

# SENTENCING PROPORTIONALITY IN THE STATES

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*It seems axiomatic in a “government of laws and not of men” that a sentence ought to be generally proportionate in degree to the underlying criminal offense. Extreme, disproportionate sentences undermine public confidence in the justice system, are ineffective deterrents to an angry public who perceive them as unjust, and fail to reform the criminal who can see no fairness in such an extreme sentence. This Note explores the principles and analytical tools several state judiciaries have employed to analyze the proportionality of sentences and concludes that these states have formulated a coherent and workable system of review that other jurisdictions can adopt through either legislative or judicial action.*

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## INTRODUCTION

When is it appropriate for a court to intervene and invalidate sentences that a legislature has prescribed for criminal activity? This question has proved difficult for each jurisdiction that has considered it. Most state and federal courts will do so in only the rarest circumstances.<sup>1</sup> However, there are currently eight states that have an explicit provision in their constitutions providing for proportionate penalties, and another two have interpreted their constitutions to require proportionate penalties.<sup>2</sup> Since at least the early twentieth century, several

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1. The Supreme Court, for example, has invalidated only three sentences in the last 100 years for being disproportionate to the underlying crime. *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010) (invalidating life without parole sentence for juvenile offender); *Solem v. Helm*, 463 U.S. 277, 303 (1983) (invalidating sentence of life without parole for a seventh nonviolent felony for uttering a false check for \$100); *Weems v. United States*, 217 U.S. 349, 382 (1910) (invalidating sentence of *cadena temporal*—hard labor in chains—for falsifying a public record). Most of the states have been similarly reluctant to develop and implement proportionality review. *See infra* note 2 and accompanying text.

2. Richard S. Frase, *Limiting Excessive Prison Sentences Under Federal and State Constitutions*, 11 U. PA. J. CONST. L. 39, 64 (2008) (finding that Indiana, Maine,

state courts have been exploring under what circumstances a noncapital sentence is so extreme that it violates their state constitutions, the Federal Constitution, or both.<sup>3</sup>

But such review gives the judiciary pause. Courts that invalidate sentences for excessiveness necessarily intrude on the power of the legislative branch. Aware of this conflict, the few courts that review proportionality have proceeded cautiously and with great deference to the legislatures they are checking.<sup>4</sup> But these courts also recognize that there is an important public interest in exercising their power: ensuring a fundamental sense of fairness and justice in the criminal system.<sup>5</sup> In most cases, these courts stress that they are culling out absurdities that occur when defendants are swept up by technicalities in a given sentencing regime.<sup>6</sup> The judicial focus on absurdities makes sense. Any legislature generating a sentencing scheme cannot foresee every application of its laws, which leaves open the possibility of rare cases that call for extraordinarily harsh penalties in situations that intuitively seem like they should require much lighter ones. By limiting proportionality review to these situations, the courts show proper deference to the legislature. The courts, then, are not commandeering a legislative role for themselves. Rather, they are supplementing the legislature's work by checking absurdities and helping the legislative sentencing scheme function in a sensible way that better approximates the legislative (and public) intent.

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Nebraska, New Hampshire, Oregon, Rhode Island, Vermont, and West Virginia have explicit provisions, and that Illinois and Washington have interpreted their constitutions to require proportionality). This Note takes to heart Professor Frase's encouragement that scholars "be less 'Fed-centric'" in their treatment of proportionality. *Id.*

3. See, e.g., *People v. Landers*, 160 N.E. 836, 837–38 (Ill. 1927); *State v. Ross*, 104 P. 596, 604–05 (Or. 1909); *State v. Newman*, 152 S.E. 195, 196–97 (W. Va. 1930).

4. See, e.g., *People v. Sharpe*, 839 N.E.2d 492, 497 (Ill. 2005) ("We generally defer to the legislature in the sentencing arena because the legislature is institutionally better equipped to gauge the seriousness of various offenses and to fashion sentences accordingly."); *State v. Fain*, 617 P.2d 720, 728 n.7 (Wash. 1980) ("Legislative judgments as to punishments for criminal offenses are entitled to the greatest possible deference, and we are reluctant to venture a conclusion . . . that a given sentence more nearly accomplishes the legislative purpose.")

5. See, e.g., *Newman*, 152 S.E. at 197 ("An excessive punishment, instead of being a deterrent, often results in the generation of an angry public contempt of justice because of its severity, and does not reform the criminal who perceives injustice towards himself.")

6. See, e.g., *Fain*, 617 P.2d at 728. *Fain* was convicted on several occasions for writing bad checks for very small amounts. *Id.* at 721–22. The first two convictions were for \$30 checks, and the third was for a series of 24 checks that had a combined total of only \$408. *Id.* Under the habitual offender statute, *Fain*'s final conviction required life imprisonment, which caused "him to face a punishment which the legislature decline[d] to impose on those who commit murder in the second degree, arson, rape, robbery, assault, and other dangerous felonies." *Id.* at 721, 728. Under these specific facts, the court concluded that "*Fain*'s sentence [was] entirely disproportionate to the seriousness of his crimes." *Id.* at 728.

True, it would be possible to wait for the legislature to correct its statutes as absurdities came to light, but a legislative fix would in all likelihood come after an individual received an extreme enough sentence to garner legislative attention. Moreover, the legislative action would not likely be retroactive and the individual with the sentence would still be stuck without a remedy. By coordinating with the judicial branch, this manifestly unjust outcome can be avoided. The courts can check absurdities before they go into effect, ensuring fairness for the criminal and obviating the time and expense of an act of the legislature.

This Note focuses on four states—Illinois, Oregon, Washington, and West Virginia—with active proportionality review to search for common principles that other jurisdictions could implement.<sup>7</sup> Part I explores the causes of extreme sentences and arguments for a need to check them. Part II discusses leading policy reasons for implementing proportionality review. Part III explores how these four states have successfully implemented proportionality review in their jurisdictions. The Note concludes in Part IV with suggestions for other jurisdictions, including a Model Proportionality in Sentencing Act.

## I. WHAT GIVES RISE TO DISPROPORTIONATE SENTENCES?

There are three leading factors that give rise to disproportionate sentences: (1) political pressure to enact ever-harsher sentences; (2) the inability of legislatures to revise, correct, and clarify the criminal code; and (3) the abuse of prosecutorial discretion. This Section briefly explores each.

### A. Political Pressure to Enact Ever-Tougher Sentences

Politicians, whether they are in the legislative or executive branch, face immense pressure to advocate for stiff criminal penalties. As one editorial remarked, “Voters want vengeance.”<sup>8</sup> Each election cycle creates a new wave of politicians who view it as politically advantageous to be tough on crime, creating a “ratchet effect: lawmakers who wish to sound tough must propose laws tougher than the ones that the last chap who wanted to sound tough proposed.”<sup>9</sup> As a result, more people may be classified as criminals, and the state may incarcerate them for longer. For example, in 1988 Arizona’s marijuana possession statute called for a class five felony (the second-lowest felony offense)<sup>10</sup> for possession of less than

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7. Because of this Note’s focus on the appellate decisions of four states, there are a number of other areas of study that could provide additional insight into proportionality review, for example: (1) the feasibility and constitutionality of voter-initiated legislation; (2) studies of trial- and sentencing-level impact of proportionality review; (3) surveys of practicing lawyers; (4) a survey of sentencing briefs; (5) analysis of sentencing opinions that consider proportionality; and (6) a review of any guideline rules that urge judges or commissions to consider proportionality before issuing a sentence.

8. *Crime and Politics: The Velvet Glove*, ECONOMIST, Oct. 24, 2009, at 33.

9. *Crime and Punishment in America: Rough Justice*, ECONOMIST, July 24, 2010, at 13.

10. In Arizona, a class one felony applies to the most serious criminal conduct, and classes two through six represent progressively less serious felony offenses. ARIZ. REV. STAT. ANN. §§ 13-601, -602, -701, -702, -703, -751, -752 (2011).

eight pounds.<sup>11</sup> As of this year, the same statute requires a class four felony (a step more serious) for possession of four pounds or more.<sup>12</sup> In other words, today in Arizona you can carry half as much illegal substance as in 1988 but receive a harsher penalty.

This steepening penalty trend has contributed to America's incarceration rate quadrupling since 1970.<sup>13</sup> Even discounting for changing notions of morality and penological theories, this trend should cause alarm. Such a broad and swift upward trend in the sentences for crimes suggests penalties are becoming less, not more, proportionate.

### ***B. Legislative Inefficiency***

A second problem that gives rise to disproportionate sentences is legislative inefficiency. Although legislatures have a strong track record of enacting more and tougher criminal laws, they often fail to see if what they are enacting is consistent with previous legislation. For example, in the middle part of the twentieth century in Oregon, attempted rape carried a sentence of up to life imprisonment yet a completed rape called for a maximum of only 20 years.<sup>14</sup> More recently, the Illinois criminal code required different penalties for the same act of kidnapping with a weapon.<sup>15</sup> The defendant in the case that explored the issue was convicted under two separate statutes: One called for 14 years' imprisonment, and the other called for 60.<sup>16</sup> The difference between the elements of the crime for each statute appears to have been only in name. One called it aggravated kidnapping, while the other called it armed violence predicated on kidnapping.<sup>17</sup>

These are but two examples of how legislatures can be unaware or unconcerned about inconsistencies within their criminal codes. There is little doubt that more examples abound. This inattention creates technical ambiguities that allow for multiple punishments based on the same act. For the defendants, "that which we call a rose / By any other name" would decidedly not "smell as sweet."<sup>18</sup> Setting a clear punishment for a crime is one matter. Creating multiple crimes and punishments for the same conduct is another. Prosecutors exploit these ambiguities to create leverage in plea bargaining and to ensure that defendants who refuse to plea out receive the maximum possible punishment.

### ***C. Prosecutorial Discretion***

Prosecutors can exploit the technicalities of statutory schemes to charge crimes in ways that lead to convictions requiring extreme penalties. Armed with tremendous discretion, prosecutors decide not only what crimes to charge but in

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11. ARIZ. REV. STAT. ANN. § 13-3405(B)(2) (1988).
  12. ARIZ. REV. STAT. ANN. § 13-3405(B)(3) (2011).
  13. *Crime and Punishment in America: Rough Justice*, *supra* note 9.
  14. Cannon v. Gladden, 281 P.2d 233, 234 (Or. 1955).
  15. People v. Christy, 564 N.E.2d 770, 771 (Ill. 1990).
  16. *Id.* at 770–71.
  17. *Id.*
  18. WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2.

what units to charge those crimes. For example, in the arena of child pornography possession, prosecutors often can decide between charging one count for each picture or simply one count to encompass the entire activity.<sup>19</sup> In the age of digital media, it would be rare for a “possessor” to have only a handful of images.<sup>20</sup> Aside from the tremendous power this discretion gives prosecutors over defendants, it also allows prosecutors to argue for convictions that mandate truly extreme sentences—even sentences that are absurd on their face. In one Arizona case the court upheld a 2,975-year sentence,<sup>21</sup> and in another case the Arizona court upheld a 200-year sentence for 20 counts of possessing child pornography—each count predicated on one image.<sup>22</sup> A number of federal judges dealing with similar sentences have begun openly criticizing them.<sup>23</sup> Sentencing regimes for child pornography often allow prosecutors to call for punishments that child rapists would be ineligible to receive.<sup>24</sup> Possessing child pornography is a serious crime.

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19. See Frank Kardasz, *200 Year Child Pornography Sentence Upheld by AZ Supreme Court*, KARDASZ.ORG (June 9, 2006, 10:54 PM), [http://www.kardasz.org/blog/2006/06/200\\_year\\_child\\_pornography\\_sen.html](http://www.kardasz.org/blog/2006/06/200_year_child_pornography_sen.html) (describing a plea offer of 17 years that the defendant declined followed by a conviction on 20 counts of sexual exploitation of a minor resulting in a 200-year sentence).

20. See Corey J. Mantel, Note, *Pornography and Privacy in Plain View: Applying the Plain View Doctrine to Computer Searches*, 53 ARIZ. L. REV. 985, 987–88 (2011) (noting that advancing technology has enabled criminals to store, buy, sell, and trade vast amounts of explicit material).

21. State v. Taylor, 773 P.2d 974, 981–82 (Ariz. 1989).

22. State v. Berger, 134 P.3d 378, 383–85 (Ariz. 2006).

23. See Amir Efrati, *Making Punishments Fit the Most Offensive Crimes: Societal Revulsion at Child-Pornography Consumers Has Led to Stiff Prison Sentences—And Caused Some Judges to Rebel*, WALL ST. J., Oct. 23, 2008, at A14. Efrati discusses growing discontent among federal judges who feel the sentences are based on gut revulsion rather than on more reasoned legislative debate or scientific research. *Id.* He also points out the split in authorities over the predatory propensity of child-pornography consumers, and quotes one public defender as arguing that the growing punishments fit not the crime committed, but the one that might be. *Id.* He argues that the way possession crimes can be prosecuted leads to punishments far in excess of what those who actually molested children would receive. *Id.*

Judge Merritt of the Sixth Circuit Court of Appeals recently remarked in dissent that “our federal legal system has lost its bearings on the subject of computer-based child pornography”—and went on to call the sentencing regimes only “somewhat more rational than the thousands of witchcraft trials and burnings conducted in Europe and here from the Thirteenth to the Eighteenth Centuries.” *United States v. Paull*, 551 F.3d 516, 533 (6th Cir. 2009) (Merritt, J., dissenting) (citing Efrati’s article).

24. Compare ARIZ. REV. STAT. ANN. § 13-705(A) (2011) (allowing the possibility of parole after 35 years to someone who has been convicted of sexually assaulting a minor), with *Berger*, 134 P.3d at 379 (describing that consecutive sentences must be imposed for each conviction of possessing child pornography, and that the consecutive sentences “must be served without the possibility of probation, early release, or pardon”). Section 13-705(M) is also troubling. It allows concurrent sentences for multiple convictions of child molestation involving only one child, but requires consecutive sentences for all other dangerous crimes against children—including possession of child pornography. ARIZ. REV. STAT. ANN. § 13-705(M) (2011). In other words, someone who

But the power prosecutors exercise in asking for such extreme sentences for possessing images should give pause to anyone concerned with proportional sentencing. There are other materials available online that are illegal to download but readily available. Illegal copies of movies, TV shows, music, and books abound; what if each of those files were subject to a separate—and lengthy—sentence?

Because many prosecutors are subject to the same political pressures that drive legislators to enact tough laws and harsh penalties, the tremendous discretionary power of prosecutors is especially problematic. As an arm of the executive branch, state prosecutors are either elected officials themselves or accountable to one who has every incentive to appear tough on crime and therefore demand the toughest penalties in every case. This pressure may give rise to less concern with seeking sentences that make sense proportionally and more concern with political gain and career advancement.

## II. POLICY REASONS FOR PROPORTIONALITY REVIEW

A more fundamental question exists before exploring how the states have implemented proportionality review: Why have it at all? Justice Balmer of the Oregon Supreme Court wrote, “The idea that there should be some proportional relationship between a crime and the crime’s punishment dates back at least to the Code of Hammurabi and the Mosaic codes that appear in the Old Testament.”<sup>25</sup> Another author quotes Cicero—a man of no small influence on this country’s Founders—as writing that “care should be taken that the punishment should not be out of proportion to the offense.”<sup>26</sup> In relatively more recent times, Blackstone argued there was a need for proportion between crimes and their punishments.<sup>27</sup> Blackstone was writing against the backdrop of a set of English laws that mandated death for more than 160 different crimes.<sup>28</sup> With the United States now leading the world in both the number of prisoners and the length of their sentences,<sup>29</sup> the time has come to reflect upon whether our sentencing schemes are

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repeatedly molested a child would receive a more lenient sentencing framework than someone who possessed multiple images of that act.

25. Thomas A. Balmer, *Some Thoughts on Proportionality*, 87 OR. L. REV. 783, 784 (2008).

26. Kathi A. Drew & R. K. Weaver, *Disproportionate or Excessive Punishments: Is There a Method for Successful Constitutional Challenges?*, 2 TEX. WESLEYAN L. REV. 1, 1 (1995) (citing CICERO, DE OFFICIIS bk. I, ch. XXV (c. 44 B.C.E.)).

27. Balmer, *supra* note 25, at 787–89 (“The method . . . of inflicting punishment ought always to be proportioned to the particular purpose it is meant to serve, and by no means to exceed it . . . .” (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*12)).

28. *Id.* at 787 (citing 4 BLACKSTONE, *supra* note 27, at \*18–19, \*244).

29. See, e.g., Adam Liptak, *America Tops Global Count of Prison Inmates—Harsher Sentences Among the Factors*, INT’L HERALD TRIB., Apr. 24, 2008, at 4. Liptak’s article discusses how the United States has less than 5% of the world’s population but nearly 25% of its prisoners. *Id.* There are 751 prisoners for every 100,000 Americans. *Id.* When compared to the median for all nations, 125, this figure becomes even more unsettling. *Id.* Another unsettling comparison: From 1925 to 1975, the rate remained stable at around 110 prisoners for every 100,000 Americans. *Id.* Liptak’s research revealed a

approaching the absurdity of the death penalties imposed in Blackstone's time. The U.S. Supreme Court has affirmed life sentences for those convicted of stealing golf clubs,<sup>30</sup> writing bad checks,<sup>31</sup> or possessing illegal drugs.<sup>32</sup> Meanwhile, the rest of the world looks on in astonishment.<sup>33</sup>

Aside from the cultural landscape, there are strong theoretical foundations for proportionality review under two leading penological theories. Under the retributive, or "just deserts" theory of punishment, an offender should receive no more punishment than the moral gravity of his offense—exactly how much he deserves; no more, no less.<sup>34</sup> When the punishment is not proportional to the offense, the offender either feels that he got away with something because his punishment is too light; or feels maligned by a justice system that punishes him more severely than he deserves. In either case the justice system has failed to appeal to the criminal's moral sense and therefore to amend his behavior.

Under the utilitarian theory of punishment, an individual offender's moral culpability for past crimes gives way to three more important goals: (1) deterring future crimes by incapacitating or rehabilitating the offender; (2) generally deterring other putative offenders through fear of receiving similar punishment; and (3) shaping societal norms surrounding the relative seriousness of various crimes.<sup>35</sup> Even when the focus is not on the individual, punishment under this theory can still be disproportionate because either its costs outweigh its probable benefits, or the sentence may be excessive (or less effective) compared with other less costly or burdensome punishments.<sup>36</sup>

Under either theory, proportionality plays an important role in meting out punishments. A recent note also argues that equal punishments for disparate crimes incentivize the commission of more serious crimes.<sup>37</sup> If the deviant viewer of child

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surprising explanation for America's sudden boom in prison population: democracy. With judges and prosecutors becoming increasingly responsive to populist demands, they have no choice (if they wish to retain their jobs) but to impose harsh punishments. *Id.*

30. *Ewing v. California*, 538 U.S. 11 (2003).

31. *Rummel v. Estelle*, 445 U.S. 263 (1980).

32. *Hutto v. Davis*, 454 U.S. 370 (1982).

33. *See* Liptak, *supra* note 29 ("Criminologists and legal scholars in other industrialized nations say they are mystified and appalled by the number and length of American prison sentences.").

34. Bruce W. Gilchrist, Note, *Disproportionality in Sentences of Imprisonment*, 79 COLUM. L. REV. 1119, 1121 (1979).

35. Frase, *supra* note 2, at 43.

36. *Id.*

37. Note, *The Eighth Amendment, Proportionality, and the Changing Meaning of "Punishments"*, 122 HARV. L. REV. 960, 978 (2009) [hereinafter *The Eighth Amendment*] ("[I]f theft and murder are both punished by life imprisonment, what incentives does the thief have not to murder the officer who discovers him?"); *see also* Brad Honigman, Case Note, *Considering Cruelty: State v. Chappell, State v. Snelling, and the Cruelty Prong of the (F)(6) Aggravator*, 53 ARIZ. L. REV. 321, 325 (2011) (exploring the incentives in the context of the death penalty). *The Eighth Amendment* also explores the changing norms in American punishment, from the public shaming prevalent around the Framers' time, to the

pornography stands to receive the same sentence as someone who actually molests children, what incentive does that person have not to act on his most lascivious fantasies? Ensuring proportional penalties—at least among the variety of penalties that already exist—promotes a twofold benefit. First, putative offenders have an incentive to refrain from more serious harm. Second, the potential for this restraint benefits the possible victims and society as a whole by reducing the amount of damage resulting from, and the overall cost of, crime.

Beyond theory, there is also empirical evidence that extreme sentences are almost completely ineffectual at deterring criminal behavior. The West End neighborhood in High Point, North Carolina was once riddled with violent drug dealers, addicts, and prostitutes.<sup>38</sup> After the usual storm and stress tactics of enforcement failed to make the neighborhood safer or more livable, High Point police began listening to Professor David Kennedy of the John Jay College of Criminal Justice in New York.<sup>39</sup> On his advice, the police apprehended the 16 drug dealers known to the community, but only prosecuted the three violent ones.<sup>40</sup> They gave the rest a choice: Stop dealing drugs and carrying guns or be prosecuted.<sup>41</sup> To make the choice to stop more enticing, a community coordinator offered help with things like finding a job, getting drug treatment, and finding a place to stay. In addition, other community members—including grandmothers—told the dealers what they were doing was wrong.<sup>42</sup> As the *coup de grâce*, prosecutors warned that if they did not stop that day, they would immediately be sent to jail and could remain there for the rest of their lives.<sup>43</sup> The result:

It worked. Nearly all the dealers reformed, bar the odd bit of shoplifting. You can still buy drugs behind closed doors in High Point, but the intervention was never about drugs. It was about making the neighbourhood liveable again. Fears that the open-air drug market would simply move elsewhere proved unfounded. As the same technique was tried in other neighbourhoods and for other types of crime, such as gang-related muggings, the city's overall violent crime rate fell noticeably, from 8.7 per 1,000 people in 2003 to 7.3 in 2008.<sup>44</sup>

This is only one experience, but it suggests that more punishment and a broader criminal code may not be the most effective strategy for deterring or preventing crime. And if extreme sentences are not effective at deterring relatively minor behavior like drug dealing, there should be less trepidation about reviewing the proportionality of the sentences relating to these crimes.

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more private imprisonment we are more familiar with now. *The Eighth Amendment, supra*, at 978.

38. *Crime and Politics: The Velvet Glove, supra* note 8, at 87.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

On a fundamental level, reviewing extreme sentences promotes a sense of fairness in the entire system. If there are coherent principles to guide that review, any objection to instituting the review should carry much less weight. And under either leading penological theory, proportional sentences make sense. Having a safety net to ensure sentences remain proportional seems ideal. But what is the best way to implement that safety net? This Note argues that the best response to this dilemma is a legislative enactment to guide judicial review. Absent legislative guidance, however, it suggests the adoption of the set of principles explored in the next Section.

As mentioned previously, there are ten states with some form of proportionality review and varying levels of activity.<sup>45</sup> The next Section examines four of the most active ones to attempt to distill common principles that could be applied in other jurisdictions.

### III. STATE DEVELOPMENT OF PROPORTIONALITY PRINCIPLES

Although there are ten states with proportionality jurisprudence, this Note focuses on four of the most active: Illinois, Oregon, Washington, and West Virginia. Despite the geographical distance between these states, they share a remarkable amount of consistency in their case law on proportionality. Each stresses different points when evaluating the proportionality of a sentence, but generally there are six common principles:

- (1) whether the relationship between the sentence and the crime shocks all reasonable sense of decency;
- (2) the gravity of the underlying offense;
- (3) the criminal history of the defendant;
- (4) the legislative purpose behind the punishment;
- (5) a comparison of the punishment inflicted on the defendant with what other jurisdictions would impose for the same or a substantially similar offense; and
- (6) a comparison of the punishment with other punishments for related offenses within the jurisdiction.

Each state stresses different factors, and each state has generally chosen two to four of these factors to use in its analysis. Three states stress the importance of the “shock” factor;<sup>46</sup> all four states consider the gravity of the underlying offense;<sup>47</sup> all

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45. See *supra* note 2 and accompanying text.

46. See *People v. Sharpe*, 839 N.E.2d 492, 499–500 (Ill. 2005) (“[T]his court [will] not invalidate a penalty under the proportionate penalties clause unless it [is] . . . ‘so wholly disproportioned to the offense as to shock the moral sense of the community.’” (citing *People v. Callicott*, 153 N.E. 688, 690 (Ill. 1926))); *State v. Wheeler*, 175 P.3d 438, 447 (Or. 2007) (“[T]his court often has used the ‘shock the moral sense’ standard to resolve a claim that a sentence does not meet the proportionality requirement.”); *State v. Cooper*, 304 S.E.2d 851, 857 (W. Va. 1983) (“There are two tests to determine whether a sentence is so disproportionate to a crime that it violates our constitution. The first is subjective and asks whether the sentence for the particular crime shocks the conscience of the court and society.” (citation omitted)).

four states consider the criminal history of the defendant,<sup>48</sup> three states consider the legislative purpose behind the sentencing statute,<sup>49</sup> three states consider the punishments that would be inflicted in other jurisdictions;<sup>50</sup> and all four states, to some extent, evaluate the punishment compared to what would be required for other offenses within the same jurisdiction.<sup>51</sup> Figure 1 provides a visual demonstration of just how consistent the proportionality review is across the states:

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47. See *People v. Guzman*, 658 N.E.2d 1268, 1278 (Ill. 1995) (examining the harm involved in the underlying offense in relation to the penalty imposed); *State v. Rodriguez*, 217 P.3d 659, 679 (Or. 2009) (“In applying [the proportionality] standard, this court first examines the relationship between the severity of the penalty and the gravity of the offense, including consideration of the particular conduct of the defendant that constituted the offense.”); *State v. Fain*, 617 P.2d 720, 725–26 (Wash. 1980) (indicating that four factors should be considered in proportionality analysis, with the “nature of the offense” as one among them); *Wanstreet v. Bordenkircher*, 276 S.E.2d 205, 207 (W. Va. 1981) (“In determining whether a given sentence violates the proportionality principle . . . consideration is given to the nature of the offense.”).

48. See, e.g., *People v. Ross*, 917 N.E.2d 1111, 1134–35 (Ill. 2009) (weighing the underlying criminal history for proportionality review); *Wheeler*, 175 P.3d at 450 (“Thus, *Smith* emphasized that the analysis must focus not only on the latest crime and its penalty, but on the defendant’s criminal history.”); *Fain*, 617 P.2d at 726 (evaluating the criminal history of the defendant in relation to his most recent crime); *Wanstreet*, 276 S.E.2d at 212 (“When we analyze a life recidivist sentence under proportionality principles, we are in effect dealing with a punishment that must be viewed from two distinct vantage points: first, the nature of the third offense and, second, the nature of the other convictions that support the recidivist sentence.”).

49. Oregon, Washington, and West Virginia use this analysis, although Washington does it with great caution. See, e.g., *Wheeler*, 175 P.3d at 448, 452 (describing the deferential “rational basis” test that a legislature’s sentencing scheme must meet); *State v. Rivers*, 921 P.2d 495, 503 (Wash. 1996) (“The second factor which must be considered . . . is the purpose behind the sentencing statute.”); *Wanstreet*, 276 S.E.2d at 211 (approving the analysis of “legislative purpose behind the punishment” for proportionality review). But see *Fain*, 617 P.2d at 728 n.7 (“In our view, this standard should be employed with caution. Legislative judgments as to punishments for criminal offenses are entitled to the greatest possible deference . . .”). Illinois, on the other hand, strongly disapproves of this analytical tool, which it used for a brief period before abandoning it: “The outcome of a cross-comparison [proportionality] case could always be determined by how narrowly or broadly a court chose to define statutory purpose, and there is simply no principled, objective way to define it.” *Sharpe*, 839 N.E.2d at 515.

50. Illinois, Washington, and West Virginia employ this analysis. See, e.g., *People v. Huddleston*, 816 N.E.2d 322, 340–42 (Ill. 2004) (evaluating the penalties imposed for the defendant’s conduct in a wide survey of other jurisdictions); *Fain*, 617 P.2d at 726–27 (exploring the possible punishments for the defendant’s offense in other jurisdictions and stating it as a factor to be considered for proportionality analysis); *Wanstreet*, 276 S.E.2d at 207 (“In determining whether a given sentence violates the proportionality principle . . . consideration is given to . . . a comparison of the punishment with what would be inflicted in other jurisdictions.”).

51. See, e.g., *Sharpe*, 839 N.E.2d at 517 (“[A] defendant may . . . challenge a penalty on the basis that it is harsher than the penalty for a different offense that contains identical elements.”); *Rodriguez*, 217 P.3d at 671 (“In determining whether a penalty is

Figure 1—Proportionality Principles Applied Across Jurisdictions

State	Shock	Gravity	Criminal History	Legislative Purpose	Inter-Jurisdictional	Intra-Jurisdictional
Ill.	Yes	Yes	Yes	No	Yes	Yes
Or.	Yes	Yes	Yes	Yes	No	Yes
Wash.	No	Yes	Yes	Yes	Yes	Yes
W. Va.	Yes	Yes	Yes	Yes	Yes	Yes

Even amid this general consistency, the states have some variation in how they apply each principle. The rest of this Section endeavors to explore each factor in more detail.

#### A. The “Shock” Factor

Illinois, Oregon, and West Virginia each consider as an initial matter whether the sentence is so disproportionate that it would shock either the court or the community.<sup>52</sup> Both Illinois and Oregon consider this to be an umbrella test that covers the rest of the factors discussed below. In evaluating the other factors, if it appears to the court that enough of them are met, then the court will make a decision about whether the sentence is shockingly disproportionate.<sup>53</sup> Illinois and Oregon both consider this to be an objective test, and their tests are basically the same. Illinois’s test is whether the sentence is “cruel, degrading, or so wholly disproportionate to the offense so as to shock the moral sense of the community.”<sup>54</sup>

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‘proportioned’ to the offense, it also is helpful to examine the penalties imposed for other, related crimes.”); *Fain*, 617 P.2d at 727–28 (exploring the punishments imposed for other offenses within Washington); *Wanstreet*, 276 S.E.2d at 207 (“In determining whether a given sentence violates the proportionality principle . . . consideration is given to . . . a comparison with other offenses within the same jurisdiction.”).

52. See *supra* note 46.

53. See *Huddleston*, 816 N.E.2d at 342 (“We return to the first question posed at the outset of our discussion: Is a sentence of natural life imprisonment, as applied to this defendant, cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community? Having applied the appropriate criteria for review of this question, having taken account of the pertinent considerations relevant to this type of offense and enactments in other jurisdictions, and having considered the facts of defendant’s case, we cannot say that it is.”); *Rodriguez*, 217 P.3d at 679 (“In summary, this court’s cases establish that a criminal penalty is unconstitutionally disproportionate to the offense . . . when imposition of the penalty would ‘shock the moral sense’ of reasonable people. In applying that standard, this court first examines the relationship between the severity of the penalty and the gravity of the offense . . . We also consider the penalties imposed for other crimes and the defendant’s criminal history. Those considerations lead us, for the reasons described above, to conclude that these cases present the rare circumstance in which the statutorily prescribed penalty is so disproportionate to the offenses committed by these defendants that it ‘shocks the moral sense’ of reasonable people.”).

54. *Sharpe*, 839 N.E.2d at 508.

Oregon's test, almost identical, asks whether the sentence is "so proportioned to the offense committed as to shock the moral sense of all reasonable men as to what is right and proper under the circumstances."<sup>55</sup>

The one difference between the Illinois and Oregon "umbrella" tests is that Illinois does not cover an intra-jurisdictional analysis of crimes and penalties;<sup>56</sup> Oregon simply considers intra-jurisdictional comparison as a subpart of the shock test.<sup>57</sup> Instead, Illinois separates these challenges into their own category.<sup>58</sup> Despite this quirk, the Illinois shock test still serves as an umbrella standard for every other factor.

In contrast to Oregon and Illinois, West Virginia bifurcates "shock" as a separate, first test for the court to consider subjectively. If the court believes the sentence is so offensive as to shock the court and society, then the analysis stops and the sentence is invalidated.<sup>59</sup> To evaluate this test, West Virginia courts consider all of the circumstances surrounding the crime.<sup>60</sup> Although subjective, this test sets a high bar for defendants to meet. There is only one reported case in which a West Virginia court invalidated a sentence solely on the subjective shock test.<sup>61</sup> In that case, the court found a 45-year sentence for robbery by violence to be shocking.<sup>62</sup> In finding the sentence shocking, the court emphasized the rather simple underlying facts, the defendant's circumstances, and the nature of the criminal statute. The defendant and one or two others beat the victim and took his wallet, credit cards, and \$35 cash.<sup>63</sup> The victim's memory of the event was hazy, but he made a full recovery.<sup>64</sup> At the time of the offense, the defendant was 19

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55. *Rodriguez*, 217 P.3d at 667.

56. Until 2005, Illinois had three tests for determining a violation of its proportionate penalties clause: (1) whether the penalty was so cruel, degrading, or wholly disproportionate to the offense so as to shock the moral sense of the community; (2) whether a penalty for one offense, compared with the penalty for a different offense, provides greater punishment for the crime that poses a less serious threat to public health and safety; and (3) whether two offenses with identical elements have different penalties. *Sharpe*, 839 N.E.2d at 508. The court abandoned the second test, and let the third test stand on its own as independent grounds for invalidating a sentence. *Id.* at 517.

57. *Rodriguez*, 217 P.3d at 679.

58. *Sharpe*, 839 N.E.2d at 509, 519.

59. *State v. Ross*, 402 S.E.2d 248, 250 (W. Va. 1990) ("[T]here are two tests to determine whether a sentence is so disproportionate that it violates our constitutional provision. The first is a subjective test and asks whether the sentence for a particular crime shocks the conscience of the Court and society. If the sentence is so offensive that it cannot pass this test, then inquiry need proceed no further.").

60. *State v. Williams*, 519 S.E.2d 835, 838 (W. Va. 1999) ("To determine whether a sentence shocks the conscience, we consider all of the circumstances surrounding the offense." (citing *State v. Phillips*, 485 S.E.2d 676, 682 (W. Va. 1997))).

61. *State v. Cooper*, 304 S.E.2d 851, 857 (W. Va. 1983) ("Cooper's sentence is so offensive to a system of justice in which proportionality is constitutionally required that we need not even reach the objective *Wanstreet* test.").

62. *Id.* at 856–57.

63. *Id.* at 852.

64. *Id.*

years old with an 11th-grade education.<sup>65</sup> The sentencing statute provided a minimum sentence of ten years for robbery by violence but had no limitation on the maximum sentence.<sup>66</sup> When the court placed these circumstances on the scales, it found that the sentence was shocking enough to be constitutionally disproportionate.<sup>67</sup>

Although West Virginia is the only state whose courts specifically separate this factor into its own, independent test, it seems that a West Virginia court still must consider its understanding of the social and political climate, the overall sentencing structure (or a comparison of related crimes in the jurisdiction), and the sentence's relationship with the gravity of the underlying offense. It is therefore unclear what separates this test—for West Virginia—from the other factors discussed below except a formalistic distinction.

### ***B. The Gravity of the Underlying Offense***

#### *1. General Overview*

As an initial matter, it is important to define “underlying offense.” Although only one court has addressed an argument where the government wished the court only to look to the statute to determine the underlying offense,<sup>68</sup> there appears to be universal consensus (although not explicit) that the underlying offense constitutes the statutory crime as embodied by the specific acts committed by the defendant.<sup>69</sup>

This distinction is important for drafting future legislation that deals with proportionality. For example, a statute that asks courts to look at only the text as written could preclude courts from looking to the actual acts and circumstances of the crime. This would result in a rather bizarre proportionality review that only looked at technicalities rather than the substance of the law. Indeed, the whole concept of proportionality seems to unravel without the specific facts of a case. How would a court determine what a given sentence was proportional *to* without analyzing the underlying facts?<sup>70</sup>

Suppose, for example, a statutory scheme allows an accomplice to a crime to be tried under the same charges as the guiltiest perpetrator of that crime.

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65. *Id.* at 853.

66. *Id.* at 854–55 (“Robbery by violence is punished by a minimum determinate ten-year sentence, but a trial court has broad discretion to impose any determinate sentence from ten years to life.” (citing *State ex rel. Faircloth v. Catlett*, 267 S.E.2d 736 (W. Va. 1980))).

67. *Id.* at 859 (invalidating the sentence and remanding to the trial court with the suggestion of a ten-year sentence, but leaving it still within the discretion of the trial court).

68. *State v. Rodriguez*, 217 P.3d 659, 669–70 (Or. 2009).

69. *See infra* notes 73–91 and accompanying text.

70. One scholar has gone so far as to suggest that conduct should be the dispositive factor in proportionality review, and that it is the most intuitively workable principle available to any court. *See Alice Ristroph, Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 314–27 (2005).

Under this system, a person who served as a lookout for a robbery that escalated into a murder could be prosecuted for murder the same as the person who actually committed the murder. But the underlying conduct between the two is profoundly different. Should courts completely disregard the difference and say a life sentence can never be disproportionate for someone convicted (as an accomplice) under a murder statute? Looking only to what sorts of prosecutions the law will allow based on the conduct instead of the details of the conduct as it relates to the statute is to shirk reality.

The one exception to this general statement is when the statutory sentencing scheme appears disproportionate on its face, as when “different” crimes with the same elements have different sentences, or when a greater-inclusive offense has a lighter penalty than a lesser-included offense—for example, if the sentence for rape calls for 20 years’ imprisonment while the sentence for attempted rape calls for life.<sup>71</sup> In such circumstances, looking to the facts is unnecessary because it is simply illogical for a greater-inclusive offense to be punished less severely than a lesser-included offense. It is disproportionate per se.

### 2. Comparison of State Approaches to This Element

Every state analyzed places significant emphasis on the gravity of the underlying offense, including the harm to the victim and the historical perception of a crime’s seriousness.<sup>72</sup> Indeed, this factor is so important to the analysis that it is almost always dispositive, or nearly so. Consider, for example, the dismay with which the Washington Supreme Court met a defendant with a life sentence for a final conviction under its habitual criminal statute who had, over his entire 17-year criminal career, forged checks amounting to less than \$470:

It is difficult to imagine felonies that pose less danger to the peace and good order of a civilized society than the three crimes committed by the petitioner. . . . Surely it takes no special judicial competence to conclude that none of Fain’s crimes even threaten violence to persons or property.<sup>73</sup>

In its most recent and seminal case on proportionality, the Oregon Supreme Court also carefully weighed the gravity of the underlying offense.<sup>74</sup> In *State v. Rodriguez*, Oregon consolidated two cases dealing with proportionality challenges in the context of a sex offender statute that mandated 75 months’ imprisonment for

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71. For a further discussion of this point, see *infra* Part III.F.

72. See *supra* note 47.

73. *State v. Fain*, 617 P.2d 720, 726 (Wash. 1980) (quoting *Rummel v. Estelle*, 445 U.S. 263, 295 (1980) (Powell, J., dissenting)) (internal quotation marks omitted). It is notable that the facts of *Rummel* and *Fain* were essentially the same, but where the U.S. Supreme Court found no disproportionality, Washington did. Just a year later, West Virginia considered a case with similar underlying facts and also invalidated the life sentence. *Wanstreet v. Bordenkircher*, 276 S.E.2d 205, 214 (W. Va. 1981). One way to account for the difference between the state cases and the federal one is the states had a clearer and more rigorous set of standards that were simply easier to apply.

74. *State v. Rodriguez*, 217 P.3d 659, 673–77 (Or. 2009).

a wide variety of offenses, including those of the defendants.<sup>75</sup> The first defendant caused the back of a boy's head to be in contact with her clothed breasts for about one minute.<sup>76</sup> The second defendant let the back of his hand remain in the same position after a girl's clothed buttocks accidentally brushed against it, and then wiped dirt off the back of the girl's shorts with two swipes of his hand.<sup>77</sup> Both victims were under the age of 14.<sup>78</sup>

In its analysis, the court stressed the minor nature of the defendants' conduct in contrast with the other conduct under the statute that would earn the same punishment: "Measure 11 imposes the *same, mandatory* prison term for a 50-year-old man forcing a 13-year-old girl to engage in prolonged skin-to-skin genital contact with him and a 19-year-old forcing the same 13-year-old to touch his clothed buttock for five seconds."<sup>79</sup> Oregon concluded that this disparity, as applied to the defendants, violated the proportionality principle of its constitution.<sup>80</sup>

But the gravity of the underlying offense factor is a double-edged sword, and courts also use it to deny proportionality appeals. The Illinois Supreme Court placed significant weight on the severity of the specific facts of a case in denying a proportionality challenge.<sup>81</sup> It noted that the defendant committed sexual assaults against three separate victims, that there had been a period of at least one month between two of the assaults where the defendant could reflect on the gravity of the offense, and that the evidence demonstrated the calculated nature of the offenses.<sup>82</sup> Based on these facts, the court was unpersuaded by the defendant's appeal for mercy.<sup>83</sup>

Even in serious cases, though, there may be circumstances that warrant a lesser sentence than a sentencing statute calls for. The Illinois Supreme Court, for example, affirmed a trial court's refusal to impose life imprisonment on a 15-year-old in a double-murder case.<sup>84</sup> The trial court instead imposed a sentence of 50 years based on its belief that a mandatory life sentence would violate the proportionate penalties clause of the Illinois Constitution.<sup>85</sup> In affirming the trial court, the Illinois Supreme Court stressed the underlying facts: The defendant agreed to be a lookout approximately one minute before the murders took place; he was only 15 when the crime took place; he never handled the gun; he had almost no involvement in the actual murders; and he had almost no time to contemplate

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75. *Id.* at 663.

76. *Id.* at 675.

77. *Id.*

78. *Id.*

79. *Id.* at 674.

80. *Id.*

81. *People v. Huddleston*, 816 N.E.2d 322, 342 (Ill. 2004).

82. *Id.*

83. *Id.*

84. *People v. Miller*, 781 N.E.2d 300, 308 (Ill. 2002).

85. *Id.* at 302.

his decision.<sup>86</sup> It further noted that under the facts presented, the defendant was “the least culpable offender imaginable.”<sup>87</sup>

### 3. Other Features of This Factor

Three state courts emphasized that reviewing the gravity of an offense is not a static doctrine, but one that must adapt to the “evolving standard of decency that marks the progress of a maturing society.”<sup>88</sup> The Illinois court stressed that the court “review[s] the gravity of the defendant’s offense in connection with the severity of the statutorily mandated sentence within our community’s evolving standard of decency.”<sup>89</sup> The Washington court also emphasized the evolving standard of decency that applies when employing proportionality principles,<sup>90</sup> and the West Virginia court cited approvingly to the same passage from *Trop v. Dulles* in discussing how it reviews a recidivism sentence.<sup>91</sup> From the outset of their analysis, then, the state courts are willing to acknowledge that the doctrine is a mobile one, meant for future generations to apply as society changes.

Each of these analyses demonstrates this factor’s link to the original umbrella shock factor. If the underlying facts are shocking, grotesque, or leave a path of victims, the courts are unlikely to find a sentence disproportionate no matter how excessive it might seem. However, if the defendant appears minimally culpable, or the underlying offenses are very minor, the courts are much more receptive to proportionality challenges.<sup>92</sup> And of course, the underlying facts are analyzed based on what society currently considers gruesome or relatively minor—a consideration rooted in society’s evolving standards of decency. These standards are often best evaluated by looking to the history of the criminal law’s development. Public hangings, whippings, and time in the stocks were once common punishments. Now it would be most difficult, if not impossible, to argue they fit within our society’s standards of what constitutes decent punishment.

In analyzing the underlying facts—and their relative potency—all the courts also stress that successful challenges are as-applied challenges to the sentence.<sup>93</sup> Courts that have granted proportionality challenges usually start by

86. *Id.* at 308–09.

87. *Id.* at 309.

88. *See, e.g., id.* at 308 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

89. *Id.*

90. *State v. Fain*, 617 P.2d 720, 725 (Wash. 1980) (“[A]pplication of proportionality standards to a specific set of facts is not an easy undertaking. . . . As the United States Supreme Court has said in reference to the Eighth Amendment, its scope is not static; rather, it ‘must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.’” (quoting *Trop*, 356 U.S. at 101)).

91. *Wanstreet v. Bordenkircher*, 276 S.E.2d 205, 213 (W. Va. 1981) (“There is woven throughout the proportionality principle, as well as the cruel and unusual punishment prohibition, the concept of ‘evolving standards of decency,’ a principle that we have recognized . . . .” (citation omitted) (quoting *Trop*, 356 U.S. at 101)).

92. *See supra* Part III.B.2.

93. *See, e.g., Miller*, 781 N.E.2d at 310 (“For the foregoing reasons, we find that [the statutes,] *as applied to defendant*, a juvenile offender convicted under a theory of

noting the presumption of validity of the statute and the heavy burden the defendant has to show why, as applied to the defendant, the statute violates proportionality principles.<sup>94</sup> Only in light of the specific facts of the case will a court grant a proportionality challenge.<sup>95</sup> This observation supports the courts' general observations that successful proportionality challenges are a rarity, as well as the courts' reluctance to entertain these challenges—presumably in deference to the legislature's sentencing prescriptions.

### C. The Defendant's Criminal History

All courts studied took into account the defendant's criminal history, or absence of it, when weighing proportionality.<sup>96</sup> This was especially true in cases

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accountability, violates the proportionate penalties clause of the Illinois Constitution.” (emphasis added)); *State v. Rodriguez*, 217 P.3d 659, 674 (Or. 2009) (“But because the statute also encompasses conduct that reasonable people would consider far less harmful, defendants are entitled . . . to argue that the mandatory sentence, *as applied to the particular facts of their cases*, is unconstitutionally disproportionate.” (emphasis added)); *Fain*, 617 P.2d at 728 (“His three fraudulent acts cause him to face a punishment which the legislature declines to impose on those who commit murder in the second degree, arson, rape, robbery, assault, and other dangerous felonies. *Under these circumstances*, we believe Fain’s sentence to be entirely disproportionate to the seriousness of his crimes.” (emphasis added)); *Wanstreet*, 276 S.E.2d at 214 (“We cannot conceive of any rational argument that would justify this sentence *in light of the nonviolent nature of this crime* and the similar nature of the two previous crimes, unless we are to turn our backs on the command of our proportionality clause and merely conclude that regardless of the gravity of the underlying offenses the maximum life sentence may be imposed.” (emphasis added)).

94. See, e.g., *Miller*, 781 N.E.2d at 307 (“*When the legislature has authorized a designated punishment for a specified crime*, it must be regarded that its action represents the general moral ideas of the people . . . .” (emphasis added) (quoting *People ex rel. Bradley v. Ill. State Reformatory*, 36 N.E. 76, 79 (Ill. 1894))); *State v. Wheeler*, 175 P.3d 438, 452 (Or. 2007) (“The court has used the test of whether the penalty was so disproportioned to the offense as to ‘shock the moral sense of reasonable people’ and *ordinarily has deferred to legislative judgments* in assigning penalties for particular crimes, requiring only that the legislature’s judgments be reasonable.” (emphasis added)); *State v. Cooper*, 304 S.E.2d 851, 855–56 (W. Va. 1983) (“We ordinarily decline to intervene with judicially imposed sentences *within legislatively prescribed limits*. . . . Nevertheless, in a case such as this, when our sensibilities are affronted and proportional principles ignored, there is an abuse of discretion that must be corrected.” (emphasis added)).

95. The exceptions to this broad general rule are the tests in Illinois and Oregon that invalidate sentences that are harsher than those for another offense with identical elements (Illinois), or punish a lesser-included offense more severely than the greater-inclusive offense (Oregon). See *People v. Sharpe*, 839 N.E.2d 492, 517 (Ill. 2005); *Wheeler*, 175 P.3d at 451. This analysis invalidates sentences simply by evaluating the statute without placing weight on the underlying facts. For a further discussion of this point, see *infra* Part III.F. Both states, though, continue to use the analysis described above to review and invalidate sentences based on underlying facts where the statutory scheme itself is not being attacked; these courts have just found a neat way of pointing out glaring technical deficiencies in the statute that require no analysis of the facts to find a proportionality problem.

96. See *supra* note 48.

where the defendant was facing a particularly harsh sentence under a recidivism statute or “three strikes” law.<sup>97</sup> Much as one would expect, if the predicate felonies were violent ones, the courts were much less likely to consider the current sentence disproportionate.<sup>98</sup> On the other hand, offenders with histories of nonviolent felonies or no felonies at all found much more sympathetic courts.<sup>99</sup>

Another way of looking at this factor—although the courts did not discuss it this way—would be to consider it a “worthiness” factor. Is this defendant a career criminal who really poses a danger to society? Or is she someone who has been swept up by the technicalities of statutorily mandated prison sentences? If the latter, then the defendant is more “worthy” to receive the inherently discretionary review involved in proportionality analysis. For example, Oregon has noted that “[a]n enhanced sentence (even a life sentence) is appropriate, and not disproportionate, when a defendant is ‘an incorrigible criminal.’”<sup>100</sup> This observation will no doubt make more conservative jurists uncomfortable because it is essentially a penological evaluation that courts prefer to refrain from. If courts are deciding who should receive review (and therefore certain punishments) based on a defendant’s history, the courts draw dangerously close to making judgments that many would argue legislatures are better equipped to handle. One way to ease judicial discomfort with this factor would be to make it but one factor among many to be considered when weighing whether a sentence is disproportional, rather than giving it any dispositive weight.

#### ***D. Legislative Purpose***

The legislative purpose factor is similar to the intra-jurisdictional comparison factor, and at first blush may seem hard to distinguish. But unlike an intra-jurisdictional comparison of the whole statutory framework, the courts analyzing this factor look to see if the legislature specifically singled out a crime for more drastic punishment. Absent a finding of that intent, the courts seem much more willing to view strangely long punishments as disproportionate.

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97. See, e.g., *Fain*, 617 P.2d at 728 (examining the minor nature of the crimes under the recidivist statute that resulted in a life sentence); *Wanstreet*, 276 S.E.2d at 211–13 (“Although the nature of the punishment meted out on the prior felony convictions does not serve to extinguish consideration of these prior felonies in weighing the proportionality of the recidivist life sentence, such prior punishment is entitled to some consideration in weighing the overall retributive effect of the life recidivist sentence as to the third felony.”).

98. See, e.g., *Wheeler*, 175 P.3d at 453–54 (examining the defendant’s prior two convictions for sodomy and a third prior for burglary and concluding that these formed an adequate basis under a recidivism statute to subject the defendant to presumptive life sentences for the convictions he was appealing).

99. See, e.g., *Fain*, 617 P.2d at 728 (“His three fraudulent acts cause him to face a punishment which the legislature declines to impose on those who commit murder in the second degree, arson, rape, robbery, assault, and other dangerous felonies. Under these circumstances, we believe *Fain*’s sentence to be entirely disproportionate to the seriousness of his crimes.”).

100. *Wheeler*, 175 P.3d at 450 (citing *State v. Smith*, 273 P. 323, 326 (Or. 1929)).

The courts in Oregon, Washington, and West Virginia all look for legislative purpose when analyzing proportionality.<sup>101</sup> But before reviewing the legislative purpose behind a statute, courts in these jurisdictions write eloquent paeans discussing judicial deference to legislative judgments in determining sentences.<sup>102</sup> In Oregon, the court has articulated that “as long as there is some reasonable basis” for a legislative determination of what the penalty for a particular crime should be, the court will not disturb that judgment.<sup>103</sup> The Washington court similarly expressed the view that reviewing the legislative purpose behind a statute should be “employed with caution” and went on to state that “[l]egislative judgments as to punishments for criminal offenses are entitled to the greatest possible deference, and we are reluctant to venture a conclusion, given the inexactitude of current theories of penology, that a given sentence more nearly accomplishes the legislative purpose.”<sup>104</sup> Nonetheless, the Washington court indicated that even the legislature’s determinations were not beyond judicial review for constitutionality, and when required to do so, it would review them.<sup>105</sup> The West Virginia court, in similar fashion, stated in its watershed case on proportionality, “[W]e have traditionally held that the Legislature has a broad power in defining offenses and prescribing punishments, limited in severity only by the constitutional prohibition against cruel or unusual or disproportionate sentences.”<sup>106</sup>

Despite these initial deferential statements, each of these three courts has gone on to invalidate a legislative determination of what a sentence for a particular offense ought to be. In invalidating sentences while acknowledging legislative purpose, they have most often stressed the irrationality that results from the defendant receiving a sentence equal to or in excess of much more serious crimes.<sup>107</sup>

For example, the Washington court lamented in one case that “[the defendant’s] three fraudulent acts cause him to face a punishment which the legislature declines to impose on those who commit murder in the second degree,

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101. See *supra* note 49.

102. See, e.g., *Wheeler*, 175 P.3d at 449–50. The court began by noting that it has “consistently . . . adhered to the view that ‘[i]t is the province of the legislature to establish the penalties for the violations of the various criminal statutes[.]’” *Id.* at 449 (alterations in original) (quoting *Jensen v. Gladden*, 372 P.2d 183, 185 (Or. 1962)). The court then went on to discuss in detail a case in which the court had upheld a legislative determination of a penalty and reaffirmed its commitment to the conclusion that “the legislature (and the people, acting through the initiative process) has broad authority to determine which crimes were ‘greater’ and therefore deserving of greater penalties, as long as there is some reasonable basis for that decision.” *Id.*

103. *Id.*

104. *Fain*, 617 P.2d at 728 n.7.

105. *Id.* at 728.

106. *Wanstreet v. Bordenkircher*, 276 S.E.2d 205, 211 (W. Va. 1981) (citations omitted).

107. See, e.g., *State v. Rodriguez*, 217 P.3d 659, 674 (Or. 2009); *Fain*, 617 P.2d at 728; *Wanstreet*, 276 S.E.2d at 212.

arson, rape, robbery, assault, and other dangerous felonies.”<sup>108</sup> The Oregon court similarly opined about a statute covering sexual assaults that had a flat requirement of 75 months regardless of the underlying conduct.<sup>109</sup> Likewise, the West Virginia court expressed exasperation with an irrational penalty: “Thus, we are confronted with this anomaly that elevates a conviction for forgery to a punishment slightly below the murderer who is found by the jury not to warrant a recommendation of mercy.”<sup>110</sup> When confronted with the situation where a defendant faces a massive sentence for a relatively minor crime like forgery or fraud, judicial deference to legislative determinations of punishment in these states strains all the way to its breaking point. In each of these cases, legislative purpose was but one factor among many the court considered, rather than being a dispositive one.

In contrast to the above states, Illinois recently abandoned looking into legislative purpose after doing so (under certain circumstances) for a number of years.<sup>111</sup> Prior to its 2005 decision in *People v. Sharpe*, Illinois had three separate tests for proportionate penalties review, the second of which was known as the “cross-comparison” test.<sup>112</sup> This test allowed the court to compare similar offenses and invalidate a sentence where the court determined one of the offenses posing a less serious threat to public health and safety received a harsher penalty.<sup>113</sup> To determine whether a penalty fit into this category, the court engaged in a two-step analysis. First, the court determined whether the statutes being compared had related purposes.<sup>114</sup> If they did not, then the challenge to the penalty failed.<sup>115</sup> However, if they did have a related purpose then the court proceeded to step two, to determine which offense was more serious and whether the less serious offense received a greater punishment.<sup>116</sup>

After 22 years of developing and using this test, the Illinois Supreme Court abandoned it as problematic and unworkable for two reasons.<sup>117</sup> First, the court noted a great deal of subjectivity in determining whether any particular penalty was more serious than another.<sup>118</sup> Second, it found that the already-uncomfortable level of subjectivity of this determination was compounded by the process of determining whether two given statutes had related purposes.<sup>119</sup> This

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108. *Fain*, 617 P.2d at 728.

109. *Rodriguez*, 217 P.3d at 674.

110. *Wanstreet*, 276 S.E.2d at 212.

111. *People v. Sharpe*, 839 N.E.2d 492, 515–16 (Ill. 2005) (abandoning the “cross-comparison” proportionate penalties challenge and its concomitant judicial inquiry into legislative purpose as problematic and unworkable).

112. *Id.* at 498.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 515. For a critique of the *Sharpe* decision, see E. THOMAS SULLIVAN & RICHARD S. FRASE, PROPORTIONALITY PRINCIPLES IN AMERICAN LAW: CONTROLLING EXCESSIVE GOVERNMENT ACTIONS 158–60 (2009).

118. *Sharpe*, 839 N.E.2d at 515.

119. *Id.*

combination, the court concluded, resulted in cases whose outcome was determined by “how narrowly or broadly a court chose to define statutory purpose, and there is simply no principled, objective way to define it.”<sup>120</sup>

Illinois’s trouble in implementing this factor in its proportionality analysis is most likely a result of its decision to make the resolution of legislative purpose outcome-determinative for its cross-comparison proportionate penalty challenge. Rather than considering legislative purpose as one factor of many to weigh in a “totality of the circumstances” analysis, as the other states did, Illinois required its courts to actually resolve what the legislative purpose of a statute was for every cross-comparison challenge. Given the significant challenges that statutory interpretation presents on its own, the often meager legislative records (especially from state legislatures) from which courts are supposed to divine a statutory purpose, and the incendiary debate about how much weight courts should place on statutory purpose, it is perhaps no surprise that Illinois’s cross-comparison test was a doomed endeavor from the outset.

But after eliminating its cross-comparison proportionate penalties challenge, Illinois still retained two other methods to challenge penalties as disproportionate.<sup>121</sup> The court gave no indication that it found them problematic or unworkable. To the contrary, it referenced one of them as “familiar.”<sup>122</sup>

This brief case study illustrates that looking to other crimes in the same jurisdiction for perspective on the severity of a given punishment can be a helpful aspect of proportionality review. However, when courts begin placing too much weight on this factor, or try to determine the legislative purpose behind a given statute, the factor becomes unwieldy and unworkable. This factor should remain part of a larger proportionality analysis and should not by itself determine the (dis)proportionality of a sentence.

#### ***E. Inter-Jurisdictional Analysis***

Illinois, Washington, and West Virginia all look to other jurisdictions in attempting to determine if a particular penalty is disproportionate to the crime.<sup>123</sup> The fact that these states are so willing to consider the penalties in other jurisdictions when undertaking their analysis is particularly interesting because so much controversy surrounds the U.S. Supreme Court looking to foreign jurisdictions for ideas when interpreting U.S. law.<sup>124</sup>

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120. *Id.*

121. *Id.* at 517 (“A defendant may still argue that the penalty for a particular offense is too severe, and such a challenge will be judged under the familiar ‘cruel or degrading’ standard. Further, a defendant may still challenge a penalty on the basis that it is harsher than the penalty for a different offense that contains identical elements.”).

122. *Id.*

123. *See supra* note 50 and accompanying text.

124. *See, e.g.*, Jesse J. Holland, *Supreme Court Looks to Foreign Law for Tips*, THE HUFFINGTON POST (Apr. 1, 2010, 4:18 AM), [http://www.huffingtonpost.com/2010/04/01/supreme-court-looks-to-fo\\_n\\_521265.html](http://www.huffingtonpost.com/2010/04/01/supreme-court-looks-to-fo_n_521265.html) (noting the controversy). Of course, the difference is that states are looking to other state laws in essentially the same system of

Illinois looks to other jurisdictions when it considers penalties under its “cruel or degrading” type of proportionate penalty challenge.<sup>125</sup> In *People v. Huddleston*, the court considered whether a sentence of natural life for a man who abused his position as a fourth grade teacher to molest three children at school violated the proportionate penalties clause of the state constitution.<sup>126</sup> In concluding that the sentence passed constitutional requirements, the court placed significant weight on the punishments that could be imposed in other jurisdictions. It looked to the types of restrictions other states and the federal system impose on sex offenders,<sup>127</sup> and then considered what punishments other jurisdictions meted out for comparable crimes.<sup>128</sup> It found that although Illinois was among only a handful of states that would require life sentences under the facts of the case, there was broad support for severe sentences for child molesters and Illinois was not unduly extreme in its punishment as compared with other states.<sup>129</sup>

The West Virginia court has also undertaken a lengthy analysis of statutory punishment schemes in other jurisdictions when assessing the proportionality of a sentence. In *State v. Buck*, the court considered whether a 75-year sentence for burglary violated proportionality principles, and concluded it did.<sup>130</sup> Key in its analysis was a description of the potential sentences the defendant could have received in other jurisdictions. It noted that in 29 other states the defendant would have received a substantially lower sentence.<sup>131</sup> These circumstances, the court decided, warranted relief for the defendant. Although the court seemed to gloss over the fact that 21 other states could impose a similar sentence, apparently the group of 29 states with significantly lower sentences was enough for the court to conclude disproportionality existed.

Similarly, the Washington court weighed its sentencing regime in relation to that of other jurisdictions when considering a defendant’s proportionality challenge. In *State v. Fain*, the court considered the effects of its recidivism statute on the defendant’s small-dollar-amount frauds.<sup>132</sup> The court found that Washington’s recidivism statute was in an extreme minority as it applied to Fain, and that the defendant’s sentence was “much harsher than he would face in virtually all American jurisdictions.”<sup>133</sup> The court took pains to emphasize that it considered Fain’s challenge an as-applied challenge, rather than a challenge to the

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shared values, whereas international justice systems may not share the same underlying assumptions about fairness as American jurisdictions.

125. One of two ways Illinois will invalidate a sentence as disproportionate is if it “is cruel, degrading, or so wholly disproportionate to the offense committed as to shock the moral sense of the community.” *People v. Huddleston*, 816 N.E.2d 322, 337 (Ill. 2004).

126. *Id.* at 333–35.

127. *Id.* at 340–41.

128. *Id.* at 341–42.

129. *Id.* at 342.

130. 314 S.E.2d 406, 408, 411 (W. Va. 1984).

131. *Id.* at 409 n.3 (listing the potential punishments in 29 other states).

132. 617 P.2d 720, 726–27 (Wash. 1980).

133. *Id.* at 727 (noting that Washington was only one of three states retaining a recidivism statute that imposed life after *any* three felony convictions).

recidivism statute itself, which it had long held constitutional.<sup>134</sup> In contrast to the West Virginia analysis, this sort of “extreme minority” finding probably fits better within what most would expect from evaluating this factor. However, if this factor were only one among a “totality of the circumstances” review, then the court could place an appropriate amount of weight on its finding based on how disparate its state was from other jurisdictions.

The Washington court was concerned not only with relative harshness, but also the incredibly broad and less nuanced nature of the Washington statute. The court noted that other jurisdictions focused on the nature of the previous crimes and provided more discretion to courts in what sentences they could impose under their recidivism statutes.<sup>135</sup> Although the court noted this factor was not determinative of the case, it stated that it was one that it “must consider in [its] analysis of [the defendant’s] claim.”<sup>136</sup>

These states place great emphasis on how their sentencing comports with their sister jurisdictions—which makes sense, given that each of these states has acknowledged that proportionality is not and should not be static, but “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>137</sup> It would be odd indeed if a state chose to allow for an extreme penalty inconsistent with nearby jurisdictions and did not even bother to explain why it was departing from a rough consensus among the states. It is somewhat strange that Oregon has not incorporated an inter-jurisdictional component to its proportionality jurisprudence—especially given the fact that the justice who authored the court’s two most recent opinions on the subject is extremely familiar with proportionality law in foreign jurisdictions.<sup>138</sup> This curious silence may simply be explained by the fact that such review has been unnecessary in the cases before the Oregon court, or perhaps Justice Balmer’s decision that it was not necessary for effective review.

#### ***F. Intra-Jurisdictional Analysis***

Every state analyzed considers the sentences for other crimes within the same jurisdiction to some degree.<sup>139</sup> On the most basic level, the state courts see no problem in invalidating a sentence for a crime when the crime of conviction has the same elements, but a harsher penalty, than another crime.<sup>140</sup> More than a half-century ago, the Oregon court invalidated a sentence of life imprisonment based on a conviction of assault with intent to commit rape.<sup>141</sup> The greater offense of actual

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134. *Id.* at 722.

135. *Id.* at 726–27.

136. *Id.* at 727.

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

138. Balmer, *supra* note 25, at 793–99.

139. *See supra* note 51 and accompanying text.

140. *See, e.g., State v. Wheeler*, 175 P.3d 438, 451 (Or. 2007) (discussing two older Oregon cases in which the court invalidated sentences because the lesser-included offense had a harsher penalty than the greater-inclusive offense).

141. *Cannon v. Gladden*, 281 P.2d 233, 235 (Or. 1955).

rape had a maximum sentence of 20 years.<sup>142</sup> The court used the test from *Weems v. United States*<sup>143</sup> to consider whether the “punishment [was] so proportioned to the offense committed as to shock the moral sense of all reasonable men as to what is right and proper under the circumstances.”<sup>144</sup> The court concluded in unequivocal language that it did:

How can it be said that life imprisonment for an assault with intent to commit rape is proportionate to the offense when the greater crime of rape authorizes a sentence of not more than 20 years? It is unthinkable, and shocking to the moral sense of all reasonable men as to what is right and proper, that in this enlightened age jurisprudence would countenance a situation where an offender, either on a plea or verdict of guilty to the charge of rape, could be sentenced to the penitentiary for a period of not more than 20 years, whereas if he were found guilty of the lesser offense of assault with intent to commit rape he could spend the rest of his days in the [Bastille].<sup>145</sup>

The Oregon court’s analysis in that case was quite short, but it is important to parse what the court was doing. First, it considered what rubric it would use to determine if a sentence was disproportionate—in this case the familiar “shock” standard, discussed above in Part II.A.<sup>146</sup> It then decided that it need only meet one sub-test in order to invalidate a sentence: If the lesser-included offense receives a lengthier sentence than the greater-inclusive offense, the sentence is invalid.<sup>147</sup> Finding the sub-test met, the court invalidated the sentence.<sup>148</sup>

Thirty-five years later, Illinois concluded in a similar situation that punishments for different crimes that have identical elements are constitutionally unsound when they are not uniform.<sup>149</sup> In *People v. Christy*, Illinois considered whether the offense of aggravated kidnapping, which carried a sentence range of 4–15 years, rendered disproportionate the offense of armed violence predicated on kidnapping, which had the same elements but carried a sentence range of 6–30 years.<sup>150</sup> The court concluded that it did.<sup>151</sup> The court reasoned that “[s]ince the elements which constitute aggravated kidnapping and armed violence [predicated on kidnapping] are identical, common sense and sound logic would seemingly dictate that their penalties be identical.”<sup>152</sup>

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142. *Id.* at 234.

143. 217 U.S. 349 (1910).

144. *Cannon*, 281 P.2d at 234.

145. *Id.* at 235.

146. *Id.* at 234–35.

147. *Id.* at 235.

148. *Id.*

149. *People v. Christy*, 564 N.E.2d 770, 774 (Ill. 1990).

150. *Id.*

151. *Id.*

152. *Id.*

The Illinois Supreme Court reaffirmed the appropriateness of this analysis again in 2005, noting that the “identical-elements analysis is not fraught with the same difficulties as cross-comparison analysis: it requires no subjective determinations by this court, it does not require that we act as a ‘superlegislature,’ and it does not threaten separation of powers principles.”<sup>153</sup> These observations by the Illinois courts are consistent with Oregon’s take on the subject.

The harder question for courts has been to what extent they should equate crimes that are not so closely related in their elements. As noted above, Illinois recently decided to abandon its “cross-comparison” proportionality jurisprudence, in which it would consider two different crimes with related legislative purposes (as determined by the court) and compare the penalties for each. If the “lesser” offense received a larger penalty, the court would invalidate the sentence.<sup>154</sup> Of course, that jurisprudence relied on actually determining a legislative purpose, which Illinois ultimately decided was too unreliable a judicial principle to retain.<sup>155</sup>

The other courts have expressed equal concern with weighing the seriousness of one crime against another, considering that to be an almost-exclusively legislative function.<sup>156</sup> Nonetheless, these courts have found the probative value of comparing the crime and sentence being appealed with other crimes in the same jurisdiction too great to pass up. West Virginia, for example, considers an intra-jurisdictional analysis an important objective standard “designed to prevent sentencing patterns that merely reflect the personal predilections of individual judges.”<sup>157</sup> Oregon has also noted that

a standard that considers the offense and the penalty at issue in the context of related offenses and penalties provides a closer connection to the manner in which the substantive criminal laws and the sentencing statutes work together—and to what would, or would not, “shock the moral sense” of reasonable people—than the purely abstract comparison of any single offense and the penalty for that offense.<sup>158</sup>

What then do courts consider, under the guidance of these standards, when looking to related offenses?

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153. *People v. Sharpe*, 839 N.E.2d 492, 517 (Ill. 2005).

154. *Id.* at 515; *supra* Part III.D.

155. *Sharpe*, 839 N.E.2d at 517.

156. *See, e.g., State v. Rodriguez*, 217 P.3d 659, 671 (Or. 2009) (“That is not to suggest that a court may roam freely through the criminal code, deciding which crimes are more or less serious than others. We have emphasized the legislature’s central role in determining which crimes are more or less serious . . . and, reflecting changing societal norms, the legislature may decide that certain crimes should henceforth be considered more serious and subject to more severe penalties than other crimes that previously had been considered more serious.”); *State v. Fain*, 617 P.2d 720, 728 (Wash. 1980) (“Our duty to determine whether a legislatively imposed penalty is constitutionally excessive is not one which we assume eagerly, but we do not shrink from our responsibility.”).

157. *Wanstreet v. Bordenkircher*, 276 S.E.2d 205, 210–11 (W. Va. 1981).

158. *Rodriguez*, 217 P.3d at 671. For a discussion of this case’s evaluation of the “shock” factor, see *supra* Part III.A.

In *State v. Rodriguez*, the case involving brief sexualized contact with fully clothed minors,<sup>159</sup> the Oregon Supreme Court evaluated the validity of the sentences by comparing the statute that mandated the sentences to the other statutes that regulated sex crimes.<sup>160</sup> The court discovered that the defendants would have been subject to the same sentence for sodomizing the victims, engaging in sexual intercourse with the victims, or penetrating the victims with anything other than their mouth or genitals.<sup>161</sup> The court believed a reasonable person would find the 75-month sentences possible for the other crimes proportional, but concluded that a reasonable person could not also “conclude that the mandatory 75-month sentence for the conduct at issue here . . . is proportioned to the offense.”<sup>162</sup>

In *State v. Buck*, the West Virginia Supreme Court considered the proportionality of a 75-year sentence for aggravated robbery.<sup>163</sup> The defendant and an accomplice went into a store and asked for soft drinks.<sup>164</sup> When the store owner went to get them, he was struck in the back of the head.<sup>165</sup> The defendant and his accomplice then stole \$1,210.12.<sup>166</sup> The court looked to related offenses to see what other possible sentences might be.<sup>167</sup> It found that the sentence the defendant received was much higher than several more serious offenses.<sup>168</sup> Under a first-degree murder sentence of life, the defendant would have been eligible for parole after ten years; with his 75-year sentence he was not eligible for 25 years.<sup>169</sup> For second-degree murder he would have received an 18-year sentence, and for voluntary manslaughter he would have received a 5-year sentence.<sup>170</sup> The court did not consider this analysis dispositive of the defendant’s appeal, but it did consider it “significant.”<sup>171</sup> The court ultimately vacated his sentence.<sup>172</sup>

As a final example, in *State v. Fain*, the Washington court considered the proportionality of a life sentence for a third conviction of fraud, where the fraudulent acts committed by the defendant added up to only a \$470 loss to his victims—over 14 years.<sup>173</sup> The court looked to other crimes that carried

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159. For a more detailed description of the facts of the case, see *supra* notes 74–80 and accompanying text.

160. *Rodriguez*, 217 P.3d at 677–78.

161. *Id.* at 677.

162. *Id.* at 677–78.

163. 314 S.E.2d 406, 408 (W. Va. 1984). For a discussion of this case as it relates to the “shock” factor, see *supra* Part III.A.

164. *Buck*, 314 S.E.2d at 408.

165. *Id.*

166. *Id.*

167. *Id.* at 408–09.

168. *Id.* at 409.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 411.

173. 617 P.2d 720, 727–28 (Wash. 1980). For a discussion of this case as it relates to the “shock” factor, see *supra* Part III.A.

comparable sentences and to the way the legislature had changed the sentences for acts comparable to those of the defendant.<sup>174</sup> It found that the only crime in the state that carried mandatory life imprisonment was first-degree murder.<sup>175</sup> Other crimes that carried the possibility of a life sentence were second-degree murder, first-degree assault, first-degree kidnapping, first-degree rape, first-degree statutory rape, first-degree arson, first-degree burglary, and first-degree robbery.<sup>176</sup> The court then found that the crime of first-degree theft (\$1,500 or more) carried a maximum penalty of only ten years, and that a second conviction of first-degree theft would again result in a maximum penalty of only ten years.<sup>177</sup> The court concluded that the defendant's "three fraudulent acts cause him to face a punishment which the legislature declines to impose on those who commit murder in the second degree, arson, rape, robbery, assault, and other dangerous felonies. Under these circumstances, we believe Fain's sentence to be entirely disproportionate to the seriousness of his crimes."<sup>178</sup>

These courts demonstrate that it is possible to look at the criminal code and discern an overall scheme of punishment for a certain category of crime. Placing a given crime and punishment in context helps to reveal aberrations. The analysis need not be outcome determinative. Instead, it is but one factor among many that help a court illuminate the sentencing landscape and weigh how disproportionate the defendant's sentence is to his crime.

To summarize, there are six principles that these four jurisdictions utilize in their proportionality analysis. They consider how "shocking" the relationship between the sentence and the crime is to the court or the community; the gravity of the underlying offense and the defendant's involvement in the crime; the criminal history of the defendant; the legislative purpose behind the sentencing scheme; a comparison of the sentences for the same crime in other jurisdictions; and finally, a comparison of the sentences of similar crimes in the same jurisdiction. By utilizing this framework, these states have been able to balance deference to the legislature with the need to achieve fundamental fairness in individual cases.

#### IV. HOW OTHER JURISDICTIONS CAN IMPLEMENT PROPORTIONALITY REVIEW

##### *A. What State Legislatures Can Do*

Much of the analysis up to this point has focused on courts, but legislatures are in a better position to implement proportionality review. The legislatures can more deftly set clear standards for review because they do not have to wait for an appropriate case to come through the system. They can take advantage of the clear principles developed by the courts already. And most importantly they can set a system of review that conforms with their sentencing

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174. *Fain*, 617 P.2d at 727–28.

175. *Id.* at 727.

176. *Id.*

177. *Id.* at 728.

178. *Id.*

schemes. Now may well be one of the best times in history to enact this sort of legislation, as many states appear to be in a fervor to retain their sovereignty against unfavorable or inadequate federal laws<sup>179</sup>—and in this case the U.S. Supreme Court seems uninterested or unwilling to bring coherence to its jurisprudence in the area.<sup>180</sup> Of course, enacting this sort of legislation will require the legislature to acknowledge its own limits: It is incapable of predicting the infinite variety of ways that the code may be applied by prosecutors to particular defendants, the way that unanticipated sets of facts will emerge, and the inability of legislatures to consistently and coherently revise and update an entire scheme of sentencing and punishment.

Acknowledging this sort of limitation may be the biggest impediment to enacting proportionality legislation. In addition, opponents of proportionality legislation could easily characterize it as being “soft on crime,” a campaign killer if ever there was one. Proponents, then, must respond with an equally forceful argument that resonates with the public: This sort of legislation will help reduce the cost of maintaining the prison system and therefore will be less of a burden on taxpayers. Absurdly long prison sentences for more and more prisoners create a huge financial burden on the state and its taxpayers.<sup>181</sup> Placing a check, however small, on the ability to keep people in prison for long periods of time will help reduce that cost. In addition to cost, proportionality review would also promote a sense of fairness and public confidence in the criminal justice system. A fair system that perhaps even criminals could identify as being just will ultimately help, not hinder, law enforcement efforts.

As discussed in Part III, Illinois, Oregon, Washington, and West Virginia courts have demonstrated a remarkable consistency in the principles they have expounded as important to proportionality review. Consistency of this nature lends itself easily to codification by the legislature through the use of a model act. By enacting a proportionality act that clearly establishes the principles for the judiciary to use, the legislature can create a system of proportionality review where the legislative and judicial branches work together to achieve a sensible sentencing scheme and to weed out absurdities. Rather than divesting the legislature of its power, such an act would acknowledge the important role of the judiciary in being able to give sentencing schemes functional coherence and would stand to create a more respectable system for everyone involved. And of course, if the legislature

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179. See Frase, *supra* note 2, at 63 (implicating the “New Federalism” movement’s potential role in promulgating proportionality review in the states); Barak Y. Orbach, Kathleen S. Callahan & Lisa M. Lindemann, *Arming States’ Rights: Federalism, Private Lawmakers, and the Battering Ram Strategy*, 52 ARIZ. L. REV. 1161, 1168–69 (2010) (discussing how states attack unpopular federal laws by enacting their own declaratory or contradictory laws).

180. Justice O’Connor went so far as to remark in one of the Court’s more recent cases that “our precedents in this area have not been a model of clarity.” Lockyer v. Andrade, 538 U.S. 63, 72 (2003).

181. Ted Downing, Editorial, *It’s Time for New Solutions to Crowded Prisons*, ARIZ. REPUBLIC, Aug. 4, 2003, at B9 (estimating an average cost of \$20,000 per prisoner per year for a new prison built outside of Tucson, Arizona).

felt the judiciary misapplied the principles, it could always clarify its sentencing scheme. With these thoughts in mind, Subsection B presents a Model Proportionality in Sentencing Act.

***B. Model Proportionality in Sentencing Act***

§ 1. Purpose. The purpose of this Act is to ensure just and proportionate sentencing for those convicted of crimes within this State. In this State, it is a fundamental precept of justice that penalties ought to be proportioned to the nature of the crime punished. This Act is not intended to allow second-guessing of every legislatively prescribed punishment. The presumption remains that a sentence required by statute is legitimate. But the legislature acknowledges that the criminal code is vast and it is impossible to determine how the criminal code may apply to every set of underlying facts. This Act serves as a safety valve for absurdities that may arise from unforeseen circumstances or applications of the law.

§ 2. Notwithstanding any other section in this State's criminal code, penalties for crimes shall be generally proportioned to the seriousness of the offense.

§ 3(a). To evaluate whether a sentence is disproportionate to the offense, the courts shall consider the following non-exhaustive list of factors under the totality of the circumstances as they relate to the specific defendant, keeping in mind the evolving standards of decency that mark the progress of a maturing society:

- (1) Whether the severity of the punishment is so great as to shock the conscience of the court and society as to what is right and proper;
- (2) The gravity of the underlying offense, including the defendant's conduct and criminal history, the circumstances surrounding the crime, and the harm to the victim and society;
- (3) The punishment for the same or a substantially similar crime in other jurisdictions;
- (4) What crimes generate similar punishments within this State, and the extent to which crimes of an equal or more serious nature carry less serious punishments.

(b) If the court concludes, under the totality of the circumstances and the factors enumerated above, that a fundamental miscarriage of justice would result from enforcing the sentence, the court shall vacate the sentence and remand the case to the trial court for resentencing that comports with this Act. If it is the trial court that concludes a sentence it would otherwise be required to impose is disproportionate, it shall impose a sentence that comports with this Act.

(c) Upon invalidating a sentence, no presumption shall arise that a given punishment is disproportionate for future defendants, unless the court determines otherwise based on the rare circumstance that the court foresees no possible proportional application of the punishment as applied to any future defendant.

§ 4. In the alternative, a court may invalidate a sentence without undergoing the analysis in § 3 if it appears on its face that a greater-inclusive

offense carries a more lenient penalty than a lesser-included offense. For example, if the penalty for rape is lower than the penalty for attempted rape, the penalty for attempted rape cannot stand.

§ 5. Except for § 3(c), nothing within this Act shall be construed to create a presumption of invalidity of any previous legislative determination of punishment for a specific crime. Only when the specific situation of a particular defendant offends the principles of proportionality contained within this Act shall a court invalidate a sentence.

### *C. Explanation of the Model Act's Provisions*

The Model Act attempts to distill the most coherent parts of the jurisprudence reviewed in Part III into one workable statute. The first section of the Act sets out a clear purpose for enacting the legislation. The second section is a simple restatement of the basic proportionality principle that just about every state studied agrees on in theory. The third section explores just how that principle should be applied.

The Model Act stresses using a “totality of the circumstances” test based on four factors, rather than making any one particular factor dispositive as some states have done.<sup>182</sup> Because some factors are necessarily more subjective than others,<sup>183</sup> this section demands the court consider all factors together to achieve as much objectivity as possible. It also allows defendants and attorneys to bring up other relevant circumstances that the four enumerated factors might not cover.

Section 3(a)(1) adopts the “shock standard” for making an initial evaluation of the sentence that all four states have accepted.<sup>184</sup> However, section 3(a) is also modified by the phrase that precedes it: “under the evolving standards of decency that mark the progress of a maturing society.” This phrase serves two purposes. First, it codifies the case law from three of the states reviewed above that specifically reasoned that this sort of doctrine cannot remain static. Second, it gives flexibility to the courts in making their decisions. Because the imposition of

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182. West Virginia, for example, will invalidate a sentence if it meets only the “shock” test, without going into any other analysis. *See, e.g., State v. Ross*, 402 S.E.2d 248, 250 (W. Va. 1990).

183. A group of judges deciding what is shocking to society may seem like a precarious endeavor, but remember that this group of people have the most consistent experience in applying the criminal code to defendants and therefore may have a better grasp of when a particular punishment seems aberrant. *See OHIO JUDICIAL CONFERENCE CRIMINAL LAW & PROCEDURE COMM., POLICY STATEMENT 1 (2008)*, available at [http://www.ohiojudges.org/\\_cms/tools/act\\_Download.cfm?FileID=2102&/Policy%20Statement%20on%20Mandatory%20Sentences%20%28v%20%29%28DDSC%29%20%28MRS%29%282%29.pdf](http://www.ohiojudges.org/_cms/tools/act_Download.cfm?FileID=2102&/Policy%20Statement%20on%20Mandatory%20Sentences%20%28v%20%29%28DDSC%29%20%28MRS%29%282%29.pdf) (“By repeatedly applying the law to diverse fact patterns, judges develop a keen sense of what is a fair and proportionate criminal sanction in individual cases.”).

184. *See supra* Part III.A.

the death penalty as punishment for 160 different crimes<sup>185</sup> and shameful public whipping<sup>186</sup> were once standard and commonly accepted practices, we must acknowledge that our notion of punishment changes over time. This section encourages the courts to consider that evolution when weighing the proportionality of sentences—for example, by considering the last time a particular punishment was given, the last time a particular statute was enforced, or compelling scientific data that suggests society’s previous understanding of a punishment is misconceived.

Section 3(a)(2) makes clear that the “underlying offense” is not simply what is written in the statute, but includes the actual facts of the defendant’s crime, the harm to the victim, and the harm to society. This section balances the competing interests of the victim and the defendant, and requires the court to consider the viewpoints of both. It also precludes a proportionality review that would be overly technical, focused narrowly on the letter of the law rather than looking to what actually has happened. Of course, the court should consider both the law and the facts.

Section 3(a)(3) encourages the court to take a broad perspective when considering the “evolving standards of decency” by looking beyond the state’s borders to how other jurisdictions are punishing the same or similar crimes. The court should pause if it discovers that there is an evolving trend among other jurisdictions to punish a similar crime more leniently, and contemplate what local rationale for the harshness can justify the disparity. This section is not meant to encourage courts to invalidate sentences merely because their jurisdiction is at the high end of a spectrum; rather, it is just another tool to use that gives the court the most objective information possible about how a certain crime, in our interconnected society, is perceived by its respected peers who have spent an equal or greater amount of time considering it.

Section 3(a)(4) concludes by requiring the court to consider whether the punishment for a specific crime appears to be absurdly long compared to other crimes that carry the same punishment. For example, if a defendant finds himself facing life imprisonment for writing a bad check, and the only other crimes that carry the same sentence are murder or attempted murder, the disparity should give the court no shortage of concern.

Section 3(b) directs the court about what it should do when it finds a sentence unacceptably disproportionate. Making explicit that the statute maintains the status quo, it leaves the most discretion open to the trial court to impose an appropriate sentence, which acknowledges that it is the trial court that is most familiar with the facts and circumstances of the case. However, this section also allows the trial court to make an initial finding of disproportionality rather than waiting for an appellate determination.

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185. Balmer, *supra* note 25, at 787 (citing 4 BLACKSTONE, *supra* note 27, at \*18–19, \*244).

186. *The Eighth Amendment, supra* note 37, at 968 (citing Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 AM. J. LEGAL HIST. 326, 348 (1982)).

Section 3(c) provides explicitly that invalidating a sentence for a particular defendant is limited to the facts and circumstances of that case. It creates no presumption that any future defendant subjected to the punishment is receiving a disproportionate sentence. This clause shows proper deference to the legislature and its determinations for what punishments are appropriate for what crimes. However, the section also acknowledges that a court may deem a given punishment categorically unacceptable. It should be a very rare case indeed that would persuade a court to reach such a conclusion because such a ruling would essentially overrule a legislative determination of punishment.

Section 4 adopts the most unobjectionable of all proportionality challenges: requiring that greater-inclusive offenses carry equal or harsher penalties than their lesser-included offenses. Oregon's reasoning on this point is so convincing<sup>187</sup> that it is included in full in the model statute.

Section 5 restates the principle in section 3(c), that no presumption of invalidity for future defendants receiving the same sentence arises simply because the court invalidated this particular defendant's sentence. It is articulated in its own section to emphasize the importance of deference to legislative determinations of punishment.

#### ***D. What State Judiciaries Can Do***

State judiciaries are in a much more precarious position, as they are frequently unelected members of the government, and overturning legislation by the elected branch is necessarily a controversial exercise. On the other hand, there are a large number of states in which judges are elected by popular vote or appointed by locally elected officials,<sup>188</sup> a decision by these judges using proportionality review to invalidate excessive sentences should be less objectionable because they are accountable to voters.<sup>189</sup> Of course, these judges face the same "soft on crime" arguments that other elected officials must face. On the other hand, the political process breakdown discussed earlier,<sup>190</sup> where elected officials face stark political pressure to enact and enforce extremely harsh penalties and will likely remain unresponsive to those whom their decisions most impact, points toward a judicial intervention necessary to preserve individual liberty.<sup>191</sup>

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187. In *Cannon v. Gladden*, 281 P.2d 233, 235 (Or. 1955), the court considered whether the sentence for the lesser offense of assault with intent to commit rape, which carried a maximum sentence of life, was disproportionate when the greater offense of actual rape mandated only 20 years. The court concluded the sentences were disproportionate. *Id.* For a full quotation of the court's reasoning, see *supra* text accompanying note 145.

188. *Judicial Campaigns: Money, Mudslinging and an Erosion of Public Trust*, ANNENBERG PUB. POLICY CTR. (May 25, 2007), [http://www.annenbergpublicpolicycenter.org/Downloads/Releases/Release\\_KHJ\\_JudicialCampaignFunds20070523/newFactCheck\\_judicial\\_conference\\_THIS\\_IS\\_FINAL.pdf](http://www.annenbergpublicpolicycenter.org/Downloads/Releases/Release_KHJ_JudicialCampaignFunds20070523/newFactCheck_judicial_conference_THIS_IS_FINAL.pdf).

189. Frase, *supra* note 2, at 63.

190. See *supra* Part I.A.

191. Cf. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938) (noting, but refusing to decide, whether commercial legislation "which restricts those

In order for the judiciary to create proportionality review, it must have some textual basis for doing so. Conveniently, all 50 states have the textual basis they need.<sup>192</sup> As Professor Frase implies, all these courts need to do is read a proportionality jurisprudence into the clauses that already exist in their state constitutions.<sup>193</sup> They can do as Vermont did when it found that its “proportioned” fines clause applies to all types of penalties and then required proportionality review under that clause.<sup>194</sup> Nineteen states could require it under the “cruel or unusual punishment” clause that exists in their constitutions.<sup>195</sup> Another five states could implement proportionality review under their “cruel” penalties clause.<sup>196</sup> And yet another 22 states could implement proportionality review under their state constitutions’ prohibition of “cruel and unusual” punishments.<sup>197</sup>

The next question is what sort of proportionality review courts should implement. They should first and foremost try to use the most objective standards possible. Objectivity will promote the proper deference to the legislature and give consistency and coherence to the doctrine. The other key element is to limit the nature of the review to specific cases and defendants as much as possible. This way judges can apply proportionality review, but not fall prey to the accusation that they are legislating from the bench. The other benefit to the court of a review limited to specific facts and circumstances is that it places the burden on the defendant to demonstrate why his or her particular sentence is disproportionate. This burden would include researching the penalties in other jurisdictions and in the home jurisdiction—perhaps the most labor-intensive part of effective proportionality review.

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political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation”). Here, legislation that keeps convicted criminals in jail longer and out of voting booths necessarily restricts their ability to have a voice in the political process.

192. Frase, *supra* note 2, at 64 (“All fifty states have constitutional provisions related to sentencing. All but two states, Connecticut and Vermont, have provisions specifically limiting severe punishments of all kinds. But both of those states have provisions limiting severe fines, and Vermont courts interpret that state’s ‘proportioned’ fines clause to apply to all types of penalties.”).

193. *See id.*

194. *Id.* (citing *State v. Venman*, 564 A.2d 574, 581–82 (Vt. 1989)).

195. *Id.* at 64–65 (finding Alabama, Arkansas, California, Hawaii, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Nevada, New Hampshire, North Carolina, North Dakota, Oklahoma, South Carolina, Texas, and Wyoming all have a “cruel or unusual” clause in their state constitutions). There is also an important textual distinction here between the disjunctive *or* and the conjunctive *and* that appears in the Eighth Amendment. Some state courts have interpreted this difference as a meaningful reason to offer more protection than the Eighth Amendment provides. *See, e.g.*, *People v. Haller*, 94 Cal. Rptr. 3d 846, 855–56 (Cal. Ct. App. 2009) (noting that the state constitution bar against “cruel ‘or’ unusual punishment” offers more protection than the Eighth Amendment (emphasis added)).

196. Frase, *supra* note 2, at 65 (finding Delaware, Kentucky, Pennsylvania, South Dakota, and Washington have a “cruel” penalties clause in their state constitutions).

197. *Id.* (finding 22 states prohibit cruel and unusual penalties).

### CONCLUSION

Perhaps the U.S. Supreme Court is right to refuse to raise the federal constitutional bar controlling disproportionate sentences, as doing so would immediately impact every state, opening the door to massive prisoner litigation. But in the absence of meaningful federal guidance, the states have an opportunity to implement the review on their own, and on their own terms, through their legislatures, voter initiatives, or their courts. As laboratories of democracy, the states can take advantage of the space the Supreme Court has left them, giving defendants with excessive, aberrational sentences some meaningful form of review. But the question remains whether the states will actually do so. This Note provides a beginning framework for how the states might go about implementing proportionality review and what they can learn from the few states that already have a well-developed proportionality review.