THE CONSTITUTION AND PUNISHMENT

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INTRODUCTION

The last year has been very frustrating for me in my role as a lawyer. In March 2003, the Supreme Court, in Lockyer v. Andrade, ruled that federal courts could not give habeas corpus relief to Leandro Andrade, who had been sentenced to life in prison with no possibility of parole for 50 years for stealing $153 worth of videotapes from K-Mart stores.1 I represented Andrade in both

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the Ninth Circuit, where he prevailed, and in the Supreme Court, which ruled against him on the ground that his sentence was not "contrary to," or involved an "unreasonable application" of, "clearly established Federal law." In the companion case, Ewing v. California, the Supreme Court held that it was not cruel and unusual punishment in violation of the Eighth Amendment to impose a life sentence, with no possibility of parole for 25 years, for stealing three golf clubs worth $1200 pursuant to California's "Three Strikes" Law. Together, the decisions in Andrade and Ewing will make it very difficult, if not impossible, for courts to find any prison sentence to be grossly disproportionate and thus cruel and unusual punishment.

In the last year, I was also very involved in a case, Romo v. Ford Motor Co., in which the California Court of Appeal found a large punitive damages award unconstitutional based on the Supreme Court's decision in State Farm Mutual Automobile Insurance Co. v. Campbell. In Romo, a jury awarded $290 million in punitive damages against Ford Motor Co. after the rollover of a 1978 Ford Bronco killed three people and seriously injured three others. The evidence at trial showed that Ford had rushed the car to market despite its knowledge that the car had a propensity to roll over, lacked a rollover bar to protect occupants, and had a flimsy roof that was sure to collapse in a rollover. In June 2002, the California Court of Appeal upheld the punitive damages award as constitutional, calling Ford's conduct "manslaughter."

After the California Supreme Court denied review, Ford sought certiorari in the United States Supreme Court. As Counsel of Record for Romo in the Supreme Court, I filed our opposition to certiorari on Friday, April 4, 2003. On Monday, April 7, the Court issued its decision in State Farm. There the Court held that due process was violated by a $145 million punitive damages award against State Farm Mutual Automobile Insurance Co. for bad faith in refusing to settle a suit against a policyholder. The Court, in a 6-3 decision, ruled that the punitive damages award was "grossly excessive" because the conduct was not sufficiently reprehensible to justify such an award, the state court had impermissibly awarded punitive damages for conduct that occurred in other states, and the ratio between punitive and compensatory damages was impermissibly large.

Based on its decision in State Farm, the Supreme Court granted certiorari.

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3. See Andrade, 538 U.S. at 63. This is the standard for federal court relief for a state prisoner pursuant to 28 U.S.C. § 2254(d) (2004).
7. Romo, 122 Cal. Rptr. 2d at 164.
8. State Farm, 538 U.S. at 409.
in *Romo*, vacated the lower court decision, and remanded the case for further consideration. After briefing and arguments, the California Court of Appeal found in November 2003 that, based on *State Farm*, the award of $290 million in punitive damages was grossly excessive and violated due process. The court ordered that plaintiffs either accept a reduction of the punitive damages award to $23.5 million or face a new trial on the issue of punitive damages.

There is a cruel irony when these cases are compared. The principle that emerges is that too many years in prison for shoplifting does not violate the Constitution but too much money in punitive damages against a business for "manslaughter" is unconstitutional.

Focusing on these cases more carefully raises difficult and profoundly important questions: Is the Supreme Court consistent in dealing with the various kinds of punishment that governments can impose? Should there be such consistency? If so, what consistent principles should guide courts in evaluating the constitutionality of punishments?

This Article focuses on these questions. There are four major types of punishments that courts can impose: death sentences, imprisonment, fines, and punitive damages. This Article focuses on how the Supreme Court has treated and should treat constitutional issues concerning these four types. My thesis is that the Court has been markedly inconsistent both in terms of substantive limits and procedural requirements for these types of penalties. Further, I argue that this inconsistency is unjustified and that there should be a unified, coherent theory of constitutional limits on punishment.

The Article is divided into three parts. Part I explores substantive limits on punishment and Part II discusses procedural requirements in punishment. Each section begins by discussing the Court's inconsistency and then considers whether it is justified. After demonstrating that the Court's approaches to punishment have been irreconcilable, Part III outlines the contours of a unified

10. *See Romo v. Ford Motor Co.*., 6 Cal. Rptr. 3d 793 (Cal. Ct. App. 2003). The ultimate resolution of *Romo* is still uncertain. Petitions for review of the Court of Appeal's decision in the California Supreme Court were due February 1, 2004, and there is still the likelihood that one or both sides will seek review in the United States Supreme Court.
11. Surprisingly, there is little in the way of scholarly literature comparing the Supreme Court's treatment of various types of punishment. After a draft of this Article was completed, I discovered that Professor Pamela Karlan had written an excellent soon-to-be-published article comparing the Supreme Court's decisions in punitive damages and criminal punishment. *See Pamela S. Karlan, "Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment, 88 MINN. L. REV. (forthcoming 2004).*
12. This is not exhaustive; for example, probation can be the sentence in a criminal case and double or treble damages are sometimes authorized in civil cases. Yet, probation is really just a form of custody that is much less restrictive than imprisonment, see, for example, *Jones v. Cunningham*, 371 U.S. 236 (1963) (noting that a person is "in custody" for purposes of the habeas corpus statute while released on parole), and multipliers of damages are analogous to punitive damages.
constitutional theory of punishment. This would emphasize proportionality review for all penalties and also a much greater role for the jury in criminal sentencing.

By way of disclaimer, this Article does not attempt to provide an overall theory of punishment under the law. Obviously, that is far beyond the scope of any article. My focus is much more modest; I want to consider how the Supreme Court has dealt with constitutional issues concerning punishment. My project is descriptive in hoping to illuminate the inconsistencies, normative in desiring to argue against what the Court has done, and prescriptive in offering an alternative vision of the Constitution and punishment.

I. SUBSTANTIVE LIMITS ON PUNISHMENT

A. The Court’s Inconsistency

The Supreme Court has consistently held, at least as an abstract proposition, that the Constitution requires proportionality in the imposition of punishment. The Court first articulated this in *Weems v. United States*, where it held that the Eighth Amendment prohibits “greatly disproportioned” sentences and stated “that it is a precept of justice that punishment for crime should be graduated and proportioned to offense.”13 In *Weems*, the Court declared unconstitutional a sentence of hard labor in chains as violating the Eighth Amendment. The Court has not, however, been consistent in its willingness to apply proportionality analysis.

1. Death penalty.

In death penalty cases, the Court has insisted on proportionality. For example, in *Coker v. Georgia*, the Court held that the Eighth Amendment limits the crimes for which a death sentence can be imposed.14 The Court ruled that a death sentence for rape is impermissible as violating the proportionality requirement.15 Similarly, the Court has ruled that it violates the Eighth Amendment to impose the death penalty for felony murder when the defendant was not a major participant in the killing.16

In fact, more generally, the Court’s approach to the death penalty, requiring consideration of aggravating and mitigating circumstances, is about ensuring

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15. *See id.* at 592. The Court declared that “a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.” *Id.*
that the punishment of death fits the crime and the defendant.\textsuperscript{17} After Furman v. Georgia invalidated the death penalty,\textsuperscript{18} the Supreme Court allowed it to be reinstituted but held that there cannot be a mandatory death penalty for any crime and ruled that juries must consider aggravating and mitigating circumstances in deciding whether a death sentence is appropriate. In Woodson v. North Carolina, the Court declared unconstitutional a North Carolina law that mandated a death sentence for first degree murder.\textsuperscript{19} In Lockett v. Ohio, the Court ruled that juries must "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."\textsuperscript{20}

The result of these decisions is that the Supreme Court has required "the particularized consideration" of the offense and the offender before a death sentence can be imposed. This is about ensuring that the punishment is appropriate for the defendant and his or her crime; this, of course, is the essence of proportionality analysis.

Most recently, the Court reaffirmed the application of proportionality analysis to death penalty cases. In Atkins v. Virginia, the Court held that the death penalty for the mentally retarded is cruel and unusual punishment in violation of the Eighth Amendment and declared, "The Eighth Amendment succinctly prohibits 'excessive' sanctions."\textsuperscript{21} Atkins follows earlier Supreme Court rulings that had invalidated the death penalty for the insane\textsuperscript{22} and for defendants who were fifteen at the time of their crime.\textsuperscript{23} The Supreme Court's decision in this case was based on the conclusion that persons with mental disabilities are not blameworthy because of their reduced mental capacities. The Court thus concluded that a death sentence was disproportionate to the criminal culpability.

2. Fines and forfeitures.

The Supreme Court considered the application of proportionality to fines and forfeitures in United States v. Bajakajian.\textsuperscript{24} An individual leaving the United States took his life savings of $357,000 with him in cash. This violated the federal law which requires declaring to federal authorities the removal from

\textsuperscript{17} See Gregg v. Georgia, 428 U.S. 153 (1976).
\textsuperscript{18} Furman v. Georgia, 408 U.S. 238 (1972).
\textsuperscript{22} See Ford v. Wainwright, 477 U.S. 399 (1986).
the country of more than $10,000 in cash.\textsuperscript{25} The government sought to have the defendant forfeit the entire $357,000, even though the maximum criminal fine was $5000. The federal district court rejected this request and instead sentenced Bajakajian to three years’ probation and imposed a $15,000 fine.

The government appealed and challenged the court’s refusal to order forfeiture of the entire $357,000. The Supreme Court also ruled against the government and stated: "[W]e therefore adopt the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clause precedents."\textsuperscript{26} The Court concluded that imposing forfeiture of the entire amount would violate the Excessive Fines Clause of the Eighth Amendment. Justice Thomas, writing for the Court, said that "[t]he “touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish."\textsuperscript{27}

3. Punitive damages.

Punitive damages date back nearly four millennia to Hammurabi’s Code (and, indeed, existed in some form in most ancient legal systems),\textsuperscript{28} and the U.S. Supreme Court first addressed the general propriety of those awards nearly two hundred years ago.\textsuperscript{29} Yet until fifteen years ago, the Court never considered whether a punitive damages award violated the Constitution, as opposed to whether a particular award ran afoul of common law or admiralty standards.\textsuperscript{30}

The Supreme Court’s initial decisions concerning punitive damages focused entirely on procedural requirements. In Pacific Mutual Life Insurance Co. v. Haslip, the Court refused to strike down a punitive damages award that was two hundred times the size of the compensatory damages award.\textsuperscript{31} In upholding the jury’s award, the Court stressed that a punitive damages award should be regarded as presumptively constitutional if, as in Haslip, adequate

\begin{enumerate}
\item \textsuperscript{26} Bajakajian, 524 U.S. at 336.
\item \textsuperscript{27} Id. at 334.
\item \textsuperscript{28} Although the earliest common law cases to explicitly discuss punitive damages are Wilkes v. Wood, 98 Eng. Rep. 489 (C.P. D. 1763) and Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763), the equivalents of such damages were available under ancient Babylonian, Egyptian, Greek, Hittite, Hebrew, Hindu, and Roman codes. See Thomas B. Colby, Beyond the Multiple Punishment Problem: Punitive Damages As Punishment for Individual, Private Wrongs, 87 M.I.NN. L. REV. 583, 614-43 (2003).
\item \textsuperscript{29} See Alexander Murray v. The Charming Betsy, 6 U.S. (2 Cranch) 64 (1804) (Marshall, C.J.).
\item \textsuperscript{30} The Court assessed the propriety of punitive damages in The Charming Betsy and other early cases solely in the exercise of its original jurisdiction over admiralty cases, not in the context of constitutional challenges to such awards.
\end{enumerate}
instructions had been available to confine the jury’s common law discretion to fix the size of an award (even if the instructions were as vague and confusing as the ones provided in that case), and if judicial review had been available at both the trial and appellate levels.

In TXO Products Corp. v. Alliance Resources Corp., the Court again stressed that the limits on punitive damages are procedural, not substantive.\textsuperscript{32} In that 1993 case, TXO, a Texas oil company, plotted to manufacture a “cloud” on the title of valuable property owned by Alliance, a rival West Virginia company—a cloud that TXO envisioned would compel Alliance to sell the property for a fraction of its true worth. What TXO did not count on was being caught in the act. Alliance suffered nothing more than $19,000 in litigation costs. However, it convinced a West Virginia jury that it should be awarded the $10 million in profits that TXO had hoped to realize if its scheme had succeeded. A plurality decision written by Justice John Paul Stevens emphasized that a punitive damages award should not be deemed unconstitutional simply because it dwarfs the compensatory damages award. To the contrary, Stevens underscored that punitive damages should be upheld as long as adequate procedural safeguards were in place, such as appropriate instructions to the jury and the availability of post hoc judicial review for reasonableness.\textsuperscript{33}

The following year, in Honda Motor Corp. v. Oberg,\textsuperscript{34} the Court invalidated an Oregon statute that precluded appellate review of punitive damages awards. The statute was in keeping with the Oregon Constitution but in derogation of the long-standing common law practices that provide the baseline for due process. Writing for the Court, Stevens declared that appellate review is an essential attribute of procedural due process.

In sum, until 1996, the Court viewed the issue of punitive damages entirely through the lens of procedural due process and focused solely on “the imprecise manner in which punitive damages systems are administered.”\textsuperscript{35} But in that year a sharply divided Court in BMW v. Gore struck down as “grossly excessive” a $2 million punitive damages award against an automaker for repainting new but damaged cars without disclosing that fact to customers.\textsuperscript{36}

Ira Gore had paid $40,000 for a “brand new” luxury sedan, only to discover that BMW had repainted the car because it had been scarred by acid rain during shipping. Gore sought compensatory damages equal to the car’s diminished value, plus unspecified punitive damages on behalf of himself and the thousands of other similarly situated BMW owners. The jury awarded


\textsuperscript{33} See id. at 456-57.

\textsuperscript{34} 512 U.S. 415 (1994).


$4000 in compensatory damages and $4 million in punitive damages, which the Alabama Supreme Court reduced to $2 million, yielding a 500:1 ratio.

Justice Stevens, writing the majority opinion, concluded that grossly excessive punitive damages are a denial of substantive due process. Although the Court again declined to fix a mathematically precise rule regarding how much was too much, it ruled that, on the facts of the case, 500:1 was certainly over the line. Given that only 56 repainted BMWs had been sold in Alabama during the relevant period, the Court held, the jury’s 1000:1 award was obviously but impermissibly based on BMW’s sales of repainted cars outside the state, even though Gore had never established that such practices were unlawful anywhere outside Alabama. As Stevens explained, “[I]t follows from . . . principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors’ lawful conduct in other States.”

Equally important, the Court articulated three “guideposts” for lower courts to use in determining whether a punitive damages award is grossly excessive. First, what is the degree of “reprehensibility” of the defendant’s conduct? The more dangerous, fraudulent, frequent, or malicious it is, the greater the amount of punitive damages warranted. Second, what is the ratio of punitive damages to the actual and potential harm that the plaintiff and other conceivable victims suffered? Third, how does the punitive damages award compare with the civil or criminal penalties that had been or could be imposed for comparable misconduct?

Most recently, in State Farm, the Supreme Court reaffirmed that substantive due process limits punitive damages awards. In 1981, Curtis Campbell was driving with his wife on a two-lane highway in rural Utah when he decided to pass six vans traveling ahead of them, causing an accident that killed the innocent driver of an oncoming car and permanently disabled the blameless driver of a third car. Although Campbell told the police and investigators from his insurer, State Farm, that he had been driving carefully and was not to blame for the accident, State Farm’s investigators quickly concluded that he was fully at fault and just as quickly advised the company to initiate settlement negotiations with the accident survivors, who had sued Campbell. But State Farm refused both that recommendation and the plaintiffs’ own subsequent offer to settle the case for Campbell’s policy limit of $50,000. At trial, a jury found Campbell 100% at fault and returned a judgment of $185,849 against him.

Although State Farm had previously promised Campbell that it would

37. Id. at 572 (emphasis added).
38. Id. at 575.
39. Id. at 580.
40. Id. at 574-75, 583.
cover him in the event of an excess liability judgment, it now refused to do so. Furthermore, when Campbell and his wife asked a State Farm lawyer whether they should—and how they could—arrange to pay the excess liability judgment, he cavalierly suggested that they sell their home.

Although the Campbells did not sell their home, they did essentially sell their lawsuit: They settled with the plaintiffs, who pledged not to collect their judgment from the Campbells—thereby enabling the Campbells to pursue a bad-faith action against State Farm for its failure to settle what it knew to be a losing case—in exchange for the Campbells’ vow to remit ninety percent of any recovery to the plaintiffs.

The Campbells then sued State Farm for bad faith, fraud, and intentional infliction of emotional distress. At trial, in an effort to establish State Farm’s motives and state of mind and to counter the company’s contention that its mishandling of the Campbells’ defense was merely an unintended and isolated mishap, the Campbells’ counsel focused nearly as much on State Farm’s overall, nationwide claims-handling policies and practices as it did on its handling of the lawsuit against Campbell.

The jury found for the Campbells, awarding them $2.6 million in compensatory damages and $145 million in punitive damages. The trial court trimmed the awards to $1 million in compensatory and $25 million in punitive damages. The Utah Supreme Court, however, reinstated the $145 million punitive damages award, concluding that “State Farm’s fraudulent conduct has been a consistent way of doing business for the last twenty years, directed specifically at some of society’s most vulnerable groups.”

In a 6-3 opinion written by Justice Anthony Kennedy, the Court concluded that even if State Farm’s nationwide policies had been designed to reject legitimate claims and reduce justified payouts in order to boost corporate profits, as the Campbells argued, “Most of [those] practices bore no relation to third-party automobile insurance claims, the type of claim underlying the Campbells’ complaint.” The Court consequently held that the award of $145 million in punitive damages was grossly excessive and therefore violated substantive due process.

The effect of BMW and State Farm is to establish clearly that there is a proportionality requirement for punitive damages awards. Unlike the death penalty or forfeitures, the limit comes from the Due Process Clause of the Fourteenth Amendment and not the Eighth Amendment. But the bottom line is that the Court is imposing a significant substantive limit on punitive damages based on proportionality.

43. State Farm, 538 U.S. at 411.

The Supreme Court has held that grossly disproportionate prison sentences violate the Eighth Amendment, but it has rarely been willing to find any prison sentence to be unconstitutional, and after Ewing v. California\textsuperscript{44} and Lockyer v. Andrade\textsuperscript{45} it is doubtful that it will do so. The Court first considered proportionality as applied to prison sentences in Rummel v. Estelle.\textsuperscript{46} In Rummel, the Court upheld a life sentence for an individual who obtained $120.75 by false pretenses; he essentially took someone else's tools without permission. The Court expressed the need for great deference to legislative choices regarding punishments for recidivists but stated: "This is not to say that a proportionality principle would not come into play in [an] extreme example . . . if a legislature made overtime parking a felony punishable by life imprisonment."\textsuperscript{47} This holding, though, would reserve proportionality analysis for only the most outrageous and extreme cases. In Rummel, the Court emphasized that Rummel was eligible for parole within twelve years and, in fact, he was released soon after the Supreme Court's decision.

However, just three years later, in Solem v. Helm,\textsuperscript{48} the Court held that it was grossly disproportionate to sentence a person to life imprisonment for passing a bad check for $100 because of six prior nonviolent offenses. Justice Powell, writing for the Court, observed that "the Court has continued to recognize that the Eighth Amendment prohibits grossly disproportionate punishments."\textsuperscript{49} The Court announced a three-part test for determining whether a sentence is grossly disproportionate:

[A] court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions.\textsuperscript{50}

But Solem v. Helm remains the only case in which the Supreme Court has found a prison sentence to be grossly disproportionate. The Court next considered the issue in Harmelin v. Michigan, where the Court upheld a life sentence for possession of more than 650 grams of cocaine.\textsuperscript{51} In Harmelin, seven Justices endorsed the principle that grossly disproportionate sentences are unconstitutional. Only Chief Justice Rehnquist joined Justice Scalia's

\textsuperscript{44} 538 U.S. 11 (2003).
\textsuperscript{45} 538 U.S. 63 (2003).
\textsuperscript{46} 445 U.S. 263 (1983).
\textsuperscript{47} Id. at 274 n.11.
\textsuperscript{49} Id. at 288 (citations omitted).
\textsuperscript{50} Id. at 292.
opinion arguing otherwise.\textsuperscript{52} Expressly disagreeing with Justice Scalia, Justice Kennedy declared in his concurring opinion that "\textit{stare decisis} counsels [this Court's] adherence to the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years."\textsuperscript{53} Justice Kennedy explained: "The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "‘grossly disproportionate’ to the crime."\textsuperscript{54} Justices O'Connor and Souter joined this opinion and its conclusion that grossly disproportionate punishments are unconstitutional. The four dissenting Justices in \textit{Harmelin}, actually the plurality in the case, argued that the Eighth Amendment prohibits disproportionate sentences and concluded that "gross disproportionality" was too restrictive a constitutional standard.\textsuperscript{55}

In \textit{Harmelin}, Justice Kennedy's concurring opinion agreed with both \textit{Solem}'s holding that a grossly disproportionate sentence of imprisonment violates the Eighth Amendment and its three-part test.\textsuperscript{56} Justice Kennedy said, though, that courts need not examine the second and third factors mentioned in \textit{Solem}—the intrajurisdictional and interjurisdictional reviews—unless a "threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality."\textsuperscript{57}

In upholding the life sentence imposed on Harmelin, Justice Kennedy stressed the harms caused by the defendant's conduct; Justice Kennedy emphasized that Harmelin possessed enough cocaine for between 32,500 and 65,000 doses.\textsuperscript{58} Justice Kennedy distinguished Harmelin's offense from the "relatively minor, nonviolent crime at issue in \textit{Solem}," concluding that Harmelin's crime was "as serious and violent as the crime of felony murder without specific intent to kill."\textsuperscript{59}

In 2003, in \textit{Ewing} and \textit{Andrade}, the Court greatly weakened, if not almost eliminated, proportionality review, as applied to prison sentences. The former case involved Gary Ewing, who stole three golf clubs worth $1200 from a golf pro shop. He put them down his pants and tried to walk out of the store. He was caught and charged with grand theft and because of his prior convictions was sentenced to life in prison with no possibility of parole for twenty-five years.

In \textit{Ewing}, the Court found that states may impose a life sentence on recidivists, even if the last crime triggering the punishment is shoplifting. In upholding Ewing's sentence, Justice O'Connor's plurality opinion stressed that

\textsuperscript{52} \textit{Id.} at 985.
\textsuperscript{53} \textit{Id.} at 995 (Kennedy, J., concurring in part and concurring in the judgment).
\textsuperscript{54} \textit{Id.} at 1001.
\textsuperscript{55} \textit{Id.} at 1009, 1012 (White, J., dissenting); \textit{id.} at 1027 (Marshall, J., dissenting).
\textsuperscript{56} \textit{Harmelin}, 501 U.S. at 1001.
\textsuperscript{57} \textit{Id.} at 1005.
\textsuperscript{58} \textit{Id.} at 1002.
\textsuperscript{59} \textit{Id.} at 1002, 1004.
"[t]hough [three strikes] laws may be relatively new, this Court has a longstanding tradition of deferring to state legislatures in making and implementing such important policy decisions."\(^{60}\) After emphasizing the need for deference to the legislature, Justice O'Connor considered the first part of the test from Solem and Harmelin. She said that in weighing the gravity of the offense and the harshness of the punishment, "both his current felony and his long history of felony recidivism must be placed on the scales."\(^{61}\) This marked quite a different approach from that taken in Solem, where the Court stated: "In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted."\(^{62}\) By requiring consideration of a defendant's entire criminal record in evaluating the constitutionality of a recidivist sentence, the Court made it much harder to argue that a punishment is grossly excessive.

Justices Scalia and Thomas wrote separate opinions concurring in the judgment in which they argued that no sentence should ever be found to be cruel and unusual punishment.\(^{63}\) They concluded that only an impermissible type of punishment, and not the length of a sentence, can violate the Eighth Amendment.

In Andrade, the Court focused on the availability of relief through a writ of habeas corpus. The 1996 Antiterroism and Effective Death Penalty Act significantly narrowed the availability of habeas corpus relief to state prisoners. The Act modified 28 U.S.C. § 2254(d) to provide that a federal court may grant habeas corpus relief only if a state court decision is "contrary to," or involved an "unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."\(^{64}\) In Andrade, the Supreme Court held that Andrade was not entitled to habeas corpus relief because, first, there was no clearly established law; and second, the state court decision was not contrary to an unreasonable application of federal law.

First, the Court's conclusion that there was no clearly established law is surprising because it did not explain why the three-part test from Solem and Harmelin does not meet this requirement. On many occasions, the Supreme Court has approvingly cited this test.\(^{65}\) Moreover, Justice O'Connor's opinion stated that "the only 'clearly established' law . . . is . . . a gross disproportionality principle."\(^{66}\) However, Justice O'Connor never explains why

61. Id.
63. See Ewing, 538 U.S. at 32 (Scalia, J., concurring); id. at 32 (Thomas, J., concurring).
64. 28 U.S.C. § 2254(d) (2004).
a life sentence, with no possibility of parole for fifty years, fails to meet this standard. Justice O'Connor's opinion will make it much harder for habeas petitioners to gain relief because it sets such a difficult, and indeed ambiguous, standard for when there is clearly established federal law.

Second, the Court ruled that the state court decision was not "contrary to" or an "unreasonable application" of clearly established federal law. The Supreme Court has held that a state court decision is "contrary to" federal law "if the state court applies a rule different from the governing law set forth in our cases, or if it decides a case differently than we have done on a set of materially indistinguishable facts." The Court rejected the argument that the California Court of Appeal acted contrary to federal law in that it never applied the three-part test prescribed by Solem and Harmelin.

Under 28 U.S.C. § 2254(d), a federal court also can grant habeas corpus if the state court "decides a case differently than we have done on a set of materially indistinguishable facts." The factual similarities between Lockyer v. Andrade and Solem v. Helm are striking. Both Andrade and Helm were in their mid-thirties when sentenced to life in prison. Both had received their first felony convictions approximately fifteen years earlier, each for residential burglary. Both had purely nonviolent prior records, principally financial and property crimes. Both received a life sentence under state recidivist statutes for minor offenses: Helm for uttering a no account check worth approximately $100; Andrade for shoplifting $153 worth of videotapes.

Justice O'Connor said that the difference between Andrade and Solem is that Andrade was eligible for parole in fifty years, whereas Helm was sentenced to life in prison without the possibility of parole. Justice O'Connor thus concluded that Andrade was similar to Rummel, where the defendant was sentenced to life in prison for misappropriating approximately $100 worth of property, but was eligible for parole in 12 years. Justice O'Connor's analysis means that a sentence is immune from Eighth Amendment attack so long as there is the theoretical possibility of parole at some point. Realistically, an indeterminate life sentence with no possibility of parole for 50 years is the same as a life sentence with no chance of parole. After Justice O'Connor's opinion, a state can immunize its sentences from Eighth Amendment analysis by just setting parole in 75 or 100 years.

The bottom line after Ewing and Andrade is that there is little in the way of proportionality review for prison sentences. If life sentences for shoplifting are not grossly disproportionate, it is hard to imagine what prison sentence will be deemed to violate the Eighth Amendment.

68. See Andrade, 538 U.S. at 74.
B. Is the Inconsistency Justified?

A review of the cases concerning these differing types of punishments reveals profound inconsistencies in the Supreme Court's approach. For example, the Court in recent years has emphasized proportionality in death penalty cases (such as in Atkins, in invalidating the death penalty for the mentally retarded); in forfeiture cases (in Bajakajian in holding that forfeitures and fines cannot be grossly excessive); and in punitive damages cases (in BMW and State Farm, in invalidating punitive damages awards as grossly excessive in violation of due process). But the Court refused to find prison sentences disproportionate, even when life sentences were imposed for shoplifting. As the Court observed two decades ago in Solem: "It 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 prison were not."70 Yet, that is exactly the result of the Supreme Court's recent decisions. Indeed, the Court's decisions provide that taking away too much money is unconstitutional, but too many years in prison is not.

There are many other inconsistencies as well. In the forfeiture case and the punitive damages cases the Supreme Court, in invalidating the punishments, stressed the lack of reprehensibility of the defendants' conduct. Failing to declare cash being removed from the country in Bajakajian, repainting cars without disclosure in BMW, and defrauding consumers in State Farm were all deemed to be low on the reprehensibility scale, and thus the conduct was deemed not to warrant large monetary penalties. But in Ewing and Andrade the Court paid no attention to the fact that the defendants' conduct was shoplifting and minimally reprehensible.

In BMW and State Farm, the Court limited the ability of a jury in one state to impose punitive damage awards for conduct in other states. But there is no such limit in the area of criminal sentencing. Under California's Three Strikes Law, for example, crimes in other states count as strikes so long as the same conduct would be criminal in California. Other convictions are used for sentencing enhancements under the federal sentencing guidelines and can be the basis for greater penalties in state courts.

The Court in Ewing stressed the need for deference to state legislatures as they decide the appropriate punishment for recidivists. In upholding Ewing's sentence, Justice O'Connor's plurality opinion stressed that "[t]hough [three strikes] laws are relatively new, the Court has a longstanding tradition of deferring to state legislatures in making and implementing such important policy decisions."71 But the Court follows no such legislative deference in BMW or State Farm, where legislatures in Alabama and Utah could have, but

did not, cap punitive damages.\textsuperscript{72}

In \textit{BMW} and \textit{State Farm}, the Court emphasized the need to consider the ratio between the compensatory and punitive damages. Yet, in \textit{Ewing} and \textit{Andrade}, the Court paid absolutely no attention to the ratio between the penalty enhancement and the punishment that otherwise would have been imposed. For example, in \textit{Andrade}, the maximum punishment for two counts of petty theft with a prior is three years, eight months in prison, but Andrade received a sentence of life imprisonment with no possibility of parole for fifty years. This is a ratio of 16:1, larger than the single digits that the Court endorsed in punitive damages cases in \textit{State Farm}.

The question is whether this inconsistency is justifiable. Certainly, the Court has not recognized its inconsistency and has made no attempt to justify it. Few scholars have even noted it.\textsuperscript{73} There is no textual basis for the inconsistency in the language of the Constitution. The limits on punitive damage awards have been based on the Due Process Clause, while proportionality is imposed in death penalty and imprisonment cases based on the Eighth Amendment’s Cruel and Unusual Punishment Clause and in forfeiture cases by the Eighth Amendment’s Excessive Fines Clause. Arguably, the text of the Eighth Amendment offers more basis for proportionality than the Due Process Clause; after all, a prohibition of “excessive fines” inherently requires some way of deciding what is too much. But, as is usually true in constitutional interpretation, the textual argument does not provide much of an answer. The Eighth Amendment’s provisions are applied to the states through the Due Process Clause, so ultimately the issue in each case is whether the punishment is so large as to violate due process. Besides, constitutional law is long past the point where substantive due process can be rejected on the grounds that it is not textual.

Are there other justifications for the Court’s inconsistency? Two are possible: history and social policy. On examination, it is clear that neither provides a satisfactory explanation for the Court’s inconsistent approaches.

1. \textit{History}.

It should be noted that while the Court has been quite inconsistent, Justice Antonin Scalia has taken the most consistent position among the Justices: He rejects proportionality analysis in all of these areas. He dissented in \textit{Atkins}, in \textit{Bajakajian}, and in the punitive damages cases. He wrote a separate opinion in

\textsuperscript{72} Several states have enacted caps on punitive damages. See, \textit{e.g.}, \textsc{Alaska Stat.} § 09.17.020(f) (2003) (limiting punitive damages to the greater of three times compensatory damages or $500,000); \textsc{Ga. Code Ann.} § 51-12-5.1(c)(1), (f), (g) (2003) (limiting punitive damages, except in products liability and intentional harm cases, at $250,000).

\textsuperscript{73} The exception is Professor Pamela Karlan’s forthcoming article, which does an excellent job of describing this inconsistency. See Karlan, \textit{supra} note 11.
Ewing, and earlier in Harmelin, to argue against any proportionality requirement regarding the length of criminal sentences.\footnote{74}

Justice Scalia bases his argument against proportionality in criminal sentencing on his view of history. However, a careful examination of the historical basis for the Eighth Amendment reveals that Justice Scalia is simply wrong and that proportionality analysis has strong historical foundations. Thus, the Court's inconsistency cannot be explained through historical practice or the Framers' intent.

The idea that grossly excessive punishments are cruel and unusual punishment is not new; it was part of English law for hundreds of years before the founding of the United States. As the Supreme Court has long recognized, the requirements of the Eighth Amendment were "taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta."\footnote{75} Blackstone, in his Commentaries, observed that the Magna Carta, in 1215, prohibited excessive punishments.\footnote{76}

As prison sentences became more common in later years, the English courts were equally insistent that "imprisonment ought always to be according to the quality of the offense."\footnote{77} In 1689, the English Bill of Rights adopted the reference to "cruel and unusual" punishments that was repeated verbatim by the framers of the Eighth Amendment. Only three months later, that language was interpreted by the House of Lords, which declared that a "fine of thirty thousand pounds, imposed by the court of King's Bench upon the earl of Devon, was excessive and exorbitant, against magna carta, the common right of the subject, and against the law of the land."\footnote{78}

In fact, Blackstone specifically said that the prohibition of cruel and unusual punishment forbids excessively harsh sentences for recidivist conduct. Blackstone discussed the permissibility of capital punishment for those who repeatedly violated statutes prohibiting loaded wagons on public roads. Blackstone said that such a punishment for recidivism was impermissible because "the evil to be prevented is not adequate to the violence of the preventive" and the punishment would violate "dictates of conscience and harmony."\footnote{79}

This principle of proportionality was also reflected in colonial laws, which served as the source of many constitutional provisions. The Maryland Charter of 1632, for example, authorized penalties if "the Quality of the Offense require

\footnote{74. Justice Thomas wrote the majority opinion in Bajakajian, but was otherwise always in accord with Justice Scalia.  
76. See, e.g., 4 WILLIAM BLACKSTONE, COMMENTARIES *10.  
78. See Solem, 463 U.S. at 285 (quoting Earl of Devon's Case, 11 State Tr. 133, 136 (1689)).  
79. See 4 BLACKSTONE, supra note 76, at *10.}
it."\(^{80}\) The Massachusetts Body of Liberties of 1641 allowed whipping only if the "crime be very shamefull."\(^{81}\) And the Charter of Rhode Island, adopted in 1663, explicitly extended proportionality to prison sentences, requiring "the imposing of lawfull and reasonable flynes . . . [and] imprisonments."\(^{82}\)

Following independence, numerous state constitutions adopted a similar view. The Pennsylvania Constitution of 1776 called for a revision of the penal system to make "punishments . . . in some cases less sanguinary, and in general more proportionate to the crimes."\(^{83}\) The South Carolina Constitution also instituted reform to make punishments "more proportionate to the crime."\(^{84}\) When George Mason copied a cruel and unusual punishments clause almost verbatim into the Virginia Declaration of Rights, he intended to include the protections of both the English Bill of Rights and the common law rights of Englishmen as publicized by Blackstone.\(^{85}\) His goal, and that of the Eighth Amendment, was to continue the ban on disproportionate punishment.

I do not mean to overstate the importance of history. As the Supreme Court recently noted, "A claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the 'Bloody Assizes' or when the Bill of Rights was adopted, but rather by those that currently prevail."\(^{86}\) My point is more limited: The rejection of proportionality review cannot be based on history. If anything, the imposition of proportionality review for punitive damages has the least historical basis. There is no indication of punitive damages awards being invalidated as grossly excessive until 1996, when the Court decided *BMW*. If anything, history would point in the opposite direction from the Supreme Court's approach, warranting proportionality review in cases involving imprisonment much more than in punitive damages cases.

2. Social policy.

Can the Court's recent decisions imposing limits on punitive damages and rejecting limits on sentences of imprisonment be justified by social policy? Is it that there is a pressing social need for deferring to legislative choices for recidivist sentences, but not to a legislature's refusal to impose limits on punitive damages? Again, an examination of the evidence undermines any such claim.

Careful studies of the effects of the Three Strikes Law have shown that it

81. Id. at 153.
82. Id. at 173.
83. PA. CONST. § 38 (1776).
84. S.C. CONST. § XL (1776).
has had no such effect on crime in California. One empirical study of "the relationship between Three Strikes and the recent decline in California's crime rate" concluded "that there is no evidence that Three Strikes played an important role in the drop in the crime rate." 87 The most extensive study of the effects of the Three Strikes Law, by three prominent professors, also concluded that the "decline in crime observed after the effective date of the Three Strikes law was not the result of the statute." 88 This is supported by another empirical study which found that "counties that vigorously and strictly enforce the Three Strikes law did not experience a decline in any crime category relative to more lenient counties." 89 Analysts at the RAND Institute compared crime rates between "three strikes" states and "nonthree strikes" states and found that three strikes laws had no independent effect on the crime rate in states with such statutes. 90

Conversely, there is not a need for judicial limits on punitive damages awards. Many states have enacted statutory limits. 91 Businesses, unlike prisoners, certainly do not lack influence in the legislative process. In defining a role for the courts, there is far more need for judicial protection of prisoners, a group with no political power or influence, than of businesses. 92 Moreover, there is no evidence to support the myth that large punitive damages awards are frequently imposed or pose a serious economic problem. Empirical studies of jury awards in actual cases have consistently found that punitive damages are infrequently awarded and are especially rare in medical malpractice and products liability suits. 93 A recent study concluded that "contrary to popular belief, juries rarely award [punitive] damages and award them especially rarely...

91. Several states have enacted caps on punitive damages. See, e.g., supra note 72.
92. See John Hart Ely, Democracy and Distrust (1980) (arguing that judicial review should be focused, in part, on protecting groups lacking political influence).
in products liability and malpractice cases."  

Thus, the Court’s inconsistent approach to proportionality review cannot be justified by the Constitution’s text, its history, or social policy. The appropriate way to resolve this inconsistency is discussed in Part III below.

II. PROCEDURAL REQUIREMENTS FOR PUNISHMENT

A. The Court’s Inconsistency

1. Criminal cases.

In criminal cases, in recent years, the Supreme Court has greatly strengthened the role of the jury. In Apprendi v. New Jersey, the Supreme Court held that the Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proven beyond a reasonable doubt.

In December 1991, Charles Apprendi fired several shots into the home of an African-American family that had recently moved into a previously all-white neighborhood. Apprendi was quickly arrested and told police that he had done this “because they are black in color” and that he did not want them in the neighborhood. Apprendi ultimately pleaded guilty to second-degree possession of a firearm for an unlawful purpose. Under New Jersey law, the penalty for this offense is a sentence of five to ten years in prison.

Under the terms of the plea agreement, the state reserved the right to ask the judge to impose a greater sentence under the New Jersey hate crimes law. New Jersey, like many states, has a statute which provides for greater penalties when it is proven that a crime is motivated by hatred. New Jersey law provides for an “extended term” of imprisonment if the judge finds, by a preponderance of the evidence, that “[t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity.” Under the terms of the plea agreement, Apprendi reserved the right to challenge the hate crime enhancement of his sentence as violating the United States Constitution.


96. Id. at 469.

The trial judge sentenced Apprendi to the maximum sentence of ten years in prison for possession of a firearm for unlawful purposes. Although Apprendi recanted his statement to the police about his reasons for the shooting, the judge found that the evidence supported a finding "that the crime was motivated by racial bias."98 The judge imposed an additional two years of imprisonment based on the New Jersey hate crimes law.

The issue before the Supreme Court was whether a penalty enhancement should be regarded as a sentencing factor, which can be proven to the judge by a preponderance of the evidence, or as an element of the offense, which must be proven to a jury beyond a reasonable doubt. In a 5-4 decision, the Supreme Court took the latter view. In an unusual division among the Justices, Justice Stevens wrote the opinion for the Court, which was joined by Justices Scalia, Souter, Thomas, and Ginsburg.

The Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."99

The Court explained that the constitutional guarantee of due process of law, together with the Sixth Amendment's right to trial by jury, entitle a criminal defendant to a jury determination that he is guilty, beyond a reasonable doubt, of every element of the crime for which he is convicted and sentenced. Simply put, the Court held that it violates due process and the Sixth Amendment to convict a person of one crime but punish him or her for another. Apprendi was convicted of possession of a firearm for an unlawful purpose, but he was sentenced both for this crime and for the separate offense of having acted with an impermissible hate-based motive. The Court ruled that this latter factor was essentially a separate crime and that it, too, must be proven to a jury beyond a reasonable doubt.

The Supreme Court applied and extended Apprendi in Ring v. Arizona.100 The Court, in a 7-2 decision, held that the jury, not the judge, must find the aggravating factors that warrant the imposition of a death sentence.101

Justice Ginsburg, writing for the Court, explained that the required finding of an aggravated circumstance, in order for the death penalty to be imposed,

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98. Apprendi, 530 U.S. at 471.
99. Id. at 490. The Court stated, quoting a concurring opinion from Justice Stevens in a decision from the previous year: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." Id. (quoting Jones v. United States, 526 U.S. 227, 252 (1998) (Stevens, J., concurring)).
100. See 536 U.S. 584 (2002).
101. The Court expressly overruled its prior decision in Walton v. Arizona, which had allowed judges to find aggravating factors and to impose death sentences. See 497 U.S. 639 (1990). The Court is currently considering whether Ring applies retroactively. See Summerlin v. Stewart, 341 F.3d 1082 (9th Cir. 2003), cert. granted, 124 S. Ct. 833 (2004).
leads to an obviously greater punishment than the guilty verdict itself. The Court thus concluded that under the logic and requirements of Apprendi, it must be the jury, not the judge, who makes this determination.

*Ring* is explicitly based on the Court’s desire to protect the jury’s role in the criminal justice system. As Justice Ginsburg explained: “The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant’s sentence by two years, but not the factfinding necessary to put him to death.” 102 The vast majority of states that allow the death penalty already have the jury make this decision. Of the 38 states with the death penalty, 29 have the jury decide whether to impose capital punishment. Other than Arizona, only 4 states leave both capital sentencing factfinding and the ultimate sentencing decision entirely to the judge. Four states have systems in which the jury renders an advisory verdict, but the judge makes the ultimate sentencing determination. *Ring* now requires that all states have the jury decide whether to impose a death sentence.

*Apprendi* and *Ring* give the jury a much greater role in imposing punishments in criminal cases. Matters that previously could have been entirely in the judge’s province are now assigned to the jury. As discussed below, the implications of *Apprendi* are broad if it is taken to its logical conclusion.

2. Civil cases.

Interestingly, in the area of punitive damages, the Court has not shown similar deference to the jury but has, in fact, shown distrust toward jurors. The Court’s decisions in *BMW* and *State Farm* are obviously based on a degree of distrust toward juries and a sense that there are runaway juries awarding grossly excessive punitive damages that need to be checked by the Court.

Moreover, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, the Court, in the exercise of its supervisory powers over inferior Article III courts, held that federal appellate courts must review punitive damages awards de novo. 103 The Court stressed that whether an award is grossly excessive, and thus violates due process, is a question of law and therefore subject to plenary review (unlike questions of fact, which cannot be reviewed de novo without violating the Seventh Amendment’s Reexamination Clause). 104 Exacting appellate review, the Court explained, is both necessary and compulsory, at least in federal courts, to ensure that a punitive damages award is based on an “application of law, rather than a decisionmaker’s caprice.” 105 Although *Cooper* concerned only federal court appellate review, 106 *State Farm* makes

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104. See *id.* at 432-40.
105. *Id.* at 436 (quoting *BMW v. Gore*, 517 U.S. 559, 587 (1996)).
106. See Robert S. Peck, *Recent Developments in Appellate Advocacy*, 37 TORT & INS.
clear that the Court believes that state appellate courts, too, must exercise de novo review over whether punitive damages are excessive.

B. Is the Inconsistency Justified?

The Court’s inconsistency with regard to the jury’s role has been striking. Most obviously, the Court has enhanced the jury’s role in criminal cases involving imprisonment and the death penalty, but diminished its role in punitive damage cases. The inconsistency, however, is even greater than that. In criminal cases involving capital punishment, the jury now must decide that a death sentence is appropriate; but in criminal cases involving imprisonment, the jury plays no direct role in setting the length of the sentence. Even after Apprendi, the jury’s role is finding, beyond a reasonable doubt, that a crime was committed, but it still does not have any say as to the sentence.

In fact, in Ewing and Andrade, the juries that convicted these individuals had no idea that the effect would be to trigger California’s Three Strikes Law and lead to life imprisonment. Prior to the oral arguments in Andrade, the television program 60 Minutes II found two of the jurors from the Andrade case. Each remembered the case and each was shocked to learn that their conviction of Andrade for petty theft led to a sentence of life imprisonment with no possibility of parole for fifty years.107

In punitive damages cases, the jury sets the punishment, subject to revision by the court. In death penalty cases, after Ring, the jury must find the aggravating factors sufficient to warrant capital punishment. But in other criminal cases, the jury plays no role whatsoever in sentencing. There is nothing in the Constitution or its history that explains this discrepancy.

III. TOWARDS A UNIFIED THEORY OF THE CONSTITUTION AND PUNISHMENT

A. Substantive Limits on Punishment

In Part I, I argued that there is a significant inconsistency in the Court’s approach to various types of punishment and that the difference in approach is not justified. There are, of course, two ways to reconcile this inconsistency: Eliminate proportionality review as to all types of punishment or create proportionality review as to all. The latter is far preferable.

The Supreme Court recently reaffirmed that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man. . . . The Amendment must draw its meaning from the evolving standards of


107. 60 Minutes II (CBS television broadcast, July 10, 2003). (tape on file with the author).
decency that mark the progress of a maturing society.\textsuperscript{108} Eliminating proportionality review would mean that a legislature could literally impose any punishment for any crime. This 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.”

Nor, especially when it comes to criminal penalties, is this an area where the legislature can be trusted to limit penalties to those that are proportionate. Criminals have no political power in the legislative process. The political incentives for politicians always point in one direction: in favor of greater punishments. A legislator who votes for increasing criminal penalties is unlikely to face political opposition for the choice; but being soft on criminals has obvious potential adverse consequences. There is no constituency for leniency toward criminals, but public fears over crime (justified or not) make it always politically safer for a politician to favor harsher punishments.

The primary criticism of proportionality review is the inherent problem in linedrawing. Obviously, there never can be a bright-line test for when a penalty is disproportionate. But the difficulty of drawing lines does not mean that no lines should be drawn. Indeed, I propose that a modified version of the Court’s current tests be applied to all types of punishments. Regardless of the sanctions, courts evaluating proportionality should look to three factors: the reprehensibility of the defendant’s conduct, the punishments imposed for that conduct in other states, and punishments for other conduct in that state.

1. \textit{Reprehensibility}.

First, the reprehensibility of the defendant’s conduct is obviously crucial in evaluating the appropriate punishment. In death penalty cases, for example, the Court has allowed capital punishment for murder, but not for rape or felony murder when the defendant is not actively involved in the killing, because of a judgment about the relative reprehensibility of crimes.\textsuperscript{109} In the area of fines, in \textit{Bajakajian}, the Court refused to allow a forfeiture of $357,000 for the relatively minor offense of not declaring cash when leaving the country.

The Court’s most detailed discussion of reprehensibility has been in the punitive damages context. In \textit{State Farm}, the Supreme Court reiterated that the reprehensibility of a defendant’s conduct remains the “most important indicium of the reasonableness of a punitive damages award.”\textsuperscript{110} In doing so, the Court identified five criteria that lower courts should consider in assessing


\textsuperscript{109} See, e.g., Coker v. Georgia, 433 U.S. 584, 592 (1977) (“[A] sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.”)

reprehensibility. They should consider whether:

1. the harm caused was physical as opposed to economic;
2. the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others;
3. the target of the conduct had financial vulnerability;
4. the conduct involved repeated actions or was an isolated incident;
5. the harm was the result of intentional malice, trickery, or deceit, or mere accident.\textsuperscript{111}

Notably, although “[t]he existence of any one of these [five] factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and [although] the absence of all of them renders any award suspect,”\textsuperscript{112} the converse is also true: The fact that a defendant’s conduct triggers all five factors should certainly tip the scales in favor of a finding that a defendant’s actions were thoroughly opprobrious. Indeed, the Court—by reiterating that the first two and most important factors in assessing reprehensibility are physical harm and health or safety, and by repeatedly stressing that State Farm’s conduct did not involve personal injuries or threats to health or safety\textsuperscript{113}—strongly suggested that lower courts should make a more generous allowance for punitive damages in tort cases that do involve injuries, deaths, or threats to public safety and health.

These same factors for assessing reprehensibility can be applied with regard to criminal sentences of imprisonment as well. Obviously, greater punishments are justified when the harm is “physical as opposed to economic;” and when the “conduct evince[s] an indifference to or a reckless disregard of the health or safety of others.”\textsuperscript{114}

Indeed, a central flaw in the Supreme Court’s decisions in \textit{Ewing} and \textit{Andrade} was its failure to focus on the minimal reprehensibility of the defendants’ conduct. Gary Ewing stole three golf clubs that were recovered before he left the store. For Leandro Andrade, the offense was minor, shoplifting a small amount of merchandise that was recovered before he left the store, but the punishment was extreme: a sentence of fifty years to life in prison.

To be fair, the Supreme Court in \textit{Ewing} did not completely ignore reprehensibility. The Court said that in evaluating the gravity of Ewing’s offenses it was appropriate to consider all of the prior offenses that he had committed. Justice O’Connor said that in assessing the penalty, “both his current felony and his long history of felony recidivism must be placed on the

\textsuperscript{111} \textit{Id.} (numbering added). \textit{BMW} had mentioned the first, second, and fifth of these five factors. See \textit{BMW} v. \textit{Gore}, 517 U.S. 559, 576 (1996).

\textsuperscript{112} \textit{State Farm}, 538 U.S. at 413.

\textsuperscript{113} \textit{See id.}

\textsuperscript{114} \textit{Id.}
But while a state may impose harsher punishments on recidivists, a defendant cannot be punished now for his earlier offenses. That would unquestionably violate the Constitution's prohibition on double jeopardy. Nor can a defendant be punished for the "status" of being a felon. Therefore, the punishment must be proportionate for this offense, while taking into account the individual's prior criminal record. As the Supreme Court declared in *Witte v. United States*, "[T]he enhanced punishment imposed for the [present] offense 'is not to be viewed as... [an] additional penalty for the earlier crimes,' but instead as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because a repetitive one.'" The Court's approach in *Ewing*, allowing severe punishments for minor offenses because of prior crimes, is thus misguided and certainly inconsistent with the Court's declaration in *Solem*: "In sum, we hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted."

Undoubtedly, assessing the reprehensibility of a defendant's conduct will involve value choices by courts. But the Supreme Court has made exactly this type of judgment when it comes to the death penalty, fines, and punitive damages. The same analysis should be followed with regard to prison sentences. In fact, the Supreme Court has explained that "courts are competent to judge the gravity of an offense, at least on a relative scale." In particular, the Court has observed that "[s]tealing a million dollars is viewed as more serious than stealing a hundred dollars—a point recognized in statutes distinguishing petty theft from grand theft."

2. Punishments in other states.

A second important factor is the nature of the punishment imposed in other states for the same conduct. The Supreme Court has been very inconsistent in applying this consideration. For example, in the area of capital punishment, the Court has, at times, given great weight to this factor. In *Atkins*, the Supreme Court emphasized that a majority of states prohibiting the death penalty for the

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120. *Id.* at 292.
121. *Id.* at 293.
mentally retarded demonstrated a "consensus" and that such executions were thus cruel and unusual punishment in violation of the Eighth Amendment.\textsuperscript{122}

In contrast, in punitive damage cases, the Court never considers whether similar awards would be allowed in other states. And in the area of prison sentences, the Supreme Court has completely ignored this factor. In his dissent in \textit{Ewing}, Justice Breyer noted that no one in the history of the country had ever received a life sentence for shoplifting until California's Three Strikes Law.\textsuperscript{123} Similarly, Justice Stevens recently noted that California is the "only State in which a misdemeanor could receive such a severe sentence."\textsuperscript{124} Yet, the Supreme Court upheld life sentences for shoplifting for Andrade and Ewing.

3. Other penalties within the state.

In punitive damage cases, the Supreme Court has expressly said that other available penalties in the state are relevant in assessing constitutionality. \textit{BMW}'s "third indicium of excessiveness" invites a comparison between "the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct"\textsuperscript{125} or between the award and "the civil penalties authorized or [actually] imposed in comparable cases."\textsuperscript{126} Despite the fact that the \textit{BMW} Court declared that penalties can "take the form of legislatively authorized fines or judicially imposed punitive damages"\textsuperscript{127}—and thus permitted lower courts to uphold punitive damages awards if they were close to awards previously rendered in similar cases\textsuperscript{128}—many post-\textit{BMW} litigants and courts have focused exclusively on "legislatively authorized" penalties rather than "judicially imposed" ones.

This was true in \textit{State Farm}, where both parties tried to turn \textit{BMW}'s comparable-legislative-sanctions concept to their advantage. On one hand, the plaintiffs contended (and the Utah Supreme Court agreed) that the jury's $145 million punitive damages award was not unconstitutional because that sum was \textit{much smaller} than the other legislative penalties, both civil and criminal, that could have been imposed on State Farm, such as "the loss of [its] business license, the disgorgement of profits, and possible imprisonment" of its

\textsuperscript{124} Riggs v. California, 525 U.S. 1114 (1999) (Stevens, J., opinion respecting the denial of the petition for a writ of certiorari). As the Ninth Circuit demonstrated in its catalogue of recidivist statutes, a defendant like Andrade would not have faced a fifty-years-to-life sentence for his offenses anywhere but in California or Louisiana; and in Louisiana, he would have had a strong claim for relief under the state constitution. See Andrade v. Attorney Gen., 270 F.3d 743, 763 (9th Cir. 2001).
\textsuperscript{125} BMW v. Gore, 517 U.S. 559, 583 (1996).
\textsuperscript{126} \textit{Id.} at 574-75.
\textsuperscript{127} \textit{Id.} at 572 (emphasis added).
\textsuperscript{128} See, e.g., Cooper v. Casey, 97 F.3d 914, 920 (7th Cir. 1996).
corporate officers. On the other hand, State Farm argued—and the Court expressly found—that "the most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud." 129

If the State Farm Court had stayed true to the BMW approach, it would have acceded to State Farm's arguments and trimmed the punitive damages award to the $10,000 pittance. The Court, however, did nothing of the sort. Instead, it essentially concluded that although State Farm's misconduct did not justify the imposition of the corporate equivalent of a death penalty—the loss of its license to do business in Utah—it did justify substantially more than a $10,000 fine. That conclusion compelled the Court to rethink its doctrine and reconsider the worth of the legislative sanctions factor in the punitive damages calculus.

Accordingly, in a notable retreat from BMW—a retreat that benefitted the plaintiffs in State Farm and could prove advantageous to those in other cases—the Court discounted the usefulness of considering comparable legislative penalties in determining the appropriate size of a punitive damages award. 130 As the Court now sees the situation, although "the existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action," the range and size of legislative penalties have "less utility" when "used to determine the dollar amount of [a punitive damages] award." 131 Indeed, the fact that the Court's ultimate recommendation in State Farm, that the punitive damages that can be awarded to the Campbells on remand should be pegged "at or near the amount of compensatory damages," 132 demonstrates that this branch of BMW's comparable-penalties guidepost has been pruned to the trunk.

Although State Farm gave great weight to the other punishments in the state, this received no attention in Ewing and Andrade where the Court considered prison sentences. For example, under California law, Andrade's crimes constitute petty theft—theft of goods or money worth less than $400—a misdemeanor punishable by a fine or a jail sentence of six months or less. 133 The penalty for two counts of petty theft, punished by a maximum of one year in jail, is vastly different from a sentence of fifty years to life in prison.

Petty theft with a prior—that is, when committed after a conviction and time served for petty theft, grand theft, auto theft, burglary, carjacking, robbery, receiving or concealing stolen property—is a "wobbler" and thus is punishable either as a misdemeanor with up to one year in county jail or as a felony with

130. See id.
131. Id.
132. Id.
up to three years in state prison. Two counts of petty theft with a prior, prosecuted as felonies, would receive a maximum sentence of three years, eight months.

In fact, for the purpose of comparing Andrade's sentence to other penalties in the state, it is noteworthy that if Andrade's prior convictions had been for violent crimes, such as murder or manslaughter, his maximum punishment for the two acts of shoplifting would have been one year in prison. Under California law, the felony of petty theft with a prior requires that there be a prior property crime; if petty theft is committed after multiple prior convictions for nontheft offenses, including serious and violent offenses, then the petty theft must be charged as a misdemeanor and cannot trigger application of the Three Strikes Law. So, for example, if Andrade's prior convictions had been for felonious assault, manslaughter or rape, only a one-year sentence for two counts of petty theft would have been possible.

As the Court of Appeal noted: "Andrade's indeterminate sentence of 50 years to life is exceeded in California only by first-degree murder and a select few violent crimes." For example, in California, voluntary manslaughter is punishable by up to eleven years in prison; rape is punishable by up to 8 years in prison; second-degree murder is punishable by 15 years to life in prison; and sexual assault on a minor is punishable by up to 8 years in prison.

Thus, I suggest that proportionality be assessed with regard to all punishments the government imposes and that three factors be used in assessing whether a penalty is unconstitutional: reprehensibility, penalties in other states, and other penalties in that state. Although this is similar to the Court's approach, it is also quite different in some notable respects.

First, it would impose a far more stringent proportionality requirement as to prison sentences than the Court followed in Ewing and Andrade. More subtly, it would require courts to consider all three factors in all cases, whereas the Court appears now to follow Justice Kennedy's approach from Harmelin v. Michigan that courts need not examine the second and third factors mentioned in Solem—the intrajurisdictional and interjurisdictional reviews—unless a

134. See id. §§ 496, 666.
135. Under the California Penal Code, a defendant receives only one third of the middle term of the second count in this situation; here it would be one third of a middle term of two years, that is, eight months. Therefore, the maximum sentence for two counts of petty theft with a prior would be three years and eight months in prison. Cal. Penal Code Ann. § 1170.1(a) (2004).
136. See id. at §§ 490, 666.
137. Andrade v. Attorney Gen., 270 F.3d 743, 761 (9th Cir. 2001).
139. See id. § 264.
140. See id. § 190.
141. See id. § 288.
“threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.”¹⁴²

Second, it would discard a key aspect of the Court’s approach in punitive damage cases comparing the ratio of the punitive and compensatory damages. In BMW, the Court said that the second guidepost to be considered in assessing the constitutionality of a punitive damages award is the ratio between the compensatory and punitive damages. In State Farm, although the Court again “decline[d] . . . to impose a bright-line ratio which a punitive damages award cannot exceed,”¹⁴³ it also observed that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”¹⁴⁴

While the Court found that the 145:1 ratio between the punitive and compensatory damages awarded to the Campbells was not justified by either what it regarded as State Farm’s relatively minor misconduct or the comparatively modest and extremely well-compensated nature of the Campbells’ actual injuries, it did not hold that all “disproportionately” high awards are ineluctably unconstitutional. To the contrary, the Court went out of its way to proclaim that “because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process” under three circumstances: where “the injury is hard to detect,” “a particularly egregious act has resulted in only a small amount of economic damages,” or “the monetary value of noneconomic harm might have been difficult to determine.”¹⁴⁵

Indeed, the Court did not overrule, or even question, its decision in TXO, where it upheld a punitive damages award that was 526 times greater than the actual damages awarded by the jury. Nor did the Court give lower courts any reason to second-guess its oft-expressed views that “some wrongs are more blameworthy than others,” that the punishment should reflect the “enormity of the offense,” and that “aggravating” factors in a “particularly egregious” case can justify both a larger gross award and a higher ratio.¹⁴⁶ Tellingly, though, the Court also suggested that “[t]he converse is also true . . . . When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.”¹⁴⁷

Lower courts, however, are reading State Farm as imposing a requirement that punitive damages not be greater than nine times larger than compensatory damages. In Romo, for example, on remand the California Court of Appeal

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¹⁴⁴ Id. (emphasis added).
¹⁴⁵ Id. at 422 (quoting BMW v. Gore, 517 U.S. 559, 582 (1996)) (emphasis added).
¹⁴⁶ BMW, 517 U.S. at 575-76, 582.
¹⁴⁷ State Farm, 538 U.S. at 421.
phrased the issue as what ratio in single digits could achieve the goals of punitive damages. But I question whether focusing on ratio makes sense at all. It is unclear why ratio tells anything useful about whether the punitive damages are excessive. Particularly important here is that "the level of compensatory damages awards in personal injury cases may be too low in practice to accomplish proper deterrence." Compensatory damages in wrongful death cases are generally calculated as a survivor's financial loss and this amount generally will not lead to proper deterrence. The Court of Appeal in its initial opinion in *Romo* emphasized exactly this point and noted that "tort law, for historical reasons, undervalues noneconomic damages and the compensatory damages award is not a reliable measure of the injury to the victims." Moreover, the usefulness of ratio is undermined because the categories and amounts of compensatory damages vary dramatically among the states. For example, Alabama does not allow for recovery of compensatory damages in a wrongful death case; thus the ratio "factor is not applicable." Texas wrongful death law provides for the recovery of damages for mental anguish, including the emotional pain, torment and suffering of the survivors. Florida allows the recovery of "mental pain and suffering" in addition to other damages for the surviving family members. Thus, consideration of the ratio between compensatory and punitive damages says little that is useful because the measure of compensatory damages varies so much by state. I would urge that this factor simply be eliminated in evaluating whether a punitive damages award is grossly excessive.

**B. Procedural Consistency**

I believe that there should be a consistent role for the jury with regard to all types of punishment. In part, this is easily accomplished and already exists under current law. Courts, at both the trial and appellate levels, should review punishments imposed by juries (or judges in bench trials) to ensure that they

154. See *Hyundai Motor Co. v. Ferayorni*, 2003 WL 354847 (Fla. Dist. Ct. App., 2003) (holding for one child, $3,380,000 to the mother and $3,120,000 to the father for past and future pain and suffering, noting other recent awards to each surviving parent ranging from $2.5 to $4.5 million).
are not grossly disproportionate.

In part, though, my desire for uniformity would lead to a much more radical change in the law in criminal cases. Juries now play no direct role in setting the sentence in criminal cases, except for the decision to impose the death penalty. I would urge a much larger role for the jury in deciding the appropriate sentence. In fact, I believe that this is ultimately the logical implication of the Supreme Court's decision in *Apprendi*. As described above, the Supreme Court there held that any factor, other than a prior conviction, that leads to a sentence greater than the statutory maximum must be proven to a jury beyond a reasonable doubt. But why should this be limited to sentences greater than the statutory maximum? Why shouldn't factors that lead to greater sentences within the statutory maximum also require proof to the jury? Nothing in the *Apprendi* or the subsequent decision in *Ring* explains this.

If *Apprendi* were extended to sentences within the statutory maximum, juries would of necessity be involved in setting the length of a sentence. For example, judges frequently impose greater sentences if a defendant fails to show remorse or if a firearm was used in the crime. Under the principles of *Apprendi*, it should be for the jury to make this determination. Doing so would dramatically change the way in which sentences are imposed and lead to the jury playing the same role in criminal cases that it does in civil cases in setting damages. A full defense of this shift is obviously beyond the scope of this Article, but it clearly follows if uniformity among types of punishment is to be pursued.

### CONCLUSION

One of the most important functions of government is imposing punishment. Whether it is a criminal or a civil case, whether the punishment is death, imprisonment, a fine, or punitive damages, the government's goals are to deter wrongdoing and inflict retribution. For at least a century, the Supreme Court has recognized that legislatures and courts do not have unlimited discretion in setting penalties. The Constitution, through a variety of clauses, restricts the punishments that can be imposed.

Unfortunately, though, constitutional law concerning punishment has developed separately depending on the nature of the penalties. One line of cases has dealt with the death penalty, while another has focused on punitive damages, and yet another has concerned prison sentences. The result has been

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155. In *Harris v. United States*, 536 U.S. 545 (2002), the Supreme Court said that a jury need not find that a defendant "brandished" a firearm when that leads to imposition of a mandatory minimum sentence. It is very hard to reconcile *Harris* with the principles of *Apprendi*. In fact, in *Harris*, the majority was comprised of the four dissenters from *Apprendi* (Justice Kennedy, who wrote for the Court, and Chief Justice Rehnquist and Justices O'Connor and Breyer) who were joined by Justice Scalia who had been in the majority in *Apprendi*. Justice Scalia did not write separately to explain this switch.
dramatically inconsistent approaches to the Constitution and punishment.

My goal in this Article has been to describe these inconsistencies which have been largely overlooked, to criticize them, and to argue for a more uniform approach. I confess that my inspiration for this scholarly project comes from my frustrations as a lawyer over the last year. There is something just wrong with a Court that has no problem with putting a person in prison for life, with no possibility of parole for fifty years, for stealing $153 worth of videotapes, but is outraged when too much is taken from a company in punitive damages when it defrauds its customers. It is time for a more coherent approach to the Constitution and punishment.