forfeiture ordered by the District Court. The Court of Appeals thus declined to address the \$15,000 forfeiture, and that question is not properly presented here either.

Id. at 337 n.11 (internal quotation marks omitted). The court of appeals had held that *any* forfeiture for failure to report would violate the Excessive Fines Clause, see *United States v. Bajakajian*, 84 F.3d 334, 338 (9th Cir. 1996), before holding that Bajakajian's failure to cross-appeal had waived that argument.

between permissible and grossly disproportionate punishment.

B. A HARD RAIN'S GONNA FALL: *BMW v. GORE* AND THE EMERGENCE OF PROPORTIONALITY IN THE PUNITIVE DAMAGES CASES

Perhaps it is only coincidence that it was also not until the 1980s that the Supreme Court showed interest in transforming the longstanding constitutional principle that civil damages awards cannot be "grossly excessive"¹²⁸ or "so severe and oppressive as to be wholly disproportioned to the offense"¹²⁹ into a judicially enforceable rule. The impetus for the Court's intervention was the perception that punitive damages had "run wild."¹³⁰ This perception reflected two developments: First, punitive damages had traditionally been used against spiteful or malicious defendants in intentional tort cases; they now emerged in product liability and other mass tort cases as well. Second, there was a striking increase in the size of high-end punitive awards, both in absolute terms and in comparison to the amount of compensatory damages.¹³¹ The cases that the Supreme Court agreed to review involved multimillion-dollar punitive damages awards, often in cases where the compensatory awards or the plaintiffs' out-of-pocket losses were quite small.¹³²

128. *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909).

129. *St. Louis, Iron Mountain & S. Ry. Co. v. Williams*, 251 U.S. 63, 67 (1919).

130. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991). Several studies have challenged the accuracy of this perception. See, e.g., Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 35, 41-43 (1990) (suggesting that punitive damages were awarded relatively infrequently, primarily in cases involving physical injury, and generally in modest amounts). In the most recent study of which I am aware, the authors concluded that "[c]ontrary to popular belief, juries rarely award [punitive] damages, and award them especially rarely in products liability and medical malpractice cases." Theodore Eisenberg et al., *Juries, Judges, and Punitive Damages: An Empirical Study*, 87 CORNELL L. REV. 743, 745 (2002). They found that most punitive damages cases involved traditional intentional misconduct cases. *Id.* Their survey found "trivially few cases with punitive-compensatory ratios greater than ten," *id.* at 778, and that "the compensatory award is the most powerful predictor of the punitive award," explaining by itself about half the variance in the punitive award. *Id.* at 773.

131. For a discussion of these factors, see, for example, *Browning-Ferris Industries v. Kelco Disposal, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 140-46 (1986) (summarizing the doctrinal developments and the scholarship).

132. For example, in *Browning-Ferris*, 492 U.S. at 262, the jury awarded the plaintiff \$51,146 in compensatory damages (trebled as a statutory matter

After a half-dozen years of false starts,¹³³ the Court finally held, in *Pacific Mutual Life Insurance Co. v. Haslip*,¹³⁴ that the Due Process Clause imposes both a procedural and a substantive limit on the size of punitive damages awards. The procedural component requires that juries be properly instructed on the purposes of punitive damages and the factors to be taken into account in deciding whether to award punitive damages and if so, what amount. It also requires appellate review of jury awards to ensure reasonableness.¹³⁵ The substantive component requires that the award in fact *be* reasonable, rather than "grossly excessive"¹³⁶ or disproportionate.

to \$153,438 along with an attorney's fees award of \$212,500) and \$6 million in punitive damages on a claim alleging antitrust violations and tortious interference with business relationships. Another business tort case, *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), involved a common-law slander of title action in which the jury awarded the plaintiff \$19,000 in actual damages and \$10 million in punitive damages. In two insurance cases, *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), and *Haslip*, 499 U.S. at 1, juries awarded plaintiffs punitive damages of \$3.5 million and \$840,000 on claims that involved out-of-pocket losses of roughly \$1400 and \$4000, respectively. And in *BMW of North America v. Gore*, 517 U.S. 559 (1996), the plaintiff suffered a loss of roughly \$4000 because his luxury automobile was touched up to repair damage caused by acid rain and was awarded \$4 million (reduced on appeal to \$2 million) in punitive damages.

133. In *Lavoie*, 475 U.S. at 813, the defendant challenged the award on the grounds that the award was impermissible under the Excessive Fines Clause of the Eighth Amendment and that the lack of sufficient standards governing punitive damages awards in Alabama violated the Due Process Clause of the Fourteenth Amendment. While the Court stated that these were "important issues which, in an appropriate setting, must be resolved," *id.* at 828-29, it disposed of the case on the ground that one of the judges should have recused himself for bias. In *Bankers Life & Casualty Co. v. Crenshaw*, the Court again appeared poised to address the constitutional constraints on punitive damages, but decided that the Eighth Amendment and due process challenges had been raised too "obliquely" in the state court proceedings to make federal review appropriate. 486 U.S. 71, 77 (1988). Finally, in *Browning-Ferris*, the Court held that the Eighth Amendment's Excessive Fines Clause did not apply to punitive damages awards in civil cases involving private parties and declined to reach the due process question because it held that *Browning-Ferris* failed to raise the issue properly in the courts below. 492 U.S. at 276-77.

134. 499 U.S. 1 (1991).

135. See *id.* at 19-23. Thus in *Honda Motor Co. v. Oberg*, the Court struck down an award of punitive damages in a products liability case involving severe and permanent injuries because a provision of the Oregon Constitution seriously restricted the scope of appellate review of punitive damages available at common law. 512 U.S. 415 (1994).

136. See *TXO*, 509 U.S. at 454 (Stevens, J.). Justices Scalia and Thomas rejected the entire enterprise of substantive due process review: while they agreed that the procedural component of the Due Process Clause required that punitive damages awards be reviewed for reasonableness, because such review

But how is a reviewing court to conduct this substantive proportionality review? Here, as in the sentencing cases, the Supreme Court's opinions reveal an equivocal stance toward the nature of the constitutional inquiry. In *TXO Production Corp. v. Alliance Resources Corp.*,¹³⁷ a majority of the Justices rejected the proposal for a "test" that depended on "objective criteria" resembling the *Solem v. Helm* factors.¹³⁸ And yet, three years later, in *BMW of North America, Inc. v. Gore*,¹³⁹ the Court articulated an approach to reviewing challenges to punitive damages awards that bears a striking resemblance to the *Solem* inquiry.

The underlying lawsuit involved a state-law fraud claim: Ira Gore bought a new BMW sports car that, unbeknownst to him, had been repainted because of exposure to acid rain during transit from the factory.¹⁴⁰ The repainting diminished the resale value of his \$40,000 car by approximately \$4000.¹⁴¹ When he found out (from "Mr. Slick," a detailer to whom he'd taken the car to "make it look snazzier than it normally would appear"), he sued.¹⁴² Presented with evidence that BMW's policy

had consistently been part of the common-law process of assessing punitive damages, they saw no federal constitutional right to a substantively correct determination of reasonableness in a given case. *See id.* at 470–72 (Scalia, J., joined by Thomas, J., concurring). In other words, the fact that West Virginia had provided TXO with appellate review of the jury award was all that the Due Process Clause required. If the West Virginia courts simply reached the wrong result, that would raise no federal constitutional question.

137. 509 U.S. 443 (1993).

138. *See id.* at 457–58 (Stevens, J., joined by the Chief Justice and Blackmun, J.) (rejecting the idea that objective factors could be combined into a "test" like the kind of objective inquiry contemplated by *Solem*); *id.* at 466–69 (Kennedy, J., concurring) (rejecting the idea of a constitutional inquiry that focuses on the amount of the award in favor of one that looks at the jury's reasoning); *id.* at 470–72 (Scalia, J., joined by Thomas, J., concurring) (rejecting the entire enterprise of constitutional proportionality review). A number of states have adopted the mechanical approach legislatively. *See, e.g.,* CONN. GEN. STAT. ANN. § 52-240b (West 1991) (capping punitive damages at twice compensatory damages in products liability cases); NEV. REV. STAT. ANN. § 42.005 (Michie 2002) (capping punitive damages at three times the compensatory damages if compensatory damages are \$100,000 or more and at \$300,000 if the compensatory damages are less than \$100,000); N.J. STAT. ANN. § 2A:15-5.14(b) (West 2000) (limiting punitive damages to five times compensatory damages or \$350,000, whichever is greater); VA. CODE ANN. § 8.01-38.1 (Michie 1992) (capping all punitive damages at \$350,000 when actual damages are less than \$100,000).

139. 517 U.S. 559 (1996).

140. *Id.* at 563.

141. *Id.* at 563–64.

142. *Id.* at 563 (internal quotations omitted).

had resulted in the company's having sold 983 repainted cars as new,¹⁴³ the jury awarded Gore \$4000 in compensatory damages and \$4 million in punitive damages.¹⁴⁴ The trial judge denied BMW's motion to set aside the award as excessive.¹⁴⁵ On appeal, the Alabama Supreme Court held that the punitive damages award was tainted by the jury's consideration of sales in other jurisdictions, and reduced the amount of the award, concluding that "a constitutionally reasonable punitive damages award in this case is \$2,000,000."¹⁴⁶

The United States Supreme Court did not question the jury's decision to award punitive damages, but it rejected even this lower amount, declaring it "apparent" that the \$2 million was "grossly excessive."¹⁴⁷ The Court identified three "guideposts" for assessing whether a punitive damages award is unconstitutionally high.¹⁴⁸ The first, and "[p]erhaps the most important," was "the degree of reprehensibility of the defendant's conduct."¹⁴⁹ Justice Stevens's opinion for the Court pointed to the absence of any of "the aggravating factors associated with particularly reprehensible conduct,"¹⁵⁰ such as violence, a non-economic injury, calculated, purposeful wrongdoing, or recidi-

143. Fourteen repainted cars were sold in Alabama, where Gore lived. *See id.* at 564. Roughly 600 repainted cars were sold in states where BMW's conduct would not even have constituted a tort, *see id.* at 573, let alone one warranting punitive damages.

144. *Id.* at 565.

145. *Id.* at 566.

146. *BMW of N. Am., Inc. v. Gore*, 646 So. 2d 619, 629 (Ala. 1994). The Alabama Supreme Court provided no explanation for picking this number other than invocation of the multifactor substantive standard under Alabama law for imposing punitive damages and an assurance that the remittitur was the result of the court's having "thoroughly and painstakingly review[ed]" the jury award. *Id.* On remand from the United States Supreme Court, the Alabama Supreme Court reduced the amount of punitive damages to \$50,000. *See BMW of N. Am., Inc. v. Gore*, 701 So. 2d 507, 515 (Ala. 1997) (per curiam). While the Alabama Supreme Court discussed the various "guideposts" from the United States Supreme Court's decision and agreed that they rendered a \$2 million award unjustifiable, the court offered no explanation for its decision that a \$50,000 punitive damages award (as opposed to some higher or lower amount) was appropriate. *See id.* at 513-14.

147. *Gore*, 517 U.S. at 574.

148. *See id.* at 574-75.

149. *Id.* at 575. Despite Justice Stevens's insistence in *TXO* that he did not want to rely on *Solem* to analyze challenges to punitive damages awards, *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 456-58 (1993), his opinion for the Court in *Gore* cited *Solem* for "[t]he principle that punishment should fit the crime." 517 U.S. at 575 n.24.

150. *Gore*, 517 U.S. at 576.

vism¹⁵¹ to conclude that even if BMW's behavior had been "sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages . . . , [it] was not sufficiently reprehensible to warrant imposition of a \$2 million exemplary damages award."¹⁵² This first guidepost is essentially identical to the first (now threshold) factor in the *Solem* inquiry—the gravity of the offense. Indeed, the Court relied on *Solem* to illustrate an example of "the accepted view that some wrongs are more blameworthy than others."¹⁵³

The second guidepost—"ratio"¹⁵⁴—rested on a distinctive characteristic of damages actions: the fact finder is already asked, in determining the amount of *compensatory* damages, to quantify the amount of harm the defendant has caused to the plaintiff. By their very nature, then, damages cases provide a piece of information that criminal cases lack: an indication of the gravity of the offense that uses the very currency in which punishment is to be meted out.¹⁵⁵ "The principle that exemplary damages must bear a reasonable relationship to compensatory damages"¹⁵⁶ suggested that a "breathhtaking" ratio between the two should "surely raise a suspicious judicial eyebrow."¹⁵⁷ The Court declined to identify a precise point at which judicial brows and lungs would seize up. And it recognized that there needed to be some play in the joints, particularly because com-

151. Gore had argued that the award was justified since BMW was "a recidivist" because of its pattern of selling repaired cars as new. See *id.* at 579. The Court rejected that contention on the merits, in part because BMW changed its policy once "it had been adjudged unlawful." *Id.*

152. *Id.* at 580.

153. *Id.* at 575–76.

154. *Id.* at 580.

155. One recent study suggests, however, that damages cases may produce a scaling problem similar to the one facing courts reviewing challenges to the length of prison sentences. See David Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139 (2000). The authors "found a remarkable consensus in the judgments of individual jurors, made on a rating scale," about the seriousness of various wrongful behavior. *Id.* at 1141. But

the study found that assessment of cases in terms of dollars produces great unpredictability. To be sure, ranking the cases by their aggregate dollar awards or by their aggregate punishment ratings produced very similar orderings of the cases from least to most severe. But dollar awards are unpredictable in the specific sense that punishment ratings are not [T]he same case, presented to different jurors, will elicit similar ratings but quite different dollar awards

Id. at 1142 (citations omitted).

156. *Gore*, 517 U.S. at 580.

157. *Id.* at 583.

pensatory damages awards do not fully capture the magnitude of a defendant's wrongdoing in two ways relevant to determining punitive damages. As a matter of retribution, compensatory awards will understate the defendant's moral culpability in cases where the defendant's wrongful designs are not fully realized.¹⁵⁸ Moreover, because punitive damages are intended to deter, a punitive damages award might also properly reflect "the possible harm to other victims that might . . . result[] if similar future behavior were not deterred,"¹⁵⁹ a harm obviously not captured in the compensatory award to the present-day victim.

Still, statutory punitive damages schemes generally doubled, trebled, or quadrupled the amount of compensatory damages to determine the amount of punitives.¹⁶⁰ And in prior cases reviewing common-law punitive damages, the Supreme Court had expressed qualms about, but ultimately upheld, ratios in the range of ten to one.¹⁶¹ By contrast, Gore's case involved a far higher ratio: his punitive damages were 500 times *his* actual harm (and there seemed not to be any unrealized potential harm to him) and thirty-five times the harm suffered by all consumers in Alabama.¹⁶²

In *State Farm Mutual Automobile Insurance Co. v. Campbell*,¹⁶³ although the Court repeated its "reluctan[ce] to identify concrete constitutional limits on the ratio," it offered what

158. See *id.* at 581 (stating "the proper inquiry is whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred" (internal quotations and emphasis omitted)).

159. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993) (Stevens, J.).

160. See *Gore*, 517 U.S. at 581 (discussing the long history of multipliers); *id.* at 615–16 (Ginsburg, J., dissenting) (describing recent statutes).

161. See *TXO*, 509 U.S. at 462. The majority thought *TXO* a close case: the deciding factor for the Justices who performed a proportionality review but upheld the verdict seems to have been the defendant's persistent bad faith. See *id.* at 462 (Stevens, J.); *id.* at 468 (Kennedy, J., concurring). In *TXO*, the punitive damages award was 526 times greater than the damages actually awarded by the jury, see *id.* at 453, but the Court noted that the jury might have concluded that the "potential harm" had *TXO* "succeeded in its illicit scheme" might have been \$1 million, rather than \$19,000, in which case the punitive damages would have been ten times the potential harm. *Id.* at 462. This did not, Justice Stevens explained, "jar one's constitutional sensibilities." *Id.* (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)).

162. *Gore*, 517 U.S. at 582 & n.35. Earlier, the Court held that federalism and interstate commerce concerns limited Alabama to imposing liability awards that protect "its own consumers and its own economy," not to regulating the nationwide market in automobile sales. *Id.* at 572–73.

163. 123 S. Ct. 1513 (2003).

might be seen as a *plastic* limit: "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."¹⁶⁴ Thus, the Court held that a punitive damages award of \$145 million was excessive given a compensatory damages award of \$1 million in a case alleging bad-faith refusal to settle an insurance claim.¹⁶⁵

The third guidepost identified by the *Gore* Court as a useful indicator of excessiveness involved comparing the punitive damages award to the civil or criminal penalties a defendant would have faced for the same conduct.¹⁶⁶ This factor incorporates the intra- and inter-jurisdictional comparisons of the *Solem* test. In *Gore*, the Court noted that the maximum civil penalty for BMW's conduct under Alabama law was \$2000 and there was no suggestion of criminal liability.¹⁶⁷ Similarly, in the other states in which BMW's actions would have been prohibited, the civil penalties ranged only up to \$10,000. Thus, there was no state in which a legislature had affirmatively authorized punishing a defendant like BMW with a multimillion-dollar fine for this kind of conduct.¹⁶⁸

In comparing the punitive damages award to the amount of punishment authorized under criminal and civil statutes, the Court essentially deployed the principle of "substantial deference to legislative judgments concerning appropriate sanctions"¹⁶⁹ to justify, rather than to constrain, judicial review. The

164. *Id.* at 1524. For one recent case where a court upheld a far higher ratio (approving \$186,000 in punitive damages for a claim that resulted in only \$5000 in compensatory damages), see *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003). Judge Posner's opinion for the court explained that the punitive damages awarded in the case could be justified as a response to the fact that not every victim of the defendants' wrongdoing—they continued to rent hotel rooms infested with bedbugs—would have detected the tortious behavior (and thus deterrence theory supported a high punitive damages award) and that no plaintiff might have brought a lawsuit at all without the prospect of heavy punitive damages (a private attorney general rationale). *Id.* at 677.

165. *Campbell*, 123 S. Ct. at 1526.

166. *Gore*, 517 U.S. at 575.

167. *Id.* at 584. This distinguished the case from *Haslip*, where, although the punitive damages were "much in excess of the fine that could be imposed," Vermont law also authorized imprisonment. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23 (1991).

168. *Gore*, 517 U.S. at 584.

169. *Id.* at 583 (quoting *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor J., concurring in part and dissenting in part)) (internal quotations omitted).

legislature's decision about what constituted appropriate punishment might be a better indicator than an individual jury's view of the actual seriousness of the defendant's wrongdoing.

Given the Court's retreat from proportionality review in the criminal context, what accounts for its enthusiastic embrace in the punitive damages cases?¹⁷⁰ Ironically, one explanation may lie in factors Justice Ginsburg identified in her dissents in *Gore* and *Campbell* as militating against substantive constitutional review: the Supreme Court's position as the sole locus of federal review and the widespread reexamination of punitive damages by state courts and legislatures.¹⁷¹

As Justice Ginsburg pointed out, while criminal sentences in state prosecutions can be challenged in federal habeas corpus proceedings as well as on direct appeal,¹⁷² the Supreme Court will be "the *only* federal court policing the area"¹⁷³ of punitive damages, at least with respect to reviewing verdicts in state court litigation.¹⁷⁴ Justice Ginsburg intimated that this

170. While some of the Justices take consistent positions in the two sets of cases—Justice Scalia, for example, would provide substantive review of neither criminal sentences nor punitive awards, see *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 470–71 (1993); *Harmelin v. Michigan*, 501 U.S. 957, 965; *Haslip*, 499 U.S. at 24–25, while Justice Stevens seems equally committed to both, see *TXO*, 509 U.S. at 458; *Harmelin*, 501 U.S. at 1028 (Stevens, J., dissenting)—other Justices take more complicated stances. For example, Justice Kennedy expressed considerable reluctance to engage in Eighth Amendment proportionality review in *Harmelin*, 501 U.S. at 1004–05 (Kennedy, J., concurring), but committed himself to due process review of punitive damages awards even though he rejected the salience of the most "objective" factor: the ratio. See *TXO*, 509 U.S. at 467–68 (Kennedy, J., concurring). And Justice O'Connor, joining the Chief Justice's opinion, dissented in *Solem v. Helm*, 463 U.S. 277, 304 (1983) (Burger, C.J., dissenting), from the entire enterprise of Eighth Amendment proportionality review and joined Justice Kennedy's opinion in *Harmelin* significantly constricting *Solem*, 501 U.S. at 1004–05, but has been perhaps the Court's most enthusiastic proponent of due process proportionality review of punitive damages. See, e.g., *TXO*, 509 U.S. at 475–78 (O'Connor, J., dissenting); *Haslip*, 499 U.S. at 42 (O'Connor, J., dissenting); *Browning-Ferris*, 492 U.S. at 282 (O'Connor, J., concurring in part and dissenting in part).

171. 517 U.S. at 613–14 (Ginsburg, J., dissenting).

172. This past Term, for example, the Supreme Court examined the constitutionality of California's "three-strikes" law in one case on direct appeal, *Ewing v. California*, 123 S. Ct. 1179 (2003), and one case on collateral review, *Lockyer v. Andrade*, 123 S. Ct. 1166 (2003).

173. *Gore*, 517 U.S. at 613 (Ginsburg, J., dissenting); see also *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct., 1513, 1527 (2003) (Ginsburg, J., dissenting) (repeating the same argument).

174. The Due Process Clause of the Fifth Amendment presumably contains the same substantive constraint that punitive damages also not be grossly

was problematic because the Court would not "be aided by the federal district courts and courts of appeals."¹⁷⁵ But perhaps it is actually a *benefit* of proportionality review in the civil context that there is such a limited opportunity for federal intervention in particular cases. After all, one of the disadvantages of the Eighth Amendment proportionality principle was the possibility that it could have spawned wholesale collateral litigation, clogging federal court dockets. At the same time, given the subjective, takes-the-judicial-breath-away-and-raises-the-judicial-eyebrows test, the availability of collateral review would have given federal judges that did not share the Justices' assessment of the gravity of particular offenses the power to overturn state criminal sentences. Thus, the Court might have had to police the lower federal courts as well as the state courts. By contrast, the structure of civil litigation makes such collateral attacks vanishingly rare.¹⁷⁶ So, having announced a general principle of proportionality for state appellate courts to apply, the Supreme Court can reserve to itself the ability to set aside awards "at which five Members of the Court bridle."¹⁷⁷

The fact that state political systems have begun to consider

disproportionate in cases arising under federal law. See, e.g., *Ross v. Kan. City Power & Light Co.*, 293 F.3d 1041, 1048–49 (8th Cir. 2002) (applying *Gore* to a punitive damages award in a federal question case). In general, though, punitive damages in federal cases are controlled by statutes, which often contain either fixed multipliers (for example, treble damages statutes) or set specific caps (for example, 42 U.S.C. § 1981a(b)(3) (2000), for various intentional discrimination cases). Thus, these awards are unlikely to trigger judicial skepticism. With respect to state law-based claims, the Court's opinion in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* presupposes that federal courts should use the *Gore* analysis to review punitive damages in diversity suits. 532 U.S. 424 (2001); see also *infra* notes 210–14 and accompanying text. Finally, one recent study suggests that damages awards in diversity cases tend to be significantly lower than damages awards for corresponding claims in state court. See Eric Helland & Alexander Tabarrok, *The Effect of Electoral Institutions on Tort Awards*, 4 AM. L. & ECON. REV. 341 (2002). The authors attribute much of this difference to the fact that federal judges are appointed for life while state judges are elected. See *id.* Whatever the reason for the difference, its existence may mean that punitive damages awards in federal court are less likely to raise constitutional concerns.

175. *Gore*, 517 U.S. at 613. (Ginsburg, J., dissenting).

176. Under the famously abstruse *Rooker-Feldman* doctrine, federal courts other than the Supreme Court "possess no power whatever to sit in direct review of state court decisions." See *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 483 n.16 (1983) (citations omitted); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923). Authority to review state court decisions "is vested solely in [the U.S. Supreme] Court." *Asarco, Inc. v. Kadish*, 490 U.S. 605, 622 (1989).

177. *Gore*, 517 U.S. at 613 n.5 (Ginsburg, J., dissenting).

responses to the threat of excessive punitive damages awards not only reinforces the sense that the Supreme Court may not need a substantial amount of aid from lower federal courts, but may also point to other key differences between the criminal and civil contexts. Criminal sentences are the product, in substantial part, of laws enacted at the state level.¹⁷⁸ Moreover, given the nature of the crimes with which most defendants who might bring excessive sentence claims are charged, there is relatively little opportunity for a prosecutor to forum shop. By contrast, excessive punitive damages awards may be primarily a product of a relatively few, and far more localized, decision makers. Liberal personal jurisdiction rules permit plaintiffs in civil cases to seek out those plaintiff-friendly judges and juries. Jefferson County, Mississippi, for example, is a poor, rural county with fewer than 10,000 residents. But between 1995 and 2000, apparently more than 21,000 people were plaintiffs in the local court, many of them in blockbuster nationwide products liability suits of the kind that can generate the sort of punitive damages that concern the Supreme Court.¹⁷⁹ Recent empirical studies have suggested that, if there is a problem, it lies primarily in a small number of cases with staggering awards, rather than in a general increase in either the incidence or size of punitive damages awards, and that the problem is geographically concentrated, rather than nationwide.¹⁸⁰

178. Of course, there may be substantial variations within a state in prosecutorial charging patterns. See, e.g., Pam Belluck, *Nebraska Is Said to Use Death Penalty Unequally*, N.Y. TIMES, Aug. 2, 2001, at A15 (reporting on a Nebraska Crime Commission report showing that prosecutors in urban counties were more likely than their rural counterparts to seek the death penalty and were more likely to take death penalty cases to trial rather than accept plea bargains); Tamar Lewin, *Who Decides Who Will Die? Even Within States, It Varies*, N.Y. TIMES, Feb. 23, 1995, at A1 (describing significant intrastate variations in how often prosecutors seek the death penalty). Nonetheless, the maximum possible sentence is determined at the state level.

179. Robert Pear, *Mississippi Gaining as Lawsuit Mecca*, N.Y. TIMES, Aug. 20, 2001, at A1; see also George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 LA. L. REV. 825, 825 (1996) (suggesting a pattern of increasing punitive damages claims and awards in Alabama); Matthew W. Rearden, Note, *OEM or Non-OEM Automobile Replacement Parts: The Solution to Avery v. State Farm*, 28 FLA. ST. U. L. REV. 543, 547 (2001) (discussing how southern Illinois became the site of a series of major cases against insurance companies).

180. See, e.g., Eisenberg et al., *supra* note 130, at 745, 755–56; David Luban, *A Flawed Case Against Punitive Damages*, 87 GEO. L.J. 359, 360–62 (1998) (summarizing studies that show that punitive damages are awarded in very few cases and that the median punitive damages award, as opposed to the mean award—which is affected by a few very high awards—is somewhere

In an important sense, proportionality is about federalism. The states are the primary source for both criminal and tort law. There is relatively little constitutional limitation on the sort of behavior a state can criminalize or for which it can impose civil liability. At the same time, there is a significant territorial limitation on the reach of a state's power. This territorial limitation seems to have caused relatively little constitutional litigation in the criminal arena. But the recent punitive damages cases before the Court have involved an extraterritorial dimension. In *Campbell*, the plaintiffs presented evidence of State Farm's claims settlement and personnel practices nationwide, and the Court expressed concern that the case was "used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country."¹⁸¹ This was troubling both because it posed a risk that a defendant might be punished "for conduct that may have been lawful where it occurred" and because states generally lack "a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction."¹⁸² With respect to this latter principle, permitting the imposition of "extraterritorial" punitive damages created the possibility of "multiple," and unjustifiable, punitive damages awards, since state courts might give no weight to punitive damages awards imposed in other states.¹⁸³

And the cases implicate the national strand of federalism as well. Although the states are free to adopt different positions on how to impose punishment and on how much punishment to impose, there is some constitutional limit on the degree of permissible deviation from national norms. The interjurisdictional analyses required by the third *Solem* factor and the third *Gore* guidepost tap into this idea. The judge who sentenced Larry Helm to life in prison¹⁸⁴ and the jury that awarded Ira Gore \$4

in the mid-five figures); Neil Vidmar & Mary R. Rose, *Punitive Damages by Juries in Florida: In Terrorem and in Reality*, 38 HARV. J. ON LEGIS. 487, 512-13 (2001) (finding that, with the exception of asbestos cases, Florida juries were neither awarding punitive damages in products liability or other nonintentional misconduct cases, nor imposing large awards in cases where damages were imposed).

181. *State Farm Mut. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1521 (2003).

182. *Id.* at 1522.

183. *Id.* at 1523; see also Jeffries, *supra* note 131, at 140-47 (discussing this problem as a central reason for imposing constitutional limitations on the award of punitive damages).

184. See *supra* notes 18-34 and accompanying text.

million in punitive damages for a cosmetic flaw in his car's paint job¹⁸⁵ imposed punishments that are *descriptively* out of line with the mine run of judgments. The proportionality principle accords normative constitutional force to these deviations. Institutional factors may affect quite profoundly the way the Court thinks about how to control the level of criminal punishment and civil sanctions. To understand this point more fully requires considering how the Court has treated one of the most important institutional actors in the adjudicatory process: the jury.

II. THE ALLURE AND DANGER OF THE JURY

Although the Rehnquist Court has significantly relaxed the substantive constitutional constraint on criminal sentences, it has revived a key procedural limitation. In *Apprendi v. New Jersey*,¹⁸⁶ the Supreme Court held that any fact that increases the authorized sentence a defendant faces must be proved beyond a reasonable doubt to a jury. This decision has already spawned a torrent of litigation¹⁸⁷ and the Supreme Court's subsequent decisions seem likely to produce yet more litigation.¹⁸⁸

185. See *supra* notes 139–52 and accompanying text.

186. 530 U.S. 466, 490 (2000). There is a rich and growing literature on *Apprendi* and its progeny. For some leading examples, see Joseph L. Hoffman, *Apprendi v. New Jersey: Back to the Future?*, 38 AM. CRIM. L. REV. 255 (2001); Nancy J. King & Susan R. Klein, *Essential Elements*, 54 VAND. L. REV. 1467 (2001) [hereinafter King & Klein, *Essential Elements*]; Nancy J. King & Susan R. Klein, *Apres Apprendi*, 12 FED. SENTENCING REP. 331 (2000).

187. The Administrative Office of the U.S. Courts attributed a thirty-six percent increase in the number of motions by federal prisoners seeking to vacate their sentences and a seventy-seven percent increase in successive habeas petitions during 2001 to inmates bringing *Apprendi*-related claims. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 2001 JUDICIAL BUSINESS 17 (2001), at <http://www.uscourts.gov/judbus2001/contents.html> (last visited Jan. 20, 2004). In *Ring v. Arizona*, Justice O'Connor stated that "[a] survey of the petitions for certiorari [the Supreme Court] received in the past year indicates that 18% raised *Apprendi*-related claims." 122 S. Ct. 2428, 2449 (2002) (O'Connor, J., dissenting).

188. *Ring*, 122 S. Ct. at 2428, is particularly likely to spawn more litigation. This opinion cast doubt on the death sentences of roughly 700 defendants on death row in nine states where judges were involved with making findings regarding the aggravating factors that justify imposing a death sentence. See *id.* at 2448–49 (O'Connor, J. dissenting). In addition, a statement by Justice Thomas in *Apprendi* may cast constitutional doubt on a huge number of sentences. See 530 U.S. at 520 (Thomas, J., concurring). Justice Thomas criticized the position taken by the five-Justice majority of which he formed a part in *Almendarez-Torres v. United States*, 523 U.S. 224, 239–40 (1998), upholding the treatment of recidivism as a "sentencing factor" that need not be proved

For our purposes, the central point of the *Apprendi* line of cases can be stated simply: The Court held that the Constitution imposes procedural constraints on the contemporary practice of enhancing a defendant's sentence on the basis of particular details about his offense.¹⁸⁹ The Due Process Clause requires that these facts be proved proven beyond a reasonable doubt, rather than by some lower standard, such as preponderance of the evidence.¹⁹⁰ And the Sixth Amendment requires that these facts be proved to a jury, rather than found by a sentencing judge.¹⁹¹

Apprendi itself involved a fairly common statutory scheme. Early one morning, Charles Apprendi fired his gun into the home of a black couple who had recently moved into a previously all-white neighborhood.¹⁹² He was charged in a twenty-three-count indictment with a litany of first-, second-, third-, and fourth-degree offenses.¹⁹³ Ultimately, he agreed to a plea in which the top count was a second-degree offense—possession of a firearm for an unlawful purpose.¹⁹⁴ Normally, second-degree offenses are punishable by imprisonment for between five and ten years.¹⁹⁵ But New Jersey also had an "extended term" law.¹⁹⁶ Under this law, defendants who met certain criteria, such as being persistent offenders, committing the crime while being involved in gang activity, committing the crime against certain particularly vulnerable victims, or, as in Charles Apprendi's case, committing the crime "with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity," became eligible for longer sentences.¹⁹⁷ In the case of second-degree offenses, instead of facing five to ten years, defendants faced terms of ten to twenty years.¹⁹⁸ Pursuant to the extended term law, the judge sentenced Apprendi to twelve years' imprison-

beyond a reasonable doubt to the jury. *See Apprendi*, 530 U.S. at 520 (Thomas, J., concurring).

189. *Apprendi*, 530 U.S. at 486.

190. *Id.* at 490.

191. *Id.*

192. *Id.* at 466.

193. *Id.* at 469–70.

194. *See* N.J. STAT. ANN. § 2C:39-4(a) (West 1995).

195. *See id.* § 2C:43-6(a)(2) (West 1995).

196. The current version of the law appears at N.J. STAT. ANN. § 2C:44-3 (West Supp. 2003).

197. *See id.* § 2C:44-3(e) (West Supp. 2003) (repealed 2001).

198. *See id.* § 2C:43-7(a)(3) (West Supp. 2003).

ment after concluding, by a preponderance of the evidence, that Apprendi had acted with racial bias.¹⁹⁹

The *Apprendi* Court held the New Jersey extended term law was unconstitutional insofar as it enhanced sentences for factors other than the existence of prior criminal convictions.²⁰⁰ Thus, it overturned the trial judge's decision to sentence Apprendi to twelve years' imprisonment based on his finding, by a preponderance of the evidence, that Apprendi had acted with a racially intimidating purpose.²⁰¹ The *Apprendi* principle has been extended to other enhancing factors, such as higher sentences based on the quantity or type of drugs sold, the use of a weapon in the commission of a particular offense, or the presence of vulnerable victims.²⁰²

With respect to one category of cases—prosecutions where the facts justifying an enhanced sentence are relatively objective—it may well be that the most significant long-term effect of *Apprendi*, if it has legs at all, lies not so much in the greater difficulty of persuading juries, rather than judges, to find the facts justifying an enhanced sentence, but in the higher burden of proof required by the Due Process Clause.²⁰³ But with respect to enhancing factors that are less clearly objective—such as a defendant's particular moral culpability—*Apprendi* may actually provide some protection against “oppression and tyranny on the part of rulers.”²⁰⁴

Consider, for example, the question of capital punishment, to which the Court extended *Apprendi*'s reasoning in *Ring v. Arizona*.²⁰⁵ A central question in capital cases is the presence of

199. *Apprendi*, 530 U.S. at 466.

200. *Id.* at 490. In *Almendarez-Torres v. United States*, the Court had held that recidivism was a “sentencing factor” that need not be presented to the jury. 523 U.S. 224, 247 (1998). Justice Thomas's concurrence in *Apprendi* casts doubt on the continued vitality of *Almendarez-Torres*. See *supra* note 188.

201. *Apprendi*, 530 U.S. at 466.

202. See, e.g., King & Klein, *Essential Elements*, *supra* note 186, at 1554–55.

203. In this class of cases, presumably the prosecutor could easily have pleaded the facts in the indictment and proved them to the jury with the same ease with which he presented them to the judge had he been aware of the *Apprendi* rule at the time. Thus, while *Apprendi* may create a substantial problem, it may be a transitional one.

204. *Apprendi*, 530 U.S. at 477 (quoting 2 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540–41 (4th ed. 1873)).

205. 122 S. Ct. 2428 (2002). *Ring* overruled *Walton v. Arizona*, 497 U.S. 639 (1990), in which the Supreme Court had upheld Arizona's practice of having a judge, rather than a jury, determine the presence of the aggravating factors

aggravating factors that make the defendant particularly morally culpable and deserving of death. Prior to *Ring*, most states already lodged the decision whether to sentence a defendant to death or some lesser penalty in the jury.²⁰⁶ But four states—Delaware, Alabama, Florida, and Indiana—permitted judges to override the jury's initial determination.²⁰⁷ A study of decisions between 1976 and 1995 in the latter three states showed that judges were three times more likely to override a jury's life sentence than they were to override a jury's death sentence in favor of life.²⁰⁸ Roughly a quarter of the inmates on Alabama's death row originally received a life sentence from the jury.²⁰⁹ So it may turn out that *Apprendi* exercises some constraint on the level of punishment the state can inflict.

But the Court's decision in *Harris v. United States*²¹⁰ removes the possibility that *Apprendi* might be used to address the troubling problem raised by *Harmelin*: that mandatory minimum sentences may impose excessive punishment.²¹¹ In *Harris*, a fractured Court held that *Apprendi* did not apply to facts that increase the mandatory minimum sentence a defendant must serve, as long as those facts do not extend the sentence beyond the otherwise applicable statutory maximum.²¹² Thus, as long as a legislature is willing to authorize a particular punishment for all defendants convicted of a crime with

necessary to justify imposing a death sentence, rather than a sentence of life imprisonment. *Ring*, 122 S. Ct. at 2431, 2443. *Ring* concluded that *Walton* was inconsistent with *Apprendi* (rejecting the *Apprendi* Court's insistence that the two cases were not inconsistent with one another, see 530 U.S. at 496) because the jury's verdict, standing alone, could not authorize a death sentence. *Ring*, 122 S. Ct. at 2432, 2443. Thus, a defendant became eligible for the death penalty on the basis of facts found by the judge, rather than the jury. *Id.* at 2432.

206. Five states—Arizona, Colorado, Idaho, Montana, and Nebraska—used sentencing schemes of the kind the Court rejected in *Ring*. See 122 S. Ct. at 2449 (O'Connor, J., dissenting).

207. See *id.* at 2449 (O'Connor, J., dissenting).

208. Amelia Gruber, *Judge and Jury on the Sentence of Death*, at <http://www.medill.northwestern.edu/docket/01-8099fx.html> (last visited Jan. 20, 2004).

209. Andy Miara, *The Equal Justice Initiative of Alabama: Breaking Down Walls of Irrationality*, at <http://www.soros.org/ideas/fall01/breaking.html> (last visited Jan. 20, 2004). For an extensive discussion of the evidence regarding judicial overrides, see JAMES LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT 405–06 (Feb. 11, 2002), at <http://justice.policy.net/cjreform/dpstudy>.

210. 536 U.S. 545 (2002).

211. See *supra* notes 36–40 and accompanying text.

212. *Harris*, 536 U.S. at 568–69.

particular elements, it can cabin judicial discretion by requiring the judge, upon additional findings, to impose a particular sentence within the previously authorized range.²¹³

In contrast to the criminal cases, where the current Court has revived the central role of the jury, the Court's punitive damages cases have evinced skepticism about the jury's role. Most recently, in *Cooper Industries v. Leatherman Tool Group*, the Court held that federal courts of appeals should review district court determinations of the constitutionality of punitive damages awards de novo, rather than under the dramatically less demanding abuse-of-discretion standard.²¹⁴ While the decision imposes a formally symmetric rule—an appellate court might, after all, just as easily reinstate a jury verdict overturned by a trial judge as overturn a verdict sustained by the trial judge²¹⁵—the Supreme Court clearly assumed that de novo review would provide two opportunities to bring excessive punitive damages awards into line.²¹⁶

In explaining its reasoning, the Court pointed to the relative institutional competence of trial and appellate judges.²¹⁷ While trial judges might enjoy “somewhat superior vantage over courts of appeals” with respect to the first *Gore* guidepost—the gravity or reprehensibility of the defendant's conduct—appellate judges were equally, if not better positioned to

213. As Bill Stuntz has pointed out, the institutional arrangements of the criminal prosecution system make legislatures quite willing to authorize sentences far in excess of the sentences they contemplate actually being imposed in the mine run of cases, since they are secure in the knowledge that prosecutorial discretion will limit the cases in which the harshest sentences are actually sought. See Stuntz, *supra* note 60.

214. 532 U.S. 424, 443 (2001).

215. In fact, that has occurred with respect to state appellate review. In *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Utah Supreme Court reinstated a \$145 million punitive damages award (in a case where the plaintiffs' out-of-pocket loss had been \$250,000 and the jury had awarded \$2.6 million in compensatory damages) that the trial court had previously reduced to \$25 million. 65 P.3d 1134, 1171–72 (Utah 2001), *rev'd*, 123 S. Ct. 1513, 1519 (2003). Similarly, in *Williams v. Phillip Morris*, the court considered a jury verdict on a fraud claim of \$500,000 in compensatory damages and \$79 million in punitive damages. 48 P.3d 824, 842 (Or. Ct. App. 2002). The trial court ordered a remittitur to \$32 million, but the court of appeals, finding nothing to raise the “judicial eyebrows” in the findings of reprehensibility or the original ratio, ordered reinstatement of original jury punitives of \$79 million. *Id.* at 841.

216. See *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 435–36 (2001) (discussing reasons in support of de novo review).

217. *Id.* at 440.

conduct the broad legal comparison demanded by the third guidepost, namely an analysis of the civil and criminal penalties provided for the defendant's conduct.²¹⁸

The Court also drew an explicit comparison to the criminal context that suggests why its perspective on the jury's role differs in criminal and civil cases:

Legislatures have extremely broad discretion in defining criminal offenses and in setting the range of permissible punishments for each offense, *Solem v. Helm*, 463 U.S. 277, 290 (1983). Judicial decisions that operate *within* these legislatively enacted guidelines are typically reviewed for abuse of discretion. . . . [Cf. *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000) (it is permissible "for judges to exercise discretion . . . in imposing a judgment within the range prescribed by statute").

As in the criminal sentencing context, legislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards. A good many States have enacted statutes that place limits on the permissible size of punitive damages awards. When juries make particular awards within those limits, the role of the trial judge is "to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered." *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989).²¹⁹

Criminal juries are already circumscribed in two important ways. First, in the absence of common-law crimes, the jury's ability to punish is constrained by a legislatively enacted statutory maximum. Thus, assuming that the statutory maximum is itself constitutionally unobjectionable, the only risk of excessive punishment comes from the imprecision of the statute.²²⁰ In addition, the state makes a second politically accountable decision about the defendant's potential punishment when the prosecutor makes her charging decision. A prosecutor might choose not to charge enhancing factors or the most serious offense in cases where the defendant, although he fits the letter of the statute, lacks the moral culpability to warrant a higher penalty. By contrast, in the absence of statutory ratio limits or damages caps, civil juries are not constrained by legislative or executive decisions.²²¹ Their decisions can be skewed upward as well as

218. *Id.*

219. *Cooper Indus.*, 532 U.S. at 432–33 (some citations omitted).

220. See *supra* note 58 and accompanying text.

221. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S. Ct. 1513, 1520 (2003) (noting that "[a]lthough these awards serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding").

downward. They are not exercising their discretion within a carefully defined sphere. It is thus not entirely surprising that the Supreme Court would see a greater appropriate role for the judicial branch in this arena.

CONCLUSION

The Supreme Court's decisions over the past twenty years with respect to constitutional limits on sentences and damages seem at first in some tension with one another. Having embraced and then largely abandoned a judicially enforceable constitutional requirement of proportionality under the Eighth Amendment in criminal cases, the Court has articulated an increasingly robust requirement of proportionality under the Due Process Clause in punitive damages cases. Differences between the two kinds of litigation may, however, explain why proportionality review is relatively more attractive in punitive damages cases. First, the Court may perceive the existence of more objective indicia of excessiveness in the punitive damages cases. Second, the punitive damages cases may raise reverse federalism concerns that are absent from criminal prosecutions. Third, the Supreme Court may think the level of federal intrusion can be better controlled in the civil context. And finally, criminal cases may involve sufficient oversight by politically accountable actors. Although the Court may still be merely "pricking the lines" when it comes to the question of when sentences are excessive or punitive damages are grossly disproportionate, we can now step back and see a pattern to its overall approach.