ACCOUNTING FOR PUNISHMENT IN PROPORTIONALITY REVIEW

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The Eighth Amendment has been interpreted to demand proportionality between an offender's crime and his punishment. However, the current proportionality standard is widely regarded as meaningless. In weighing the severity of the crime against the harshness of the punishment, modern courts do not consider any aspect of the sentence beyond the number of years listed. This Note argues that a more comprehensive analysis of the features of a sentence that contribute to its severity has the potential to reinvigorate the proportionality principle by giving courts a fuller picture of the harshness of modern sentences. Although there are some hurdles to conducting this more robust analysis, this Note proposes methods by which courts could consider the true length of carceral sentences, the prison conditions in which the sentences are served, and the collateral consequences that accompany many criminal convictions. In so doing, this Note demonstrates that some methods of accounting more accurately for the harshness of punishments are neither impracticable nor in tension with other areas of Eighth Amendment doctrine.

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INTRODUCTION

As rates of conviction and incarceration have skyrocketed, the number of people whose primary constitutional refuge is the Eighth Amendment has grown.[1] Though courts have interpreted the Eighth Amendment to offer more expansive protection in specific contexts, such as for certain offenders facing the death penalty,[2] individuals serving term-of-years sentences[3] very rarely get relief under the

[1] The population of American jails and prisons has doubled twice since the early 1980s; roughly two million people are incarcerated today. ASHLEY NELLIS & RYAN S. KING, THE SENTENCING PROJECT, NO EXIT: THE EXPANDING USE OF LIFE SENTENCES IN AMERICA 1 (2009); *see* ALLEN J. BECK & DARRELL K. GILLIARD, BUREAU OF JUSTICE STATISTICS, NCJ 151654, PRISONERS IN 1994, at 1 (1995), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/Pi94.pdf (documenting the dramatic growth in the prison population between 1980 and the mid-1990s); *see also* PAUL GUERINO ET AL., BUREAU OF JUSTICE STATISTICS, NCJ 236096, PRISONERS IN 2010 (2012), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/p10.pdf (providing detailed statistics on the number of prisoners in federal and state custody).

[2] *E.g.*, Kennedy v. Louisiana, 554 U.S. 407 (2008); Roper v. Simmons, 543 U.S. 551 (2005); Atkins v. Virginia, 536 U.S. 304 (2002); Coker v. Georgia, 433 U.S. 584 (1977).

[3] I use the phrase "term-of-years sentence" to describe a sentence of imprisonment for a length of time, including life in prison without the possibility of parole (LWOP).

Eighth Amendment.[4] In *Harmelin v. Michigan*,[5] the governing precedent in this area, Justice Kennedy announced that the Punishments Clause of the Eighth Amendment "forbids only extreme sentences that are 'grossly disproportionate' to the crime."[6] Kennedy approvingly noted that "*successful* challenges to the proportionality of particular sentences [are] exceedingly rare,"[7] and this pronouncement has proven true.[8]

A meaningful proportionality principle is critical, as disproportionate sentences have the potential to weaken citizens' respect for the fairness of criminal sanctions[9] and are unlikely to be corrected

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[4] *See* 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, 1146 (2009) (noting that in capital cases, "[t]he Court will scrutinize whether the death sentence is proportionate to the crime and the defendant, exempting certain crimes and certain offenders from a capital sentence to avoid an unconstitutionally excessive punishment," but that in contrast, "[i]n noncapital cases . . . the Court has done virtually nothing to ensure that the sentence is appropriate").

[5] 501 U.S. 957 (1991).

[6] *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring) (quoting Solem v. Helm, 463 U.S. 277, 288, 303 (1983)). Justice Kennedy's opinion in *Harmelin* is widely regarded as the controlling opinion in that case. *See* Ewing v. California, 538 U.S. 11, 23–24 (2003) (plurality opinion) ("The proportionality principles in our cases distilled in Justice Kennedy's [*Harmelin*] concurrence guide our application of the Eighth Amendment . . . ."). The Punishments Clause of the Eighth Amendment refers to the portion of the text that reads "nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. Claims under the Punishments Clause arise in three distinct but overlapping contexts. The doctrinal frameworks surrounding two of these contexts, prison conditions and sentences of death or juvenile LWOP, are beyond the scope of this Note, which focuses on how the Eighth Amendment applies to noncapital sentences imposed on adult offenders.

[7] *Harmelin*, 501 U.S. at 1101 (Kennedy, J., concurring) (quoting *Solem*, 463 U.S. at 289–90).

[8] There are very few examples of federal courts overturning a criminal sentence as unconstitutionally disproportionate. *See, e.g.*, Gonzalez v. Duncan, 551 F.3d 875, 891 (9th Cir. 2008) (holding that a sentence of twenty-eight years to life was grossly disproportionate to a technical violation of California's sex offender registration law, and reversing and remanding the case to a lower court after holding that the lower court's application of clearly established Supreme Court law was objectively unreasonable); Ramirez v. Castro, 365 F.3d 755, 775 (9th Cir. 2004) (holding that a sentence of twenty-five years to life under California's "three strikes" law for a third shoplifting offense was grossly disproportionate and that lower courts had applied the standard unreasonably); Henderson v. Norris, 258 F.3d 706, 714 (8th Cir. 2001) (finding a life sentence wherein the petitioner would not be eligible for parole unless granted clemency by the governor was unconstitutionally disproportionate to the offender's first offense of selling a small amount of cocaine base). Such challenges have not, however, been infrequent. *See* Christopher J. DeClue, *Sugarcoating the Eighth Amendment: The Grossly Disproportionate Test Is Simply the Fourteenth Amendment Rational Basis Test in Disguise*, 41 Sw. L. REV. 533, 572–79 (2012) (listing over one hundred circuit court decisions denying petitioners' disproportionality claims since the 1980s).

[9] *See* Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 211–12 (2012) ("[P]erceptions of the system's 'legitimacy,' . . . may

through the political process.[10] Felon disenfranchisement makes it impossible for many people convicted of felonies to engage in the political process through voting,[11] and the political incentives for politicians point in one direction: in favor of greater punishments.[12] Prosecutorial discretion has also failed to check this trend.[13] Some scholars argue that "[e]liminating proportionality review would mean that a legislature could literally impose any punishment for any crime,"[14] and, if true, this could erode confidence in the fairness of the criminal justice system. There is, therefore, a strong need for meaningful judicial enforcement in this area.

The core of the current proportionality standard instructs courts to weigh the severity of the offender's crime against the harshness of the offender's punishment.[15] Insisting on proportionality is a reasoned and well-established way to prevent cruel and unusual punishments; many jurisdictions that assess proportionality, including foreign courts and domestic state courts interpreting state constitutions, do so by

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promote systemic compliance with substantive law, cooperation with legal institutions and actors, and deference to even unfavorable outcomes.").

[10] *See* Barkow, *supra* note 4, at 1149 (noting that, especially in noncapital cases, reform through the political process is difficult and that it is "almost impossible for the millions of people serving noncapital sentences to get the public's attention about injustices in noncapital sentencing law, even though there are many").

[11] *See* Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349, 350–52 (2012) ("An estimated 5.85 million Americans, or 2.5 percent of the total U.S. voting age population, have lost the right to vote . . . because they have a criminal conviction."); Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1169–70 (2004) (arguing that modern disenfranchisement "operates primarily to punish . . . not only individual citizens . . . but the communities which bear the brunt of the criminal laws the political system enacts"). This phenomenon has disturbing racial dimensions; thirteen percent of African American men are permanently disenfranchised. *See* Cammett, *supra* note 11, at 365–66.

[12] *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) ("How did criminal law come to be a one-way ratchet that makes an ever larger slice of the population felons, and that turns real felons into felons several times over? The conventional answer is politics."); *see also* Barkow, *supra* note 4, at 1192 ("Criminal defendants and their representatives are, to put it mildly, a politically weak group.").

[13] Barkow, *supra* note 4, at 1193 ("Without judicial oversight by either judges or juries . . . there is little to police these disproportionate and arbitrary sentences except the discretion of the prosecutor bringing the charges. That mechanism has fallen far short of an adequate check.").

[14] Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1071 (2004).

[15] *See* United States v. Harmelin, 501 U.S. 957, 1004–05 (1991) (Kennedy, J., concurring). In some cases, courts also conduct interjurisdictional and intrajurisdictional comparisons of the crime and the punishment. *Id.* at 1005. As I will discuss in Part I, *infra*, this analysis has become rare.

weighing the crime against the punishment.[16] However, American courts have been reluctant to overturn any sentence under this test, upholding the lengthiest of sentences for minor crimes.[17] For example, the Supreme Court has upheld sentences of twenty-five years to life for a recidivist convicted of shoplifting golf clubs[18] and life without the possibility of parole (LWOP) for a first-time offender convicted of possessing roughly 600 grams of cocaine.[19] Lower courts have likewise not generally applied the test to offer meaningful protection for offenders.[20] Thus, although the *Harmelin* test is the only constitutional review of sentence length for the overwhelming majority of incarcerated people,[21] the near-impossibility of prevailing on a claim has led many to pronounce it a dead letter.[22]

This Note will argue that courts' application of the *Harmelin* test, not the test itself, has undermined its efficacy. I offer a theory of *why*

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[16] *See* Solem v. Helm, 463 U.S. 277, 288–89 (1983) (noting that, as the Eighth Amendment prohibits excessive fines and demands proportionality in capital sentencing, "[i]t would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not"); R. v. Smith, [1987] 1 S.C.R. 1045, 1053 (Can.) (in interpreting a section of the Canadian charter similar to the Eighth Amendment, employing an analysis with a similar structure that includes a weighing of the severity of the crime against that of the penalty); Julia Fong Sheketoff, Note, *State Innovations in Noncapital Proportionality Doctrine*, 85 N.Y.U. L. REV. 2209, 2218 (2010) ("The vast majority of state constitutions include a prohibition of cruel and/or unusual punishments [which] have . . . been interpreted to encompass a proportionality principle . . . ."); Michael J. Wishnie, *Immigration Law and the Proportionality Requirement*, 2 U.C. IRVINE L. REV. 415, 416 (2012) ("[T]he [proportionality] principle is ancient and nearly uncontestable, and its vitality is well established . . . .").

[17] *See* DeClue, *supra* note 8, at 572–79; Sheketoff, *supra* note 16, at 2210 ("[The Court] has invalidated only three noncapital sentences over the last two centuries, approving life sentences for minor property crimes and single drug offenses.").

[18] *See* Ewing v. California, 538 U.S. 11, 17–20 (2003) (plurality opinion).

[19] *See Harmelin*, 501 U.S. at 961, 996 (Kennedy, J., concurring).

[20] *See, e.g.*, *infra* notes 53–59 and accompanying text (discussing lower courts' somewhat limited analyses of the severity of crimes in proportionality review); *infra* note 69 and accompanying text (discussing lower courts' very limited analyses of the harshness of punishment in proportionality review).

[21] The vast majority of incarcerated people are serving noncapital sentences. *See* JOAN PETERSILIA, WHEN PRISONERS COME HOME 3 (2003) ("[J]ust 7 percent of all prisoners are serving death or life sentences . . . . Thus, 93 percent of *all* prison inmates are eventually released.").

[22] *See, e.g.*, Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1746 (2012) (noting that that Eighth Amendment proportionality principle was long viewed as dead); John D. Castiglione, *Qualitative and Quantitative Proportionality: A Specific Critique of Retributivism*, 71 OHIO ST. L.J. 71, 80 (2010) ("It is time . . . to pronounce the body of Eighth Amendment quantitative proportionality dead . . . ."). However, as at least one scholar has noted, eliminating the proportionality principle "would require a major reversal of precedent and would certainly be inconsistent with the Court's statement that the Eighth Amendment is about protecting the 'dignity of man.'" Chemerinsky, *supra* note 14, at 1071.

the proportionality principle is weak—that courts do not allow themselves to fully comprehend sentences' severity—and propose *how* the current test could be applied in a way that remedies this problem. Courts' reluctance to conduct a deep analysis of punishment during proportionality review creates an incomplete picture of sentence severity; there are additional aspects of punishment that courts can and should consider during the analysis.[23] Because the Supreme Court's past consideration of sentences' severity has been brief, it is not immediately clear what this more probing analysis would look like—that is, which aspects of punishment should be weighed by a court that wishes to undertake a more robust analysis of the severity of a sentence.

This Note will first critique courts' analysis of sentence length by demonstrating that the current nominal inquiry often misses the "true" length of a sentence. It will then argue that two features affecting the nature of punishment—the prison conditions in which a sentence is served and the collateral consequences that stem from conviction—are normatively relevant to a sentence's severity. These factors have been weighed by the Supreme Court as relevant to the severity of a punishment in the past, and I argue that courts should consider them in modern proportionality review.

To illustrate the issue that the current method of proportionality review presents, consider two hypothetical offenders, both of whom are convicted of the same crime and sentenced to twenty-five years to life in prison:

> The first man lives in a state with a functional parole system and limited executive oversight of parole. He expects to be released after serving twenty-five years in a medium-security prison. Because the prison is not overcrowded, this man will sometimes share a cell with another man but will also sometimes have a single cell to himself. There are vocational training opportunities and other self-improvement activities in the prison. When he is released, this man will face few legal restrictions.
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> The second man lives in a state where parole is very rarely granted because the governor must approve each grant of parole. He has very little hope of release and expects to die in prison. This man lives in an overcrowded maximum-security prison where, because of

[23] Though a fuller analysis of an offender's crime and culpability could also theoretically strengthen the proportionality principle, I focus only on the courts' analysis of punishment. Others have advocated for a more robust analysis of crime and culpability in proportionality review. *See, e.g.*, Sara Taylor, *Unlocking the Gates of Desolation Row*, 59 UCLA L. REV. 1810, 1847–48 (2012) ("[T]o faithfully conduct a proportionality assessment . . . courts must look beyond the moment of the crime . . . to fully and accurately capture culpability and proportionality.").

> his small stature and unfamiliarity with the prison system, he will be at risk of being sexually victimized. This man can escape the victimization only if he lives in special housing, often known as solitary confinement, which has been compared with psychological torture when borne for long periods of time. If this man is ever released from prison, he will be banned from accessing public housing, leaving him at risk of homelessness. Because of the trauma of his prison experience, and because prison overcrowding meant that this offender did not receive job training, he will be unable to hold a job.

To a court conducting modern proportionality review, these punishments are indistinguishable because the details that make the second punishment harsher than the first—the true length of the sentence, the conditions of the incarceration, and the noncarceral consequences of the conviction—are not considered by courts during proportionality analysis.[24]

The *Harmelin* standard need not be toothless; the test and associated Supreme Court precedent do not necessarily preclude a fuller consideration of punishment. As this Note will discuss, there are hurdles to a more robust proportionality review, perhaps the most significant of which is the Court's own narrow definition of "punishment" in some contexts—namely when assessing the constitutionality of prison conditions and collateral consequences.[25] However, Supreme Court precedent in the area of proportionality review is foggy; shifting pluralities of the Court have articulated the proportionality principle in different terms, leading to significant confusion about the content of the right to a proportionate sentence.[26] Two recent Supreme Court cases, *Graham v. Florida*[27] and *Miller v. Alabama*,[28] struck down

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[24] Some oppose a more robust analysis on the ground that the Court has warned against making fine-grained distinctions between relatively similar sentences such as these. *See*, *e.g.*, Solem v. Helm, 463 U.S. 277, 294 (1983) ("It is clear that a 25-year sentence generally is more severe than a 15-year sentence, but in most cases it would be difficult to decide that the former violates the Eighth Amendment while the latter does not."). However, regardless of whether a court ultimately decides that one, neither, or both of these sentences violate the Eighth Amendment, courts should be able to perceive the ways in which these sentences differ.

[25] *See infra* Part III. Though this Note does not argue for the adoption of a particular definition of "punishment," it considers anything that an offender experiences that can be causally linked to his original crime and corresponding criminal sentence as potentially relevant to proportionality review.

[26] *See* Lockyer v. Andrade, 538 U.S. 63, 72 (2003) (noting the confusion in this area and stating that the only "clearly established" legal principle evident from its opinions is that "[a] gross disproportionality principle is applicable to sentences for terms of years"); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 681 (2005) ("[T]he body of law is messy and complex, yet largely meaningless as a constraint . . . .").

[27] 130 S. Ct. 2011, 2034 (2010).

[28] 132 S. Ct. 2455, 2475 (2012).

LWOP sentences imposed on juveniles, respectively holding that the extreme severity of this punishment made it categorically unconstitutional for juveniles who did not kill to receive LWOP, and for any juvenile to receive mandatory LWOP.[29] Though the majority opinions did not employ the *Harmelin* test to arrive at these decisions, *Graham* and *Miller* may indicate that a more probing analysis of the severity of punishments is permissible or even encouraged. The Court's analysis of the severity of LWOP in these cases far surpassed the depth of the analysis of similar punishments in *Harmelin* or *Ewing*.[30] However, regardless of whether Supreme Court doctrine shifts or evolves in the area of proportionality review, this Note argues that lower courts can begin to work within the Court's current doctrinal framework to enforce the proportionality principle more meaningfully.

Part I will demonstrate that modern courts conduct an inadequate analysis of the nature and harshness of the offender's punishment but perform a comparatively lengthy analysis of the severity of the crime. Operating under the premise that a deeper analysis of the severity of punishment would provide better judicial enforcement of the proportionality principle without departing from the structure of the current test, Part II will advocate that courts conduct a more than cursory analysis of the feature of punishment that is explicitly relevant in the *Harmelin* test: the length of the sentence. Part III will explain why the prison conditions in which a sentence is served and the collateral consequences that accompany many convictions—though not mentioned by modern courts conducting proportionality review—also have a place in the analysis. Finally, Part IV will propose ways in which courts could consider, in small but significant ways, these features of punishment without running afoul of current Supreme Court doctrine.

[29] The shape of the majority's analysis in these cases differs somewhat from what is sometimes called "case-by-case" proportionality review. *See* Wishnie, *supra* note 16, at 421–22 (describing the judicial test for proportionality in categorical cases as first considering "objective indicia of society's standards," and then weighing the culpability of the offender and the severity of his crime, also considering whether the penalty "serves legitimate penological goals").

[30] *See id.* at 421 (arguing that, in light of the *Graham* opinion and the *Ewing* Court's insistence on the "vitality" of the proportionality principle, "the demise of the [proportionality] doctrine may be overstated").

I
Roots and Overview of the Modern Proportionality Principle

A. Overview of the Eighth Amendment Proportionality Doctrine

Although the Court has long recognized that the Eighth Amendment contains a proportionality principle,[31] the modern test began to take shape much more recently, after the prison population rapidly began to expand in the late 1970s. In 1980, the Court in *Rummel v. Estelle* rejected the claim that a sentence of life in prison with the possibility of parole was an unconstitutionally severe punishment for an individual who committed check fraud and had two prior convictions, exposing him to sentencing under a recidivist statute.[32] However, three years later, in *Solem v. Helm*,[33] the Court held that a sentence of LWOP was a disproportionate punishment for a similar crime: committing check fraud while having multiple prior felony convictions. The factors articulated in *Solem* for judging the proportionality of a sentence were eventually shaped into the modern proportionality standard in *Harmelin v. Michigan*.[34]

In *Harmelin*, Justice Kennedy announced that the Court would adhere to the "*narrow* proportionality principle that has existed in [the Court's] Eighth Amendment jurisprudence for 80 years,"[35] which "does not require strict proportionality between crime and sentence . . . [but rather] forbids only extreme sentences that are '*grossly* disproportionate' to the crime."[36] Kennedy invoked the three-part test articulated by the Court in *Solem*: "[A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including:

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[31] *See* Weems v. United States, 217 U.S. 349, 366–67 (1910) (invalidating a sentence of *cadena temporal*, which carried a minimum term of twelve years imprisonment at hard labor and additional civil disabilities upon release, on the grounds that it was a disproportionately harsh punishment for the petitioner's crime of making false entries in a government document).

[32] 445 U.S. 263, 284–85 (1980) ("[G]iven Rummel's record, Texas was not required to treat him in the same manner as it might treat him were this his first 'petty property offense.'"). Rummel had been imprisoned previously twice for two felony offenses. *Id*.

[33] 463 U.S. 277, 303 (1983).

[34] 501 U.S. 957, 1001–05 (1991) (Kennedy, J., concurring) (applying this standard in evaluating the constitutionality of the length of petitioner's sentence).

[35] *Id.* at 996 (emphasis added).

[36] *Id.* at 1001 (emphasis added) (quoting *Solem*, 463 U.S. at 288, 303).

i. the gravity of the offense and the harshness of the penalty;
ii. the sentences imposed on other criminals in the same jurisdiction; and
iii. the sentences imposed for commission of the same crime in other jurisdictions."[37]

The first prong of the test, Kennedy wrote, is a threshold question, and unless this "threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality," the remaining two prongs of the test are unnecessary.[38]

In *Ewing v. California*, the Court's most recent opinion addressing the proportionality test, a majority of the Court affirmed that the test as articulated by Justice Kennedy in *Harmelin* remains the proper standard.[39] The *Ewing* majority found no inference of gross disproportionality between a sentence of twenty-five years in prison and the crime of stealing three golf clubs for an individual who had multiple prior convictions.[40]

The *Harmelin* Court's modification of the *Solem* test made the first prong of the test effectively outcome determinative. In theory, a court could make a finding of gross disproportionality but go on to find that interjurisdictional and intrajurisdictional analyses reveal that the punishment is not unconstitutionally unusual.[41] However, research

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[37] *Solem*, 463 U.S. at 292.

[38] *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring). Justice Kennedy's analysis ceased after the petitioner failed on the first prong. *See id.*

[39] Ewing v. California, 538 U.S. 11, 23–24 (2003) (plurality opinion) ("The proportionality principles in our cases distilled in Justice Kennedy's concurrence guide our application of the Eighth Amendment . . . ."). Though Justice O'Connor, writing for the Court, purported to be applying the *Harmelin* standard, many commentators have noted that her analysis differed in some ways. *See, e.g.*, DeClue, *supra* note 8, at 543–46 (contending that the analysis in *Ewing* looked more like a test of the rationality of the recidivist sentencing law than a weighing of crime against punishment); Lee, *supra* note 26, at 682 (arguing that the *Ewing* Court's analysis rests on two ideas: that "a sentence is not unconstitutionally excessive as long as it can be justified under any one of the traditional justifications for punishment . . . . [and] second[,] . . . the view that legislatures are entitled to deference on the question of whether a given sentence can be justified"). Regardless, the *Ewing* Court's deferential analysis is consistent with the *Harmelin* message that proportionality challenges will very rarely be successful.

[40] *Ewing*, 538 U.S. at 30–31 (plurality opinion).

[41] Though Justice Kennedy stressed the importance of relying on objective factors in his *Harmelin* opinion, his insistence on determining whether there was an inference of gross disproportionality before engaging in interjurisdictional and intrajurisdictional analyses of the sentence—the second and third prongs of the test—arguably invites a more subjective judicial analysis than if the three prongs were considered together. *See Harmelin*, 501 U.S. at 1020 (White, J., dissenting) ("Justice Kennedy's abandonment of the second and third factors set forth in *Solem* makes any attempt at an objective proportionality analysis futile."); *see also Solem*, 463 U.S. at 290–91 (1983) ("When sentences are reviewed under the Eighth Amendment, courts should be guided by objective factors that our cases have recognized.").

has failed to uncover even one case in which a federal court has found that the initial weighing of the crime against the punishment led to an inference of gross disproportionality, but then went on to find the sentence was not disproportionate to the crime after performing the intrajurisdictional and interjurisdictional analyses.[42] The difficulty of clearing the bar of the initial threshold question, and the necessity of doing so, have transformed the first prong into the entirety of the test.[43] Thus, in examining how courts are analyzing the proportionality principle, one need not look past the application of the test's first prong.

B. Application of Harmelin*'s First Prong: Weighing the Crime Against the Punishment*

As noted above, courts applying *Harmelin*'s first prong weigh the culpability of the offender against the severity of his sentence to determine whether the comparison gives rise to an inference of gross disproportionality. This Subpart begins with a brief description of the courts' analyses of the severity of offenders' crimes, both for context and as a point of comparison for courts' analyses of the severity of offenders' sentences. Next, this Subpart explores more deeply how the Court has conducted its analysis of the severity of punishments during proportionality review, highlighting aspects of sentences that it has considered or ignored.

1. The Severity of the Crime (and Culpability of the Offender)

Over time, the Supreme Court has articulated a number of characteristics of the crime and offender that courts may consider in determining a crime's severity. Though courts have quibbled about what should actually be relevant to the analysis, most of the Court's considerations have exerted influence on how lower courts analyze these claims. At various times, the Court has considered the "harm caused

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[42] Graham v. Florida, 130 S. Ct. 2011, 2039–41 (2010) (Roberts, C.J., concurring) (concluding that all three prongs of the *Harmelin* test suggested that the sentence was disproportionate); *Solem*, 463 U.S. at 295–300, 303 (invalidating a sentence after finding an inference of disproportionality from a comparison of the crime and punishment, and after conducting comparative interjurisdictional and intrajurisdictional analyses); Ramirez v. Castro, 365 F.3d 755, 767–73 (9th Cir. 2004) (similarly concluding that all three prongs of the *Harmelin* test suggested disproportionality).

[43] *See, e.g.*, *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring) ("In light of the gravity of petitioner's offense, a comparison of his crime with his sentence does not give rise to an inference of gross disproportionality, and comparative analysis of his sentence with others in Michigan and across the Nation need not be performed."); *see also infra* notes 54–57 and accompanying text (describing how the proportionality analysis of federal appellate courts has, in a number of cases, gone no further than an analysis of the severity of the crime and a conclusion that no inference of gross disproportionality exists).

or threatened to the victim,"[44] harm the crime generally causes society,[45] "culpability of the offender,"[46] "absolute magnitude of the crime,"[47] mens rea,[48] and motive.[49] When a repeat offender is being sentenced under a recidivist statute, courts may "place on the scales not only [an offender's] current felony, but also [a] long history of felony recidivism."[50] Additionally, Justice Roberts's recent concurrence in *Graham v. Florida*[51] emphasized the importance of considering additional factors, including the petitioner's propensity for violence and the specific details of the offense.[52]

Lower courts conducting proportionality review generally contemplate some or all of these considerations. If there is a single characteristic that federal circuit courts take most seriously, it appears to be the offender's history of recidivism. For example, the petitioner in *United States v. Parker*,[53] who committed a drug crime, faced a "sentence [that] was enhanced to life imprisonment because of two convictions for sale of marihuana." Though the prior convictions were more than fifteen years old, the court weighed Parker's recidivism heavily.[54] In *United States v. Yirkovsky*[55]—in which the petitioner was a repeat

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[44] *Solem*, 463 U.S. at 292.

[45] *Harmelin*, 501 U.S. at 1002–03 (Kennedy, J., concurring) (considering the severity of the nation's drug problem when assessing the harm that the offense caused society).

[46] *Solem*, 463 U.S. at 292.

[47] *Id.* at 293 (noting that "a lesser included offense should not be punished more severely than the greater offense. . . . [and] an accessory after the fact should not be subject to a higher penalty than the principal").

[48] *Id.* at 293 (stating, for example, that intentional conduct is more serious than negligent conduct).

[49] *Id.* at 293–94 (listing motive as a factor and adding that the list was "by no means exhaustive").

[50] Ewing v. California, 538 U.S. 11, 29 (2003) (plurality opinion) (noting that "[a]ny other approach would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions").

[51] 130 S. Ct. 2011 (2010). In *Graham*, the majority held that juveniles who did not commit homicide were categorically ineligible for LWOP. *Id.* at 2030.

[52] *Id.* at 2037–38 (Roberts, C.J., concurring) (citing *Solem*, 463 U.S. at 292–94, 296–97, 297 n.22; *Ewing*, 538 U.S. at 28–30 (plurality opinion); and Harmelin v. Michigan, 501 U.S. 957, 1001–04 (1991) (Kennedy, J., concurring)) (noting that the "analysis can consider a particular offender's mental state and motive in committing the crime, the actual harm caused to his victim or to society by his conduct, and any prior criminal history" as well as "past criminal conduct, alcoholism, . . . propensity for violence of the particular defendant, [and] . . . specific details of the particular crime of conviction"). Justice Roberts's characterization of the test has the potential to reinvigorate the proportionality test by providing lower courts with more guidance.

[53] 505 F.3d 323, 330 (5th Cir. 2007).

[54] *Id.* at 330–31; *see also* United States v. Gurule, 461 F.3d 1238, 1247–48 (10th Cir. 2006) ("[W]e are certain that we cannot conclude that the sentence is grossly disproportionate when the defendant had twice before been convicted of a serious violent felony.").

[55] 259 F.3d 704, 705–07 (8th Cir. 2001) (upholding petitioner's sentence for the crime of being a felon in possession of ammunition).

offender who had found and kept a single bullet while remodeling a house and was sentenced to the mandatory minimum of fifteen years imprisonment—the court ruled his disproportionality challenge foreclosed because a fifteen-year prison sentence had never been held cruel or unusual for a recidivist. Other considerations courts have taken seriously include whether the offense was a crime of violence[56] and the offense's harm to society, especially in drug cases.[57]

As commentators have articulated, the fact that the Court has identified relevant considerations in determining the severity of a crime does not mean that it has given meaningful guidance about how courts should analyze them.[58] Indeed, many lower courts have conducted a much less thorough analysis than that suggested by these guideposts.[59] However, when compared with courts' analyses of the severity of punishments, which generally only contemplate the sentence's length,[60] the mere fact that the Supreme Court has enumerated multiple possible features of the crime and offender for lower courts to consider when determining a crime's severity makes the analysis look comparatively robust. As I will discuss below, courts have wasted few words giving content to the "punishment" side of the scale.

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[56] *See, e.g.*, United States v. Thomas, 627 F.3d 146, 159–60 (5th Cir. 2010) ("Each robbery was a 'crime of violence.'" (citing 18 U.S.C. § 924(c) (2012))); United States v. Snype, 441 F.3d 119, 152 (2d Cir. 2006) (upholding a life sentence, in part because "Snype was convicted of conspiring to participate in an exceptionally violent robbery"); McCullough v. Singletary, 967 F.2d 530, 535 (11th Cir. 1992) ("McCullough's convictions for sexual assault and burglary in the first-degree involved a crime of violence against a person. Therefore . . . we hold that his sentence is not grossly disproportionate . . . .").

[57] *See, e.g.*, United States v. Scott, 610 F.3d 1009, 1017–18 (8th Cir. 2010) ("'Possession, use, and distribution of illegal drugs represent one of the greatest problems affecting the health and welfare of our population. . . . [The defendant's] crime threatened to cause grave harm to society.'" (alteration in original) (internal quotation marks omitted) (quoting *Harmelin*, 501 U.S. at 1002 (Kennedy, J., concurring))); United States v. MacEwan, 445 F.3d 237, 249–50 (3d Cir. 2006) (discussing the extreme harm caused by child pornography); United States v. Collins, 340 F.3d 672, 679–80 (8th Cir. 2003) ("[M]andatory minimum penalties for drug offenses do not violate the Eighth Amendment's prohibition of cruel and unusual punishments.").

[58] *See* Taylor, *supra* note 23, at 1817 ("[T]he doctrine should be revised to include a comprehensive and clear analysis of the individual defendant's culpability as a means of measuring the gravity of the offense to be weighed against the severity of the sentence, which would protect defendants from unconstitutionally disproportionate sentences.").

[59] *See, e.g.*, *Thomas*, 627 F.3d at 159–60 (5th Cir. 2010) (noting only that the petitioner's crimes were considered "crime[s] of violence"); United States v. Watkins, 509 F.3d 277, 282–83 (6th Cir. 2007) (providing a brief description of the petitioner's crimes before holding that the "numerosity and seriousness" of the offenses justified imprisoning him for life, despite the facts that the petitioner "did not fire a gun, that no person was physically injured during the [crimes], and that [petitioner's] criminal history prior to the robberies was zero").

[60] *See infra* Part II.

2. *The Harshness of the Punishment*

The Supreme Court has provided almost no guidance as to which aspects of the punishment contribute to its harshness; it has named only the relative length of the sentence as a consideration.[61] In performing the analysis of the sentence's harshness, the *Solem* Court acknowledged the difficulty of comparing sentences of similar length. It emphasized, however, that courts are capable of doing so (at least when the sentence is particularly lengthy), explaining that "[the petitioner's] sentence is the most severe punishment that the State could have imposed on any criminal for any crime."[62] Similarly, the *Harmelin* Court focused on the sentence's comparative length, noting that a "life sentence without parole is the second most severe penalty permitted by law."[63] Recent cases have not departed from the singular focus on sentence length. Chief Justice Roberts noted in his *Graham* concurrence that the sentence of LWOP was "far less severe than a death sentence"[64] and not reserved for "the very worst offenders,"[65] but also acknowledged that the sentence was the "second-harshest sentence available under [the Court's] precedents for *any* crime, and the most severe sanction available for a nonhomicide offense."[66] The Court has consistently focused on relative sentence length, yet it is not clear that the comparative approach actually assists courts in analyzing the harshness of a sentence, as the Court has not clearly articulated when a sentence's length makes it severe.

Although sentence length is the only factor the Court has named as relevant in determining a sentence's harshness, it has spent very little time analyzing that factor. Indeed, it is not clear that the Court's treatment of sentence length can fairly be called "analysis." For example, the entirety of the Court's discussion of the sentence length in *Ewing* is as follows: "To be sure, Ewing's sentence is a long one."[67]

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[61] Though the question of why the analysis of punishment lacks real content is beyond the scope of this Note, it is an interesting one. One possibility is that the Court has refined its understanding of the severity of crimes and offenders' culpability through its extensive death penalty jurisprudence (wherein juries often consider factors that affect culpability like age, intoxication, history of hardship, etc.) but that its understanding of punishment has not had equal space to develop because capital cases present binary sentencing decisions (that is, whether or not the death penalty should be imposed) rather than a range of sentencing options.

[62] Solem v. Helm, 463 U.S. 277, 296–97 (1983) (comparing the length of Helm's sentence of LWOP to the lengths and severity of his other possible sentences).

[63] Harmelin v. Michigan, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring).

[64] Graham v. Florida, 130 S. Ct. 2011, 2038 (2010) (Roberts, C.J., concurring).

[65] *Id.*

[66] *Id.* at 2040.

[67] Ewing v. California, 538 U.S. 11, 30 (2003) (plurality opinion) (The Court continued: "But it reflects a rational legislative judgment, entitled to deference, that offenders who

Ewing's sentence was 25 years to life.[68] And the *Ewing* decision is not an anomaly. Lower courts have followed the Supreme Court's lead, both in focusing solely on the sentence's length, and in avoiding extensive analysis.[69] Often, as I will discuss at length in Part II, it is impossible to even discern the actual temporal length of the sentence because the court does not mention whether the possibility of parole exists for the offender. Such analysis makes it difficult to understand which sentences are actually the most severe, leading to a risk of inconsistency in this area.

II
CRITIQUING *HARMELIN*'S KEY INQUIRY

There is nothing in the structure or language of the *Harmelin* test itself that precludes a robust examination of each sentence. The Supreme Court explicitly made the actual length of the carceral sentence, including the possibility of parole, relevant to the analysis in *Rummel* and *Solem*. But as many sentencing regimes shifted towards determinacy and the meaning of "parole" changed in many jurisdictions,[70] courts have not acknowledged these changed circumstances or grappled with what they mean in terms of conducting proportionality review.

This Part begins the task of proposing a more robust proportionality review by seeking to define some of the inherent characteristics of incarceration and assessing whether courts' singular focus on the length of incarceration is helping to illuminate carceral sentences' relative severity. It describes the relatively recent changes that have taken place in sentencing schemes and examines courts' analyses of sentence length during proportionality review. Ultimately, this Subpart concludes that the increased "true" length of many sentences goes unnoticed by courts. It proposes that courts should consider more carefully whether the possibility of parole meaningfully exists in order to gain a more accurate picture of sentence length.

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have committed serious or violent felonies and who continue to commit felonies must be incapacitated.").

[68] *Id.* at 20.

[69] *See, e.g.*, Norris v. Morgan, 622 F.3d 1276, 1290–91 (9th Cir. 2010) ("Norris argues that a sentence of life imprisonment without the possibility of parole is extremely harsh, and the State so concedes, as it must. '[L]ife without parole is the second most severe penalty permitted by law.'" (quoting *Graham*, 130 S. Ct. at 2027)); Gonzalez v. Duncan, 551 F.3d 875, 886–87 (9th Cir. 2008) ("The indeterminate life sentence he received is the third most severe penalty available under California law . . . ."); McGruder v. Puckett, 954 F.2d 313, 316–17 (5th Cir. 1992) ("With respect to the sentence he received . . . it is the second most severe punishment that a state can inflict.").

[70] *See infra* Part II.C.

A. A Threshold Question: What Is Being Measured?

The term "sentence length," as employed by this Note, refers to the amount of time spent in a prison or jail as part of a criminal punishment. Though the modern United States imposes some punitive sanctions aside from incarceration, carceral punishment is the most common form, or default form, of punishment for felonies.[71] The Court spends ample time assessing the length of each sentence during proportionality review, yet it does so in an abstract way without discussing how these years will be spent or what opportunities the length of incarceration will foreclose for the offender. This is an artificial way to conceive of the meaning or severity of a term of incarceration. Before courts can properly measure the length of a sentence, they must identify and define what they are measuring. Put differently, courts must examine the nature of the punishment in order to understand it and thus properly measure its severity.

Courts conducting proportionality review should recognize the unavoidable effects of even a constitutional term of imprisonment as they consider sentence length. As this Note will discuss, there are situations in which the Court has decided that prison conditions themselves constitute punishment, such as when the conditions involve the unnecessary infliction of pain or deprive inmates of a basic human need.[72] The conditions that are left untouched by the Court under this analysis are presumed constitutional, but the Court has noted that those conditions may still be severe.[73] Many characteristics of incarceration are inherent to the punishment itself. Gresham Sykes was one of the first scholars to acknowledge that incarceration not intended to cause pain is still accompanied by identifiable "pains of imprisonment."[74] While all of these effects of imprisonment may not be inherent to modern incarceration,[75] many are. The "loss of liberty,

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[71] *See* Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 885 (2009) (calling the United States a "society where incarceration is the most common penalty for criminal acts"); Note, *The Eighth Amendment, Proportionality, and the Changing Meaning of "Punishments*," 122 HARV. L. REV. 960, 967 (2009) [hereinafter *Changing Meaning of "Punishments"*] (referring to incarceration as "the *sine qua non* of modern American punishment"). For a discussion of noncarceral consequences of criminal convictions, see *infra* Part III.B.

[72] *See* Rhodes v. Chapman, 452 U.S. 337, 347 (1981) (discussing various holdings of this nature). The extent to which these conditions should be weighed during proportionality review will be discussed in Parts III–IV, *infra*.

[73] *See Rhodes*, 452 U.S. at 347 ("To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.").

[74] GRESHAM M. SYKES, THE SOCIETY OF CAPTIVES 63–68 (1958).

[75] Ben Crewe, *Depth, Weight, Tightness: Revisiting the Pains of Imprisonment*, 13 PUNISHMENT & SOC'Y 509, 509 (2011) (acknowledging that some pains of imprisonment

the deprivation of goods and services, [and] frustration of sexual desire" that may be "the acceptable or unavoidable implications of imprisonment," Sykes argued, can be as painful as now prohibited physical punishments.[76] Courts purport to be assessing the severity of this experience when counting the number of years an offender will spend in prison.

American jurisprudence does not wholly fail to acknowledge the nature of American incarceration. As one example, Judge Gleeson of the U.S. District Court for the Eastern District of New York commented on his own imposition of a mandatory sentence by writing that "[i]ncarceration is often necessary, but the unnecessarily punitive extra months and years . . . matter: children grow up; loved ones drift away; employment opportunities fade; parents die."[77] Such a simple recognition of the meaning of incarceration during proportionality review would strengthen the analysis.[78] However, though this Note advocates for courts to define what they are measuring before attempting to judge sentence length, it acknowledges that the Court's current framework does not embrace this method. Thus, for this reason and for the sake of clarity, the remainder of this Note will follow the lead of the Court and analyze the severity of a sentence's length and its nature separately.

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are inherent in incarceration, some result from negligence or malice of the prison, and some result from broad policies and practices).

[76] SYKES, *supra* note 74, at 64 ("Such attacks on the psychological level are less easily seen than a sadistic beating, a pair of shackles in the floor, or the caged man on a treadmill, but the destruction of the psyche is no less fearful than bodily affliction . . . ."). Subsequent scholars have further articulated a number of consequences of imprisonment that are inherent in carceral punishment: Prisons burden autonomy, attack prisoners' sense of self-worth, lead to anxieties about identity, strip prisoners of privacy, and produce feelings of fear or stress. *See* Crewe, *supra* note 75, at 510–13 (describing the conclusions of penological scholars in this area).

[77] Memorandum Explaining a Policy Disagreement with the Drug Trafficking Offense Guideline at 45, United States v. Diaz, 11-CR-00821-2 (JG), 2013 WL 322243 (E.D.N.Y. Jan. 28, 2013).

[78] Despite the current dominance of the modern prison system, incarceration has not always been the primary American mode of punishment, and the nature of American incarceration has changed over time. *See Changing Meaning of "Punishments," supra* note 71, at 967–68 (noting that whipping, executions, and public shaming were the predominant modes of punishment at the time that the Eighth Amendment was drafted, and describing early American prisons as resembling households and as mostly serving coercive—not penal—purposes). Examining these deeper questions about the nature of incarceration will give courts a picture of what they are measuring, ensuring that courts are not blind to changes in the system over time.

B. The Constitutional Significance of Sentence Length and the Possibility of Parole

The Court's analysis of various sentences during proportionality review indicates that an assessment of a sentence's length, including whether the possibility of parole is available, is a critical component of proportionality review.[79] For example, in the most recent opinion considering whether an adult term-of-years sentence was disproportionate to its associated crime, the Court highlighted the importance of the possibility of parole. The *Ewing* Court explained the difference between the outcome in *Rummel*, in which a recidivist offender's life sentence was held constitutional, and in *Solem*, in which a similar offender's life sentence was held unconstitutional: The Court "specifically noted the contrast between that [true life] sentence [in *Solem*] and the sentence in *Rummel*, pursuant to which the defendant was eligible for parole."[80] Thus, the modern Court has suggested that considering whether parole is available remains a central part of the proportionality test.

The possibility of parole, although not outcome determinative, has figured significantly into the Court's analysis.[81] In *Rummel*, the petitioner was convicted of obtaining $120 by false pretenses and received a mandatory sentence of life imprisonment under Texas's recidivist statute because he had previously committed two similar crimes: credit card fraud and writing a bad check.[82] In upholding the sentence, the Court found that "because parole is an established variation on imprisonment of convicted criminals, a proper assessment of Texas's treatment of Rummel could hardly ignore the possibility that he will not actually be imprisoned for the rest of his life."[83] At the time of *Rummel*, it was standard practice that an individual who was

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[79] Though one could argue that the Court's pattern of upholding increasingly severe sentences suggests an active attempt to foreclose meaningful Eighth Amendment review of term-of-years sentences, this Note takes the Court at its word that it is acting in good faith when reviewing sentences for proportionality. Regardless of the Court's true intentions, its cases can be read to repeatedly emphasize the significance of the possibility of parole in proportionality review.

[80] Ewing v. California, 538 U.S. 11, 22 (2003) (plurality opinion).

[81] Although some scholars have argued that courts conducting proportionality review are only concerned with maximum sentence length, making parole irrelevant to the analysis, the fact that the Supreme Court has consistently referenced the centrality of the possibility of parole to the *Rummel* holding in its modern proportionality analysis contradicts this reading of the Court's decisions. *See* Bierschbach, *supra* note 22, at 1760 ("[S]everity turns on the maximum punishment an offender might suffer[,] which is how the Court's proportionality cases have generally viewed the issue.").

[82] Rummel v. Estelle, 445 U.S. 263, 265–66 (1980). In all three crimes combined, Rummel obtained less than $230. *Id.*

[83] *Id.* at 280–81 (citations omitted) (internal quotation marks omitted).

sentenced to life was likely to be paroled after twelve years of imprisonment.[84] The Court made clear that because Rummel did not have any enforceable right to parole, it was not treating Rummel's life sentence like a twelve-year sentence; instead, the possibility of parole reduced the harshness of Rummel's sentence.[85] Conversely, the absence of this possibility increased the harshness of the life sentence in *Solem* to the point where its harshness outweighed the severity of Helm's most recent crime and six prior felony convictions.[86]

When parole is unavailable, as when LWOP has been imposed, the Court has recognized that this sentence is uniquely harsh. For example, in *Harmelin*, the severity of the LWOP sentence is likely what caused Justice Kennedy to go to such great lengths to explain the extensive damage that the petitioner's crime caused society; the crime needed to be viewed as extremely severe to justify such a sentence.[87] The severity of LWOP was recently reaffirmed in *Graham v. Florida*, which considered the constitutionality of imposing LWOP on a juvenile, but reached that conclusion after applying a special analysis for the sentence of juvenile LWOP which is distinct from the *Harmelin* test.[88] The denial of parole, the Court wrote, "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 convict], he will remain in prison for the rest of his

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[84] *Id.* at 280.

[85] *Id.* at 280–81. The Court specifically noted that "Texas . . . ha[d] a relatively liberal policy of granting 'good time' credits to its prisoners, a policy that historically ha[d] allowed a prisoner serving a life sentence to become eligible for parole in as little as 12 years." *Id.* However, the Court also "agree[d] with Rummel that his inability to enforce any 'right' to parole preclude[d] [the Court] from treating his life sentence as if it were equivalent to a sentence of 12 years." *Id.* at 280.

[86] Solem v. Helm, 463 U.S. 277, 297 (1983) ("Helm will spend the rest of his life in the state penitentiary. This sentence is far more severe than the life sentence we considered in *Rummel v. Estelle*."). The Court in *Solem* pointed to the likelihood of Rummel becoming eligible for parole within twelve years as "a fact on which the Court relied heavily." *Id.*

[87] Harmelin v. Michigan, 501 U.S. 957, 1002 (1991) (Kennedy, J., concurring) ("Possession, use, and distribution of illegal drugs represent one of the greatest problems affecting the health and welfare of our population. Petitioner's suggestion that his crime was nonviolent and victimless . . . is false to the point of absurdity. To the contrary, petitioner's crime threatened to cause grave harm to society.") (citations omitted) (internal quotation marks omitted).

[88] 130 S. Ct. 2011, 2030 (2010) (striking down a sentence of LWOP for a juvenile and relying heavily on the Court's juvenile death penalty jurisprudence); *see also* Bierschbach, *supra* note 22, at 1753 (noting that "[*Graham*] put parole's significance to the constitutional regulation of punishment at center stage," but that the Court did not discuss the issue at length in its opinion). Though the case arose in a slightly different context, with petitioner arguing for a categorical rule barring the use of LWOP for juvenile nonhomicide offenders instead of arguing that his specific sentence was unconstitutional, the Court drew substantially from the reasoning in its *Solem*/*Harmelin* line of cases.

days."[89] The *Graham* Court noted that LWOP, which the *Harmelin* Court had termed "the second most severe [penalty] known to the law,"[90] actually "share[s] some characteristics with death sentences that are shared by no other sentences," indicating its belief in the sentence's extreme severity.[91] In light of these precedents, consideration of the possibility of parole—or the absence thereof—in proportionality review cases appears to be mandatory. It is less clear exactly how the availability of parole should affect the outcomes of cases.

Notably, the Court has also consistently held that the possibility of executive commutation is not constitutionally significant to proportionality review. When confronted with the question of whether courts should weigh less heavily the severity of LWOP because of the possibility that the sentence could be commuted, the *Solem* Court wrote that "[r]ecognition of such a bare possibility would make judicial review under the Eighth Amendment meaningless."[92] Unlike parole, which the Court called "the normal expectation in the vast majority of cases"[93] and for which it is possible to predict roughly when it will be granted, commutation was called "nothing more than a hope for an *ad hoc* exercise of clemency."[94] Such an abstract hope was not deemed relevant to proportionality analysis, unlike a parole system that regularly grants early release. However, the distinction between parole and commutation that existed at the time the Court decided *Solem* no longer truly exists in many jurisdictions—a fact that the Court has not accounted for in its proportionality analysis.

C. Modern Sentencing

In recent years, the average length of prison sentences has grown due to a mix of factors. Many offenders are serving a larger portion of

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[89] *Graham*, 130 S. Ct. at 2027 (quoting Naovarath v. State, 779 P.2d 944, 944 (1989)) (alteration in original). Others have suggested that *Graham* makes parole constitutionally relevant not only because it affects sentence length, but also because it affects the nature of the sentence. Alice Ristroph, *Hope, Imprisonment, and the Constitution*, 23 FED. SENT'G REP. 75, 76 (2010) ("Hope, or its denial, distinguishes LWOP from other prison sentences—not irrevocability, and not any necessary difference in the actual length of incarceration.").

[90] *Harmelin*, 501 U.S. at 996 (Kennedy, J., concurring).

[91] *Graham*, 130 S. Ct. at 2027 (holding that juveniles who did not kill may not be sentenced to LWOP but may still receive life with parole sentences).

[92] Solem v. Helm, 463 U.S. 277, 303 (1983).

[93] *Id.* at 300.

[94] *Id.* at 303 (internal quotation marks omitted).

their sentence behind bars,[95] prison sentences have explicitly lengthened, and there has been increased use of life and LWOP sentences, which were very rare before the 1970s but are now widely imposed.[96] In many cases, a term-of-years sentence means more "real time served" today than it did in the 1970s. Due to legislative initiatives (sometimes called "truth in sentencing" laws) that mandate a specific percentage of the sentence be served in prison,[97] high mandatory minimum sentences,[98] and "three strikes laws,"[99] offenders may not be eligible for parole until much later in their sentences, if at all. Additionally, many of those jurisdictions that still have operating parole systems—roughly half of American states[100]—grant parole less

[95] PEW CENTER ON THE STATES, TIME SERVED: THE HIGH COST, LOW RETURN OF LONGER PRISON TERMS 13 (2012), *available at* http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_Time_Served_report.pdf (noting that the average length of sentence grew thirty-six percent between 1990 and 2009). This means that there are significantly more people serving harsher sentences today than there were in previous decades.

[96] In 1984, 34,000 individuals were serving parole-eligible life sentences; in 2008, there were 140,610 such individuals behind bars. NELLIS & KING, *supra* note 1, at 6. The number of LWOP sentences has also grown rapidly, from 12,453 in 1992 to 41,095 in 2008. *Id.* at 9. The rate of imposing LWOP sentences increased more dramatically than the rates of other sentences in recent years. Between 2003 and 2008, "[t]he number of individuals serving life without parole sentences increased by 22% . . . . nearly four times the rate of growth of the parole-eligible life sentenced population." *Id.* at 3. While the number of lifers has increased steadily, sometimes by rates of over eighty percent in a roughly ten-year period, the number of years each lifer can expect to serve in prison has also increased, which corresponds with an overall increase in the percentage of sentences actually served in prison. MARC MAUER ET AL., THE SENTENCING PROJECT, THE MEANING OF "LIFE": LONG PRISON SENTENCES IN CONTEXT 11 (2004), *available at* http://www.sentencingproject.org/doc/publications/inc_meaningoflife.pdf (noting that the number of individuals serving life sentences rose eighty-three percent between 1992 and 2003).

[97] MAUER ET AL., *supra* note 96, at 12 ("Legislative changes such as 'truth in sentencing' . . . have increased the amount of time served before parole consideration.").

[98] THE SENTENCING PROJECT, FEDERAL MANDATORY MINIMUM SENTENCING: AN OVERVIEW OF THE 2011 REPORT BY THE U.S. SENTENCING COMMISSION 1–2, *available at* http://sentencingproject.org/doc/publications/sen_USSC_Mand_Min_2011_Report_Overview.pdf (noting that "[m]andatory minimum penalties have contributed to an increase in the federal prison population" and explaining that "62% of judges surveyed in 2010 felt that mandatory sentences across all offenses were 'too high'").

[99] *See, e.g.*, Ewing v. California, 538 U.S. 11, 30 (2003) (plurality opinion) (upholding a sentence of at least twenty-five years on a recidivist under California's "three strikes" law).

[100] *See* Kevin R. Reitz, *The "Traditional" Indeterminate Sentencing Model*, *in* THE OXFORD HANDBOOK OF SENTENCING & CORRECTIONS 270, 270 (Joan Petersilla & Kevin R. Reitz eds., 2012) ("Half of the American states continue to use such [indeterminate sentencing] systems today, at least for the majority of felony cases.").

frequently than in the 1970s;[101] it is not often "the normal expectation" today.[102]

Whereas a life sentence once meant ten to fifteen years in prison in many jurisdictions, a life sentence today often practically operates as an LWOP sentence because the possibility of parole is so remote.[103] Two examples of jurisdictions where this is true are Illinois and Louisiana. If an offender was serving a life sentence in Illinois in the 1970s, he would have been eligible for parole after eleven years; in Louisiana the same offender would have served an average of ten years.[104] Today, receiving a life sentence in either jurisdiction means that the offender will be incarcerated for the rest of his natural life because parole is not available as a practical matter, or is so unlikely that the possibility is not meaningful.[105] An additional illustration of what the possibility of parole means today can be found in the modern parole system of California, which has a high number of offenders serving life sentences.[106] For an individual convicted of murder to receive parole in California, the governor must affirmatively give his approval. Thus, after such a person is deemed fit to return to society by the parole board, the governor may still deny that person parole.

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[101] *See* EDWARD E. RHINE, *The Present Status and Future Prospects of Parole Boards and Parole Supervision*, *in* THE OXFORD HANDBOOK OF SENTENCING & CORRECTIONS, *supra* note 100, at 627, 628 ("[T]he release authority of parole boards has been abolished or severely curtailed in many jurisdictions . . . ."); MAUER ET AL., *supra* note 96, at 12; *see also* Reitz, *supra* note 100, at 270 ("[In the] early 1970s, every jurisdiction in the United States operated with a traditional *indeterminate* sentencing structure, in which judges had broad and unregulated discretion to select criminal sentences constrained only by maximum statutory penalties (normally much higher than any sentence a judge was likely to impose).").

[102] *See supra* note 93 and accompanying text (noting the *Solem* Court's understanding of parole as an ordinary part of a criminal sentence).

[103] *See* United States v. Rummel, 445 U.S. 263, 293–94 (1980) (Powell, J., dissenting) (noting that Rummel did not have an enforceable "right" to demand parole during his sentence); *see also* MAUER ET AL., *supra* note 96, at 12 (explaining that lifers today serve lengthier sentences than they would have in past decades, in large part due to the reduced availability of parole).

[104] *See* MAUER ET AL., *supra* note 96, at 6.

[105] *See id.* (explaining that parole is no longer available to lifers in Illinois and is rarely given to lifers in Louisiana).

[106] *See* ROBERT WEISBERG ET AL., LIFE IN LIMBO: AN EXAMINATION OF PAROLE RELEASE FOR PRISONERS SERVING LIFE SENTENCES WITH THE POSSIBILITY OF PAROLE IN CALIFORNIA 15 chart 7 (2011) (estimating the likelihood that an offender convicted of murder would be paroled between 1991 and 2010 varied from zero to six percent, depending on which governor was in power). Giving governors this power reduced the number of lifers released on parole; Governor Gray Davis paroled only eight lifers between 1999 and 2003. Governor Schwarzenegger, after being politically attacked in 2004 after he paroled seventy-two lifers, went on to parole thirty-five lifers in 2005 and twenty-three in 2006. NELLIS & KING, *supra* note 1, at 25–26.

The probability of parole for these lifers is, consequently, very low.[107] Thus, though the names of sentences have not changed—offenders still receive a sentence of "life"—the actual length of the sentence is quite different than it was when the Court began to articulate the modern proportionality standard in the early 1980s.

D. Critiquing Modern Proportionality Review's Consideration of Sentence Length

The Court's description of clemency in *Solem* as a "bare possibility" could easily be mistaken for a description of the way parole currently operates in some jurisdictions. Despite the fact that "parole" today often means what "clemency" meant at the time of *Solem*, in that parole is as remote a possibility as clemency for many offenders today, the Court continues to refer to parole and clemency as distinct concepts, the former of which is relevant to proportionality review and the latter of which is not.[108] If Rummel were to be sentenced to life in a jurisdiction like Illinois, Louisiana, or California today, the court should not ask if a twelve-year sentence is proportionate to his crime, but rather if a sentence of LWOP is proportionate. However, there is little evidence that this type of analysis—in which the court looks behind the name of the sentence to ascertain how many years will actually be spent in prison—is actually happening.

The Court's insistence that clemency is never relevant to Eighth Amendment proportionality analysis while parole is always relevant gives lower courts a responsibility not only to ask whether the state provides a method of early release it calls parole, but to inquire into whether that system will realistically grant an offender early release. Conducting this analysis would help courts assess whether an offender's possibility of parole is constitutionally significant during proportionality review. However, as the following discussion indicates, a review of modern circuit court proportionality review reveals that such analysis is rare.

When lower federal courts explain the length of a petitioner's sentence, courts very rarely discuss whether there is a functional parole system in the jurisdiction, or whether the petitioner can

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[107] *See* NELLIS & KING, *supra* note 1, at 25–26.

[108] Graham v. Florida, 130 S. Ct. 2011, 2027 (2010) (referring to executive clemency as a "remote possibility . . . which does not mitigate the harshness of the sentence"); Solem v. Helm, 463 U.S. 277, 300 (1983) ("As a matter of law, parole and commutation are different concepts . . . ."); *see also* Conn. Bd. of Pardons v. Dumschat, 452 U.S. 458, 465 (1981) ("No matter how frequently a particular form of clemency has been granted, the statistical probabilities standing alone generate no constitutional protections . . . .").

effectively shorten his sentence by earning good time credits.[109] For example, in *United States v. Strahan*,[110] the Seventh Circuit affirmed a life sentence for a recidivist offender without mentioning whether the sentence included the possibility of parole. This lack of analysis is the norm.[111] When courts do mention parole, the analysis is often brief. In *United States v. Watkins*,[112] the Sixth Circuit noted that the petitioner claimed that his sentence would incarcerate him for the rest of his life, but did not conduct its own analysis of whether early release would be possible for the offender. By neglecting to recognize whether a sentence contains a possibility of early release, courts are not only unable to weigh the harshness of the penalty, but also cannot measure the *relative* severity of the punishment, thus incorrectly concluding that certain sentences are longer than others. For example, consider again the two hypothetical offenders described earlier.[113] Though both offenders received a sentence of "twenty-five years to life," one may be paroled after living in prison for twenty-five years, while the other will spend the entirety of his natural life incarcerated, which could easily amount to fifty years in prison for an offender sentenced in his early twenties. If it does not inquire into the true length of sentences, a court will incorrectly conclude that the two sentences are the same length, and may also incorrectly determine that both offenders are serving a less severe punishment than a man sentenced to thirty years in prison, for example.

The absence of analysis of the true length of sentences is troubling and surprising because, though the Court has been infamously

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[109] Courts in a few exceptional cases have taken time to analyze these features. *See* Gonzalez v. Duncan, 551 F.3d 875, 886 (9th Cir. 2008) (taking the time to note that, "[u]nder the Three Strikes law, Gonzales must serve a minimum of 28 years before he is eligible for parole"); Ramirez v. Castro, 365 F.3d 755, 767–68 (9th Cir. 2004) (finding petitioner's sentence unconstitutionally disproportionate, in part "[b]ecause the 25-year minimum of his indeterminate life sentence may not be reduced[,] . . . [therefore] Ramirez's 'real time term' of 25 years in prison is more than twice the length of the real time term at issue in *Rummel*, where parole was available after 12 years").

[110] 565 F.3d 1047, 1052–53 (7th Cir. 2009).

[111] *See, e.g.*, United States v. Farley, 607 F.3d 1294, 1343–45 (11th Cir. 2010) (holding that a thirty-year sentence was not a disproportionate sentence for a man convicted of attempting to molest a minor, without noting whether parole would be available); United States v. Parker, 505 F.3d 323, 330–31 (5th Cir. 2007) (holding that a life sentence was appropriate under a three-strikes law for a man convicted of a third felony and two previous marijuana-related offenses, without discussing whether parole was a possibility); United States v. Snype, 441 F.3d 119, 152 (2d Cir. 2006) (concluding that Snype's recidivist nature legitimated subjecting him to a life sentence, without discussing whether parole or early release would be available to him).

[112] 509 F.3d 277, 282–83 (6th Cir. 2007).

[113] *See supra* Introduction.

unclear in its explanation of the proportionality principle,[114] the Court has explicitly and consistently considered a sentence's stated length and the possibility of parole in this analysis.[115] Though it may not seem like a new proposal to suggest that courts consider sentence length during proportionality review, a thorough examination of the sentence with the goal of determining how many years will be spent in prison would actually represent a departure from the current practice. Additionally, there are other aspects of punishment that the Court has historically—though perhaps unclearly or inconsistently—considered during proportionality review that are ignored by modern courts. Part III of this Note will discuss these features of punishment.

III
THE VARIABLY HARSH NATURE OF PUNISHMENT: WHAT THE *HARMELIN* TEST MISSES

This Part will explore how the nature of punishment affects its severity by focusing on two key aspects of modern punishment: conditions of confinement and collateral consequences. It describes how the nature of punishment is relevant to proportionality review and argues that, though there are doctrinal hurdles to conducting this type of analysis, there is also doctrinal support for it.

Outside of the context of proportionality review, the length and nature of a punishment are generally both understood to contribute to its harshness. For example, a teenager who is being disciplined and given a choice between being grounded for one week and washing the family's dishes for one week may logically choose to do dishes; though the lengths of the punishments are identical, one is harsher *in nature* than the other. This teenager might also opt for a weeklong grounding over a punishment of a lifelong obligation to wash all of her family's dishes—even though she has just established that being grounded is more severe in her opinion than cleaning. This simple example illustrates a basic point: Both the nature and duration of a punishment contribute to its severity.[116] For the two hypothetical offenders

[114] *See* Lockyer v. Andrade, 538 U.S. 63, 72 (2003) ("Our cases exhibit a lack of clarity regarding what factors may indicate gross disproportionality."); Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 529 (2008) ("Despite the determinative effect of the first part of the *Solem* test in the vast majority of cases, the Supreme Court has not established a process for making this threshold judgment, nor any substantive guideposts.").

[115] *See supra* Part II.B.

[116] This understanding was also reflected by the Canadian Supreme Court when it considered a claim that the minimum sentence that could be imposed by a statute was disproportionately severe. R. v. Smith, [1987] 1 S.C.R. 1045, 1073 (Can.) ("The effect of the

described previously,[117] the higher risk of harm in prison and barriers to reentering society if released make the sentence of the second offender harsher than that of the first offender, though the sentences share the label of "twenty-five years to life."

An understanding that punishment may be severe in nature though short in length has not been completely absent from the Court's jurisprudence. In his concurrence in *Farmer v. Brennan*, Justice Blackmun urged his fellow justices to take a broader view of punishment:

> Consider, for example, a situation in which one individual is sentenced to a period of confinement at a relatively safe, well-managed prison, complete with tennis courts and cable television, while another is sentenced to a prison characterized by rampant violence and terror. . . . [I]t is natural to say that the latter individual was subjected to a more extreme punishment. It matters little that the sentencing judge did not specify to which prison the individuals would be sent; nor is it relevant that the prison officials did not intend either individual to suffer any attack. The conditions of confinement, whatever the reason for them, resulted in differing punishment for the two convicts.[118]

Though many on the Court are willing to compare the relative severity of different modes of noncarceral punishment, the Court does not generally acknowledge that incarceration can be conducted in different modes as well—that is, its nature (and thus its severity) can vary.[119] The modern Supreme Court has not examined the nature of an offender's carceral sentence when conducting proportionality review.[120]

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sentence is often a composite of many factors and is not limited to the quantum or duration of the sentence but includes its nature and the conditions under which it is applied.").

[117] *See supra* Introduction.

[118] 511 U.S. 825, 855 (1994) (Blackmun, J., concurring).

[119] *See* Harmelin v. Michigan, 501 U.S. 957, 976–78 (1991) (plurality opinion) (arguing that the Punishments Clause "disables the Legislature from authorizing particular forms or 'modes' of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed" rather than acting as a guarantee against disproportionate sentences).

[120] Though courts have not generally assessed the relative severity of different types of prison sentences during proportionality review for term-of-years sentences, some scholars have argued that the Court's opinion in the juvenile LWOP case *Graham* should be read to require this type of inquiry. *See* Ristroph, *supra* note 89, at 77 ("*Graham* . . . suggests that to assess the severity of a prison sentence, one must give some consideration to the prisoner's subjective experience. It is not enough to consult the calendar and count years.").

A. Conditions of Confinement

This Subpart will argue that considering the conditions in which a sentence will be served would give courts a more full and accurate picture of each sentence's harshness. Additionally, as was true of the possibility of parole, there is strong evidence that this feature of punishment has been constitutionally relevant to proportionality review in the past, and that to consider the conditions of confinement would not be a dramatic departure from Eighth Amendment proportionality doctrine.

1. Conditions of Confinement Should Be Considered During Proportionality Review

The conditions in which a sentence is served and the experiences of an inmate in prison both contribute to a sentence's harshness. In addition to depriving the offender of his liberty for a period of time, prison sentences can be accompanied by physical discomfort or pain, a heightened risk of sexual assault, inadequate medical care, and the psychological consequences that stem from these experiences or other aspects of confinement.[121] Some offenders, because of their personal characteristics, are at a higher risk of harm.[122] Additionally, prison conditions can be highly variable between, or even within, different institutions. For example, minimum-security prisons are generally more comfortable than maximum-security prisons, and solitary confinement cells are understood to be dramatically less comfortable—and arguably, more torturous—than a normal cell.[123]

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[121] *See generally* Craig Haney, *The Wages of Prison Overcrowding: Harmful Psychological Consequences and Dysfunctional Correctional Reactions*, 22 WASH. U. J.L. & POL'Y 265, 266 (2006) ("[E]ven those analysts who conclude that incarceration is not uniformly devastating or inevitably damaging rarely deny its potential to do harm."); Terry A. Kupers, *Prison and the Decimation of Pro-Social Life Skills*, *in* THE TRAUMA OF PSYCHOLOGICAL TORTURE (Almerindo E. Ojeda ed., 2008).

[122] *See infra* notes 175–77 and accompanying text.

[123] *See, e.g.*, Mikel-Meredith Weidman, *The Culture of Judicial Deference and the Problem of Supermax Prisons*, 51 UCLA L. REV. 1505, 1506–07 (2004) (describing the extreme isolation and sensory deprivation of the supermax prison regime); Atul Gawande, *Hellhole: Annals of Human Rights*, THE NEW YORKER, Mar. 30, 2009, at 36, *available at* http://www.newyorker.com/reporting/2009/03/30/090330fa_fact_gawande (describing similarities between the effects of torture and the longterm effects of living in solitary confinement); Sadhbh Walshe, *Britain's Double Standard on Extradition to US Prison Abuse*, THE GUARDIAN (Nov. 8, 2012), http://www.guardian.co.uk/commentisfree/2012/nov/08/britain-double-standard-extradition-us-prison-abuse (explaining that Britain's home secretary denied extradition of a man accused of hacking into the Pentagon's computer system, after concluding that, because the accused has Asperger's syndrome, extraditing him to America "where he would face up to 70 years of isolation in a maximum security prison, 'would give rise to such a high risk of him ending his life that the decision to extradite would be incompatible with [his] human rights'").

As a normative matter, it would be difficult to defend the position that the conditions in which a sentence is served do not affect its severity.

However, the Court's jurisprudence surrounding the Eighth Amendment's prohibition on cruel and unusual punishment in the prison context presents a major barrier to considering the conditions of confinement during proportionality review. The Supreme Court has held that prison conditions themselves may sometimes constitute cruel and unusual punishments—without consideration of their proportionality to the crime for which the offender was incarcerated.[124] Under this Eighth Amendment prison conditions analysis, the feature that distinguishes a constitutional condition from an unconstitutional condition is not that condition's harshness, but the state of mind of the prison official responsible for the condition. The Court has held that "any pain and suffering endured by a prisoner that is not formally a part of his sentence—no matter how severe or unnecessary—will not be held violative of [the Eighth Amendment] unless the prisoner establishes that some prison official intended the harm."[125] Only conditions that are caused by an official who is deliberately indifferent to a substantial risk of serious harm formally constitute "punishment."[126]

Thus, Eighth Amendment review for prison conditions themselves explicitly leaves many harms unremedied and does not consider whether the harm is disproportionate to the offender's original crime. However, this does not preclude courts from considering prison conditions in a different context, such as when conducting proportionality review. Put differently, it is possible that a court could find that the harm imposed by a prison condition on an offender makes his prison sentence *disproportionate* to his specific crime—though the condition itself is not the result of an officer's deliberate indifference to a substantial risk of serious harm and thus not unconstitutional for all offenders.

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[124] *See* Farmer v. Brennan, 511 U.S. 825, 828–29 (1994) (describing the test by which courts may judge if a prison condition itself violates the Eighth Amendment).

[125] *Id.* at 854 (Blackmun, J., concurring) (citing Wilson v. Seiter, 501 U.S. 294 (1991)).

[126] *Id.* at 828–29 (majority opinion). The justification for this intent requirement comes from the text of the Eighth Amendment's Punishments Clause, which as Justice Scalia emphatically pointed out, "bans only cruel and unusual *punishment*." *Wilson*, 501 U.S. at 300 (emphasis in original). The *Wilson* opinion went on to note that, "[i]f the pain inflicted is not formally meted out *as punishment* by the statute or the sentencing judge, some mental element must be attributed to the inflicting officer before it can qualify." *Id.* (emphasis in original). During this analysis, courts do not look at the offense for which the inmate was originally sentenced. *Id.*

2. *The Constitutional Basis for Considering Conditions of Confinement in Proportionality Review*

Although the modern Supreme Court has not engaged in a rigorous analysis of conditions of confinement during proportionality review, some historical precedents can be read as engaging in this type of analysis, and no decisions have foreclosed it. In *Weems v. United States*, the Court held that a punishment of *cadena temporal*, which included a minimum of twelve years imprisonment at hard labor and significant post-release restrictions, was disproportionate to the crime of falsifying government documents.[127] The description of Weems's punishment[128] reveals at least a partial focus on its conditions. The Court noted that there was potential for Weems's imprisonment to cause him physical pain, writing that "[n]o circumstance of degradation is omitted. It may be that even the cruelty of pain is not omitted. He must bear a chain night and day."[129] Ultimately, it noted that the twelve-year long *cadena temporal* punishment "amaze[s] those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths."[130] The opinion indicates the Court's significant disapproval of the *cadena temporal* punishment. While it is arguable that the Court was referring to the specific *mode* of punishment as violating the Constitution,[131] it is not clear that the current form of American incarceration[132]—which often includes harsh conditions and post-release surveillance—is so dissimilar from Weems's incarceration so as to be called a different mode.

As the modern Court began to articulate the shape of the proportionality standard in *Rummel*, it affirmed that the decision in *Weems* did not rest solely on the length of the sentence, which was identical to the estimated length of Rummel's sentence. Instead, the Court focused on the nature of the term of imprisonment, noting that, "in *Weems* the Court could differentiate in an objective fashion between

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127 *See* Weems v. United States, 217 U.S. 349, 364, 381 (1910) ("The punishment of *cadena temporal* is from twelve years and one day to twenty years . . . . They shall always carry a chain at the ankle, hanging from the wrists; they shall be employed at hard and painful labor . . . . There are besides certain accessory penalties imposed . . . [including] subjection to surveillance during life." (internal quotation marks omitted)).

128 *Id.* at 363 ("The penalties of *cadena temporal* and a fine of from 1,250 to 12,500 pesetas shall be imposed on a public official who, taking advantage of his authority, shall commit a falsification. . . . by perverting the truth in the narration of facts." (internal quotation marks omitted)).

129 *Id.* at 366.

130 *Id.* at 366–67.

131 *See supra* note 119 and accompanying text.

132 *See supra* Part II.A.

the highly unusual *cadena temporal* and more traditional forms of imprisonment imposed under the Anglo-Saxon system."[133] It is possible to read the Court in *Rummel* as finding the punishment of *cadena temporal* so "unusual" because of the harsh conditions (specifically, that Weems would work at hard labor during his confinement), and its post-release "accessories" (the collateral consequences of the conviction), a possibility that this Note will address. Though the *Weems* decision certainly arose in a different time and context, modern courts have not disclaimed its analysis of either the severity of the post-release restrictions or the imprisonment itself.

B. Collateral Consequences

This Subpart will advocate that considering collateral consequences during proportionality review is normatively appropriate and has both modern and historical doctrinal support.

1. Collateral Consequences Should Be Considered During Proportionality Review

The term "collateral consequences" describes the restrictions, requirements, or changes in legal status that accompany a criminal conviction but are not formally meted out by the sentencing judge as "the sentence."[134] Collateral consequences should be considered part of the punishment during proportionality analysis because they dramatically affect its severity. In some cases, collateral consequences may actually be the harshest result of a criminal conviction.[135]

Collateral consequences are vast and diverse. Although collateral consequences vary from state to state and it is difficult to predict

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[133] Rummel v. Estelle, 445 U.S. 263, 275 (1980). The Court, in a passage that was disclaimed as speculative in later cases, posited that the length of imprisonment was not relevant to a proportionality inquiry, suggesting that the *nature* of the imprisonment or other punishment *was* relevant. *Id.* at 274 ("Given the unique nature of the punishments considered in *Weems* . . . one could argue without fear of contradiction by any decision of this Court that for [felonies] . . . the length of the sentence actually imposed is purely a matter of legislative prerogative.").

[134] *See, e.g.*, Cammett, *supra* note 11, at 370–72 ("Disenfranchisement is not part of an offender's sentence and is therefore a 'collateral' consequence of a felony conviction.").

[135] *See* Gabriel J. Chin, *The New Civil Death: Rethinking Punishment in the Era of Mass Conviction*, 160 U. PA. L. REV. 1789, 1791 (2012) (noting that "hundreds and sometimes thousands of [collateral] consequences apply under federal and state constitutional provisions, statutes, administrative regulations, and ordinances"). For some convicted persons who are not sentenced to a term of imprisonment (but are instead sentenced to probation or a noncarceral sentence), the collateral consequences of the conviction can feel like the entirety of the punishment. For other convicted persons who have served their prison terms, the collateral consequences that they face once they reenter free society can operate as a functional continuation of the offender's sentence. *Id.*

which restrictions will apply to a particular offender,[136] people with criminal convictions can be permanently excluded from social programs such as public assistance, barred from entering certain fields of employment, unable to obtain a driver's license, ineligible to vote, subject to restrictions on where they are able to live, unable to legally maintain familial relationships, and subject to registration and community notification rules.[137] Some of these restrictions and requirements are permanent.[138]

As one commenter has noted, "civil sanctions are not collateral at all in at least one important sense: they *directly* limit participation in critical areas of life as the result of a criminal conviction."[139] These sanctions also impede offenders' ability to rebuild their lives after release from prison and may contribute to recidivism.[140] For noncitizens, criminal convictions can result in deportation.[141] Indeed, for many offenders, collateral consequences are "the most severe and long-lasting effect of conviction . . . ."[142] The permanency of many collateral consequences, along with the way that regulations often overlap to exclude convicted people from numerous areas of political and social life, has led one scholar to declare that "[v]irtually every felony conviction carries with it a life sentence."[143] Furthermore, many convicted persons never serve time in prison and instead experience the collateral consequences of their convictions as the core of

136 *See* Margaret Colgate Love, *Starting Over with a Clean Slate: In Praise of a Forgotten Section of the Model Penal Code*, 30 FORDHAM URB. L.J. 1705, 1718 (2003) ("A cursory review of state codes reveals a hodge-podge of inaccessible and over-lapping provisions, riddled with qualifications and exceptions, and of uncertain effect.").

137 *See* Deborah N. Archer & Kele S. Williams, *Making America "The Land of Second Chances": Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527, 529–34 (2006) (enumerating and describing common collateral consequences); Chin, *supra* note 135, at 1810 (listing a number of collateral consequences that the Court has found "unobjectionable").

138 *See* Love, *supra* note 136, at 1705, 1719 (noting that "licensing and employment-related restrictions are generally not affected when civil rights are restored," and that "relief mechanisms are generally inaccessible, or ineffective, or both"). The process of restoring those rights which are not permanently revoked is often prohibitively complex. *Id.* at 1719–26.

139 Cammett, *supra* note 11, at 370–72.

140 ABA STANDARDS FOR CRIMINAL JUSTICE, COLLATERAL SANCTIONS AND DISCRETIONARY DISQUALIFICATION OF CONVICTED PERSONS 8–10 (3d ed. 2004) ("If promulgated and administered indiscriminately, a regime of collateral consequences may frustrate the chance of successful re-entry into the community, and thereby encourage recidivism.").

141 *See* Padilla v. Kentucky, 130 S. Ct. 1473, 1478, 1480 (2010) (noting that, over time, changes to immigration law have expanded the class of offenses for which individuals may be deported).

142 Chin, *supra* note 135, at 1790–91.

143 Archer & Williams, *supra* note 137, at 527.

their punishment.[144] Nevertheless, under the Supreme Court's present articulation of the Eighth Amendment's proportionality principle, those persons who are not sentenced to a term of imprisonment receive no judicial review of their sentences' proportionality. Yet collateral consequences, which follow from criminal convictions in the same way that some mandatory minimum sentences follow from convictions for certain crimes, undoubtedly contribute to the severity of the punishments that offenders experience.

One of the largest roadblocks to comprehensive proportionality analysis that acknowledges collateral consequences is that collateral consequences are not considered "punishment" within the meaning of the Eighth Amendment.[145] Congress and state legislatures have promulgated numerous laws that modify citizens' rights following criminal convictions, and courts have been called upon to decide whether these laws constitute "punishment" in a variety of contexts.[146] In *Trop v. Dulles*, the Court articulated a general standard:

> In deciding whether or not a law is penal, this Court has generally based its determination upon the purpose of the statute. If the statute imposes a disability for the purposes of punishment—that is, to reprimand the wrongdoer, to deter others, etc.—it has been considered penal. But a statute has been considered nonpenal if it imposes a disability, not to punish, but to accomplish some other legitimate governmental purpose.[147]

The Supreme Court has outlined a number of factors to consider when determining whether or not a law is penal.[148] Courts applying these factors have almost uniformly upheld collateral consequences as

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144 *See* Cammett, *supra* note 11, at 357 (noting that, although our prisons currently hold more than two million inmates, an additional five million adults live under some form of criminal justice system control).

145 U.S. CONST. amend. VIII (forbidding "cruel and unusual *punishments*" from being inflicted) (emphasis added); Kennedy v. Mendoza-Martinez, 372 U.S. 144, 163–64 (1963) (discussing the difference between laws that are punitive and those that are merely civil regulations); Chin, *supra* note 135, at 1791 ("[I]n a line of cases examining individual restrictions, the Court has held they are subject to extremely limited constitutional regulation. . . . [C]ollateral consequences are deemed to be something other than criminal sanctions . . . .").

146 *See Mendoza-Martinez*, 372 U.S. at 167 (labeling a law that stripped military deserters in times of war of their citizenship "punitive"); Trop v. Dulles, 356 U.S. 86, 97 (1958) (plurality opinion) (holding that the Eighth Amendment prohibited Congress from punishing deserters by revoking their citizenship).

147 *Trop*, 356 U.S. at 96 (plurality opinion).

148 *See Mendoza-Martinez*, 372 U.S. at 168–69 (listing, among other factors, whether the regulation is an "affirmative disability or restraint," whether the restriction is historically criminal in nature or will promote traditional goals of punishment, and whether the restriction appears excessive in relation to its purpose).

civil regulations with nonpunitive purposes.[149] However, these decisions have been widely criticized, in part because the nonpunitive purposes are not subject to a high level of scrutiny, and thus the civil regulations imposed on persons convicted of crimes need not be particularly narrowly tailored to achieve their purposes, which need not be particularly important.[150] As this Note argues, the controlling test for whether a statute is "punishment" presents a significant roadblock, but it does not necessarily preclude consideration of collateral consequences during proportionality review.

2. *The Constitutional Basis for Considering Collateral Consequences in Proportionality Review*

Though collateral consequences are not considered during proportionality review today, there are indications that they have been considered historically. As noted above, the punishment *cadena temporal* in *Weems* included a permanent loss of political and civil rights.[151] The Court's description of Weems's "accessory penalties" could be mistaken for a description of modern collateral consequences:

> He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicil without giving notice to the 'authority immediately in charge of his surveillance,' and without permission in writing. He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude. Even that hope is taken from him and he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty.[152]

The permanency and degree of control exerted by this feature of the punishment clearly weighed heavily on the Court. In *Rummel v.*

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[149] *See* Jeremy Travis, *Invisible Punishment: An Instrument of Social Exclusion*, *in* INVISIBLE PUNISHMENT: THE COLLATERAL CONSEQUENCES OF MASS IMPRISONMENT 15–16 (Marc Mauer & Meda Chesney-Lind eds., 2002) (noting that most courts interpret such rights-limiting regulations as "'civil' rather than criminal in nature, as 'disabilities' rather than punishments, as the 'collateral consequences' of criminal convictions rather than the direct results"); *see also* Chin, *supra* note 135, at 1791–92 (noting that collateral consequences are often deemed civil regulations).

[150] *See* Chin, *supra* note 135, at 1807–08 ("[V]irtually no examination of the actual motivation of the legislature is permitted by the judiciary. Obviously, a test putting so much weight on formal categorization will uphold many measures that are in fact motivated by a desire to punish."); Karlan, *supra* note 11, at 1150 (arguing that our current understanding of the right to vote "so undercuts originally regulatory justifications for disenfranchising offenders that only penal justifications remain").

[151] *See supra* note 127 and accompanying text.

[152] Weems v. United States, 217 U.S. 349, 366–67 (1910).

Estelle, a more recent Supreme Court recognized that the loss of rights was critical to the *Weems* Court's conclusion that the punishment imposed was disproportionate to the crime of falsifying papers.[153] The *Rummel* Court emphasized that the *Weems* opinion "consistently referred jointly to the length of imprisonment and its 'accessories,'" in addition to the conditions of Weems's imprisonment, as noted above, and that the *Weems* precedent had to be interpreted in light of its "peculiar facts . . . [including] the extraordinary nature of the 'accessories' included within the punishment."[154] Though more recent Supreme Court opinions conducting proportionality review have not explicitly examined the impact of collateral consequences, the Court has also never overruled or otherwise disclaimed such an analysis, which clearly weighed heavily upon the Court in *Weems*.

One might argue that there is a key difference, however, between the "accessories" of Weems's punishment and the collateral consequences that many offenders face today as a result of their convictions: The civil disabilities imposed on Weems were formally meted out by the sentencing judge as part of the sentence, while modern collateral consequences often are not. However, in *Trop v. Dulles*, the Supreme Court found that the loss of citizenship imposed after the conviction of the offender violated the Eighth Amendment's prohibition against cruel and unusual punishment.[155] That the petitioner's citizenship was not formally stripped by the sentencing judge was of no moment. Thus, because the *Trop* and *Weems* Courts considered what could be termed "collateral consequences" during proportionality review, and because this analysis has not been disclaimed by the Court, there is a historical basis for courts analyzing the severity of a sentence today to consider collateral consequences.[156]

There is also support from the modern Court for the proposition that some noncarceral consequences of a criminal conviction can contribute to the punishment's harshness. In the 2010 case *Padilla v. Kentucky*, the Court wrote that "deportation is an integral part—

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153 *See supra* note 133 and accompanying text (discussing the *Rummel* Court's emphasis that the Weems decision was not based solely on the length of the sentence, as it also took into account the nature of that sentence).

154 Rummel v. Estelle, 445 U.S. 263, 273–74 (1980).

155 356 U.S. 86, 101 (1958) ("We believe . . . that use of denationalization as a punishment is barred by the Eighth Amendment.").

156 It is also possible to read *Trop* and *Weems* as rare cases wherein the Court considered the consequences to too closely resemble complete civil death—a punishment that existed in early America but has been explicitly disclaimed since the mid-twentieth century—to allow them to stand. *See* Chin, *supra* note 135, at 1790 ("Civil death extinguished most civil rights of a person convicted of a crime and largely put that person outside the law's protection."). This Note argues, however, that modern collateral consequences do resemble the punishments described in both *Trop* and *Weems*.

indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes."[157] Like the loss of citizenship in *Trop*, deportation was not, the Court noted, a punishment meted out by the sentencing judge—it was a consequence of a criminal conviction for certain kinds of offenses that was "practically inevitable" for certain offenders.[158] Though the case arose in the context of a claim that petitioner's counsel had been unconstitutionally ineffective by not warning the petitioner that deportation would be a consequence of a guilty plea, its holding that deportation is at least somewhat punitive likely has consequences for Eighth Amendment proportionality review. In today's world, with numerous severe collateral consequences that are closely tied to the criminal process, the logic of *Padilla* is difficult to specifically limit to the deportation context.[159]

IV
The Viability of a More Thorough Analysis of Punishment's Harshness

It may be argued that, regardless of whether true sentence length, collateral consequences, and prison conditions are relevant to a sentence's severity, there are practical and doctrinal hurdles to considering these features during proportionality review. Additionally, the modern reluctance to engage in more meaningful analysis seems to stem from the concern that it is difficult for courts to draw reasoned and objective lines between sentences that are actually disproportionate and those that are not.[160] By proposing how courts might

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157 130 S. Ct. 1473, 1480 (2010).

158 *Id.*

159 The *Padilla* Court distinguished deportation from other collateral consequences by noting that it had a particularly "close connection to the criminal process," and was "uniquely difficult to classify as either a direct or a collateral consequence." *Id.* at 1481–82. The full reach of the decision is not yet clear; the Court may distinguish between collateral consequences that are sufficiently punitive and those that are not, or the Court may choose to extend this analysis to all or most collateral consequences.

160 *See* Harmelin v. Michigan, 501 U.S. 957, 1020–21 (1991) (White, J., dissenting) ("[F]or sentences of imprisonment, the problem is . . . one of line-drawing. . . . [However,] [t]he courts are constantly called upon to draw similar lines in a variety of contexts." (quoting Solem v. Helm, 463 U.S. 277, 294 (1983))); Rummel v. Estelle, 445 U.S. 263, 275 (1980) ("[A] more extensive intrusion into the basic line-drawing process that is preeminently the province of the legislature . . . would be difficult to square with the view [that] . . . judgments should neither be nor appear to be merely the subjective views of individual Justices."). Professor Chemerinsky observes that "[t]he primary criticism of proportionality review is the inherent problem in linedrawing" and notes that "there never can be a bright-line test for when a penalty is disproportionate." Chemerinsky, *supra* note 14, at 1071. Nevertheless, he concludes that "the difficulty of drawing lines does not mean that no lines should be drawn." *Id.*

examine these features of punishment during proportionality review, Part IV tries to demonstrate that these concerns—practicality, potential legal barriers, and the Court's fear of drawing subjective lines between sentences—do not entirely preclude this type of analysis.[161]

Unfortunately, as detailed above, the Court's current, narrow definition of "punishment" forecloses a truly robust form of proportionality review—one that would subject lengthy prison sentences to meaningful judicial scrutiny and act as a check on excessively punitive legislation. Were all prison conditions and collateral consequences defined as "punishment" for Eighth Amendment purposes, courts could more easily consider them during proportionality review. There are, however, some ways that lower courts can intervene that are consistent with the Court's current doctrine. These tactics admittedly police only the margins of extreme sentencing, but still represent an important starting place for lower courts that wish to conduct a more thorough proportionality review.

A. Accounting for True Sentence Length

Though critics might argue that the complexity of our various parole systems makes it impossible to predict how many years of a sentence will actually be served in prison, courts have the tools to conduct this type of analysis. Supreme Court precedent provides sufficient guidance; the *Rummel* majority and Justice Breyer's dissent in *Ewing* demonstrated that courts can calculate the "real time served" of each sentence, and *Graham* provides a standard by which to judge whether the possibility of parole actually affects a sentence's length.

The "real time served" principle can guide lower courts as they determine the severity of a sentence of imprisonment. The principle's definition is intuitive; as Justice Breyer noted in his *Ewing* dissent, "since hypothetical punishment is beside the point, the relevant prison time . . . is *real* prison time, *i.e.,* the time that an offender must *actually serve*."[162] Though the majority of the Court conducted this analysis in *Rummel*, modern courts have stepped back from this type of review.

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[161] Others have identified similar explanations for the Court's jurisprudence. *See* Sheketoff, *supra* note 16, at 2210 (listing as justifications for the 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").

[162] Ewing v. California, 538 U.S. 11, 43 (2003) (Breyer, J., dissenting).

Justice Breyer's dissent in *Ewing* presents an example of an analysis of the true length of sentences, which is feasible even given the diversity of modern parole systems:

> Ewing's sentence here amounts, in real terms, to at least 25 years without parole or good-time credits. That sentence is considerably shorter than Helm's sentence in *Solem*, which amounted, in real terms, to life in prison. Nonetheless Ewing's real prison term is more than twice as long as the term at issue in *Rummel*, which amounted, in real terms, to at least 10 or 12 years.[163]

The Appendix that accompanied Justice Breyer's dissent illustrated that inquiring into different states' sentencing schemes and parole systems is possible by listing the sentences Ewing would have been given, and whether parole would have been a possibility, in other jurisdictions.[164] Looking beyond the number of years or name of a sentence and analyzing its true length would help courts give proper weight to that sentence's length when evaluating its harshness in light of the severity of the crime committed.[165]

Though Justice Breyer demonstrated that it is possible for modern courts to note when a sentence includes the possibility of parole and when it does not, he did not provide much guidance on how to determine whether the possibility of parole is actually likely to impact a sentence's length. However, the Court's recent opinion in *Graham*, wherein the Court considered the proportionality of the juvenile petitioner's LWOP sentence but did not exclusively employ the method laid out in *Harmelin*, provides this guidance. When the *Graham* Court struck down the sentence of LWOP for juvenile nonhomicide offenders and explained that these juvenile offenders were due the possibility of parole, the Court defined parole as a "meaningful opportunity for release."[166] In 2012, when the Court extended this ruling in *Miller* by holding that no juvenile, even those charged with homicide, could be sentenced to mandatory LWOP, it again referenced *Graham*'s definition of parole.[167] Because the

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163 *Id.* at 39.

164 *Id.* at 53–59 ("In nine other States, the law *might* make it legally possible to impose a sentence of 25 years or more upon a Ewing-type offender. But in five of those nine States, the offender would be parole-eligible before 25 years . . . .").

165 Others have also agreed with Justice Breyer that "real time served" should be a core consideration when courts weigh the harshness of a penalty in proportionality analysis. *See* Lee, *supra* note 114, at 532 ("The sentence factors require consideration of severity based on the actual sentence likely to be served rather than the imposed sentence, and on the offender's age and life opportunities at the time of his or her likely release.").

166 Graham v. Florida, 130 S. Ct. 2011, 2016 (2010).

167 Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012) ("We therefore hold that the Eighth Amendment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. . . . A State is not required to guarantee eventual freedom,

Graham Court was answering the same question that arises during proportionality review—when the possibility of parole so dramatically affects a sentence that it changes its severity—this standard can and should be the central question in proportionality analysis when courts consider the effect of parole on the true length of an offender's sentence. The Court in *Graham* articulated a modern definition for what a constitutionally significant possibility of parole looks like, and courts considering challenges to term-of-years sentences should define parole as such. These guideposts should and will be further elaborated upon if courts consider true sentence length during proportionality review.[168]

B. Accounting for the Nature of Punishment

As noted earlier, analyzing the nature of a punishment as if it were separable from a sentence's length is not faithful to the lived experience of a prison sentence, where the nature and length together produce a sentence's severity.[169] However, this approach is the one currently embraced by the Court, and this Note therefore continues to work within the Court's framework.

1. Considering Conditions of Confinement

Courts are competent to distinguish between prison conditions that present a disproportionate risk of harm to inmates and those that do not, a practice which need not be inconsistent with Eighth Amendment doctrine surrounding whether prison conditions are cruel and unusual. Considering the risk of harm ex ante, as courts con-

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but must provide some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.") (citing *Graham*, 130 S. Ct. at 2030) (internal quotation marks omitted).

[168] There are considerations besides the type of parole system in the offender's jurisdiction that may be deemed relevant to a sentence's real length. For example, when considering a sentence of juvenile LWOP, the *Miller* Court emphasized the petitioner's age, noting that LWOP "is an 'especially harsh punishment for a juvenile,' because he will almost inevitably serve 'more years and a greater percentage of his life in prison than an adult offender.'" *Miller*, 132 S. Ct. at 2466–67 (quoting *Graham*, 130 S. Ct. at 2028). Similarly, Justice Breyer focused on the offender's age in his *Ewing* dissent, noting that the seriously ill thirty-eight-year-old offender "will likely die in prison." *Ewing*, 538 U.S. at 39. This focus on "productive" years spent in prison suggests that courts could look beyond the sentence's number of years and analyze what the offender will miss while he is incarcerated, or how a term of years will impact a particular individual based on her age and characteristics. This is not an impossible task for judges. *See* Sheketoff, *supra* note 16, at 2228–29 (explaining that some state courts, when interpreting their states' Eighth Amendment analogues, treat term-of-years sentences differently when they will effectively incarcerate the offender for the remainder of his life). However, this is clearly a very complex topic, and a full discussion of the subject is beyond the scope of this Note.

[169] *See supra* Part II.A.

ducting proportionality review would often do, can be read as consistent with the Court's prison conditions jurisprudence. Additionally, federal courts have conducted similar analysis in a slightly different posture, suggesting that the "line-drawing problem" is not an insurmountable barrier.

As described above, many of prison's harms cannot be successfully linked to a prison official's actions and thus are not technically deemed "punishment" for the purpose of Eighth Amendment prison conditions claims.[170] However, the Court has consistently held that a *risk* of harm itself can be unconstitutional—the harm does not have to actually manifest before a prisoner can claim a violation of his or her Eighth Amendment rights.[171] Recently, the Court noted that conditions in some prisons can be so abysmal that they expose *every* prisoner to an unconstitutional level of risk, at least in the context of an inadequate medical care system.[172] Thus, though courts conducting proportionality review may not be able to consider specific prison conditions abstractly, it is possible for courts analyzing a sentence to consider whether the conditions of confinement present an unusually high risk of additional harm—either by deciding that a specific offender faces a high risk of harm in prison, or by deciding that a specific type of prison creates a high risk of harm for that prisoner.

Because risky conditions are not actually deemed "punishment" until they are linked to a prison official's actions, this may only be possible for offenders entering prisons that have been adjudicated unconstitutional.[173] This is not an entirely unlikely scenario for a court to face. One example of a prison system that has been adjudicated unconstitutional in some respects is the California prison system in the wake of *Brown v. Plata*.[174] Courts could view every sentence in the California prison system as excessively punitive, or could view sentences for offenders who are at a heightened risk of being exposed to an unconstitutional condition (here, deficient medical and mental health systems) as such.

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170 *See, e.g.*, Wilson v. Seiter, 501 U.S. 294, 300 (1991) (holding that prison conditions did not violate the Eighth Amendment because they were not caused by the deliberate indifference of a prison official).

171 *See* Farmer v. Brennan, 511 U.S. 825, 837–49 (1994) (holding that placing a male-to-female transgender prisoner in the general population of a men's prison could violate the petitioner's Eighth Amendment rights if a prison official has acted with deliberate indifference to a substantial risk of serious harm to petitioner).

172 Brown v. Plata, 131 S. Ct. 1910, 1940 (2011) ("[A]ll prisoners in California are at risk so long as the State continues to provide inadequate care.").

173 *See* notes 170–71 and accompanying text.

174 131 S. Ct. at 1928.

Courts are competent to conduct this analysis. It is widely understood that the risk that imprisonment will be accompanied by severe trauma is not evenly borne by every offender, and there is significant consensus as to which types of offenders and prisons present the greatest risk. For example, following the 2003 passage of the federal Prison Rape Elimination Act (PREA), the congressionally-formed PREA Commission published a report enumerating types of offenders with characteristics that subject them to a heightened risk of sexual abuse,[175] including young or young-looking individuals, individuals with small stature, first-time offenders or others who are unfamiliar with the prison system, nonheterosexual and transgender people or those perceived to be gender nonconforming, individuals who have been sexually victimized in the past, and physically or intellectually disabled individuals.[176] There is a general consensus that some of these characteristics make inmates vulnerable, specifically to sexual abuse but also to other types of harm.[177]

Additionally, characteristics of the prison itself may create heightened risk for its residents. It is well understood that some prisons have harsher conditions than others,[178] and that it is often possible to roughly judge a prison's harshness based on its security level.[179] Overcrowded prisons heighten the risk of violence and rates of health problems among prisoners.[180] Living for extended periods of time in isolation, or solitary confinement, can likewise cause permanent damage and heighten the risk of suicide and self-harm.[181] In light of the wealth of evidence regarding what makes imprisonment more

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[175] NATIONAL PRISON RAPE ELIMINATION COMMISSION, NATIONAL PRISON RAPE ELIMINATION COMMISSION REPORT 70–74 (2009) [hereinafter PREA Commission Report], *available at* https://www.ncjrs.gov/pdffiles1/226680.pdf.

[176] *Id.*

[177] HUMAN RIGHTS WATCH, AGAINST ALL ODDS: PRISON CONDITIONS FOR YOUTH OFFENDERS SERVING LIFE WITHOUT PAROLE SENTENCES IN THE UNITED STATES 14–24 (2012) (noting that youth face high rates of sexual victimization, physical assault, and the likelihood of being housed under psychologically damaging conditions).

[178] *See, e.g.*, Charles H. Logan, *Well Kept: Comparing Quality of Confinement in Private and Public Prisons*, 83 J. CRIM. L. & CRIMINOLOGY 577, 585–86 (1992) (comparing the quality of confinement of three similar prisons, based on the formulation of a "Prison Quality Index").

[179] *See supra* note 123 and accompanying text.

[180] *See* Haney, *supra* note 121, at 270–72 ("Overcrowding . . . exacerbates the chronic pains of imprisonment. . . . [A] large literature on overcrowding has documented a range of adverse effects that occur when prisons have been filled to capacity and beyond."); *see also* PREA Commission Report, *supra* note 175, at 80–81 ("Crowding is both a risk factor—environmental rather than personal—and a real barrier to carving out safe spaces for vulnerable prisoners.").

[181] *See generally* Gawande, *supra* note 123; Weidman, *supra* note 123, at 1528 (describing psychiatrists' findings that long-term isolation can damage inmates' mental health).

or less severe, courts need not blind themselves to likely differences in carceral experiences.

Though critics may argue that it would be impossible for courts to draw lines between sentences that present a level of risk that is relevant to a sentence's severity and those that do not, courts are already undertaking similar analyses and making reasoned distinctions in a different context. Some federal courts have accounted for the extraordinary risk that certain offenders face in prison at the time of sentencing by reducing the length of their sentences.[182] The Supreme Court has upheld this practice, which can provide guidance to courts attempting to make similar distinctions during proportionality review.[183]

Before the Supreme Court ruled that the Federal Sentencing Guidelines (Guidelines) must be advisory instead of mandatory,[184] the Guidelines allowed sentencing judges to impose less prison time than the suggested range when the judge found some mitigating factor that the Sentencing Commission did not account for when it promulgated the rules.[185] In some circumstances, judges imposed lighter sentences (known as "downward departures" from the Guidelines sentence) when they found that offenders were unusually vulnerable to harm in prison.[186] Judges have also taken the prison's security level into

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[182] *See infra* note 190 and accompanying text.

[183] *See infra* note 185.

[184] United States v. Booker, 543 U.S. 220, 221 (2005) ("Were the Guidelines merely advisory . . . their use would not implicate the Sixth Amendment.").

[185] 18 U.S.C. § 3553 (2012) ("[T]he court shall impose a sentence of the kind, and within the range . . . unless the court finds that there exists an aggravating or mitigating circumstance . . . not adequately taken into consideration by the Sentencing Commission in formulating the guidelines . . . ."); U.S.S.G. § 5H1.4 ("Physical condition or appearance, including physique, may be relevant in determining whether a departure is warranted, if the condition or appearance, individually or in combination with other offender characteristics, is present to an unusual degree and distinguishes the case from the typical cases covered by the guidelines."); *see also* Koon v. United States, 518 U.S. 81, 93 (1996) ("The Commission intends the sentencing courts to treat each guideline as carving out a 'heartland'. . . . When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted." (quoting U.S. SENTENCING GUIDELINES MANUAL § 1A1.4(b) (1995))).

[186] *See* Mary Sigler, *Just Deserts, Prison Rape, and the Pleasing Fiction of Guideline Sentencing*, 38 ARIZ. ST. L.J. 561, 570–71 (2006) (noting and describing the phenomenon of downward departures for defendants seen as particularly vulnerable); *see also* United States v. Parish, 308 F.3d 1025, 1031 (9th Cir. 2002) (upholding a district court's downward departure for a person convicted of possessing child pornography, based in part on the defendant's small stature and susceptibility to abuse); United States v. Garza-Juarez, 992 F.2d 896, 913 (9th Cir. 1993) (upholding a downward departure based in part on defendant's panic disorder); United States v. Tucker, 986 F.2d 278, 279–80 (8th Cir. 1993) (noting that downward departures based on vulnerability to abuse in prison are sometimes appropriate but reversing the district court's departure in this case, which was based in part

account when making this judgment.[187]

Though these courts generally do not explicitly invoke the Eighth Amendment's prohibition on excessive or extra punishment, some courts have downwardly departed on the grounds that a heightened vulnerability to harm in prison constitutes "additional punishment."[188] A court could depart on the basis of certain "discouraged" factors, such as increased vulnerability, "only if the factor is present to an exceptional degree or in some other way makes the case different from the ordinary case,"[189] and thus departures on this ground are relatively rare. Lower courts have recognized that features of an offender that make him vulnerable to victimization can be grounds for a downward departure in extraordinary cases, while holding that more ordinary vulnerabilities are not grounds for a shorter sentence.[190] The ability of courts to distinguish between cases in which the offender faced an especially heightened risk, and cases in which the risk is merely average, demonstrates courts' ability to draw these types of lines. It also undermines the critique that incorporating similar analysis in proportionality review would create an insurmountable line-drawing problem.

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on defendant's age and history of abuse); *cf.* United States v. Russell, 156 F.3d 687, 694 (6th Cir. 1998) (holding that defendant's deafness did not entitle him to a downward departure).

187 *See, e.g.*, United States v. Gonzalez, 945 F.2d 525, 527 (2d Cir. 1991) (discussing the security level of the facility in determining whether the district court's sentence was reasonable).

188 United States v. Koon, 833 F. Supp. 769, 788 (C.D. Cal. 1993) ("A legitimate mitigating circumstance arises where a defendant is subject to punishment in addition to the court-imposed sentence."), *aff'd in part, vacated in part*, 34 F.3d 1416 (9th Cir. 1994), *aff'd in part, rev'd in part*, 518 U.S. 81 (1996) (holding that the district court did not abuse its discretion in downwardly departing on the grounds of vulnerability).

189 *Koon*, 518 U.S. at 96.

190 *See id.* at 111–12 (holding that the district court did not abuse its discretion by taking into account the susceptibility to abuse in prison of the offenders, officers convicted of violating the constitutional rights of Rodney King in a highly publicized trial); United States v. Lara, 905 F.2d 599, 605 (2d Cir. 1990) (holding that the district court did not abuse its discretion in departing downward from the Guidelines range because of the vulnerability of a bisexual, young-looking offender of small stature who had been threatened with victimization and placed in protective segregation while awaiting sentencing); *cf.* United States v. DeBeir, 186 F.3d 561, 567–69, 574 (4th Cir. 1999) (holding that a downward departure based on sex-offender status and mental fragility was an abuse of discretion); United States v. Wilke, 156 F.3d 749, 753–54 (7th Cir. 1998) (declining to use the fact that a defendant was convicted of distributing child pornography as a justification for a departure); United States v. Thomas, 49 F.3d 253, 260–61 (6th Cir. 1995) (holding that HIV-positive status was not an "extraordinary physical impairment" that could justify a downward departure).

2. *Considering Collateral Consequences*

Critics of considering collateral consequences during proportionality review also raise doctrinal and practical objections. As noted earlier, the main doctrinal objection to such analysis is the Court's definition of many collateral consequences as nonpunitive.[191] Another argument against considering collateral consequences during proportionality review is that it would be impractical, given the sometimes thousands of collateral consequences experienced by offenders, and the fact that some are imposed after the original sentence was served. However, one approach to considering collateral consequences during proportionality review that is consistent with current doctrine is for courts to only consider *certain* collateral consequences as punitive.

There is historical and modern doctrinal support for deeming certain collateral consequences to be punitive and considering only these collateral consequences during proportionality review. This approach would not be impracticable. The Supreme Court's historical proportionality precedents and its recent decision in *Padilla v. Kentucky*[192] together suggest that some collateral consequences are uniquely punitive. In light of these precedents, legal scholar Gabriel Chin has articulated a theory of when collateral consequences are considered "punishment" by the Court: "Looking at individual collateral consequences in isolation, the Supreme Court has held that they are not punishment and has placed little substantive or procedural restriction on their imposition. Yet the same Court has understood civil death and other systematic loss of status as punishment."[193]

Professor Wishnie, meanwhile, has argued that "[t]he rationale of [the *Padilla*] decision implies that removal orders that are the inevitable result of a criminal conviction are subject to review for excessiveness under the Eighth Amendment."[194] Others have commented more generally on the Court's treatment of consequences when they

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191 *See supra* notes 146–50 and accompanying text.

192 130 S. Ct. 1473 (2010); *see supra* notes 157–59 and accompanying text.

193 Chin, *supra* note 135, at 1825. Chin also notes that "deportation, like civil death or expatriation, has systematic effects on status. It does not merely affect employment, or residence, or family relationships; instead, it may result also in loss of both property and life; or of all that makes life worth living." *Id.* at 1826 (internal citations and quotation marks omitted).

194 Wishnie, *supra* note 16, at 417; *see also* Brief in Support of R-M-L-'s Motion for Termination of Removal Proceedings and Objection to the Entry of a Final Order of Removal, In re R-M-L- (EOIR Mar. 12, 2012) (on file with author) (arguing that "[t]he well-established and long-standing principle that a penalty be proportionate to the underlying offense applies in the immigration context just as it does in the civil or criminal context").

affect a citizen's status or last a long period of time[195] and have argued that systematic exclusions like disenfranchisement should often be held disproportionate.[196]

This distinction between collateral consequences that impede offenders' lives in a cabined way and those that operate to systematically deny offenders participation in society—that the former is not "punishment" while the latter meets the definition[197]—is a defensible distinction for courts to make when conducting proportionality review. One approach could be for courts to find that only certain particularly restrictive collateral consequences enhance the severity of an offender's sentence in a way that raises an inference of gross disproportionality. The result of such review would likely be to forbid only punishments that are "grossly disproportionate" to the crime.

Conclusion

Modern courts often conclude that punishments are not grossly disproportionate to the crimes for which they are imposed without having comprehended the true scope of the punishment. This is because courts conducting the current method of proportionality analysis do not inquire into the real length of carceral sentences, whether they are accompanied by significant collateral consequences, or whether they are served under unusually harsh prison conditions.

A more thorough analysis is possible. Justice Breyer's dissent in *Ewing* demonstrates that estimating the "real time served" of a sentence is feasible, and the *Graham* opinion articulates a standard by which to judge the availability of parole. The Court's decisions regarding whether collateral consequences are punitive, from *Weems* and *Trop* to its recent discussion in *Padilla*, suggest that laws that operate to separate an offender from society could be regarded as punishment and examined during proportionality review. Finally, the focus of Court's prison conditions jurisprudence on the unconstitutionality of even a risk of harm, as well as the practice of downwardly

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[195] Margaret Colgate Love, *Paying Their Debt to Society: Forgiveness, Redemption, and the Uniform Collateral Consequences of Conviction Act*, 54 How. L.J. 753, 756 (2011) ("*Padilla*'s rationale is hard to confine to deportation consequences alone but potentially extends to other status-generated penalties that are sufficiently important to a criminal defendant to influence his willingness to plead guilty.").

[196] Karlan, *supra* note 11, at 1164–69 (calling the severity of disenfranchisement as a punishment "undeniable" because the convicted person is "'severed from the body politic and condemned to the lowest form of citizenship, where voiceless at the ballot box . . . . [he] must sit idly by while others . . . choose the fiscal and governmental policies which will govern him and his family'" (quoting McLaughlin v. City of Canton, 947 F. Supp. 954, 971 (S.D. Miss. 1995))).

[197] *See supra* notes 193–94 and accompanying text.

departing from the Sentencing Guidelines based on extreme vulnerability to harm in prison, provide bases on which to distinguish excessively punitive conditions from those that are merely part of the sentence of imprisonment. These areas of law demonstrate that it is possible for courts to rationally categorize sentences without impermissibly relying on subjective views, and may provide the tools for courts to begin a more meaningful proportionality analysis.

The analysis suggested by this Note also would be consistent with the values underlying the Eighth Amendment. In *Graham*, the Court wrestled with the nature of an LWOP sentence imposed on a juvenile, repeatedly highlighting that the sentence is unique among term-of-years sentences because of its complete stripping of the offender's hope.[198] This points toward an analysis of punishment that accounts for whether a sentence amounts to a complete denial of hope when determining its severity.[199] Additionally, respect for the dignity of offenders has long been considered a core value of the Eighth Amendment,[200] and the Court recently noted that this value "animates the Eighth Amendment prohibition against cruel and unusual punishment."[201] In order for proportionality review to be consistent with these values, it must acknowledge how offenders experience the severity of their sentences, as the analysis proposed by this Note aims to do. Absent a dramatic shift in the Court's Eighth Amendment jurisprudence and an expansion of what is deemed punishment, a complete transformation of proportionality review is unlikely. However, this Note proposes a number of small steps forward for proportionality review that are both supported by the Court's jurisprudence and compelled by the values underlying the Eighth Amendment.

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198 *See* Graham v. Florida, 130 S. Ct. 2011, 2032 (2010) (analyzing the juvenile's sentence of LWOP and noting that it "gives no chance for fulfillment outside prison walls, no chance for reconciliation with society, no hope").

199 *See* Ristroph, *supra* note 89, at 75 ("[T]he denial of hope is a form of cruelty. So teaches *Graham* . . . .").

200 *See* Trop v. Dulles, 356 U.S. 86, 100 (1958) ("The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

201 Brown v. Plata, 131 S. Ct. 1910, 1928 (2011) ("Prisoners retain the essence of human dignity inherent in all persons."); *see also* Jonathan Simon, *Editorial: Mass Incarceration on Trial*, 13 PUNISHMENT & SOC'Y 251, 251 (2011) (noting that "the *Brown* opinion already counts as an important shift for its revitalization of dignity as a value in our constitutional jurisprudence").