

STATE INNOVATIONS IN NONCAPITAL PROPORTIONALITY DOCTRINE

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The Supreme Court has recognized a proportionality principle under the Eighth Amendment's prohibition against "cruel and unusual punishments." The proportionality principle governs both capital and noncapital sentences, yet the Court does not apply the principle equally. In the capital context, the Court has created a robust methodology for determining when the death penalty is disproportionate and has forbidden its use in a number of contexts. In contrast, the Court has virtually renounced proportionality review in the noncapital context. This Note focuses on three points of difference between the capital and noncapital contexts that the Court has identified as justifying its fractured proportionality doctrines: the inherent subjectivity in distinguishing among noncapital sentences; the resultant inadministrability of engaging in robust noncapital proportionality review; and the infringement upon penological decisions made by state legislatures that searching noncapital review would require. It then responds to the Court's articulated concerns by surveying the noncapital proportionality jurisprudence of the fifty states, which illustrates that there are principled, administrable, and legislatively deferential ways to police noncapital sentences. This Note suggests that the Court adopt a modified strand of states' jurisprudence in order to craft a more rigorous noncapital proportionality doctrine at the federal level.

INTRODUCTION

The Supreme Court has recognized a proportionality principle under the Eighth Amendment's prohibition of "cruel and unusual punishments."¹ This principle bars punishment that is "excessive in relation to the crime committed"² and demands that "punishment for crime . . . be graduated and proportioned to [the] offense."³ In other words, even if the method or duration of a particular punishment does not violate the Eighth Amendment in all cases, the Amendment pre-

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¹ U.S. CONST. amend. VIII.

² *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (internal quotations omitted).

³ *Weems v. United States*, 217 U.S. 349, 367 (1910).

vents the imposition of such punishment in cases where its severity is disproportionate to the conduct for which it is imposed.

The Court has acknowledged that the proportionality principle governs both capital and noncapital sentences;⁴ however, it does not apply the principle equally. In the capital context, the Court has created a robust methodology for determining when the death penalty is disproportionate and has forbidden its use in a number of contexts. In contrast, the Court has virtually renounced proportionality review in the noncapital context. Indeed, it has invalidated only three noncapital sentences over the last two centuries,⁵ approving life sentences for minor property crimes⁶ and single drug offenses.⁷

The Court has defended its refusal to subject noncapital sentences to the same rigorous proportionality review applied in the capital context by relying on the truism that “death is different.” While this Note does not contest that death is indeed different in kind from all other punishments, it examines whether this difference justifies the breadth of the chasm between noncapital and capital proportionality doctrine. In particular, this Note focuses on three points of difference that the Court has identified as justifying its fractured proportionality doctrine: (i) the inherent subjectivity in distinguishing among noncapital sentences; (ii) the resultant inadministrability of engaging in robust noncapital proportionality review; and (iii) the infringement upon penological decisions made by state legislatures that searching noncapital review would require.

This Note responds to the Court’s articulated concerns by surveying the noncapital proportionality jurisprudence of the states. While many authors have discussed and criticized the Court’s justifications for its empty noncapital proportionality review,⁸ this Note is the

⁴ For the purposes of this Note, I use the term “noncapital” to refer solely to terms of imprisonment.

⁵ *Graham v. Florida*, No. 08-7412 (U.S. May 17, 2010); *Solem v. Helm*, 463 U.S. 277 (1983); *Weems*, 217 U.S. 349.

⁶ *Rummel v. Estelle*, 445 U.S. 263 (1980) (upholding mandatory life sentence under recidivist statute for third felony conviction where defendant obtained \$120.75 by false pretenses).

⁷ *Harmelin v. Michigan*, 501 U.S. 957 (1991) (affirming mandatory life sentence for first time felony possession of more than 650 grams of cocaine).

⁸ See, e.g., Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145 (2009) (critiquing legal reasoning and policy implications of Supreme Court’s two-track review of capital and noncapital sentences under Eighth Amendment); Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 63 (2008) (“Of all the government measures subject to Eighth Amendment scrutiny, excessively long prison sentences seem to receive the least favorable treatment, and are governed by the most opaque standards.”); Steven Grossman, *Proportionality in Noncapital Sentencing: The Supreme Court’s Tortured Approach to Cruel and Unusual Punish-*

first comprehensive investigation into how state court proportionality jurisprudence fits into the debate.⁹ It identifies and explores examples of state court proportionality doctrines that are more rigorous than that of the Supreme Court and considers whether such examples substantiate or controvert the Court's claims.¹⁰

This analysis suggests that the extent of the discrepancy in the way the Supreme Court reviews noncapital and capital sentences is unwarranted. By adopting modified strands of state court jurisprudence, the Court could craft a more robust noncapital proportionality doctrine at the federal level. To be clear, this Note does not suggest that the Supreme Court should follow the states' lead simply because the states have successfully propounded more rigorous proportionality review; it recognizes that state and federal courts are different in important ways and thus review appropriate in state courts is not, *ipso facto*, appropriate in federal courts.¹¹ Instead, this Note looks to the

ment, 84 KY. L.J. 107 (1995) (criticizing Supreme Court's Eighth Amendment jurisprudence as confused and resting on weak foundations); G. David Hackney, *A Trunk Full of Trouble: Harmelin v. Michigan*, 27 HARV. C.R.-C.L. L. REV. 262 (1992) (arguing that *Harmelin* Court drastically and inadvisably departed from existing noncapital proportionality jurisprudence); Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527 (2008) (criticizing contradictions in noncapital proportionality review and proposing alternate analytical framework); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 680 (2005) (condemning Supreme Court's noncapital proportionality jurisprudence as "meaningless muddle"); Adam M. Gershowitz, Note, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249 (2000) (arguing that criminal punishment merits more rigorous proportionality review).

⁹ Several authors describe the proportionality doctrines of various states, but they do not engage in an analysis of how these doctrines respond to the Supreme Court's justifications for its meager noncapital review. See, e.g., Kathi A. Drew & R.K. Weaver, *Disproportionate or Excessive Punishments: Is There a Method for Successful Constitutional Challenges?*, 2 TEX. WESLEYAN L. REV. 1, 24–33 (1995) (describing Michigan, South Dakota, Arizona, and Texas proportionality cases); Frase, *supra* note 8, at 66–72 (describing Indiana, Kentucky, Louisiana, Michigan, and Georgia proportionality cases); Peter Mathis Spett, *Confounding the Gradations of Iniquity: An Analysis of Eighth Amendment Jurisprudence Set Forth in Harmelin v. Michigan*, 24 COLUM. HUM. RTS. L. REV. 203, 228–33 (1993) (describing proportionality cases from Michigan, California, Colorado, and Idaho that apply *Harmelin*); Michael Vitiello, *California's Three Strikes and We're Out: Was Judicial Activism California's Best Hope?*, 37 U.C. DAVIS L. REV. 1025 (2004) (describing California proportionality cases).

¹⁰ While the research for this Note involved an in-depth survey of the proportionality jurisprudence of the fifty states, this Note discusses only the state doctrines relevant to my purpose here: to respond to the Court's three articulated concerns about rigorous noncapital proportionality review.

¹¹ See, e.g., Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999) (describing differences between federal and state courts and arguing that these differences militate against applying federal rationality review to claims for welfare assistance under state constitutional guarantees).

states as creative laboratories and fonts of experiential knowledge. In light of these findings, this Note proposes a nonproportionality doctrine that is based upon—but not identical to—those adopted by the states. It then carefully considers whether the proposed noncapital proportionality review adequately responds to the Court’s three articulated concerns. This Note concludes that there are principled, administrable, and deferential ways to better police noncapital sentences.

This Note proceeds in three parts. Part I presents an overview of the Supreme Court’s capital and noncapital proportionality doctrines. It discusses the central reasons the Court has identified in justifying the vast difference—in substance and level of scrutiny—of proportionality review in the two contexts. Part II then turns to state court jurisprudence, describing specific doctrines that state courts have developed to provide more rigorous review than that of the Supreme Court. Part III suggests that the Court should adopt and modify these doctrines in order to strengthen federal proportionality jurisprudence. Following the states’ lead would allow the Court to promulgate more robust noncapital proportionality doctrine, while avoiding the three central pitfalls the Court has associated with more searching review.

I

THE SUPREME COURT’S EMPTY PROPORTIONALITY DOCTRINE FOR NONCAPITAL SENTENCES

A. *Capital and Noncapital Proportionality Doctrine Compared*

The Supreme Court has been active in defining the contours of the proportionality principle in the capital context, creating a rigorous methodology for categorically determining whether the death penalty is “grossly out of proportion” for specific classes of offenders and offenses.¹² First, the Court asks whether a punishment was cruel and unusual under the common law or “the evolving standards of decency that mark the progress of a maturing society.”¹³ To determine whether a punishment comports with evolving standards of decency, the Court first surveys state legislatures that have confronted the issue to see whether they have come to a consensus.¹⁴ The Court compares the number of states that impose the death penalty for the specific offense or class of offender in question with the number of states that do not.

¹² *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

¹³ *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

¹⁴ See *id.* at 564 (examining state legislative consensus against death penalty for juveniles).

This comparison, however, is not determinative: The Court also looks to the “consistency of the direction of change”¹⁵ and the infrequency of imposition of capital punishment, even in states that statutorily authorize it.¹⁶ If multiple states have abandoned the death penalty for a certain offense or class of offenders and few states have reinstated it, or if states that allow capital punishment rarely impose it, this may be strong evidence of a national consensus against the death penalty.¹⁷ The last step in the Court’s national consensus analysis is to consider other evidence of a “broader social and professional consensus” against the death penalty.¹⁸ The Court may look to the official positions of professional and religious organizations, polling data concerning American attitudes towards capital punishment, and the views of the “world community.”¹⁹

After this extensive empirical analysis, the Court “then . . . determine[s], in the exercise of [its] own independent judgment, whether the death penalty is a disproportionate punishment”²⁰ At least when the Court is dealing with a challenge to the imposition of the death penalty on a particular class of offender, the Court may consider at this step whether the punishment serves traditionally recognized penological goals.²¹ Also relevant is whether the particular class of offender may be at heightened risk of being wrongfully convicted or receiving an inappropriate sentence.²²

By employing this probing categorical methodology, the Court has actively policed the landscape of capital punishment. In recent landmark decisions, the Court has forbidden the imposition of capital punishment for crimes committed by juvenile²³ and mentally

¹⁵ *Atkins v. Virginia*, 536 U.S. 304, 315 (2002).

¹⁶ *Id.* at 316.

¹⁷ See *Roper*, 543 U.S. at 564–67 (considering infrequency of imposition and trend towards abolition of death penalty for juveniles under 18); *Atkins*, 536 U.S. at 315–16 (noting that execution of mentally retarded defendants “has become truly unusual,” even in states that had not banned practice).

¹⁸ *Atkins*, 536 U.S. at 316 n.21.

¹⁹ See *id.*; see also *Roper*, 543 U.S. at 575–78 (“The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”).

²⁰ *Roper*, 543 U.S. at 564.

²¹ See *id.* at 571–72 (“[N]either retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders”); *Atkins*, 536 U.S. at 318–20 (finding that execution of mentally retarded defendants would not serve penological goals of deterrence or retribution).

²² See *Roper*, 543 U.S. at 572–73 (showing concern that “the mitigating force of youth” may be “overlooked,” and noting that “[i]n some cases a defendant’s youth may even be counted against him”); *Atkins*, 536 U.S. at 320–21 (finding that mentally retarded defendants “face a special risk of wrongful execution”).

²³ *Roper*, 536 U.S. 551.

retarded²⁴ offenders under its proportionality doctrine. The Court has also concluded that the proportionality principle bars the death penalty for certain kinds of offenses, including rape (of adults²⁵ and children²⁶) and felony murder where the defendant does not personally kill, attempt to kill, or intend to kill.²⁷

The Court recently extended this robust “categorical” inquiry outside of the capital context in order to evaluate life-without-parole (LWOP) sentences for juveniles. However, it generally reviews non-capital sentences “as applied.”²⁸ In comparison to the Court’s categorical capital doctrine, as-applied noncapital doctrine is shallow and perfunctory. Under the latter approach, the Court will first make “a threshold comparison of the crime committed and the sentence imposed [to see whether it] leads to an inference of gross disproportionality.”²⁹ Only in the “rare case” that compels such an inference will the Court proceed with its review by comparing the penalties imposed for the same crime in other jurisdictions (an interjurisdictional comparison) and comparing the sentences imposed in the same state for more serious offenses (an intrajurisdictional comparison).³⁰ The Court’s as-applied methodology does not permit review of any other evidence, including evidence that could be determinative or persuasive in the capital context, or involve any additional analysis.

As Justice White explained in his dissent from the Court’s formulation of traditional noncapital proportionality doctrine, as-applied proportionality review “eviscerate[s]” rigorous proportionality review, “leaving only an empty shell.”³¹ Even extreme punishments will survive the threshold inquiry (into whether they raise an inference of gross disproportionality) as long as the states enforcing them have a

²⁴ *Atkins*, 536 U.S. 320.

²⁵ *Coker v. Georgia*, 433 U.S. 584 (1977).

²⁶ *Kennedy v. Louisiana*, 128 S. Ct. 2641 (2008).

²⁷ *Enmund v. Florida*, 458 U.S. 782 (1982).

²⁸ See *Graham v. Florida*, No. 08-7412, slip op. at 8 (U.S. May 17, 2010) (explaining that when considering “challenges to the length of term-of-years sentences” under traditional as-applied proportionality doctrine, the Supreme Court “considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive”). The Court explained that because the challenge to LWOP sentences for juveniles “implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes . . . [noncapital as-applied proportionality doctrine] does not advance the analysis.” *Id.*, slip op. at 10. The Court instead utilized its categorical capital proportionality doctrine to review the question. It is yet unclear how far the Court will extend its categorical jurisprudence, but the restrictive language just quoted suggests that most non-capital challenges will remain ineligible for categorical review.

²⁹ *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

³⁰ *Id.*

³¹ *Id.* at 1018 (White, J., dissenting).

“reasonable basis for believing that [such punishments] ‘advance[] the goals of [their] criminal justice system[s] in any substantial way.’”³² The Court has provided virtually no guidance on how to meet the threshold test, and, predictably, it has never been used to strike down a noncapital punishment since its inception.³³ It is no surprise then that many scholars agree that the Court’s noncapital proportionality doctrine is a dead end for policing unjust sentences.³⁴

B. Rationales Behind Noncapital Proportionality Doctrine

The changing composition of the Court has led it to offer various explanations as to why noncapital sentences merit such uncritical constitutional review, yet the most general and basic justification has remained constant: Death is different. Several distinct strands of this argument recur throughout the Court’s jurisprudence. This section will examine each of those strands in turn, elaborating on the Court’s arguments about objectivity in sentencing, administrability of review, and deference to state legislative decisionmaking.

First, and most importantly, the Court has claimed that more rigorous review of noncapital sentences would be a purely subjective exercise. The Court has asserted that any difference in severity among noncapital sentences is insignificant when compared to the unique severity of the death penalty. Indeed, the Court has asserted that capital punishment “differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.”³⁵ Whereas capital punishment represents a discrete category, the severity of imprisonment is a continuum: The severity gradually increases with each additional year, day, hour, or minute. From this logic, the Court has claimed that there is no principled way to declare one noncapital sen-

³² *Ewing v. California*, 538 U.S. 11, 27 (2003) (quoting *Solem v. Helm*, 463 U.S. 277, 297 n.22 (1983)); Barkow, *supra* note 8, at 1183.

³³ See *Lockyer v. Andrade*, 538 U.S. 63 (2003) (upholding life sentence assessed under “three strikes” law for theft of \$150 worth of videotapes); *Ewing*, 538 U.S. 11 (upholding indeterminate life sentence assessed under “three strikes” law for stealing \$1197 worth of golf clubs); *Harmelin*, 501 U.S. 957 (affirming mandatory LWOP sentence for single drug offense).

³⁴ See, e.g., Barkow, *supra* note 8, at 1155–62 (surveying Supreme Court cases that demonstrate weak proportionality review in noncapital cases); Hackney, *supra* note 8, at 274–80 (strongly criticizing proportionality review established in *Harmelin* and proposing additional safeguards); Carol S. Steiker & Jordan M. Steiker, *Opening a Window or Building a Wall? The Effect of Eighth Amendment Death Penalty Law and Advocacy on Criminal Justice More Broadly*, 11 U. PA. J. CONST. L. 155, 186 (2008) (“The application of this new threshold requirement of gross disproportionality has proven to be an insurmountable hurdle for Eighth Amendment challenges to long prison terms.”).

³⁵ *Solem v. Helm*, 463 U.S. 277, 312 n.4 (1983) (Burger, C.J., dissenting) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)).

tence constitutionally disproportionate for a given crime while upholding a slightly shorter sentence.³⁶ In other words, on the “sliding scale” of terms of imprisonment, there is no objective method for determining precisely where to draw the constitutional boundary for any given crime.³⁷ According to the Court, any doctrinal distinctions between noncapital sentences will reflect judges’ individual preferences and penological ideologies rather than principled analysis.³⁸

Second, the Court has reasoned that a more robust noncapital review would prove inadministrable.³⁹ Two distinct forms of this argument recur. I call the first “derivative administrability” because it derives from the Court’s belief that distinguishing among noncapital sentences is inherently subjective. The Court has claimed that, because rigorous proportionality review is subjective, such review is not within its competence.⁴⁰ In other words, precisely because there is no objective way to differentiate among noncapital sentences, the Court is faced with a messy line-drawing project that it is ill equipped to sort out. The second strand of this argument, which I call “practical administrability,” relates to the sheer number and complexity of cases involving noncapital sentences. The Court has expressed concerns

³⁶ *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment) (“[O]ur decisions recognize that we lack clear objective standards to distinguish between sentences for different terms of years.”); *Rummel v. Estelle*, 445 U.S. 263, 274–75 (1980); Transcript of Oral Argument at 8, *Graham v. Florida*, No. 08-7412 (U.S. May 17, 2010) (Roberts, C.J.) (“Are you saying there is something in the Eighth Amendment that draws a distinction between 40 and 50 [years] . . . ?”); see also Hackney, *supra* note 8, at 266 (“Justice Rehnquist, writing for the *Rummel* majority, . . . concluded that drawing lines of distinction between terms of imprisonment is inherently subjective . . .”).

³⁷ Barkow, *supra* note 8, at 1182.

³⁸ *Solem*, 463 U.S. at 308 (Burger, C.J., dissenting) (“[T]he *Rummel* Court emphasized that drawing lines between different sentences of imprisonment would . . . produce judgments that were no more than the visceral reactions of individual Justices.”); *Rummel*, 445 U.S. at 282–83 n.27 (“Once the death penalty and other punishments different in kind from fine or imprisonment have been put to one side, there remains little in the way of objective standards for judging whether or not a life sentence imposed . . . violates . . . the Eighth Amendment.”).

³⁹ Barkow, *supra* note 8, at 1182 (“[T]he Court has resisted extending protections to noncapital cases because of a concern with judicial management.”).

⁴⁰ See *Solem*, 463 U.S. at 314 (Burger, C.J., dissenting) (“Legislatures are far better equipped than we are to balance the competing penal and public interests and to draw the essentially arbitrary lines between appropriate [noncapital] sentences for different crimes.”); see also Barkow, *supra* note 8, at 1182 & n.222 (discussing Court’s administrative concerns regarding noncapital proportionality review); Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 312–13 (2005) (criticizing the Court’s “institutional competence concerns”). Chief Justice Burger, who wrote for Justices White, Rehnquist, and O’Connor in dissent in *Solem*, formed part of Justice Rehnquist’s five-member majority in *Rummel*, which decided just three years prior to *Solem*. Burger’s *Solem* dissent thus reflects many of the concerns that animated the Court’s developing noncapital proportionality doctrine.

that, if it decided to scrutinize noncapital sentences more closely, courts would become overwhelmed.⁴¹

Finally, the Court has asserted that a weak noncapital doctrine is necessary to ensure an appropriate level of deference to state legislative policymaking. There are two threads of this argument as well. I call the first “derivative deference” because it derives from the Court’s belief that ascertaining the relative severity of noncapital sentences is subjective. The Court has argued that subjective decisions are, at bottom, policy decisions and, as such, should be reserved for state legislatures.⁴² The second deference argument, which I will call “outlier deference,” warns that courts must not declare a state’s punishment for an offense unconstitutional merely because it is harsher than other states’ punishments for the same offense.⁴³ Rather, the Court urges deference to states’ penological goals and choices.⁴⁴

These three concerns—about subjectivity, administrability, and deference to state legislatures—are important, yet are not easily addressed in the abstract. The following Part surveys the propo-

⁴¹ *Rummel*, 445 U.S. at 280 (“It is one thing for a court to compare those States that impose capital punishment for a specific offense with those States that do not. It is quite another thing for a court to attempt to evaluate the position of any particular recidivist scheme within Rummel’s complex matrix.” (internal citation omitted)); *Solem*, 463 U.S. at 315 (Burger, C.J., dissenting); Steiker & Steiker, *supra* note 34, at 189 (“The[] . . . facts . . . suggest a much more ominous threat of floodgates opening on the non-capital side than on the capital side of proportionality litigation.”).

⁴² *Solem*, 463 U.S. at 308 (Burger, C.J., dissenting) (“[T]he *Rummel* Court emphasized that drawing lines between different sentences of imprisonment would thrust the Court inevitably ‘into the basic line-drawing process that is preeminently the province of the legislature.’” (quoting *Rummel*, 445 U.S. at 275)); *Rummel*, 445 U.S. at 275–76 (arguing that “subjective” line-drawing inherent in evaluating noncapital sentences is “properly within the province of legislatures, not courts”).

⁴³ *Rummel*, 445 U.S. at 281–82; see also Bruce W. Gilchrist, Note, *Disproportionality in Sentences of Imprisonment*, 79 COLUM. L. REV. 1119, 1134–35 (1979) (“It is predictable that the maximum penalties imposed by states for the same offense will vary according to local conditions and the differing assessments by the citizens of each state of the moral depravity and harm associated with the offense. Therefore, the mere fact that one jurisdiction exacts a higher penalty for an offense than the rest of the nation is not by itself evidence of disproportionality.” (footnote omitted)).

⁴⁴ *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (“[R]eviewing courts . . . should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes.” (quoting *Solem*, 463 U.S. at 290)); see also Margaret R. Gibbs, *Eighth Amendment—Narrow Proportionality Requirement Preserves Deference to Legislative Judgment*, 82 J. CRIM. L. & CRIMINOLOGY 955, 972 (1992) (“[T]he Eighth Amendment’s proportionality requirement must be narrow to avoid interference with the deference courts owe legislatures.”); Youngjae Lee, *supra* note 8, at 682 (“The *Ewing* Court’s reasoning rests [in part] on . . . the view that legislatures are entitled to deference on the question of whether a given sentence can be justified under any of the traditional justifications of punishment.”).

tionality jurisprudence of the states, identifying examples of doctrine that provide more rigorous scrutiny of noncapital sentences.

II

THE STATES' RESPONSES

The vast majority of state constitutions include a prohibition of cruel and/or unusual punishments.⁴⁵ And the vast majority of these constitutions have either been interpreted to encompass a proportionality principle or contain an express guarantee of proportionate punishment.⁴⁶ This section surveys examples of how several states have developed proportionality principles under their own state constitutions or the Federal Constitution. After discussing tools that states have utilized to determine both relative and absolute proportionality, this Part turns to a discussion of how courts have decided when to apply particularly searching proportionality review.

A. Relative Proportionality: Policing the Coherence of the Sentencing Scheme

A number of states have employed various types of intrajurisdictional comparisons to ensure the internal coherence of their sentencing schemes. This has been called relative proportionality review.⁴⁷ Absolute proportionality—the subject of the rest of this Note—sets an unqualified ceiling on the degree of punishment a state can authorize for a given offense. In contrast, relative proportionality—which looks not to the particular sentences imposed on

⁴⁵ ALA. CONST. art. I, § 16; ALASKA CONST. art. I, § 12; ARIZ. CONST. art. II, § 15; ARK. CONST. art. II, § 9; CAL. CONST. art. I, § 17; COLO. CONST. art. II, § 20; DEL. CONST. art. I, § 11; FLA. CONST. art. I, § 17; GA. CONST. art. I, § 1, ¶ XVII; HAW. CONST. art. I, § 12; IDAHO CONST. art. I, § 6; IND. CONST. art. I, § 16; IOWA CONST. art. I, § 17; KAN. CONST. BILL OF RIGHTS, § 9; KY. CONST. BILL OF RIGHTS, § 17; LA. CONST. art. I, § 20; ME. CONST. art. I, § 9; MD. CONST. DECLARATION OF RIGHTS, arts. XVI, XXV; MASS. CONST. DECLARATION OF RIGHTS pt. 1, art. XXVI; MICH. CONST. art. I, § 16; MINN. CONST. art. I, § 5; MISS. CONST. art. III, § 28; MO. CONST. art. I, § 21; MONT. CONST. art. II, § 22; NEB. CONST. art. I, § 9; NEV. CONST. art. I, § 6; N.H. CONST. pt. 1, art. XXXIII; N.J. CONST. art. I, ¶ 12; N.M. CONST. art. II, § 13; N.Y. CONST. art. I, § 5; N.C. CONST. art. I, § 27; N.D. CONST. art. I, § 11; OHIO CONST. art. I, § 9; OKLA. CONST. art. II, § 9; OR. CONST. art. I, § 16; PA. CONST. art. I, § 13; R.I. CONST. art. I, § 8; S.C. CONST. art. I, § 15; S.D. CONST. art. VI, § 23; TENN. CONST. art. I, § 16; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 9; VT. CONST. ch. 2, § 39; VA. CONST. art. I, § 9; WASH. CONST. art. I, § 14; W. VA. CONST. art. III, § 5; WIS. CONST. art. I, § 6; WYO. CONST. art. I, § 14.

⁴⁶ The state constitutions with freestanding proportionality guarantees include those of Illinois, Indiana, Maine, Nebraska, New Hampshire, Oregon, Rhode Island, Vermont, and West Virginia. See ILL. CONST. art. I, § 11; IND. CONST. art. I, § 16; ME. CONST. art. I, § 9; NEB. CONST. art. I, § 15; N.H. CONST. pt. 1, art. XVIII; OR. CONST. art. I, § 16; R.I. CONST. art. I, § 8; VT. CONST. ch. 2, § 39; W. VA. CONST. art. III, § 5.

⁴⁷ Gilchrist, *supra* note 43, at 1137–41.

individuals within a jurisdiction, but to the statutory maximums authorized for an offense—ensures only that an individual jurisdiction’s sentencing laws make sense in relation to each other. Where a sentence for a crime is greater than the statutory maximum for an equally or more serious crime, the sentence violates the principle of relative proportionality.

1. *Identical Elements Analysis*

One form of relative proportionality review is identical elements analysis. Identical elements analysis is premised upon the idea that “[i]t is illogical that identical [offenses] can render two different [penalties].”⁴⁸ Under this approach, punishment is constitutionally disproportionate when “a penalty for one offense is harsher than the penalty for a different offense that contains identical elements.”⁴⁹ This strand of proportionality doctrine requires a reviewing court to parse closely the statutory language of the offense in question and compare the elements of that offense with those of other statutory offenses within the same jurisdiction. If a court finds another statutory offense with identical elements that triggers a less severe punishment, it declares this unconstitutional.

At least two states have employed this type of proportionality review. Illinois has been particularly active in its use of identical elements review, striking down punishments in a number of cases.⁵⁰ For example, in *People v. Christy*, the Supreme Court of Illinois found that the proportionality principle barred imposing different penalty ranges for two crimes with identical elements.⁵¹ In that case, the defendant had committed a kidnapping (a felony) while armed with a weapon and was convicted of “armed violence.”⁵² Armed violence was defined as the commission of a felony while armed with a dangerous weapon and carried a statutory range of imprisonment

⁴⁸ *People v. Christy*, 564 N.E.2d 770, 774 (Ill. 1990) (second and third alterations in original) (quoting *People v. Christy*, 544 N.E.2d 88, 90 (Ill. App. Ct. 1989)).

⁴⁹ *People v. Andrews*, 845 N.E.2d 974, 992 (Ill. App. Ct. 2006).

⁵⁰ See, e.g., *People v. Hauschild*, 871 N.E.2d 1 (Ill. 2007) (using identical elements analysis to find that defendant’s sentence for armed robbery violated proportionate penalties clause of state constitution); *Christy*, 564 N.E.2d 770 (holding penalties for aggravated kidnapping and armed violence to be unconstitutionally disproportionate under identical elements analysis); *People v. Lee*, 876 N.E.2d 671 (Ill. App. Ct. 2007) (using identical elements analysis to find defendant’s sentence for armed robbery violated proportionate penalties clause of state constitution); *Andrews*, 845 N.E.2d 974 (holding penalty for aggravated vehicular hijacking while carrying firearm to be constitutionally disproportionate to penalty for armed violence predicated on vehicular hijacking offense under identical elements analysis).

⁵¹ 564 N.E.2d at 774.

⁵² *Id.* at 770–71.

between six and thirty years.⁵³ On the other hand, Illinois defined “aggravated kidnapping” as a kidnapping while armed with a dangerous weapon, which was punishable by between four and fifteen years in prison.⁵⁴ After comparing the statutory language and declaring that aggravated kidnapping and armed violence contained the same elements, the Illinois high court found the divergent sentence ranges unconstitutional.⁵⁵

Similarly, in *Poling v. State*, the Indiana Court of Appeals found that two distinct penalty ranges authorized for the exact same crime contravened the state’s proportionality principle.⁵⁶ The defendant in the case was convicted of neglect of a dependent.⁵⁷ One of the elements of the relevant statute was that the defendant “abandon[] or cruelly confine[] the dependent.”⁵⁸ This crime was deemed a class D felony.⁵⁹ However, the statute also provided that a class C felony, which subjected an offender to a longer prison sentence than a class D felony, was committed whenever an individual committed the class D felony of neglect of a dependent with “cruel or unusual confinement or abandonment.”⁶⁰ The defendant, who was convicted of the class C felony (and, therefore, received a greater sentence than he would have for a class D felony conviction), successfully demonstrated to the court that the two crimes included identical elements. Relying on the logic of Illinois’s *People v. Christy*, the court of appeals found the defendant’s punishment unconstitutionally disproportionate, stating that “[s]ince the elements . . . are identical, common sense and sound logic would seemingly dictate that the[] penalties be identical.”⁶¹

2. Lesser Included Offense Analysis

Under lesser included offense analysis, which is a variation of identical elements doctrine, judges also examine the elements of a crime and engage in an intrajurisdictional comparison. Courts consider whether the state punishes the crime with which the defendant is charged more harshly than other crimes that involve those same elements plus other elements. If so, they find the defendant’s sentence disproportionate.

⁵³ *Id.* at 772, 774.

⁵⁴ *Id.*

⁵⁵ *Id.* at 772–74.

⁵⁶ 853 N.E.2d 1270 (Ind. Ct. App. 2006).

⁵⁷ *Id.* at 1274.

⁵⁸ *Id.* at 1275 (quoting IND. CODE ANN. § 35-46-1-4(a)(2) (West 2004)).

⁵⁹ *Id.*

⁶⁰ *Id.* (quoting IND. CODE ANN. § 35-46-1-4(b)(4) (West 2004)).

⁶¹ *Id.* at 1277 (quoting *People v. Christy*, 564 N.E.2d 770, 774 (Ill. 1990)).

Several states have adopted lesser included offense analysis. The Supreme Court of Oregon, for example, has declared that it is unconstitutionally disproportionate for the maximum penalty for assault with intent to commit rape to be greater than the maximum penalty for rape.⁶² This is because, under lesser included offense analysis, the actual commission of a rape constitutes an additional element that distinguishes the greater crime from the lesser included offense of assault.⁶³ Similarly, the high court of North Carolina has held that punishment imposed for possessing the implements of housebreaking may not be of greater severity than that which can be imposed for housebreaking.⁶⁴ Additionally, some courts have found that it is unconstitutional for: the maximum punishment for attempted murder to be higher than for murder;⁶⁵ the maximum penalty for robbery to be higher than that for armed robbery;⁶⁶ the maximum sentence to be greater for entering someone's house with the intent to commit a felony than the greater offense of second-degree burglary;⁶⁷ and the maximum term before eligibility for parole for murder to be greater than that for aggravated murder.⁶⁸

3. *Lesser Culpability Analysis*

Under lesser culpability analysis, which also involves intrajurisdictional comparison, a court examines the elements of the crime with which a defendant is charged to determine whether there is any other crime with otherwise identical elements that requires a higher degree of culpability. If such a crime exists and is punished less harshly, the court will find the defendant's sentence for the lesser crime to be disproportionate.

Ohio, for example, has utilized this form of review, although it has not referred to it in these terms.⁶⁹ In *State v. Shy*, the Ohio Court of Appeals found a violation of the proportionality principle where a

⁶² Cannon v. Gladden, 281 P.2d 233, 235 (Or. 1955) (en banc).

⁶³ *Id.*

⁶⁴ State v. Blackmon, 132 S.E.2d 880 (N.C. 1963). The court in this case did not explicitly specify that the decision rested on the proportionality principle. However, since the decision was based on the cruel and unusual punishment clause of the state's constitution, we can understand it as a proportionality decision.

⁶⁵ People v. Morgan, 786 N.E.2d 994, 1006–07 (Ill. 2003).

⁶⁶ Jackson v. State, 275 N.E.2d 538, 542 (Ind. 1971); Dembowski v. State, 240 N.E.2d 815, 817 (Ind. 1968).

⁶⁷ Heath v. State, 274 N.E.2d 697, 699 (Ind. 1971).

⁶⁸ State v. Shumway, 630 P.2d 796, 802 (Or. 1981) (en banc); State v. Davilla, 972 P.2d 902, 905–06 (Or. Ct. App. 1998).

⁶⁹ Rather, when Ohio courts have conducted lesser culpability analysis, they have applied the Supreme Court's three-part test from *Solem v. Helm*, 463 U.S. 277 (1983), and *Harmelin v. Michigan*, 501 U.S. 957 (1991). See, e.g., State v. Shy, No. 96CA587, 1997 WL

strict liability traffic offense was subject to a more severe punishment than the same traffic offense if committed negligently.⁷⁰ The defendant in *Shy* caused a fatality during a car accident. Under the applicable vehicular homicide provision, negligently causing the death of another while operating a motor vehicle constituted a first-degree misdemeanor.⁷¹ However, involuntary manslaughter, which could be predicated on a strict liability misdemeanor traffic offense, constituted a third-degree aggravated felony and accordingly carried a harsher sentence.⁷² The Ohio court found that the defendant, who had been convicted of involuntary manslaughter, had been subject to disproportionate punishment, since “persons committing strict liability crimes are less culpable than persons committing crimes based on negligent or reckless mental states.”⁷³

B. Absolute Proportionality: Objective Evidence of Contemporary Standards of Decency

Many states have adopted approaches to ascertain absolute proportionality in the noncapital context. In contrast to relative proportionality, absolute proportionality sets a categorical limit on the severity of the penalty a state may impose for a particular offense. Under this approach, the state may not punish a defendant for an offense beyond the established limit, regardless of the rationality of its internal sentencing scheme.

When analyzing whether the death penalty is absolutely disproportionate in the capital context, the Supreme Court considers objective evidence of contemporary standards of decency.⁷⁴ As part of this analysis, it examines the number of states that authorize the sentence (and recent increases or decreases in the number), relevant jury verdicts, and the official positions of professional and religious organizations.⁷⁵ Such evidence allows the Court to gauge public sentiment on the use of the death penalty and bears great weight in the Court’s ultimate proportionality determination.

381782, at *5–6 (Ohio Ct. App. June 30, 1997); *State v. Campbell*, 691 N.E.2d 711, 714–15 (Ohio Ct. App. 1997).

⁷⁰ 1997 WL 381782, at *5–6.

⁷¹ *Id.* at *5.

⁷² *Id.*

⁷³ *Id.* at *5. The court applied lesser culpability analysis to a crime premised on strict liability, comparing it to a crime that involved negligence. In theory, however, courts could also use lesser culpability analysis to overturn sentences where a crime that requires recklessness, knowledge, or intent triggers a lower maximum penalty than does an otherwise identical crime that requires any less culpable mens rea.

⁷⁴ See *supra* notes 13–19 and accompanying text.

⁷⁵ See *id.*

Although state courts have not used the same vocabulary about evidence of contemporary standards of decency in the noncapital context, they have in effect mirrored the Court's inquiry into public opinion about standards of decency. This Section reviews several methods that states have devised to gauge such contemporary standards.

1. *Interjurisdictional Comparison*

Courts across the nation have relied heavily on an interjurisdictional comparison in making proportionality determinations. Under this approach, courts survey the criminal sentencing laws of other jurisdictions and compare the penalty ranges authorized thereunder with the penalty the offender received. When an offender's sentence is harsher than the sentence he could have received in all or most other states, courts have found that this provides strong—if not determinative—evidence that this sentence violates the proportionality principle.

In *People v. Wingo*, the Supreme Court of California conducted an interjurisdictional comparison to analyze whether an indeterminate sentence up to life in prison was disproportionate to the crime of assault with a deadly weapon.⁷⁶ The court considered evidence that only one other state imposed an equally harsh sentence, all other jurisdictions with analogous criminal statutes authorized maximum sentences of up to twenty-one years, and most of those states' statutory maximums fell within the range of five to ten years.⁷⁷ Based in large part on this comparison, the court concluded that a life sentence for assault with a deadly weapon could violate the proportionality principle in certain circumstances.⁷⁸ In addition to California,⁷⁹ several other states, including Alabama,⁸⁰ Michigan,⁸¹ Ohio,⁸² and West

⁷⁶ 534 P.2d 1001, 1009–10 (Cal. 1975) (en banc).

⁷⁷ *Id.*

⁷⁸ *Id.* at 1010.

⁷⁹ For other California cases that employ the interjurisdictional comparison, see, for example, *In re Grant*, 553 P.2d 590 (Cal. 1976), *In re Rodriguez*, 537 P.2d 384 (Cal. 1975) (en banc), and *In re Foss*, 519 P.2d 1073 (Cal. 1974) (en banc).

⁸⁰ See, e.g., *Wilson v. State*, 830 So. 2d 765, 780–81 (Ala. Crim. App. 2001) (finding Alabama's penalty of life imprisonment without parole for morphine trafficking "far more severe" than punishments imposed by other states).

⁸¹ See, e.g., *People v. Lorentzen*, 194 N.W.2d 827, 832–33 (Mich. 1972) (employing interjurisdictional comparison explicitly to gather evidence of evolving standards of decency).

⁸² See, e.g., *State v. Campbell*, 691 N.E.2d 711, 715–16 (Ohio Ct. App. 1997) (finding that no other state "would permit a felony conviction for involuntary manslaughter premised on a strict liability minor misdemeanor").

Virginia⁸³ have all utilized interjurisdictional analysis in their noncapital proportionality review.

2. *Comparison with Defendants Convicted of Same Crime*

State courts have also examined the sentences of other individuals who have been convicted under the same statutory provision when considering whether a defendant's punishment is unconstitutionally excessive. Louisiana regularly relies upon such evidence as one of several factors in its proportionality review. In *State v. Lathers*, for example, the Supreme Court of Louisiana engaged in an extensive review of other sentences received under the state's forcible rape statute to determine whether the defendant's forty-year sentence was disproportionate.⁸⁴ Although it identified one other defendant who had been sentenced to the same term, the court found that "[g]enerally, . . . sentences for forcible rape which have been reviewed or noted by this court reflect a range of sentences from ten years . . . to twenty-five years"⁸⁵ In light of the vast disparity between the range of sentences generally imposed and the sentence imposed on the defendant, as well as other factors, the court found the defendant's sentence to be disproportionate.⁸⁶

Similarly, in *Wilson v. State*, the Alabama Court of Criminal Appeals considered the sentences received by other similar offenders in assessing the proportionality of a sentence of LWOP for a first-time drug offender who had been convicted of distributing a controlled substance and trafficking in morphine.⁸⁷ The court emphasized that the three other individuals who had been convicted of the same offense had received sentences of less than twenty-five years.⁸⁸ Noting that the defendant's sentence was "more extreme than that imposed on many other offenders in [the state]," the court found that the defendant's sentence violated the proportionality principle.⁸⁹ In addition to these states, Colorado has also considered the sentences of other in-state defendants in its proportionality review.⁹⁰

⁸³ See, e.g., *State v. Lewis*, 447 S.E.2d 570, 574 (W. Va. 1994) (comparing West Virginia's ban on probation as punishment for third or subsequent shoplifting offense to other states' sentencing regimes).

⁸⁴ 444 So. 2d 96, 98–101 (La. 1983).

⁸⁵ *Id.* at 98 (quoting *State v. Telsee*, 425 So. 2d 1251, 1254 (La. 1983)).

⁸⁶ See *id.* at 102 ("[The punishment] is far too severe for this defendant . . . , especially considering that it is the most severe sentence imposed of all those reviewed").

⁸⁷ 830 So. 2d 765, 780 (Ala. Crim. App. 2001).

⁸⁸ *Id.* at 769, 780.

⁸⁹ *Id.* at 780–81.

⁹⁰ See, e.g., *People v. Gaskins*, 923 P.2d 292, 296 (Colo. App. 1996) (comparing defendant to two other "similarly situated" offenders in state).

3. *Change in Legislative Penal Policy*

Several states have considered sentencing law amendments when engaging in proportionality review. For example, in *Humphrey v. Wilson*, the defendant, a teenager convicted of aggravated child molestation, received a sentence of ten years in prison without the possibility of parole and was required to register as a sex offender.⁹¹ In finding this sentence disproportionate, the Supreme Court of Georgia placed determinative emphasis on the fact that the legislature had recently amended the relevant sentencing statute, changing the sentence to a misdemeanor punishment and repealing the requirement for teenagers to register as sex offenders.⁹² The court declared that “[i]t is beyond dispute that these changes represent a seismic shift in the legislature’s view of the gravity of [the defendant’s conduct],”⁹³ and went on to “[a]cknowledg[e] . . . that no one has a better sense of the evolving standards of decency in this State than our elected representatives”⁹⁴

Michigan and West Virginia have similarly relied on legislative changes to sentencing schemes as evidence that a defendant’s sentence may be disproportionate. In *People v. Lorentzen*, for example, one thing the Supreme Court of Michigan considered in ruling that the defendant’s minimum twenty-year sentence was disproportionate was that the legislature had recently drastically reduced penalties for all drug offenses, including for the offense of which the defendant was convicted.⁹⁵ Additionally, in *State v. Lewis*, the fact that the legislature had recently amended its sentencing scheme to allow the alternative punishment of home detention rather than imprisonment for a third offense of shoplifting was important to the West Virginia Supreme Court of Appeals’s finding that the defendant’s indeterminate one-to-ten year sentence was unconstitutionally excessive.⁹⁶

C. *Heightened Review of Extreme Sentences*

Many states have effectively, albeit not always explicitly, cabined off particularly severe kinds of sentences for stricter proportionality review, in much the same way that the Supreme Court has isolated capital punishment for robust review. Although discerning the exact level of severity of each of these sentences is complicated, many state courts have found that LWOP, life imprisonment with the possibility

⁹¹ 652 S.E.2d 501, 502–03 (Ga. 2007).

⁹² *Id.* at 507.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ 194 N.W.2d 827, 832–33 (Mich. 1972).

⁹⁶ 447 S.E.2d 570, 575 (W. Va. 1994).

of parole (LWPP), and “effective” life sentences⁹⁷ are different in kind from terms of imprisonment that fall short of effective life sentences. Indeed, a host of states have explicitly pointed to the uniqueness of these extreme sanctions in order to justify applying aggressive proportionality review when they are imposed. Other states have implicitly but effectively relied on the uniqueness of these sentences to do the same.

1. *Life Imprisonment Without Parole*

Several state courts have stressed the uniqueness of the LWOP sentence. For example, the Supreme Court of Illinois proclaimed that “[a] life sentence without the possibility of parole implies that under any circumstances a . . . defendant . . . is incorrigible and incapable of rehabilitation for the rest of his life.”⁹⁸ Similarly, the Supreme Court of South Dakota declared that “[w]hile . . . there are cases where the imposition of a life sentence without parole is meritorious, . . . [t]hey are rare and should involve a history of . . . offenses that by reason of their brutality or calculated destructiveness render *irrelevant* the goal of rehabilitation.”⁹⁹ These states (and others) recognize that LWOP is the only noncapital sentence that wholly rejects rehabilitation as a goal of punishment. The sentence is unique in that, by definition, it *requires* that the offender die in prison.

Acknowledging the unique severity of LWOP, multiple courts have held that the sentence is disproportionate for crimes committed by children. For example, Kentucky courts have found that LWOP is categorically unconstitutional for children.¹⁰⁰ According to the Court of Appeals of Kentucky, LWOP was intended to deal with “dangerous and incorrigible individuals who would be a constant threat to society.”¹⁰¹ Because children, by virtue of their youth, cannot be incorrigible, the court barred imposition of the LWOP sanction for that class of offenders.¹⁰² However, Kentucky courts have cabined the

⁹⁷ An “effective life sentence” is a sentence that will endure beyond the natural life of the offender.

⁹⁸ *People v. Miller*, 781 N.E.2d 300, 309 (Ill. 2002).

⁹⁹ *Bult v. Leapley*, 507 N.W.2d 325, 327 (S.D. 1993) (emphasis added) (quoting *State v. Weiker*, 342 N.W.2d 7, 12 (S.D. 1983)); see also *State v. Hinger*, 600 N.W.2d 542, 549 (S.D. 1999) (“A life sentence should only be imposed when a trial court[] ‘[c]an determine . . . that rehabilitation is so unlikely as to be removed from consideration in sentencing.’” (quoting *State v. Peterson*, 557 N.W.2d 389, 395 (S.D. 1996))).

¹⁰⁰ *Workman v. Commonwealth*, 429 S.W.2d 374 (Ky. Ct. App. 1968).

¹⁰¹ *Id.* at 378.

¹⁰² *Id.*

implications of this holding to the context of LWOP sentences,¹⁰³ thus reaffirming the notion that LWOP is unique in its severity.

Similarly, the Supreme Court of Nevada deemed LWOP disproportionate for the juvenile offender in *Naovorath v. State*.¹⁰⁴ In making this determination, the court highlighted the unique severity of LWOP:

Denial of th[e] vital opportunity [of parole] means denial of hope; it means that good behavior and character improvement are immaterial; it means that whatever the future might hold in store for the mind and spirit of [the offender], he will remain in prison for the rest of his days.¹⁰⁵

The court converted the defendant's sentence from LWOP to a sentence of life *with* the possibility of parole.¹⁰⁶

2. *Life Imprisonment with the Possibility of Parole*

Courts have also targeted LWPP sentences for aggressive proportionality review. The way in which a court conceptualizes the parole system shapes its understanding of the severity of LWPP sentences. According to some courts, and implicit in the views of the courts discussed in the prior subsection, LWPP is vastly different from LWOP because only the latter necessarily forecloses the possibility of release, thus fully rejecting the goal of rehabilitation. Under this view, LWPP looks nothing like LWOP because the offender may have numerous opportunities to demonstrate to a parole board that he is not, in fact, incorrigible. LWPP sentences embrace the goal of rehabilitation since, in theory, the offender will be released once he is rehabilitated.

According to other courts, however, LWPP closely approximates LWOP sentences. As the Supreme Court of Georgia recognized, because a state has discretion to deny a prisoner parole—constrained only by due process guarantees¹⁰⁷—LWPP sentences may be effectively equivalent to LWOP sentences.¹⁰⁸ The Supreme Court of

¹⁰³ See, e.g., *Edmondson v. Commonwealth*, No. 2001-SC-0253-MR, 2002 WL 32065611, at *7 (Ky. Dec. 19, 2002) (“[T]wo crucial facts distinguish *Workman* from the case *sub judice*: (1) Appellant is not a juvenile, and (2) he was not sentenced to life without the possibility of parole.”).

¹⁰⁴ 779 P.2d 944 (Nev. 1989).

¹⁰⁵ *Id.* at 944.

¹⁰⁶ *Id.* at 948–49.

¹⁰⁷ While there is no constitutional right to parole, due process protections may still apply to a parole system. See *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1 (1979).

¹⁰⁸ See *Bradshaw v. State*, 671 S.E.2d 485, 490 (Ga. 2008) (noting that parole decisions are “discretionary” and “appellant’s ‘inability to enforce any ‘right’ to parole precludes us from treating his life sentence as [a fixed term of years]” (quoting *Rummel v. Estelle*, 445 U.S. 263, 280 (1980))).

Appeals of West Virginia emphasized the same point, declaring that the argument that the possibility of parole mitigates a life sentence “tends to overlook [a] harsh practical fact[:]. . . there is no automatic right to parole once the prisoner crosses the threshold of eligibility.”¹⁰⁹

On this alternative view, LWPP is an extremely harsh sentence. Indeed, courts that adopt this perspective have distinguished LWPP from discrete terms of imprisonment and engaged in more searching review of LWPP sentences than of other prison terms. For example, the West Virginia high court made clear that a life sentence with eligibility for parole after seven years is leagues away from a mere seven-year sentence. Not only is parole discretionary, as already discussed, “parole even if granted does not automatically obliterate the life sentence. . . . [A] relatively minor infraction while on parole, such as driving a car without a license, can result in a revocation of the parole.”¹¹⁰ The extraordinarily harsh character of LWPP led the West Virginia court to propound a proportionality jurisprudence that provides particularly careful review of LWPP sentences. The court stated in frank terms that, while proportionality doctrine theoretically applied to all criminal sentences, it was in practice only applicable to LWPP sentences.¹¹¹ Other states have followed suit, acknowledging either explicitly or implicitly the unusually severe character of LWPP sentences and providing more aggressive review of these sentences than term-of-years sentences.¹¹²

3. *Effective Life Sentences*

Another particularly extreme sentence that has been identified by a small number of courts and individual judges as akin in severity to LWOP and LWPP is the “effective life sentence.” Effective life sentences may take two forms. First, a term of years greater than the natural life span of a human serves as an effective life sentence for all offenders; this is termed an absolute effective life sentence.¹¹³ Second,

¹⁰⁹ *Wanstreet v. Bordenkircher*, 276 S.E.2d 205, 213 (W. Va. 1981).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 211 (“While our constitutional proportionality standards theoretically can apply to any criminal sentence, they are basically applicable to these sentences where there is either no fixed maximum set by statute or where there is a life recidivist sentence.”).

¹¹² *See, e.g., People v. Gaskins*, 923 P.2d 29 (Colo. App. 1996) (affirming remand to trial court to determine whether LWPP was appropriate sentence for habitual offender); *Bradshaw*, 671 S.E.2d at 490, 492 (coining LWPP “the third most severe penalty permitted by law” and finding it disproportionate when authorized for second conviction for failing to register as sex offender).

¹¹³ *See, e.g., State v. Lefeure*, 831 So. 2d 398, 401 (La. Ct. App. 2002) (describing defendant’s argument that 209-year sentence was “in excess of his natural life span” and hence constitutionally disproportionate); *cf. State v. Lohnes*, 344 N.W.2d 686 (S.D. 1984)

a shorter term of years might be an effective life sentence for only some individuals, depending on their age and health; this is termed a situational effective life sentence.¹¹⁴ As some courts have recognized, an absolute effective life sentence is a “[m]aximum sentence” and should accordingly be “reserved for the most egregious and blame-worthy of offenders.”¹¹⁵ In effect and spirit, it is the same as LWOP (when no parole is authorized) or LWPP (when parole is a possibility). As stated succinctly by a South Dakota judge, a sentence of, for example, 146 years “amounts to an entire life behind bars. . . . What alternative does this leave for rehabilitation? The answer is: None.”¹¹⁶ In this way, effective life sentences approach true life sentences in severity.

Acknowledging the particular severity of such punishment, the Court of Appeals of Louisiana has engaged in careful scrutiny of effective life sentences. For example, in *State v. White*, the court found that a forty-eight-year sentence imposed on a twenty-year-old individual would “effectively span the remainder of his life.”¹¹⁷ The court then proceeded to consider whether the offender could be characterized as the “worst kind of offender,” thereby justifying the effective life sentence.¹¹⁸ Finding that he could not be so characterized, the court held the sentence unconstitutionally disproportionate.¹¹⁹ Similarly, in *State v. Kennerson*, the court explained that a forty-year sentence imposed on a thirty-one-year-old offender would “effectively span the remainder of his life” and, in finding that the offender could not be described as the worst kind of offender, concluded that the sentence was unconstitutional.¹²⁰ In short, as courts have recognized,

(allowing defendant to withdraw his guilty plea after being sentenced to 347 years, where defendant had been led to believe that he would not receive a life sentence).

¹¹⁴ See Cristina J. Pertierra, *Do the Crime, Do the Time: Should Elderly Criminals Receive Proportionate Sentences?*, 19 *NOVA L. REV.* 793 (1995) (surveying states that apply age of offender as factor in proportionality analysis); see also *State v. White*, 704 So.2d 376, 380 (La. Ct. App. 1997) (adopting defendant’s argument that his forty-eight-year sentence was unconstitutionally disproportionate because it would “effectively span the remainder of his life”); *State v. Stenzel*, 688 N.W.2d 20, 26–27 (Wis. Ct. App. 2004) (rejecting contention that seventy-eight-year-old defendant’s life expectancy must be considered when meting out fourteen-year prison sentence, even though it may ultimately constitute LWOP sentence).

¹¹⁵ *White*, 704 So. 2d at 380.

¹¹⁶ *State v. Holloway*, 482 N.W.2d 306, 312 (S.D. 1992) (Henderson, J., concurring in part and dissenting in part).

¹¹⁷ *White*, 704 So. 2d at 380.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ 695 So. 2d 1367, 1382 (La. Ct. App. 1997).

sentences that endure beyond the natural life of humans are akin to life sentences and hence merit serious proportionality scrutiny.¹²¹

III

STATE INNOVATIONS AS A GUIDE FOR FEDERAL PROPORTIONALITY DOCTRINE

While death is indeed different from noncapital punishment, this difference does not justify the Court's wholesale renunciation of searching proportionality review in the noncapital context. The Court can adopt and modify the state court doctrines discussed in the preceding part without raising the concerns about objectivity, administrability, or legislative deference that it has ascribed to rigorous nonproportionality review. Because the Court has relied heavily upon these three concerns to distinguish the capital from the noncapital context, when they are absent, the Court's meager noncapital review is indefensible.¹²² Thus, the Court should look to the states' experimentations and craft a more careful proportionality jurisprudence.

First, the Court should utilize relative proportionality review. It should not permit any state to maintain and impose punishment pursuant to an internally incoherent sentencing scheme. If identical elements analysis, lesser included offense analysis, or lesser culpability analysis reveals that a defendant was sentenced under an irrational statutory scheme, the reviewing court should strike down that sentence—and the relevant sentencing law—as unconstitutionally disproportionate.¹²³

Second, the Court should find noncapital sentences disproportionate where objective evidence of public opinion reveals that a national consensus has developed against use of a particular punishment for a given offense or class of offender. When a nationwide com-

¹²¹ Perhaps the most difficult question presented by the heightened review of effective life sentences is the definitional question of what constitutes an effective life sentence. I discuss this in Part III.A, *infra*.

¹²² I do not disclaim that one may make other objections to the modified noncapital proportionality doctrine suggested by this Note. However, the purpose and sole focus of this Note is to respond to the concerns that the Supreme Court has articulated in this area. When those concerns do not arise, the Court cannot justify the vast difference in rigor between its categorical and as-applied proportionality doctrine.

¹²³ The states discussed herein have developed these doctrines as part of their proportionality review. Hence, following the states' lead, this Note advocates that the Court adopt relative proportionality review as part of its Eighth Amendment jurisprudence. I recognize, however, that such review might also be appropriate under the Due Process Clause of the Fourteenth Amendment because, in essence, relative proportionality functions as a species of rational basis review of a particular jurisdiction's sentencing laws. I argue that the Court *should* engage in this review, irrespective of the doctrine under which it is conducted.

parison of the sentences authorized by other jurisdictions for the same conduct, an analysis of sentences actually imposed under the same statutory provision or an analogous one in other states,¹²⁴ and legislative changes to the sentencing law in the same state or analogous laws in other states¹²⁵ demonstrate that the punishment for an offense or offender does not comport with currently prevailing standards of decency, the Court should declare that punishment unconstitutional.¹²⁶

Finally, even if the Court refuses to adopt the first two suggestions advocated, at the very least it should utilize the same categorical proportionality doctrine it uses in the capital context for extreme non-capital sentences. It has begun this process recently by applying categorical proportionality review in the context of LWOP sentences for juveniles.¹²⁷ As state courts have recognized, extreme sentences are sufficiently more severe than other sentences to justify heightened proportionality review, and the Court should be willing to treat such sentences with the same scrutiny it provides in the capital context. While this Note does not advance a normative argument about precisely how the Court should define “extreme,” it argues that categor-

¹²⁴ While the state court decisions surveyed in Part II of this Note involve analysis of punishments imposed only in the same jurisdiction under the same sentencing law, I argue that the Court should also consider the sentences imposed under analogous laws in other jurisdictions. Canvassing evidence of national consensus should be a fully national inquiry, since a proportionality decision made by the Supreme Court will affect all states, and not just the single state where the sentence in question was imposed. As this Part demonstrates, this national inquiry is not overly subjective, inadministrable, or insufficiently differential to state legislative policymaking.

¹²⁵ Similarly, although the state court decisions surveyed by this Note consider evidence of sentencing law changes only in the same jurisdiction, I argue that the Court should also consider changes to analogous sentencing laws in other jurisdictions.

¹²⁶ In the capital context, ascertaining the national consensus is the first of two steps in the Supreme Court’s analysis. The second step requires the Court to use its own judgment in discerning whether a punishment is proportionate. This Note posits that, as state courts have done, *see supra* Part II.B, the Supreme Court could simply rely on the first prong of its analysis and consider only objective evidence of national consensus. It need not undertake the more subjective project of considering its own judgment about proportionality.

¹²⁷ In its recent decision in *Graham v. Florida*, No. 08-7412 (U.S. May 17, 2010), the Court extended the categorical review previously reserved only for capital cases to the context of LWOP sentences for juveniles. It explained that when a proportionality question—capital or noncapital—“implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes,” categorical proportionality doctrine should apply. *Id.*, slip op. at 10. While it remains to be seen how the Court will apply this test, *Graham* makes clear that the Court has neither extended it to LWOP sentences generally nor foreclosed the possibility of extending it beyond LWOP sentences. This Note suggests that the Court can and should go further by extending categorical review beyond the context of juvenile LWOP to cover all extreme sentences—defined as LWOP, LWPP, or effective life sentences, or some combination of the three.

ical proportionality doctrine should govern extreme sentences, however the Court decides to define them.

This Part proceeds in three sections. In each section, I explain why the Court's commitments to ensuring objectivity, administrability, and appropriate deference in its proportionality review, respectively, should not preclude the new forms of review advocated by this Note.

A. *Objectivity*

None of the doctrines advocated by this Note threatens the Court's interest in ensuring that proportionality decisions are "informed by objective factors to the maximum possible extent."¹²⁸ These doctrines ask the Court to engage in principled and constrained forms of analysis, a task leagues away from merely imposing the "subjective views of individual Justices."¹²⁹

First, relative proportionality review does not call for imposition of a court's subjective values; it merely imposes the bare requirement of rationality on states' sentencing schemes. Judges reviewing for relative proportionality do not consider their own personal preferences regarding the appropriate sentence for a given offense or offender. Rather, they assume that the sentencing policy judgments a state has made are correct and limit their review to ensuring that inconsistencies do not pervade the sentencing scheme as a whole. In identical elements analysis, for example, courts do not question whether a state's statutory range for any given crime is appropriate according to judges' personal beliefs. Courts only demand that no other crime with the same elements is punished differently. Such analysis involves pure statutory interpretation, which the Court clearly has not found to be impermissibly subjective, since it frequently engages in such interpretation in other contexts.

Similarly, judges' personal values are irrelevant in lesser included offense and lesser culpability analysis. Where the statutory maximum is higher for a crime that has one fewer element or a lesser culpability requirement than another otherwise identical crime, courts are able to objectively declare the sentencing scheme irrational. In sum then, relative proportionality review is an objective analytical exercise insulated from judges' subjective values.

Second, examining evidence of public opinion of contemporary standards of decency also involves objective and principled analysis. By engaging in an interjurisdictional comparison and reviewing the

¹²⁸ *Rummel v. Estelle*, 445 U.S. 263, 274–75 (1980) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).

¹²⁹ *Id.* at 274 (quoting *Coker*, 433 U.S. at 592).

terms of imprisonment imposed on other defendants sentenced under the same or analogous statutory provisions and legislative changes to the same or analogous sentencing laws, courts aggregate objective data that allow them to discern public opinion about a particular proportionality question. Although the information gathered does not wholly erase the difficulty in determining exactly when a term of imprisonment becomes unconstitutionally excessive, it serves as a point of reference from which a sentence can be evaluated. The data provide information about the range of sentences that are commonly accepted and, in this way, help courts identify when a given punishment is outside of the norm. When a sentence is radically more severe than what is commonly accepted—that is, when it contravenes the national consensus—that sentence should be held to be unconstitutionally disproportionate.

One might fear that subjectivity intolerably pervades this analysis because courts will have to make difficult judgments about when the objective evidence constitutes a national consensus. Using this analysis, courts must make close calls in deciding when a punishment is sufficiently outside the norm that it becomes unconstitutional and they must draw lines between similar sentences that may seem subjective.

While certainly such decisions might seem arbitrary or infected by individual preference at the margins, this should be no more true in the noncapital context than in other contexts that the Court has found sufficiently objective to warrant judicial review. In its categorical proportionality jurisprudence,¹³⁰ which governs both capital sentences and LWOP sentences for juveniles convicted of nonhomicide crimes,¹³¹ the Court relies heavily on evidence of public opinion in making determinations. In deciding that LWOP sentences are disproportionate punishments for juveniles convicted of nonhomicide crimes, for example, the Court concluded that public opinion condemned such sentences.¹³² From evidence about what punishments other states statutorily authorized and actually imposed, the Court carefully determined that a national consensus existed.¹³³ Similarly, in countless other contexts wherein the Court utilizes totality-of-the-circumstances tests, the Court makes delicate judgments about whether a variety of fact-based determinations together meet a judicially

¹³⁰ See *supra* notes 12–19 and accompanying text.

¹³¹ *Graham*, No. 08-7412 (U.S. May 17, 2010).

¹³² *Id.*, slip op. at 16.

¹³³ *Id.*

created standard.¹³⁴ In the context of Fourth Amendment seizures, for example, the presence of an additional police officer, the precise positioning of his gun, the exact location of the officer relative to the defendant, or the unique words used by the officer might be the determinative factor that transforms a consensual stop into a seizure.¹³⁵ While one could argue that providing Fourth Amendment protection where four but not three police officers surround the defendant is arbitrary, the Court has not renounced totality-of-the-circumstances review in such situations. Determining whether evidence of public opinion disfavors a particular sentence in the noncapital context should be no more subjective, and hence should not justify the Court's renunciation of serious proportionality review.¹³⁶

Finally, the Supreme Court can extend the categorical proportionality review from the capital context to the most severe noncapital sentences without introducing subjectivity into its judicial review. As many state courts have recognized, LWOP, LWPP, and effective life sentences are three discrete and particularly harsh sentences. While they are qualitatively less severe than capital punishment, they are objectively so much more severe than other noncapital sentences that the Court need not worry that it will be unable to differentiate these extreme sentences from lesser sentences. In effect, the Court can provide heightened proportionality review of these punishments without opening up all sentences for the same caliber review or making excessively subjective decisions.

One might argue that the lines dividing extreme sentences from other prison terms are inherently blurry. Accordingly, we might abandon the project of providing heightened proportionality review in these contexts because we fear that there is no principled way to distinguish between the "most severe" sentences on the one hand, and "less severe" sentences on the other. This argument is misguided. Although state courts have taken different paths regarding precisely how far to extend aggressive proportionality review, their experiences

¹³⁴ Cf. *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (utilizing totality-of-the-circumstances test to determine when individual is seized under Fourth Amendment); *EDWARDS V. ARIZONA*, 451 U.S. 477, 482 (1981) (utilizing totality-of-the-circumstances test to determine whether defendant waived his right to counsel under Fifth Amendment); *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945) (utilizing totality-of-the-circumstances test to determine whether state can assert personal jurisdiction over party under Due Process Clause of Fourteenth Amendment).

¹³⁵ See *Bostick*, 501 U.S. 429.

¹³⁶ The Court can make proportionality decisions based solely on objective evidence of national consensus. If the Court adheres to a national consensus analysis, concerns about subjectivity should be alleviated for the reasons just explained. The Court need not bring its own judgment to bear, since this would inject the subjectivity the Court has eschewed.

provide a number of principled distinctions between severe and less harsh sentences, any of which the Supreme Court could adopt. It is defensible to draw the line at LWOP for heightened proportionality review, because LWOP is the only sentence that by definition wholly rejects an offender's rehabilitative prospects. It is also defensible to draw the line at LWPP or effective life sentences since these punishments arguably are—in effect albeit not in definition—the equivalent of LWOP. There are objective and persuasive reasons to take any of these routes, as the state court decisions reviewed in Part II have demonstrated. The Court need only choose where to draw its own line—at LWOP, LWPP, or effective life sentences.

One might also object that because the decision about how to define extreme sentences presents multiple alternatives, deciding where to draw the line is fundamentally subjective. In other words, this argument alleges that because the Court could reasonably decide to define extreme sentences as including solely LWOP, or both LWOP and LWPP, or LWOP, LWPP, and effective life sentences, choosing where to draw the line would be the product of judicial preference rather than reason. This argument, too, is unfounded. The Court's concern about subjectivity is tied to the specific context of differentiating among the *infinite* number of potential terms of imprisonment. The Court has explained that on the sliding scale of noncapital punishment, where every successive sentence is only the slightest bit harsher than the one before, drawing boundaries between proportionate and disproportionate sentences is a subjective endeavor. The Court has worried that it is simply unable to find nonarbitrary ways to differentiate among these sentences.¹³⁷

The project of distinguishing among the infinite points on a continuum is vastly different from the definitional decision about what constitutes an extreme sentence. In the latter context, there are three *discrete* possibilities. Even more importantly, as just described, there are persuasive and rational reasons to choose any one of the three possibilities. That the Court could reasonably make one of several decisions does not justify its renunciation of serious review of extreme sentences. Arguably, every single case requires the Court to make a decision between two or more reasonable alternatives. Most analogously, where the Court decides which groups of people constitute a suspect class that receives heightened scrutiny for equal protection purposes, it makes precisely this kind of careful determination.¹³⁸ That

¹³⁷ See *supra* Part I.B.

¹³⁸ ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 669–74 (3d ed. 2006).

reasonable alternatives exist simply cannot be—and has not been—enough to render judicial inquiries so subjective that the Court must refrain from making them.

Even accepting the above, one might claim that it is impossible to objectively delineate when a noncapital sentence becomes an effective life sentence and therefore conclude that any analysis that treats effective life sentences differently from other sentences will necessarily introduce subjectivity. It is true that there is no single obvious way to define what constitutes an effective life sentence. The definition of an absolute life sentence could be premised upon the average natural life span of humans, upon the record for the longest life span, or even upon the projected maximum possible life span at the time the individual will die. Similar uncertainties arise when considering at what point a sentence becomes a situational effective life sentence. This Note does not suggest a particular definition of an effective life sentence. The crucial issue is simply that the Court can provide a principled defense of any of the options laid out above. The Court's decision of which option to choose injects no more subjectivity into the judicial determination than do, for example, its decisions in other contexts when it chooses among competing interpretations of statutory or constitutional language.

B. Administrability

The proportionality jurisprudence advocated by this Note is both derivatively and practically administrable. The Court's derivative administrability concern is that, when proportionality review is inherently subjective, it is beyond the Court's capacity.¹³⁹ Because of the derivative nature of this administrability argument, if proportionality review is not itself inherently subjective, it should not be derivatively inadministrable either. Put simply, because the Court's derivative administrability concerns flow fully and directly from its concerns about subjectivity,¹⁴⁰ doctrinal innovations that do not introduce significant subjectivity into the Court's analysis do not present such concerns. As the proportionality review suggested by this Note is not unduly subjective, derivative administrability concerns should not arise.

Practical administrability concerns—which emphasize the increase in both docket size and complexity of review that would accompany the adoption of rigorous proportionality review—should

¹³⁹ See *supra* note 40 and accompanying text; see also Barkow, *supra* note 8, at 1182 & n.222.

¹⁴⁰ Barkow, *supra* note 8, at 1182 & n.222; see also *supra* Part I.B.

also be insufficient to prevent the Court from adopting the proportionality review this Note suggests. With regard to relative proportionality review, the very high bar for finding a sentencing law unconstitutionally disproportionate would likely limit the number of challenges to state laws. It seems probable that only a small number of states maintain criminal sentencing laws that are internally incoherent and irrational, as these terms are used in this Note. Yet even if my assumption here is incorrect, once a court declares a sentencing law unconstitutional, there will be no need to relitigate the constitutionality of that law in individual cases.¹⁴¹ This should limit the total number of cases brought before the courts for proportionality review. Furthermore, relative proportionality review requires only that courts engage in basic statutory interpretation, a task for which courts are uniquely well equipped and which should not prove practically inadministrable.

In contrast, discerning contemporary standards of decency for noncapital cases is admittedly a large and difficult project. Any individual could raise a proportionality challenge if she believed that evidence existed demonstrating that society deemed her sentence disproportionate. Conducting an interjurisdictional comparison, comparing the terms of imprisonment imposed on other defendants sentenced under the same and analogous statutory provisions, and considering legislative changes to sentencing laws is a vast and complicated exercise. Similarly, extending the demanding proportionality review available in the capital context to extreme sentences in the noncapital realm would also be a significant undertaking, given the large number of extreme sentences meted out annually and the intricacy of capital review.

Yet the Court's practical administrability concerns may be overblown. First, if the Court chooses to extend its capital proportionality review only to LWOP sentences, for example, the problem would be significantly diminished. Because there are many fewer LWOP sentences than LWPP and effective life sentences, the number of cases qualifying for this review would be limited. Furthermore, the vast majority of proportionality questions would reach the federal courts

¹⁴¹ After a court determines that a given law is unconstitutional under relative proportionality doctrine, people sentenced under that law may be able to petition for relief. See *Teague v. Lane* 489 U.S. 288, 300 (1989) (“[O]nce a new rule is applied to the defendant in the case announcing the rule, evenhanded justice requires that it be applied retroactively to all who are similarly situated.”). However, these litigants would not relitigate the constitutionality of the relevant law; they would simply request relief under the court's prior ruling. Thus, once a court determines that a particular law is relatively disproportionate, there would be no need for future courts to engage in any proportionality analysis.

through the Supreme Court's certiorari practice,¹⁴² and often through federal habeas review. In these cases, state courts would bear the primary responsibility for engaging in proportionality inquiries. As Part II of this Note has shown, state courts have already demonstrated that they are able and willing to engage in rigorous and complicated proportionality analyses. Federal courts will thus benefit from making their decisions in light of several layers of careful state court analysis and upon a full record. Particularly given the highly deferential standard of habeas review in the federal courts,¹⁴³ more rigorous proportionality review should not be practically inadministrable for federal judges.

Regardless, the number and complexity of potential cases should not, without more, dissuade the Court from providing review. Constitutional guarantees would be meaningless if, as Justice Brennan said, we chose not to implement them because of "a fear of too much justice."¹⁴⁴ As Justice Harlan argued, "current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles."¹⁴⁵

C. *Deference to State Legislative Decisionmaking*

The proportionality jurisprudence advocated by this Note is not vulnerable to the Court's arguments about derivative and outlier deference to state legislative decisionmaking. With regard to derivative deference, the Court has explained that, because rigorous proportionality review is inherently subjective, proportionality review is essentially policymaking.¹⁴⁶ Since the responsibility to make policy decisions about criminal sentencing resides with state legislatures, the Court has been reluctant to engage in serious proportionality review and has proclaimed deference to state legislatures. Because of the derivative nature of this deference argument, when proportionality review is not inherently subjective—and therefore does not involve policymaking—derivative deference should not be a problem either.

¹⁴² See Geneva Brown, *White Man's Justice, Black Man's Grief: Voting Disenfranchisement and the Failure of the Social Contract*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 287, 292 n.41 (2008) (explaining that federal prosecutions accounted for only 6% of all felony prosecutions in 2004).

¹⁴³ Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d) (2006) (barring courts from granting application for writ of habeas corpus absent decision contrary to "clearly established Federal law" or "unreasonable determination of the facts").

¹⁴⁴ *McCleskey v. Kemp*, 481 U.S. 279, 339 (1987) (Brennan, J., dissenting).

¹⁴⁵ *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 411 (1971) (Harlan, J., concurring in the judgment).

¹⁴⁶ See *supra* note 42 and accompanying text.

In sum then, because the Court's derivative deference concerns flow fully and directly from its concerns about subjectivity, doctrinal innovations that do not introduce significant subjectivity into the Court's analysis do not present derivative deference concerns. Since the proportionality review suggested by this Note is not unduly subjective, derivative deference concerns are inapposite.

However, one might object that because the question of how to define extreme sentences could be answered in multiple ways, deciding where to draw the line is a policy decision appropriately made by state legislatures, not federal courts. Since the Court is concerned about reserving policy decisions to state legislatures, it should not adopt doctrine that compels it to usurp such decisions from states.

As explained in Parts I.B and III.A, however, the Court's argument about subjectivity and deference to state legislatures is tied to the specific context of differentiating among the infinite number of potential terms of imprisonment. A judicial inquiry does not transform into a policy decision because a court must make a choice between *reasonable* alternatives. It becomes a policy decision when the inquiry is so fraught with impermissible subjectivity that mere judicial preference or whim rather than *reason* determines the outcome.¹⁴⁷ Because there are compelling reasons for the Court to adopt each of the three possible definitions of extreme sentences, the Court need not defer to state legislatures to make this decision. The Court need only consider and decide which of the reasons it finds most compelling and choose the corresponding definition.

With regard to outlier deference—which stresses that the judiciary should not ban a state from maintaining a sentencing law merely because it is the most severe sentencing law in the country, but should instead show deference to state penological policy—the Court's fears are unsubstantiated under the strands of proportionality doctrine advocated by this Note. First, relative proportionality is, by definition, a purely intrajurisdictional analysis; other states' sentencing laws are irrelevant to a court's relative proportionality decision in any given state. Furthermore, relative proportionality review permits great deference to a state's penological goals; courts do not independently evaluate a state's penological policy choices but merely police for sentences that are irrational in light of the state's own policies and laws.

Second, the concern about outlier deference would be only slightly more substantial if the Court adopted this Note's proposal to examine objective evidence of national consensus or, failing that, to

¹⁴⁷ See *supra* text accompanying notes 136–39.

extend capital proportionality review to extreme noncapital sentences. It is true that there will be times when courts will refuse to accept a state's sentencing judgment and will overturn a sentence imposed by an outlier state. However, in neither of these contexts would courts declare a state's sentence disproportionate solely because it was the most severe of the fifty states. Rather, courts would take into account all of the evidence surveyed and use that evidence to inform its analysis into whether the sentence in question comported with prevailing standards of decency. By overturning a state's authorized sentence only when significant evidence of public opinion—gleaned from states across the nation—demonstrates its disproportionality, courts would balance the importance of deferring to state sentencing policy against the need to enforce the Eighth Amendment, just as they do in the capital context. Indeed our Constitution contemplates that state sovereignty must at times give way to federal mandate: “[T]he Eighth Amendment and its state counterparts . . . were adopted to guard against isolated excesses of majoritarian zeal and the too vigorous pursuit of social benefit at the expense of undeserved individual suffering.”¹⁴⁸ In sum then, outlier deference is insufficient to justify the Court's empty noncapital review.

CONCLUSION

In the name of objectivity, administrability, and deference to state legislative will, the Supreme Court has sacrificed meaningful proportionality review in the noncapital context. While it has actively regulated the proportionality of the death penalty, it has sanctioned extreme noncapital punishments, including life imprisonment, for conduct that many people would deem undeserving of such severe condemnation. This Note argues that the Court has unnecessarily and inadvisably abdicated its responsibility to police noncapital sentences. As reviewed in this Note, state courts have created strands of proportionality doctrine that simultaneously provide more searching review and avoid the three problems the Court has ascribed to such review. While I hope that the Court will go further and devise new and creative methods for ensuring noncapital proportionality, at the very least, it should follow the states' lead and adopt modified versions of the methods of review they have created.

¹⁴⁸ Gilchrist, *supra* note 43, at 1167.