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Some Thoughts on Proportionality

The framers of the Oregon Constitution gave little reported attention to many of the provisions that they included in that document. Among the provisions that did not generate debate was the "proportionality" requirement of article I, section 16. That provision provides that "all penalties shall be proportioned to the offense."[1] The framers, who used the Indiana Constitution of 1851 as the source for much of the Oregon Constitution—including article I, which the framers identified as a "Bill of Rights"—took both the proportionality requirement and the prohibition on "cruel and unusual punishment" from that document.[2] The section containing these provisions was in the first draft of the Oregon Constitution that was introduced at the

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[1] Article I, section 16 provides, in part: "Excessive bail shall not be required, nor excessive fines imposed. Cruel and unusual punishments shall not be inflicted, but all penalties shall be proportioned to the offense." OR. CONST. art. I, § 16.

The use of the conjunction "but" between the prohibition on cruel and unusual punishments and the proportionality requirement raises the question whether the latter is intended to contrast with or be an exception to the former. However, the Oregon Supreme Court appears to be correct in concluding that, because the two clauses refer to different concepts, each of which could stand alone as a constitutional requirement, the clauses "should be interpreted independently, although the interpretation of one may inform the interpretation of the other." *Wheeler*, 343 Or. at 656, 175 P.3d at 441. Thus, as used in article I, section 16, the word "but" appears "simply [to] be serving its ordinary function as a conjunction, *viz.*, joining the two clauses into a single sentence without purporting to define the particular relationship between them—whatever it may be." *Id.*

[2] THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857, at 468 (Charles Henry Carey ed., 1926); W.C. Palmer, *The Sources of the Oregon Constitution*, 5 OR. L. REV. 200, 201 (1926).

constitutional convention. Although it apparently was omitted (perhaps by mistake) at one point in the proceedings, it reappeared and was included in the final draft—all without reported discussion.[3]

Yet the concept of proportionality in criminal punishment has a philosophical heritage dating back millennia and a well-documented history as a constitutional principle, beginning with the earliest American state constitutions. This Article reviews the ancient concept of proportionality in punishment and turns to the more systematic application of this concept in the mid-18th century by Cesare Beccaria and William Blackstone and to current discussions of "just deserts" as a theory of criminal punishment. The Article then returns to the historical development of the constitutional requirement that criminal punishments be proportional to the offense, both in the explicit form in which the requirement is found in several state constitutions and as some decisions have interpreted the prohibition against cruel and unusual punishment found in the Eighth Amendment and in many state constitutions. With this background, the Article considers the Oregon cases interpreting the proportionality provision of article I, section 16, and concludes with an attempt to outline the approach these cases take in interpreting and applying Oregon's proportionality provision.

I
THE CONCEPT OF PROPORTIONALITY

The idea that there should be some proportional relationship between a crime and the crime's punishment dates back at least to the Code of Hammurabi and the Mosaic codes that appear in the Old Testament.[4] In the familiar words of the Book of Exodus, "[T]hou shalt give life for life, Eye for eye, tooth for tooth . . . ."[5] This form of proportionality suggests that a punishment is appropriate if it is similar in magnitude to the crime. It rests on the intuitive moral notion that one "fair" means of punishing the wrongdoer is to inflict the same kind and degree of harm that was inflicted on the victim. It furthers one significant purpose of criminal law—retribution against the wrongdoer for the harm he or she caused the innocent victim and society as a whole. Although the "eye for an eye" approach has

3 Claudia Burton & Andrew Grade, *A Legislative History of the Oregon Constitution of 1857 – Part I*, 37 WILLAMETTE L. REV. 469, 521–26 (2001).

4 Jeremy Waldron, *Lex Talionis*, 34 ARIZ. L. REV. 25, 26 (1992).

5 *Exodus* 21:23–24 (King James).

serious limitations in practice,[6] its common sense appeal to earlier societies is obvious, and continues to resonate as a principle for setting penalties for criminal offenses. Indeed, the "eye for an eye" proportionality principle is at least one rationale underlying the U.S. Supreme Court's 2008 decision in *Kennedy v. Louisiana*, holding that the imposition of the death penalty for child rape is unconstitutional.[7]

Although the traditional "eye for an eye" formulation of proportionality, generally referred to as *lex talionis*, often is associated with the *retributive* purpose of punishment—you inflicted harm on an innocent person; the state (or society) will now have retribution against you by inflicting the same harm on you—it also is consistent with other purposes of punishment. An "eye for an eye" is a powerful *deterrent* to criminal conduct and a means of *incapacitating* a criminal in a way that prevents recidivism—both important concerns in protecting public safety.[8] Thus, proportionality may play a role even in a more utilitarian view of criminal punishment.[9]

A moment's reflection, however, suggests that the most basic "eye for an eye" formulation that focuses solely on the *injury* caused by the wrongdoer, is too simplistic a means of establishing a "proportional"

[6] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 13 (1769) ("[T]here are very many crimes, that will in no shape admit of these penalties, without manifest absurdity and wickedness. Theft cannot be punished by theft, defamation by defamation, forgery by forgery, adultery by adultery, and the like."); *see also* Alice Ristroph, *Proportionality As a Principle of Limited Government*, 55 DUKE L.J. 263, 281 (2005).

[7] 128 S. Ct. 2641, 2646 (2008). The Court held that the death penalty "must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution." *Id.* at 2650 (internal quotation marks omitted). Although the Court based its decision in substantial part on what it described as "objective indicia of consensus against making [the crime of child rape] punishable by death," *id.* at 2651, the imposition of the death penalty for a crime that did not cause death obviously played a significant role in the Court's decision. *See id.* at 2658 ("Evolving standards of decency that mark the progress of a maturing society counsel us to be most hesitant before interpreting the Eighth Amendment to allow the extension of the death penalty, *a hesitation that has special force where no life was taken in the commission of the crime*.") (emphasis added).

[8] This point is carefully made by Alice Ristroph, who identifies Cesare Beccaria and Jeremy Bentham as supporting proportionality in punishment as a means of achieving the utilitarian end of preventing future criminal conduct. Ristroph, *supra* note 6, at 272–79.

[9] Ristroph states that proportionality does not serve the utilitarian purpose of incapacitation. *Id.* at 277. However, at least as practiced in ancient societies, the loss of a hand or an eye would certainly seem to affect the capacity to engage in later criminal conduct. She is on firmer ground in arguing that the penological goal of *rehabilitation* seems to lack an internal proportionality principle. *Id.*

penalty.[10] Certainly, the wrongdoer's *mens rea* and the *actus reus*, as well as the resulting injury, are relevant in determining whether a punishment is appropriately "proportional."[11] If the wrongdoer did not intend to kill, for example, but was only reckless in engaging in the conduct that led to the victim's death, the wrongdoer may not "deserve" the death penalty. And if the killing was in self-defense, the killer may not be guilty of a crime at all. For these reasons, the underlying moral foundation of "proportional" punishment ordinarily requires at least some consideration of the circumstances in which the conduct occurred and the culpability of the defendant.[12] These concerns quickly move the proportionality concept from an "eye for an eye" to a focus on the proportionality between the *crime* or *offense* —a concept that includes the mental state of the wrongdoer, other circumstances of the crime, and the victim's injury—and the punishment. This is the more typical modern formulation, and it appears in the notion that the punishment should "fit the crime" or, as article I, section 16 of the Oregon Constitution puts it, that the penalty must be "proportioned to the offense."

In some formulations, particularly those based on a more utilitarian view of punishment, a full proportionality inquiry takes into consideration individual characteristics of the offender. What punishment imposed on *this* offender would be proportional to *his or her* crime? In addition to serving society's prerogative of retribution

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[10] Early legal systems often focused exclusively on the victim's injury and the act or even the object that directly caused the injury. Greek, Judaic, and Babylonian law provided that if an animal or an inanimate object caused the death of a person, the animal or object would be destroyed or cast beyond the country's borders. *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 8, 10–11, 19 (1881).

[11] *See* BLACKSTONE, *supra* note 6, at 13 ("[I]n general, the difference of persons, place, time, provocation, or other circumstances, may enhance or mitigate the offence; and in such cases retaliation can never be a proper measure of justice.").

[12] This aspect of proportionality appears to underlie, at least in part, the U.S. Supreme Court's decisions that the Eighth Amendment prohibits the execution of a person convicted of murder who is not mentally competent. Atkins v. Virginia, 536 U.S. 304 (2002). Or the execution of a person who was under the age of eighteen at the time he or she committed the crime. Roper v. Simmons, 543 U.S. 551 (2005). As in *Kennedy*, the Court in those cases examined whether different jurisdictions permitted the death penalty in order to determine whether such a punishment was "unusual," but also focused on the way the defendants' mental capacity (in *Atkins*) or age (in *Roper*) affected their culpability. This focus suggests that the Court was concerned that the death penalty, even if proportionate for the crime of murder, might be disproportionate for a murder committed by a person not mentally competent or by a minor.

against the offender for the crime, what punishment would deter *this* offender from future criminal conduct?[13]

Despite its ancient pedigree, the concept of proportionality as a factor limiting the severity of criminal punishments played little role in the criminal justice system in England in the Middle Ages. Typical punishments included branding, banishment, fines, and whipping.[14] English criminals probably would have preferred the "eye for an eye" standard since, by the time Blackstone was writing in the 1760s, English law prescribed the death penalty for more than 160 different crimes, ranging from murder to hunting on certain lands or cutting down certain trees.[15] It was against this background that Blackstone forcefully asserted the need for proportion between a crime and the punishment. Blackstone followed Beccaria who, writing in the Enlightenment tradition and a few years before Blackstone,[16] argued against the indiscriminate application of the death penalty and in favor of considering aggravating and extenuating circumstances in determining criminal punishments, as well as whether a particular penalty would be effective in preventing future crimes.[17]

Blackstone asserted that punishment should be proportional to the offense and based on the social ends of criminal punishment generally: "The method . . . of inflicting punishment ought always to be proportioned to the particular purpose it is meant to serve, and by no means to exceed it . . . ."[18] For Blackstone, the primary purpose of punishment was the prevention of future crime. This would be accomplished by penalties that led to the "amendment of the offender himself," "by deterring others by the dread of his example from offending in the like way," and "by depriving the party injuring of the power to do future mischief"—by death, exile, slavery, or life imprisonment.[19] He criticized *lex talionis* for punishments that were too severe in some circumstances while too lenient in others;

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[13] *See* HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 264–69 (1968).

[14] BLACKSTONE, *supra* note 6, at 370; *see also* 11 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 556–80 (1938).

[15] BLACKSTONE, *supra* note 6, at 18–19, 244.

[16] CESARE BECCARIA, ON CRIMES AND PUNISHMENTS (Henry Paolucci trans., 1963) (1768).

[17] BLACKSTONE, *supra* note 6, at 15–16.

[18] *Id.* at 12.

[19] *Id.* at 11–12. For Blackstone, retribution—"atonement or expiation for the crime committed"—was not the purpose of "human punishment," "for that must be left to the just determination of the supreme being." *Id.* at 11.

Blackstone urged a more rational application of the proportionality principle that took into account the offender's mental state, the victim's circumstances, and other contextual factors.[20] He also severely criticized England's reliance on the death penalty as a punishment for so many crimes:

> It is a kind of quackery in government, and argues a want of solid skill, to apply the same universal remedy, the *ultimum supplicium,* to every case of difficulty. It is, it must be owned, much *easier* to extirpate than to amend mankind: yet that magistrate must be esteemed both a weak and a cruel surgeon, who cuts off every limb, which through ignorance or indolence he will not attempt to cure.[21]

Blackstone argued that the legislature should adopt punishments that were proportional to the offense, based on the considerations mentioned above, but he recognized that "there cannot be any regular or determinate method of rating the quantity of punishments for crimes, by any one uniform rule; but they must be referred to the will and discretion of the legislative power."[22] And, again by citing Beccaria, he called for an approach that looks similar to the kinds of modern sentencing guidelines used throughout the United States:

> [I]n every state a scale of crimes should be formed, with a corresponding scale of punishments, descending from the greatest to the least: but, if that be too romantic an idea, yet at least a wise legislator will mark the principal divisions, and not assign penalties of the first degree to offences of an inferior rank.[23]

Blackstone distinguished his argument for proportionality from what he saw as the irrationality of *lex talionis* and overreliance on the death penalty and articulated the purposes of punishment as fundamentally utilitarian. But his concept of proportionality was consistent with the retributive purpose of criminal law: is not the moral aspect of criminal punishment best served by a punishment that is proportional to the seriousness of the offense? Thus, both those in favor of a utilitarian approach to punishment and those focused more on retribution for criminal acts could support Blackstone's argument that punishments should be proportioned to the offense.

In England, Blackstone's views on proportionality became the basis for an exclusively utilitarian view of punishment in the works of

[20] *Id.* at 12–18.

[21] *Id.* at 17–18.

[22] *Id.* at 14–15.

[23] *Id.* at 18.

Austin and Bentham. Bentham, for example, explicitly departed from the idea of a moral or retributive aspect of punishment. Rather, punishment for past crimes would be calibrated to prevent future crimes through reformation of the defendant, deterrence, or incapacitation.[24]

Meanwhile, in the United States, Blackstone's views—and sometimes his very words—about proportionality in sentencing were finding their way into the new state constitutions, as we will discuss in greater detail below. The framers of both the U.S. Constitution and early state constitutions (often the same people) were aware of the thinking of Blackstone, Beccaria, and others with respect to proportionality in criminal punishment and the ends the criminal justice system should serve. Ronald Pestritto argues that while some of the framers, particularly those most closely associated with Enlightenment thought, like Jefferson, took a utilitarian approach to criminal punishment, others, such as Madison and Washington, emphasized retribution and the moral imperative of punishment for wrongdoing as a critical component of criminal justice.[25] Although the framers' views on criminal punishment may have differed, the concept of proportionality was well known to them and played an important part in their constitution drafting in the late 1700s.

More than 200 years later, the debate over the principles of criminal punishment continues. Public opinion toward crime and punishment has shifted back and forth. The variables underlying these shifts include economic and immigration trends, social dislocation, and underlying crime rates, along with the concepts of retribution, reformation, and public safety, all playing varying roles in criminal law. But, through the middle of the twentieth century, policy makers and the public generally embraced a rehabilitation-based approach to punishment.[26] This approach favored punishments that were intended to reform criminals and deter future crimes, rather than to mete out retribution against the wrongdoer. Indeed, from statehood until 1996, the Oregon Constitution stated that "[l]aws for the punishment of crime shall be founded on the principles of reformation, and not of vindictive justice."[27] A key aspect of the

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24 PACKER, *supra* note 13, at 40–45.

25 RONALD J. PESTRITTO, FOUNDING THE CRIMINAL LAW: PUNISHMENT AND POLITICAL THOUGHT IN THE ORIGINS OF AMERICA (2000).

26 ARTHUR W. CAMPBELL, LAW OF SENTENCING 8–10 (3d ed. 2004).

27 OR. CONST. art. I, § 15 (1857). This provision currently reads, "Laws for the punishment of crime shall be founded on these principles: protection of society, personal

reformative or rehabilitative approach was indeterminate sentencing, in which statutes gave the sentencing judge broad discretion in setting the length of sentence, using various factors related to the circumstances of the crime and the offender. Moreover, parole boards often were given discretion to release incarcerated criminals based on behavior in prison and an assessment of the individual's likelihood of re-offending.[28]

By the 1970s, however, disenchantment with the rehabilitation-based approach of indeterminate sentencing spread, along with concerns about rising crime rates and inconsistent and arbitrary sentencing patterns.[29] Some criminal justice theorists reinvigorated a morals-based retributivist theory of sentencing, which became known as the "just deserts" approach. This theory responded to what some observers perceived as the inequality and harshness of utilitarian sentencing, as well as to the popular concern that the criminal justice system was, in many instances, unable to assess when "reformation" had occurred or when an offender could be released, consistent with public safety.[30] Scholars argued that, under a utilitarian scheme, some offenders were forced "to suffer, unequally, to achieve [the common] good."[31] In contrast, just deserts centered on morality: the criminal has done wrong, and the state must punish him to the extent of his moral culpability. Presumably then, the criminal "gets what he deserves"—no more, no less.

Just deserts proponents argued that the appropriate focus of sentencing is the defendants' moral culpability for the *prior* acts committed. This is in contrast to utilitarians who emphasized individual characteristics to determine the possible *future* acts of defendants. By concentrating on the blameworthiness of the defendants, they maintained, equality in sentencing could be achieved because similar acts would merit similar blame.[32] Proponents also

responsibility, accountability for one's actions and reformation." OR. CONST. art. I, § 15 (2008).

28 CAMPBELL, *supra* note 26, at 10; LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 159–63, 304–05 (1993).

29 FRANCIS A. ALLEN, THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE (1981); CAMPBELL, *supra* note 26, at 10–17; FRIEDMAN, *supra* note 28, at 305–09.

30 *See* Robert Martinson, *What Works? Questions and Answers About Prison Reform*, 35 PUB. INT. 22, 25 (1974).

31 RICHARD G. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 15 (1979).

32 *Id.* at 17.

claimed that just deserts better comported with notions of proportionality—albeit "rough" proportionality—than did indeterminate sentencing. Just deserts theory, by focusing on the offense rather than the offender, required proportionality between crimes (more serious crimes merited more serious punishment) and in determining the ultimate magnitude of punishment for each particular crime (the severity of punishment would reflect the seriousness of the crime).[33]

Norval Morris's "limited retributivism" theory, partially adopted by the tentative draft of the new Model Penal Code on sentencing,[34] answers questions about how one determines the seriousness of any given crime by modifying just deserts theory. Under Morris's scheme, just deserts considerations, based on society's views of blameworthiness and retribution, frame the maximum and minimum sentences available for any given crime, while utilitarian considerations determine the specific sentence within that range.[35] To borrow from the U.S. Supreme Court,[36] Morris's theory attempts to avoid, at least, "grossly disproportionate" sentences. Opponents of the Model Penal Code draft argue that the focus on blameworthiness tilts sentencing away from public safety as a purpose to guide sentencing, leaving primarily retribution, with a constrained form of proportionality, as the only limiting principle.[37]

As rehabilitation-based theories of criminal sentencing gave way to a more "just deserts," morals-based approach, state and federal legislatures and courts were also making changes in actual sentencing practices. Indeterminate sentences, which had predominated for

[33] *Id.* at 27–28 (citation omitted).

[34] MODEL PENAL CODE: SENTENCING § 1.02(2), Reporter's Note at 30–33 (tentative draft No. 1, 2007). The drafters decided to use "proportionality" because "the word 'retribution' in recent years has become ideologically charged." *Id.* at 31. For a trenchant critique of the revised Model Penal Code draft, see J. Michael H. Marcus, *Responding to the Model Penal Code Sentencing Provisions: Tips for Early Adopters and Power Users*, 17 S. CAL. INTERDISC. L.J. 67 (2007).

[35] The Model Penal Code draft thus articulates the first "purpose" of the sentencing provisions as "to render sentences in all cases within a range of severity proportionate to the gravity of offenses, the harms done to crime victims, and the blameworthiness of offenders." MODEL PENAL CODE: SENTENCING § 1.02(2)(a)(i) (tentative draft No. 1, 2007). The draft then states that utilitarian goals, such as "offender rehabilitation" and "incapacitation of dangerous offenders" should be pursued "when reasonably feasible," but only within the "boundaries of proportionality" previously identified. *Id.* § 1.02(2)(a)(ii).

[36] Rummel v. Estelle, 445 U.S. 263, 271 (1980).

[37] Marcus, *supra* note 34, at 72–83.

decades, gave judges broad discretion in sentencing and parole boards similar discretion in release decisions. That model was replaced, in many states and in the federal courts, with "determinate" sentences.[38] Determinate sentencing schemes often included a matrix or grid that established a presumptive sentence based on the severity of the crime and the defendant's criminal history, with a possible increase or decrease in the presumptive sentence based on a variety of identified aggravating or mitigating circumstances.[39] These sentencing schemes received support from across the political spectrum, in part because they were perceived as a means to reduce disparities in sentencing practices among judges and prevent judges from discriminating (on the basis of race or other factors) in the sentencing of particular defendants.[40] Sentencing grids and guidelines, in listing crimes by level of severity and setting mandatory or presumptive punishments based on those levels, recall the rationality and proportionality in criminal punishment advocated by Blackstone and Beccaria.[41]

As we have seen, at its most general, the concept of proportionality can be used to justify approaches to punishment as old (and as blunt) as *lex talionis* and as current as the modified "just deserts" theories advanced by Norval Morris and included in part in the tentative draft of the revised sentencing provisions of the Model Penal Code. More important, a concern with proportionality in sentencing is consistent with both retributive and utilitarian views of the purposes of punishment—the two principal theoretical justifications for criminal punishment.[42] Indeed, although it is beyond this Article's narrower

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[38] CAMPBELL, *supra* note 26, at 10–26, 105–14.

[39] *Id.* at 123–34.

[40] *Id.* at 11–12. As Campbell points out, "the articulated hopes for determinacy were varied and often contradictory," with some believing that determinate sentencing would lead to more lenient sentences, while others thought that the result would be more severe sentences. *Id.* at 16.

[41] Although the sentencing guidelines that emerged in the 1980s clearly were "rational" and "proportional" in the sense used by Blackstone and Beccaria, these characteristics were undermined in the 1990s by the widespread adoption of "three strikes you're out" provisions requiring life imprisonment for a third conviction (for certain crimes) and mandatory minimum sentences for many specific offenses. *Id.* at 20, 114–23. These statutes often were adopted without regard for the gradations established in the existing sentencing guidelines.

[42] Although retributive and utilitarian justifications for punishment often are seen as exclusive and in conflict, forty years ago Herbert Packer persuasively argued that a satisfactory theory of punishment must include both elements. PACKER, *supra* note 13, at 36–45. Packer also addressed the complex issue of proportionality between crime and punishment in light of these justifications for punishment. *Id.* at 139–45.

focus on criminal sentencing, proportionality also plays a significant role in applying a number of noncriminal constitutional provisions, including the Takings Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment.[43]

II
PROPORTIONALITY AS A CONSTITUTIONAL REQUIREMENT FOR CRIMINAL PENALTIES

A. Proportionality Provisions in State Constitutions

Blackstone strongly argued for the legislature to establish penalties proportional to particular offenses by ranking offenses and corresponding punishments from the greatest to the least. His views are reflected in the first state constitutions adopted after American independence, and many states used the occasion of adopting their fundamental document to specifically direct their legislatures to amend the criminal laws to ensure proportionality in sentencing. The Pennsylvania Constitution of 1776, for example, included a provision stating that "[t]he penal laws as heretofore used, shall be reformed by the future legislature of this State, as soon as may be, and punishments made in some cases less sanguinary, and in general more proportionate to the crimes."[44] Similarly, South Carolina's Constitution of 1778 provided that "the penal Laws, as heretofore used, shall be reformed, and Punishments made, in some Cases, less sanguinary, and, in general, more proportionate to the Crime."[45] In

[43] *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (city may require dedication of part of land to public use as condition for development permit only if there is "rough proportionality" between city's exaction and impact of proposed development); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 429 (2003) (punitive damage award unconstitutional under the Due Process Clause because it was "neither reasonable nor proportionate to the wrong committed"); *see generally* Ristroph, *supra* note 6, at 292–300; Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1054–57 (2004); Pamela S. Karlan, *"Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880 (2004). Similar concerns to proportionality—the weighing or balancing of one interest against another and the limitations of government action to the minimum level necessary to accomplish the government's legitimate goal—also are implicated by "reasonableness" tests under the Fourth Amendment, speech restrictions under the First Amendment, and balancing under the Commerce Clause, among other constitutional provisions. Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 598–621 (2005).

[44] PA. CONST. of 1776, § 38. The actions of the Pennsylvania legislature in response to that constitutional directive are reviewed in PESTRITTO, *supra* note 25, at 37–44.

[45] S.C. CONST. of 1778, art. XL.

addition, New Hampshire's Constitution of 1784 contained a detailed explanation, apparently drawn in substantial part from Blackstone, of the rationale for proportionality in criminal sentencing:

> All penalties ought to be proportioned to the nature of the offense. No wise Legislature will affix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason; where the same undistinguishing severity is exerted against all offences[,] the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of the lightest dye: For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate, mankind.[46]

Subsequent revisions of these state constitutions often deleted the specific provisions requiring the legislature to reform the criminal laws and make punishment more proportional. After statehood, Pennsylvania reformed its penal code in 1786 and made other changes to criminal statutes in 1789—abolishing the death penalty for many crimes and implementing hard labor, fines, and other punishments[47]—and the new Pennsylvania Constitution of 1790 eliminated the explicit reference to proportionality, leaving only a provision prohibiting excessive fines and "cruel punishments."[48] South Carolina and Ohio also adopted explicit proportionality provisions, but later deleted them in favor of provisions similar to those of Pennsylvania.[49]

46 N.H. CONST. of 1784, pt. I, art. XVIII. Illinois appears to have used a condensed version of the New Hampshire text in its 1818 and 1848 constitutions. *See* ILL. CONST. of 1818, art. VIII, § 14; ILL. CONST. of 1848, art. XIII, § 14 ("All penalties shall be proportioned to the nature of the offence, the true design of all punishments being to reform, not to exterminate, mankind."). The Illinois Constitution of 1870 used similar phrasing, but when the constitution was again revised in 1970, the word "proportioned" was omitted, and the provision now provides, in part, that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." ILL. CONST. art. I, § 11. However, the Illinois Supreme Court has stated that the change in wording was not intended to change the meaning of the provision and has continued to interpret the provision as if it explicitly required that penalties be "proportioned to the nature of the offense." People v. Sharpe, 839 N.E.2d 492, 500 (Ill. 2005).

47 PESTRITTO, *supra* note 25, at 37–38.

48 PA. CONST. of 1790, art. IX, § 13.

49 *Compare* S.C. CONST. of 1778, art. XL ("penal Laws . . . shall be reformed" to make them "more proportionate to the Crime"), *with* S.C. CONST. art. IX, § 4 ("cruel and unusual punishment" prohibited; no reference to proportionality). *Compare* OHIO CONST. art. 8, § 14 (1802) (proportionality clause identical to New Hampshire), *with* OHIO CONST.

Other states, however, adopted and retained specific constitutional provisions with respect to proportionality. When Indiana became a state in 1816, Article I, section 16 of its constitution provided: "All penalties shall be proportioned to the nature of the offence." A separate section prohibited excessive bail, excessive fines, and cruel and unusual punishment.[50] When the Indiana Constitution was revised, the two sections were combined.[51] The framers of the Oregon Constitution took the requirement that "all penalties shall be proportioned to the offense" from the Indiana Constitution.[52]

As one would expect, it is difficult—and perhaps not very useful—to generalize about the application of these provisions by state courts because the wording of the proportionality provisions in state constitutions varies. The courts have struggled to articulate standards to identify when a punishment is "proportionate" or "disproportionate" to an offense. Blackstone recognized that there is no "regular or determinate method of rating the quantity of punishments for crimes,"[53] and courts have routinely deferred to the legislature's determination of the appropriate level of punishment for a crime. An Oregon case, *Jensen v. Gladden*,[54] is illustrative. The defendant was convicted of a sex crime. Because he had a previous sex crime conviction, the applicable statutes provided for an indeterminate sentence of up to life in prison; the trial court imposed that sentence. In rejecting the defendant's argument that the sentence violated the proportionality provision of the Oregon Constitution, the Oregon Supreme Court stated:

> [W]e cannot say that there was not a reasonable basis for the enactment of the punishment provision [of an indeterminate life sentence for a second sex crime]. It is the province of the legislature to establish the penalties for the violation of the various criminal statutes and if the penalties are founded upon an arguably rational basis we have no authority to hold that they are invalid.[55]

art. 1, § 9 (1851) ("cruel and unusual punishment" prohibited; no reference to proportionality).

50 IND. CONST. of 1816, art. I, § 15.

51 IND. CONST. of 1851, art. I, § 16.

52 *Id.* In addition to Oregon and Indiana, at least five other state constitutions contain provisions that specifically require "proportionality" in criminal punishment. ME. CONST. art. I, § 9; NEB. CONST. art. I, § 15; N.H. CONST. pt. 1, art. 18; R.I. CONST. art. 3, § 5; W. VA. CONST. art. 3, § 5.

53 BLACKSTONE, *supra* note 6, at 14–15.

54 231 Or. 141, 372 P.2d 183 (1962).

55 *Jensen*, 231 Or. at 145–46, 372 P.2d at 185.

Yet the Oregon courts, like other state courts construing similar provisions in their state constitutions, have been unwilling to leave the determination of proportionality entirely to the legislature. This, of course, is not surprising. Nothing in the Oregon Constitution—or in most of the other state constitutions with proportionality requirements—suggests that the clause speaks only to the legislature, and, like other constitutional provisions, it is susceptible to judicial interpretation and enforcement, even if the provision eludes easy application. The Oregon cases will be examined in detail below, but, in general, state proportionality decisions articulate several different kinds of standards for determining whether a sentence is disproportionate to the offense. First, a number of decisions set forth the somewhat vague—and perhaps necessarily so—standard that a sentence is unconstitutionally disproportionate if it is so severe compared to the gravity of the offense as to "shock public sentiment and violate the judgment of a reasonable people."[56] The test is sometimes stated in terms of "gross" or "manifest" disproportionality and is often accompanied by the statement that the courts generally will defer to the legislature's determination of the appropriate sentence; courts will "rarely" find a sentence that is within statutory limits to be disproportionate.[57] Other courts have described this proportionality test as a variation of the "cruel and unusual" (or as some state constitutions phrase it, "cruel or unusual" or "cruel and degrading") standard, and have attempted to determine whether the penalty at issue was "so wholly disproportionate to the nature of the offense that it shocked the moral sense of the community."[58]

Standing alone, the "shocks the conscience" test seems rather conclusory and subjective—and in a number of cases, state courts have attempted to identify objective criteria for applying that test.

[56] Cox v. State, 181 N.E. 469, 472 (Ind. 1932); *see also* Sustar v. County Court of Marion County, 101 Or. 657, 665, 201 P. 445, 448 (1921) (duration of sentence is disproportionate when it "shock[s] the moral sense of all reasonable men as to what is right and proper under the circumstances"); People v. Landers, 160 N.E. 836, 838 (Ill. 1928) (sentence is disproportionate under state constitution only if it "shocks the conscience of reasonable men").

[57] State v. Wheeler, 343 Or. 652, 671, 175 P.3d 438, 449 (2007) (court will hold sentence unconstitutional under proportionality provision "only in rare circumstances"); State v. Moss-Dwyer, 686 N.E.2d 109, 111–12 (Ind. 1997) (court will not find sentence disproportionate "except upon a showing of clear constitutional infirmity"; party challenging statute "labors under a heavy burden to show" unconstitutionality; court will not set aside legislatively determined penalty "merely because it seems too severe").

[58] People v. Sharpe, 839 N.E.2d 492, 508 (Ill. 2005) (summarizing *People v. Davis*, 687 N.E.2d 24 (Ill. 1997)).

The New Hampshire Supreme Court has stated that it will decide proportionality challenges by considering the gravity of the offense, the harshness of the penalty, sentences imposed on other defendants and for other crimes, and sentences imposed for the same crime in other jurisdictions.[59] For many years, the Illinois courts attempted to determine whether particular offenses presented greater or lesser threats to the public than other offenses. The courts would then review the respective penalties for those offenses to determine whether they were disproportionate because a greater penalty was imposed on an offense that the court had concluded was less serious.[60] It described this technique as "cross-comparison" review because it permitted comparison of unrelated crimes and the penalties for those crimes as part of determining proportionality. In 2005, the Illinois Supreme Court overruled the "cross-comparison" cases, concluding that the test they had used was "unworkable" and improperly allowed the courts "to act as a superior legislative branch, substituting our judgment for the legislature whenever we disagreed with the penalties it set."[61]

Similarly, the California Supreme Court, which has interpreted the state's constitutional ban on cruel or unusual punishment to prohibit grossly disproportionate sentences,[62] has abandoned its earlier effort to engage in "intercase" proportionality review—determining whether a penalty is disproportionate by considering penalties imposed in other cases.[63] Although the California Supreme Court no longer compares the penalties for different crimes or the penalties imposed on different defendants that have committed the same crime, it continues to consider "the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the

[59] State v. Dayutis, 498 A.2d 325, 329 (N.H. 1985) (citing Solem v. Helm, 463 U.S. 277 (1983)). Although the New Hampshire court set out an expansive list of considerations, *Dayutis* itself was more easily resolved on "vertical proportionality" grounds, as discussed below.

[60] The history of the court's effort in this regard is described in *Sharpe*, 839 N.E.2d at 498.

[61] *Id.* at 517. Significantly, the court retained the general test that a penalty is unconstitutionally disproportionate if it is "cruel and degrading" and would shock the moral sense of the community, as well as the "identical elements" test, under which a penalty for an offense is disproportionate if it is greater than the penalty for another crime that consists of the identical elements as the first crime. *Id.* The latter test is similar in most respects to the vertical proportionality test discussed below.

[62] *In re* Lynch, 503 P.2d 921, 930 (Cal. 1972).

[63] People v. Leonard, 157 P.3d 973, 1014 (Cal. 2007).

manner in which the crime was committed, and the consequences of the defendant's acts," as well as the personal characteristics of the defendant.[64]

A more specific variation of the comparison of one crime to another for proportionality purposes examines whether the legislature has classified a particular crime as less serious than a related crime—for example, negligent homicide or manslaughter compared to first degree murder—and yet has provided a greater penalty for the lesser crime. In Oregon, this test has been described as "vertical" proportionality because it compares the penalties for crimes that the legislature has "ranked" as to seriousness, often because one is a lesser-included offense of another crime.[65] Vertical disproportionality is not as much a different test as it is a specific application of the more general "shocks the conscience" test described above. Under the test, a court may conclude that it is irrational for the legislature to create, or that it would "shock the conscience" for the court to permit, a greater penalty for attempted murder than for murder.

Vertical disproportionality—although it has been discussed only in a small number of cases—is more easily applied and less controversial than the formulations discussed above because it avoids the court's involvement in a more open-ended and subjective inquiry regarding the relationship between a crime and its penalty or the relative seriousness of unrelated crimes. It is easy for a court to look at the applicable statutes and conclude that negligent homicide involving an automobile is a lesser-included offense of manslaughter involving an automobile and that proportionality prohibits the legislature from imposing a greater punishment for the lesser offense. In contrast, it is difficult for a court to determine whether identity theft is a "more serious" offense than third degree assault and therefore may be punished more severely.

State courts have used vertical proportionality—although not necessarily with that label—to hold certain sentences invalid because they were disproportionate to the offense. The New Hampshire Supreme Court used this reasoning when it overturned a sentence of life imprisonment with a minimum term of thirty-five years for a man

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[64] *Id.* at 1014 (internal quotation marks omitted).

[65] State v. Wheeler, 343 Or. 652, 675–76, 175 P.3d 438, 451–52 (2007) (describing "vertical" disproportionality).

convicted of second degree murder.[66] At the time of the murder, a defendant convicted of *first* degree murder would have faced a maximum sentence of life imprisonment with an eighteen-year minimum. The court concluded that the imposition of a more severe penalty for a lesser crime violated the proportionality provision of the New Hampshire Constitution, as well as the Eighth Amendment of the U.S. Constitution. Similarly, the Oregon Supreme Court held that a sentence was unconstitutionally disproportionate when a defendant convicted of intentional murder received a longer minimum sentence than he would have received if he had been convicted of aggravated murder.[67]

B. Federal Proportionality

In contrast to the early state constitutions described above, neither the original federal Constitution nor the Bill of Rights contained an explicit proportionality requirement for criminal punishment. Pestritto argues that the leading thinkers of the constitutional period—including Jefferson, Wilson, Madison, and Hamilton—favored proportionality in criminal sentencing for moral (retributive) and practical (utilitarian) reasons.[68] The only specific limitation on the scope of criminal punishment in the federal Constitution, however, is the Eighth Amendment. Adopted in 1791 and drawn from the English Bill of Rights (by way of the Virginia Declaration of Rights and the federal Northwest Ordinance of 1787), the amendment prohibits "excessive fines" and "cruel and unusual punishments."[69]

Whether the explicit prohibition of cruel and unusual punishment contains an implicit ban on *disproportionate* punishments has divided scholars and the U.S. Supreme Court for many years. Anthony Granucci argues that the framers did not view the English prohibition on cruel and unusual punishment, which was the basis for the Eighth

[66] State v. Dayutis, 498 A.2d 325, 328 (N.H. 1985).

[67] State v. Shumway, 291 Or. 153, 164, 630 P.2d 796, 802 (1981).

[68] PESTRITTO, *supra* note 25, at 124–36. Pestritto seems to be at pains to refute the idea that the framers agreed with Beccaria's utilitarian, nonmorals based approach to criminal punishment. Certainly, he is correct that almost all of the framers, even Jefferson, viewed criminal punishment as including an important moral component. As Pestritto's own research demonstrates, however, antinatural law thinkers like Becarria and Hobbes also had an important influence on the framers, even when their ideas were not accepted *in toto*.

[69] On the origins of the Eighth Amendment, see Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 839–44 (1969).

Amendment, as also prohibiting excessive or disproportionate sentences—but that they were incorrect in interpreting the English rule that way.[70] His reading of the English history suggests that the provision in the English Bill of Rights on which the Cruel and Unusual Punishment Clause was based was intended to prohibit "excessive punishments in any form."[71] He argues that the word "cruel" was a synonym for "severe" or "excessive" and that the prohibition thus extended to "disproportionate penalties" of any kind.[72] The prohibition, of course, did not prohibit capital punishment or even many forms of corporal punishment, but rather barred forms of torture that were illegal or at least not customary and all punishments that were excessive compared to the seriousness of the crime.[73]

The Court was divided in its first decision addressing whether the Eighth Amendment contained a proportionality component, *Weems v. United States*.[74] Confronted with the argument that a sentence of fifteen years at hard labor was a cruel and unusual punishment for making a false entry in a government payroll book, the Court held that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense."[75] Comparing the crime with the penalty, the Court held that the sentence was disproportionate and thus constituted cruel and unusual punishment. Justice White, joined by Justice Holmes, dissented. Looking to the history of the Eighth Amendment, the dissent concluded that the amendment was principally meant as a prohibition against "barbarous modes of bodily punishment or torture."[76] The dissent acknowledged that *judges* cannot use their discretion to "select and exert . . . usual modes of

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[70] *Id.* at 860–65.

[71] *Id.* at 847.

[72] *Id.* at 860.

[73] *Id.* at 842; *see also* Harmelin v. Michigan, 501 U.S. 957, 966–75 (1991) (describing historical background and noting focus of "cruel and unusual punishment" prohibition on illegal sentences and cruel methods of punishment). One recent article argues that, whether or not the Eighth Amendment was intended to bar disproportionate punishments, its application today, when incarceration is the primary form of criminal punishment, requires that it be read to include a proportionality element. Note, *The Eighth Amendment, Proportionality, and the Changing Meaning of Punishment*, 122 HARV. L. REV. 960 (2009).

[74] 217 U.S. 349, 371 (1910).

[75] *Id.* at 367.

[76] *Id.* at 397 (White, J., dissenting).

punishment to a degree not usual,"[77] but maintained that the amendment did not similarly confine the *legislature*. Instead, the only limit imposed on the legislature was the prohibition on "the infliction of bodily punishments of a cruel and barbarous character against which the Amendment expressly provided."[78]

Since *Weems,* the Court has developed two lines of reasoning regarding proportionality within the Cruel and Unusual Punishment Clause. In death penalty cases, the Court has looked to "history" and "the objective evidence of the country's present judgment" concerning death as a penalty for any given crime.[79] For example, the Court has surveyed state law to determine how many states authorize the death penalty for certain crimes and examined whether juries enforce those laws that authorize it.[80] The Court has acknowledged, however, that ultimately its "own judgment will be brought to bear on the question of the acceptability of the death penalty" for any given crime.[81] In so doing, the Court has compared the severity of the crime, including the offender's *mens rea*, with the penalty of death, which "is unique in its severity and irrevocability,"[82] to reject death as a penalty for rape,[83] child rape,[84] some types of felony murder,[85] and for defendants who are not mentally capable[86] or are minors.[87]

In noncapital cases, the Court's efforts to apply the Cruel and Unusual Punishment Clause have not been as straightforward. It was more than sixty years after *Weems* that the Court, in *Rummel v. Estelle*, again addressed proportionality—albeit cryptically—in a

[77] *Id.*

[78] *Id.* at 398.

[79] Coker v. Georgia, 433 U.S. 584, 593 (1977). *Coker* was a plurality opinion; Justice Brennan and Justice Marshall concurred, concluding that the death penalty is always cruel and unusual punishment. *Id.* at 600.

[80] *E.g.*, *id.* at 593–97; Enmund v. Florida, 458 U.S. 782, 789–97 (1982).

[81] *Coker*, 433 U.S. at 597.

[82] *Id.* at 598 (quoting Gregg v. Georgia, 428 U.S. 153, 187 (1976)).

[83] *Id.* at 592.

[84] Kennedy v. Louisiana, 128 S. Ct. 2641 (2008).

[85] *Compare Enmund*, 458 U.S. at 801 (no death penalty when defendant did not kill or intend to kill), *with* Tison v. Arizona, 481 U.S. 137, 158 (1987) (death penalty allowed when defendants did not kill, but were actively and substantially involved in events leading to murder, and acted with reckless indifference to human life).

[86] Atkins v. Virginia, 536 U.S. 304, 310, 320–21 (2002).

[87] Roper v. Simmons, 543 U.S. 551, 575 (2005).

noncapital case.[88] The defendant in *Rummel* was sentenced under a habitual offender statute to life imprisonment (with the possibility of parole) for obtaining $120.75 by false pretenses;[89] his two prior crimes were fraudulent use of a credit card to obtain $80 worth of goods or services and passing a forged check for $28.36.[90]

The Court distinguished *Rummel* and other cases concerning ordinary felony prison sentences from *Weems*, noting that the "accessories" accompanying the punishment (including "hard and painful labor") put *Weems* more on par with the death penalty cases than noncapital cases.[91] Instead of simply abandoning the proportionality analysis in ordinary noncapital cases, however, the Court stated only that "*one could argue* without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, . . . the length of the sentence actually imposed is purely a matter of legislative prerogative."[92] The Court acknowledged only that, in certain "extreme" cases, a proportionality principle would come into play.[93] As an example of such an extreme case, the Court gave a legislature's decision to make overtime parking a felony punishable by life imprisonment.[94] But the Court held that life imprisonment for the three crimes at issue in *Rummel* was not such an extreme case.[95] Four Justices dissented in an opinion by Justice Powell.[96]

Just three years later, in *Solem v. Helm*, the Court reached nearly the opposite conclusion, holding unconstitutional a mandatory sentence of life imprisonment *without* the possibility of parole for passing a bad check for $100, a punishment required by South Dakota's recidivist sentencing scheme.[97] The five Justices in the majority expressly adopted the "deeply rooted"[98] concept of proportionality in ordinary noncapital cases finding "no basis for the State's assertion that the general principle of proportionality does not

[88] 445 U.S. 263 (1980).

[89] *Id.* at 265–66.

[90] *Id.* at 265.

[91] *Id.* at 273–74.

[92] *Id.* at 274 (emphasis added).

[93] *Id.* at 274 n.11.

[94] *Id.*

[95] *Id.* at 275 (deferring to the Texas legislature).

[96] *Id.* at 285 (Powell, J., dissenting).

[97] 463 U.S. 277, 303 (1983).

[98] *Id.* at 284.

apply to felony prison sentences."[99] The Court used a three-factor test first set forth by the dissent in *Rummel* to determine disproportionality. It looked to the "objective criteria" of (1) the gravity of the offense and the severity of the penalty; (2) the sentences imposed for other crimes in the same jurisdiction; and (3) the sentences imposed for the same crime in other jurisdictions.[100] The Court noted that the defendant's current crime, along with his prior offenses—theft crimes and driving while intoxicated—"were all relatively minor" and that life imprisonment without the possibility of parole was more severe than the life sentences considered in *Rummel*, which provided for the possibility of parole in twelve years.[101] The Court also determined that the defendant was treated more harshly than others convicted of "far more serious crimes," and received a greater sentence than he would have in any other state.[102] Based on these factors, the Court concluded that the defendant's life sentence was cruel and unusual.[103]

In the decades following *Solem*, the Court has continued to struggle to find agreement on the test for determining proportionality. The next major case, *Harmelin v. Michigan*, failed to produce a majority opinion.[104] In that case, the Court upheld a life sentence without the possibility of parole for possession of more than 650 grams of cocaine, but based that result on two different rationales. Two Justices would have abandoned proportionality altogether in noncapital cases;[105] three—Justices Kennedy, O'Connor, and Souter—adopted a modified version of the three-factor *Solem* test.[106] Writing for the three-member concurrence, Justice Kennedy applied

[99] *Id.* at 288.

[100] *Id.* at 292. The Court (in an opinion by Justice Powell, who wrote the dissenting opinion in *Rummel*) took pains to distinguish *Rummel* and asserted that *Rummel* had not abandoned proportionality in noncapital cases. However, as discussed, *Solem* does stray quite far from *Rummel* and in fact adopts the reasoning of Justice Powell's dissent in that case. *Id.* at 290–303.

[101] *Id.* at 296–97.

[102] *Id.* at 299–300.

[103] *Id.* at 303.

[104] 501 U.S. 957 (1991).

[105] Justice Scalia, joined by Justice Rehnquist, announced the judgment of the Court, but the two Justices were alone in the view that the Eighth Amendment provides no proportionality principle for noncapital cases. *Id.* at 961–94.

[106] *Id.* at 996–1009 (Kennedy, J., concurring). Although the concurrence claimed it was simply applying *Solem*, the dissent disagreed: "While Justice Scalia seeks to deliver a swift death sentence to *Solem*, Justice Kennedy prefers to eviscerate it, leaving only an empty shell." *Id.* at 1018 (White, J., dissenting).

only the first factor (comparing the offense with the penalty), stating that consideration of the other factors (intra- and interjurisdictional comparison) is "appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."[107] This, the concurrence maintained, was not such a "rare case." The four dissenting Justices would have adhered to the *Solem* framework and overturned the sentence.[108]

The Court's struggle to reach a consensus—or even a stable majority—highlights the difficulty of attempting to establish an objective test for determining proportionality. States with their own proportionality clauses, like Oregon, are able to avoid the threshold issue the Court has faced—whether the Eighth Amendment contains a proportionality component at all. But once this threshold is crossed, the search for standards of proportionality in the Eighth Amendment is equally difficult. Not surprisingly, the Court's cases foreshadow the two main tests that state courts have articulated. Justice Kennedy's general "gross disproportionality" threshold represents the subjective but deferential "shocks the conscience" test. By contrast, Justice Powell's three-factor "objective" test from *Solem* is an effort to establish a more broadly based standard that allows for changing values to emerge, but also reminds us of the difficulty of applying the test and gaining consensus on its application in a particular case.

III
OREGON'S PROPORTIONALITY REQUIREMENT

Oregon adopted an explicit proportionality requirement as part of article I, section 16 of the original 1857 constitution. But it was not until 1921, in *Sustar v. County Court of Marion County*, that the Oregon Supreme Court first addressed proportionality explicitly.[109]

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[107] *Id.* at 1005. The Court was similarly split in *Ewing v. California*, 538 U.S. 11 (2003).

[108] *Harmelin*, 501 U.S. at 1009 (White, J., dissenting); *id.* at 1027 (Marshall, J., dissenting) (concurring in Justice White's opinion "except insofar as it asserts that the Eighth Amendment's Cruel and Unusual Punishments Clause does not proscribe the death penalty").

[109] 101 Or. 657, 201 P. 445 (1921). In *State v. Ross*, the Oregon Supreme Court held that a criminal sentence was so excessive as to be cruel and unusual punishment. 55 Or. 450, 474, 104 P. 596, 604–05 (1910), *modified on reh'g*, 55 Or. 450, 106 P. 1022 (1910), *appeal dismissed*, 227 U.S. 150 (1913). With essentially no analysis of the relevant constitutional provisions, the court overturned a sentence that required the defendant, convicted of larceny, to pay a fine of $576,953.74, to serve five years in the penitentiary,

The defendant in *Sustar* was convicted of possessing two quarts of "moonshine" and sentenced to six months in jail and fined $500. He challenged his sentence as disproportionate to the offense. Although the court opined that the trial judge "went to the verge by inflicting the extreme penalty," it held that the "sentence was within the law."[110] As to the defendant's proportionality challenge, the court quoted the U.S. Supreme Court's decision in *Weems* that "[i]t is a precept of justice that punishment for crime should be graduated and proportioned to the offense."[111] The Oregon court then set forth the test that it would apply to determine whether a punishment was so graduated and proportioned: "In order to justify the court in declaring punishment cruel and unusual with reference to its duration, the punishment must be so proportioned to the offense committed as to shock the moral sense of all reasonable men as to what is right and proper under the circumstances."[112]

Several aspects of *Sustar* are worth noting. First, although the Oregon court cited *Weems* for its "shock the moral sense" test, these words appear nowhere in *Weems*. *Weems* does include a discussion of the framers' intent to establish a government of limited powers and a constitution that would not permit government practices "which would shock the sensibilities of men."[113] Presumably, the court relied upon the "shock the sensibilities" wording in *Weems*'s discussion of the historical origins of the Eighth Amendment, but the Court itself did not articulate that specific test as the standard for applying the Cruel and Unusual Punishment Clause. Nevertheless, the Oregon court was not inaccurate in using the phrase "shock the moral sense" as shorthand for the U.S. Supreme Court's standard, and other state courts have similarly read *Weems* as establishing a "shocks the conscience" or "shocks the moral sense" standard for applying the prohibition on cruel and unusual punishment.[114]

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and to spend one day in the county jail for every $2 of the fine, not to exceed 288,426 days. *Ross*, 55 Or. at 457, 104 P. at 599.

110 *Sustar*, 101 Or. at 662, 201 P. at 447.

111 *Sustar*, 101 Or. at 665, 201 P. at 448 (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)).

112 *Sustar*, 101 Or. at 665, 201 P. at 448 (citing *Weems*, 217 U.S. at 367).

113 *Weems*, 217 U.S. at 375; *see also id.* at 381 (contrasting unrestrained power and constitutionally limited power).

114 State v. Freeman, 574 P.2d 950, 954–55 (Kan. 1978) (prohibition of cruel and unusual punishment includes "terms of sentences which are so out of proportion to the nature of the crime that they shock the general conscience in light of concepts of elemental decency"); Weber v. Commonwealth, 196 S.W.2d 465, 469 (Ky. 1946) (punishment is

Second, the court in *Sustar* did not distinguish between the cruel and unusual punishment provision and the proportionality provision in article I, section 16.[115] Indeed, by relying on *Weems*'s interpretation of the Eighth Amendment for its interpretation of article I, section 16, the court seems to have either ignored the separate Oregon constitutional requirement of proportionality or concluded that that provision added no substantive limitation on criminal punishment that was not also included in the ban on cruel and unusual punishment.[116]

Since *Sustar*, the Oregon Supreme Court has continued to use the "shock the moral sense" standard to determine whether a criminal sentence meets the proportionality requirement.[117] The court has, however, refined that general test. In several cases, the court has examined statutes imposing enhanced penalties on repeat offenders and has upheld them against constitutional challenge "even if those sentences would be disproportionate when applied to a defendant

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cruel and unusual with respect to duration if it "shocks the moral sense of all reasonable men as to what is right and proper under the circumstances").

[115] The defendant in *Sustar* specifically relied on the proportionality provision of article I, section 16, and cited authorities holding that the Eighth Amendment and general principles of American law barred clearly excessive punishments. The state argued that the punishment was "not disproportionate to the crime charged to such an extent that it shocked the conscience or moral sense," and that it was not cruel and unusual. It relied upon *Weems* and a number of state decisions upholding similar penalties for liquor possession. *See* 548 Oregon Briefs, Tab 8 (1921).

[116] *See* State v. Rodriguez, 217 Or. App. 351, 357 n.2, 174 P.3d 1100, 1103 n.2 (2007), *review allowed*, 344 Or. 539, 186 P.3d 285 (2008) (discussing the lack of distinction between proportionality and cruel and unusual punishment in Oregon case law). Other state courts have similarly melded their own proportionality provisions with the Cruel and Unusual Punishment Clause of the Eighth Amendment. People v. Sharpe, 839 N.E.2d 492, 514 (Ill. 2005) ("[T]he proportionate penalties clause was clearly intended by the framers to be synonymous with the eighth amendment to the United States Constitution's cruel and unusual punishment clause."); State v. Dayutis, 498 A.2d 325, 328–29 (N.H. 1985) (recognizing that the state constitutional provision was separate but concluding that the state provision "provides at least as much protection of individual rights as that established in *Solem v. Helm*" and analyzing under *Solem*).

[117] *See* State v. Wheeler, 343 Or. 652, 676–79, 175 P.3d 438, 452–53 (2007); State v. Rogers, 313 Or. 356, 380, 836 P.2d 1308, 1323 (1992); State v. Teague, 215 Or. 609, 611, 336 P.2d 338, 339–40 (1959). The court also has clarified—assuming any clarification was necessary—that the reference in *Sustar* to the "moral sense of *all* reasonable people" was not intended to refer literally to "all" people, but rather to articulate a standard "that would find a penalty to be disproportionately severe for a particular offense only in rare circumstances." *Wheeler*, 343 Or. at 671, 175 P.3d at 449.

without prior convictions."[118] The court also, on occasion, has articulated a somewhat different test from the "shocks the moral sense" standard, but one that gives a similar degree of deference to legislative choice as to criminal penalties. As noted earlier, in *Jensen v. Gladden* the court stated that "if the penalties are founded upon an arguably rational basis we have no authority to hold that they are invalid" under the proportionality provision.[119] In *State v. Wheeler*, the court rejected the idea that the "rational basis" test and the "moral shock" test were different in substance, observing that the rational basis cases also cited the moral shock test and asserting that the court in those cases had "looked to the legislative enactment of the particular penalties at issue as an external source of law to assist in determining whether those penalties would shock the moral sense of reasonable people."[120]

In addition to the general "shock the moral sense" and "rational basis" tests for proportionality, Oregon has also used a "vertical" proportionality standard, discussed above, to hold invalid a sentence imposed for committing a lesser degree of the same crime (or a lesser-included offense) that exceeded the permissible sentence for committing the greater degree of the crime (or the greater-included offense). The Oregon Supreme Court first confronted this issue in *Cannon v. Gladden*.[121] The defendant was charged with rape, but convicted of the lesser-included offense of assault with intent to commit rape. Rape carried a maximum penalty of twenty years, while assault with intent to commit raped carried a maximum penalty of life in prison. The defendant challenged his life sentence on proportionality grounds. The Oregon Supreme Court reversed, asking and then answering a rhetorical question:

> How can it be said that life imprisonment for an assault with intent to commit rape is proportionate to the offense when the greater crime of rape authorizes a sentence of not more than 20 years? It is unthinkable, and shocking to the moral sense of all reasonable men as to what is right and proper, that in this enlightened age jurisprudence would countenance a situation where an offender, either on a plea or verdict of guilty to the charge of

[118] *Wheeler*, 343 Or. at 677, 175 P.3d at 452; *see also* Jensen v. Gladden, 231 Or. 141, 372 P.2d 183 (1962) (upholding, against proportionality challenges, enhanced penalties for repeat offenders); State v. Smith, 128 Or. 515, 273 P. 323 (1929) (same).

[119] 231 Or. at 146, 372 P.2d at 185; *see also* State v. Isom, 313 Or. 391, 400, 837 P.2d 491, 497 (1992) (applying rational basis test).

[120] 343 Or. at 671, 175 P.3d at 449.

[121] 203 Or. 629, 281 P.2d 233 (1955).

> rape, could be sentenced to the penitentiary for a period of not more than 20 years, whereas if he were found guilty of the lesser offense of assault with intent to commit rape he could spend the rest of his days in the bastile [sic].[122]

The court followed *Cannon* in *State v. Shumway*, where the defendant was convicted of intentional homicide and sentenced to life in prison, with a minimum of twenty-five years before being eligible for parole. He challenged his sentence as disproportionate to the offense because if he had committed *aggravated* intentional homicide, he could have received a life sentence with eligibility for parole in fifteen or twenty years, depending on the nature of the aggravating circumstances.[123] The court held that that disparity rendered the twenty-five-year minimum unconstitutional, but otherwise upheld his indeterminate life sentence.

Cannon and *Shumway* indicate that Oregon, like some other states, has occasionally used "vertical" proportionality to find sentences (and statutes authorizing those sentences) unconstitutional.[124] In vertical proportionality cases, the court's inquiry is more focused and less open-ended because the court can look to the legislature's own determination of which crimes it considers to be less serious or more serious—which crimes, for example, are lesser-included offenses of other crimes because they require proof of only certain elements of the greater crime. The court can then compare the penalties that the legislature has set for those crimes to see whether the greater crime leads to the greater penalty and therefore is "proportional."

Vertical proportionality is not as easy to apply as it first appears. It requires, for example, a careful reading of the elements of the statutes defining the relevant crimes. In some circumstances—such as delivery of a controlled substance[125] and robbery[126]—the legislature has set the same penalty for the "attempt" crime as for the completed crime, usually by defining the substantive crime to include an attempt to commit the crime. In *Wheeler*, the court stated that those penalties do not violate the proportionality requirement because the penalty for

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[122] *Cannon*, 203 Or. at 632–33, 281 P.2d at 235.

[123] State v. Shumway, 291 Or. 153, 164, 630 P.2d 796, 802 (1981); *see also* State v. McLain, 158 Or. App. 419, 974 P.2d 727 (1999) (applying *Shumway* to hold unconstitutional life sentence for murder when sentence for greater offense of aggravated murder allowed possibility of parole after twenty-five years).

[124] 343 Or. at 677 n.11, 175 P.3d at 452 n.11.

[125] OR. REV. STAT. § 475.005(8) (2008).

[126] OR. REV. STAT. § 164.395 (2008).

the attempted crime is the same as, but not greater than, that for the completed crime.

Moreover, the seemingly straightforward facial analysis in *Cannon*—assault with intent to commit rape is a lesser-included offense of the crime of rape; therefore, imposing a greater penalty for the former crime than for the latter is disproportionate—may break down when considering specific cases. The court in *Cannon* observed that the penalty for statutory rape (as well as for forcible rape) was twenty years in prison. One can easily imagine why the legislature might impose a *greater* penalty for a brutal assault with intent to commit a forcible rape than for a nonforcible, statutory rape. And it is difficult to see why that greater sentence should be unconstitutionally disproportionate.[127] For that reason, the court's rationale in *Cannon* seems inadequate, or at least incomplete, while the result in the case seems right on its facts.

But vertical proportionality, notwithstanding the nuances just discussed, at least relies on legislative determinations as to the severity of particular, related crimes. It is more difficult to articulate meaningful standards for comparing the severity of different crimes that are unrelated—such as assault and theft—or to determine whether the penalty for a crime, standing alone, is "disproportionate" to the crime. Indeed, the only Oregon cases holding penalties to be unconstitutionally disproportionate are the vertical proportionality cases, *Cannon* and *Shumway*.[128]

The difficulty of establishing objective standards for determining proportionality outside the vertical proportionality context is presumably what led Oregon, like many other states, to use more general tests such as "shocks the moral sense" or "shocks the conscience." These tests recognize the court's authority to declare a sentence or a statute permitting a sentence unconstitutional in extreme cases, but give substantial deference to the legislature's determination

[127] The unusual circumstances in *Cannon* help make the point. The defendant was charged with *statutory* rape, but the jury found him guilty of the lesser-included offense of assault with intent to commit rape; he received the more severe penalty. While the rationale of the court's proportionality clause analysis would have made sense if the defendant had been charged with forcible rape, it is less persuasive given the reported facts of the case—and, as noted, the result is sound enough.

[128] *State v. Ross*, discussed *supra* note 109, overturned a sentence as cruel and unusual because the court considered it excessive. However, the court did not discuss proportionality, indicate whether it was relying on the Oregon or federal constitution, or analyze the meaning of the constitutional provision. 55 Or. 450, 104 P. 596, *on reh'g*, 55 Or. 450, 106 P. 1022 (1910), *appeal dismissed*, 227 U.S. 150 (1913).

of the severity level of the crime—and thus whether the penalty for that crime is proportional.

The legislature's primary role in determining the seriousness of a crime was addressed in *State v. Ferman-Velasco*.[129] The defendant challenged a sentence imposed under a voter-passed mandatory sentencing law because the sentence was more severe than the existing sentences for equal or more serious crimes unchanged by the new law. The court rejected that argument, reasoning that the law setting the new and greater penalties for certain crimes demonstrated that those crimes were more serious than the comparator crimes. The new law, the court said, "represents the most recent legislative enactment demonstrating the seriousness with which the legislative branch views [the crimes identified in that law], including defendant's crimes."[130]

Ferman-Velasco emphasizes once again the primary role of the legislature in determining which crimes are more serious by setting more severe penalties for those crimes. But the case does not mean that the Oregon courts have no role in ensuring, as article I, section 16 requires, that "all penalties . . . be proportioned to the offense." Indeed, the Oregon courts consistently have been willing to consider proportionality challenges to sentences, although they usually have found the sentences constitutional. Most recently in *State v. Wheeler*, the court upheld life sentences without the possibility of parole for each of eighteen sex convictions when the defendant had two previous felony sex convictions.[131]

The lingering question for Oregon courts, and those of other states, is whether any more useful standard than "shocks the conscience" exists for determining proportionality, outside the context of vertical proportionality. In many ways, the struggles of state courts to interpret proportionality provisions have mirrored the mixed results of the U.S. Supreme Court's efforts, described above, to determine when long prison terms for minor crimes may be held unconstitutional as cruel and unusual punishment. A court, with some confidence, may be able to say that life imprisonment for a parking offense is an excessive punishment that is disproportionate to the crime or constitutes cruel and unusual punishment.[132] Although not as

[129] 333 Or. 422, 41 P.3d 404 (2002).

[130] *Ferman-Velasco*, 333 Or. at 431, 41 P.3d at 409.

[131] State v. Wheeler, 343 Or. 652, 676–80, 175 P.3d 438, 452–54 (2007).

[132] Rummel v. Estelle, 445 U.S. 263, 274 n.11 (1980).

extreme as the example offered by the U.S. Supreme Court, the Illinois Supreme Court had little trouble holding unconstitutionally disproportionate a mandatory three- to seven-year prison term for altering by six months the expiration date on a temporary registration permit for one's own car.[133] But agreement on the standards that should be applied rapidly breaks down as one considers more serious crimes.

A number of state courts have examined factors similar to those that the U.S. Supreme Court identified in *Solem*—the gravity of the offense and severity of the punishment; the sentences imposed for other crimes in the same jurisdiction; and the sentences imposed for the same crime in other jurisdictions.[134] Two states—Illinois and California—now appear to have abandoned the second *Solem* factor and no longer attempt to compare sentences imposed for unrelated crimes as part of deciding proportionality challenges.[135] Both states continue to use a version of the "shock the conscience" test, and California examines a variety of factors concerning the defendant and the circumstances of the crime to determine whether the sentence is disproportionate.[136]

To date, the most elaborate effort in the Oregon appellate courts to apply the proportionality standards of article I, section 16 in a close case are the opinions by four different judges of the Oregon Court of Appeals, sitting *en banc*, in *State v. Thorp*. In that case, a sixteen-

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133 People v. Morris, 554 N.E.2d 235 (Ill. 1990).

134 *See In re* Lynch, 503 P.2d 921 (Cal. 1972); People v. Davis, 687 N.E.2d 24 (Ill. 1997); State v. Dayutis, 498 A.2d 325 (N.H. 1985); State v. Thorp, 166 Or. App. 564, 576–80, 2 P.3d 903, 909–11 (majority opinion) (comparing penalties for the same crime in other states but refusing to compare the penalty at issue with penalties for other crimes in Oregon), 916 (Haselton, J., dissenting) (2000), *review dismissed*, 34 P.3d 1177 (2001); *see also* State v. Rodriguez, 217 Or. App. 351, 174 P.3d 1100 (2007), *review allowed*, 344 Or. 539, 186 P.3d 285 (2008) (stating that the *Solem* test "can provide useful, objective guidance" but determining that applying it was unnecessary because the penalty at issue would not "shock the moral sense" of all reasonable people).

135 *See* People v. Sharpe, 839 N.E.2d 492 (Ill. 2005); People v. Leonard, 157 P.3d 973 (Cal. 2007).

136 *See supra* text accompanying note 64. One relevant factor in this analysis is the defendant's criminal history. Blackstone argued that death and other harsh penalties "ought never to be inflicted, but when the offender appears *incorrigible*: which may be collected either from a repetition of minuter offences; or from the perpetration of some one crime of deep malignity, which of itself demonstrates a disposition without hope or probability of amendment." BLACKSTONE, *supra* note 6, at 12 (emphasis in original); *see* State v. Wheeler, 343 Or. 652, 676, 175 P.3d 438, 452 (2007) (a penalty that might be "disproportionate when applied to a defendant without prior convictions" may not be disproportionate when applied to repeat offender).

year-old defendant was given a mandatory sentence of seventy-five months for consensual sex with a girl who was three years and ten days younger than him. Writing for the majority, Judge (now Chief Justice) De Muniz reviewed the Oregon proportionality cases and the U.S. Supreme Court's decision in *Solem*, and identified three principles that the court viewed as "controlling" in the interpretation of article I, section 16: the power to establish sentences for specific crimes was reserved to the legislature, subject to constitutional limitations; proportionality challenges have rarely been successful; and the proportionality provision "forbids only those sentences that are *grossly disproportionate* to the crime."[137] The majority then examined in detail the crime of statutory rape, including its early history and its status since Oregon statehood, and discussed the policy reasons for criminalizing consensual sex in those circumstances.[138] Turning to the *Sustar* test, the majority stated that it could not hold the sentence unconstitutional unless it could "conclude that the moral sense of *all* reasonable persons is shocked by the sentence,"[139] although it rejected the state's argument that the existence of a statute imposing the prescribed sentence conclusively demonstrated that the sentence was not disproportionate.[140] The majority examined the characteristics of the defendant, noting that, although he had no history of sex crimes, he described himself as a "gangster" and had had many run-ins with the police.[141] Rejecting the dissent's effort to compare statutory rape with crimes that the dissent considered more serious but carried lesser penalties, the majority held that the legislature had the authority "to determine the relative seriousness of crimes" by establishing more severe penalties for crimes that they considered more serious, and upheld the mandatory seventy-five-month sentence.[142]

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137 *Thorp*, 166 Or. App. at 572, 2 P.3d at 907 (emphasis in original).

138 *Thorp*, 166 Or. App. at 572–75, 2 P.3d at 907–09.

139 *Thorp*, 166 Or. App. at 577, 2 P.3d at 909 (emphasis in original).

140 *Thorp*, 166 Or. App. at 578, 2 P.3d at 910.

141 *Thorp*, 166 Or. App. at 578, 2 P.3d at 910.

142 *Thorp*, 166 Or. App. at 577, 2 P.3d at 911. The Oregon Supreme Court first allowed review of *Thorp*, but later granted the state's motion to dismiss the petition for review. 332 Or. 559, 34 P.3d 1177 (2001). Although the order dismissing review did not state the court's reason(s) for deciding not to review the case, the state's motion pointed out that after the Oregon Court of Appeals decision, the legislature had amended the statute under which Thorp was sentenced. As amended, the sentencing statute, ORS 137.712(2)(e), permits the court to make a downward departure from the otherwise mandatory seventy-five-month sentence that Thorp received. The departure sentence is permitted only in

Judge Edmonds concurred, stating that he considered the sentence to be "unjust," but he could not say that it "shock[ed] the conscience of all reasonable people," because when article I, section 16 was adopted, a defendant convicted of statutory rape could have been sentenced to between three and twenty years in prison.[143] Judge Brewer also filed a separate concurring opinion in which Judge Landau joined. In Judge Brewer's view, the case involved a claim that the sentence was unconstitutional because it was cruel and unusual, not because it was disproportionate.[144] He stated that it seemed probable that "most" people would consider a seventy-five-month sentence unreasonable on the facts of the case, but that even that "objective probability" involved a subjective component.[145] He rejected use of the *Solem* test because, although the test might be useful, it had substantial analytical flaws. He asserted that the first component—comparing the gravity of the offense and the harshness of the penalty—"is somewhat tautological."[146] Further, he stated that the second and third parts of the test—examining sentences for other crimes in the same jurisdiction and for the same crime in other jurisdictions—improperly limited the legislature's authority to change its assessment of which crimes are more serious and the penalties imposed for those crimes.[147] Like the majority, Judge Brewer focused on the defendant's manipulative conduct and eventually concluded that because there was "an arguably rational basis" for applying the mandatory sentence to the particular defendant, he was unable to "confidently proclaim" that the "moral sense of all reasonable people would be shocked" by the sentence.[148]

Judge Haselton, joined by three other members of the court, dissented.[149] He generally adhered to the *Solem* test, focusing first on the gravity of the offense and the harshness of the penalty. In doing

certain narrow circumstances that closely track the facts in *Thorp*, including the ages of the victim and defendant, the consensual nature of the conduct, and the absence of prior convictions. Although the amended statute was not retroactive and did not apply to Thorp, the state asserted that the case was no longer review-worthy; in any subsequent case involving similar facts, the court would be authorized to depart from the mandatory sentence and impose any lesser sentence permitted under the sentencing guidelines.

143 *Thorp*, 166 Or. App. at 581, 2 P.3d at 911–12 (Edmonds, J., concurring).

144 *Thorp*, 166 Or. App. at 581–86, 2 P.3d at 912–15 (Brewer, J., concurring).

145 *Thorp*, 166 Or. App. at 582, 2 P.3d at 912 (Brewer, J., concurring).

146 *Thorp*, 166 Or. App. at 583, 2 P.3d at 913 (Brewer, J., concurring).

147 *Thorp*, 166 Or. App. at 583, 2 P.3d at 913 (Brewer, J., concurring).

148 *Thorp*, 166 Or. App. at 586, 2 P.3d at 914 (Brewer, J., concurring).

149 *Thorp*, 166 Or. App. at 587, 2 P.3d at 915 (Haselton, J., dissenting).

so, he emphasized the importance of evaluating the "*specific* facts surrounding the *particular* defendant's offense, in addition to the nature of the crime in a more generic sense."[150] To that end, he discussed in detail the relationship between the defendant and the victim and the personal characteristics of each, as well as the penalties historically imposed in Oregon for statutory rape. As to the second *Solem* factor, Judge Haselton compared the sentences imposed in Oregon for robbery, assault, and sex crimes other than statutory rape. He pointed out that the defendant would have received a lesser punishment if, instead of having consensual sex with the girl, "he had compelled her to engage in prostitution, used her in creating child pornography, or sexually abused her corpse."[151] In his view, the disproportionality of the statutory rape sentence was "manifest."[152] Finally, examining the third *Solem* factor, Judge Haselton reviewed the penalties for statutory rape in other jurisdictions. Although he acknowledged that some other states had mandatory prison sentences for that crime and in some states the defendant also could have been tried as an adult (as was the defendant in *Thorp*), in no other state would the defendant automatically have been tried as an adult and also been subject to such a lengthy mandatory sentence, with no discretion on the part of the trial court to consider the circumstances of the parties or the offense.[153] He concluded that the sentence was unconstitutional because it violated the proportionality requirement of article I, section 16.[154]

Decisions since *Thorp* have altered some of the legal conclusions that the Oregon Court of Appeals reached. In *Wheeler*, the Oregon Supreme Court treated earlier cases focusing on allegedly excessive sentences as cases arising under the proportionality clause of article I, section 16, rather than solely under the cruel and unusual punishment provision, contrary to some of the suggestions in Judge Brewer's concurring opinion.[155] The *Wheeler* court also held that the *Sustar* "shock the moral sense of all reasonable people" test should not be taken literally—"that is, that a penalty for a particular crime would meet the proportionality requirement if a single 'reasonable person'

[150] *Thorp*, 166 Or. App. at 590, 2 P.3d at 917 (Haselton, J., dissenting) (emphasis in original).

[151] *Thorp*, 166 Or. App. at 594, 2 P.3d at 919 (Haselton, J., dissenting).

[152] *Thorp*, 166 Or. App. at 594, 2 P.3d at 919 (Haselton, J., dissenting).

[153] *Thorp*, 166 Or. App. at 594–98, 2 P.3d at 919–21 (Haselton, J., dissenting).

[154] *Thorp*, 166 Or. App. at 598, 2 P.3d at 921 (Haselton, J., dissenting).

[155] State v. Wheeler, 343 Or. 652, 175 P.3d 438 (2007) (discussing *Sustar*).

could be found whose moral sense was not 'shocked' by that penalty."[156] Rather, the court stated, the *Sustar* court was attempting to articulate a standard that would "find a penalty to be disproportionately severe . . . only in rare circumstances."[157] To the extent that the majority and concurring opinions in *Thorp* emphasized—as they did in several places—the "all" in "all reasonable people," they applied a test that is at least somewhat more stringent than that most recently used by the Oregon Supreme Court.[158]

However, many aspects of *Thorp* stand as the Oregon appellate courts' most detailed consideration of how the proportionality clause should be applied.[159] The Oregon Supreme Court's more recent decisions on proportionality, *Wheeler* and *Ferman-Velasco*, did not involve the same kind of detailed review of the circumstances of the crime and the parties or a comparison of the crime and the penalty, other crimes and their penalties, or crimes and penalties in other jurisdictions. Indeed, the Oregon Supreme Court has not clearly indicated that the factors considered by the majority and dissenting opinions in *Thorp*—derived generally from *Solem*—are the controlling considerations. In *Wheeler*, as noted, the court did give significant weight to the defendant's prior felony sex crimes, indicating that

156 *Wheeler*, 343 Or. at 670, 175 P.3d at 449.

157 *Wheeler*, 343 Or. at 670, 175 P.3d at 449.

158 *See* Wheeler, 343 Or. at 670, 175 P.3d at 449.

159 In two recent Oregon Court of Appeals cases, decided before the Oregon Supreme Court's decision in *Wheeler*, the court discussed several aspects of *Thorp* and *Solem*. State v. Rodriguez, 217 Or. App. 351, 174 P.3d 1100 (2007), *review allowed*, 344 Or. 539, 186 P.3d 285 (2008); State v. Buck, 217 Or. App. 363, 174 P.3d 1106 (2007), *review allowed*, 344 Or. 539, 186 P.3d 285 (2008). In both of those cases, the defendants were convicted of first-degree sex abuse, which carries a mandatory minimum sentence of seventy-five months imprisonment. The trial judge in each case concluded that, as applied to each defendant and the circumstances of each case—both cases involved defendants without prior convictions and sexual touching that, the defendants argued, was at the less serious end of the spectrum of conduct prohibited by the sex abuse statute—the seventy-five-month sentence violated the proportionality requirement of article I, section 16, and imposed a shorter sentence. The Oregon Court of Appeals reversed both cases and imposed the mandatory minimum sentence. The court stated that it would apply the *Sustar* "shock the moral sense of all reasonable people" test, *Rodriguez*, 217 Or. App. at 358, 174 P.3d at 1104, but that if the court had "serious doubts" that the sentence might be unconstitutional under that test, it would examine the *Solem* factors. 217 Or. App. at 360, 174 P.3d at 1105. In *Rodriguez* and *Buck*, however, the court concluded that it did not have "serious doubts." Accordingly, the court looked only at "the gravity of the offense and the harshness of the penalty"—which it identified as the first *Solem* criterion and which it viewed as "central" to the "shock the moral sense" test. *Rodriguez*, 217 Or. App. at 360, 174 P.3d at 1105.

recidivism is a relevant factor in applying the proportionality provision.[160] The court in *Wheeler* also rejected the defendant's claim that a life sentence without possibility of parole was disproportionate because his crimes did not involve a physical assault or result in permanent physical injury—in contrast to crimes that did involve such physical injury, but carried lesser penalties. The court held that the legislature was entitled to presume that sex crimes pose the risk of physical and psychological injury and to decide that lengthy sentences for such crimes are necessary to protect the public from further harm by repeat offenders.[161] Yet the court evidently felt that *Wheeler* did not present the kind of close question that would have required as detailed a circumstantial and comparative analysis as the Court of Appeals undertook in *Thorp*.

CONCLUSION

We end, in many respects, where we began. The framers of the Oregon Constitution have told us that "all penalties shall be proportioned to the offense."[162] Although the historical background of this mandate suggests that it may be directed in the first instance to the legislature, settled principles of judicial review give the courts the authority to interpret and apply the provision and to hold unconstitutional statutes and sentences that are inconsistent with it. Beyond that, the view becomes less clear. Oregon courts, like other state courts interpreting similar provisions, have adopted both a specific test under which related, but lesser crimes (typically a lesser-included offense) may not be punished more severely than the greater-inclusive offense as well as a more general test ("shocks the moral sense") that is deferential to the legislature but that provides little in the way of guidance for deciding whether a penalty is disproportionate.

The difficulty of articulating meaningful standards for constitutional review of legislative action confronts the courts in many areas. The federal constitution's guarantees of "due process of law" and "equal protection of the law" and the Oregon Constitution's protection of "equal privileges and immunities"[163] and of a "remedy

160 *Wheeler*, 343 Or. at 678, 175 P.3d at 453.

161 *Wheeler*, 343 Or. at 679–80, 175 P.3d at 454.

162 OR. CONST. art. I, § 16 (1857).

163 *Id.* art. 1, § 20.

by due course of law for injury"[164] are but a few of the most obvious examples. Yet the courts have enforced these provisions in a meaningful way even when they have not yielded easily applicable standards.

Blackstone insightfully observed that "the quantity of punishment can never be absolutely determined by any standing invariable rule,"[165] and that teaching requires a substantial degree of judicial deference to the legislature to determine penalties "proportioned to the offense." But the inclusion of the proportionality provision in the Oregon Constitution also requires the courts to review these legislative determinations when challenged and, in the extreme case, to be willing to conclude that a particular penalty is invalid because it is not proportioned to the offense. Only time will tell whether litigants can propose or the courts can articulate tests for determining proportionality that are less subjective or that provide more analytical structure than the stark "shocks the moral sense" standard of *Sustar*. We do know that proportionality cases will continue to come, and—satisfactory tests or not—the courts will decide them.

[164] *Id.* art. 1, § 10.

[165] BLACKSTONE, *supra* note 6, at 12.