

THE CONSTITUTIONAL RIGHT AGAINST EXCESSIVE PUNISHMENT

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INTRODUCTION

THE current cruel and unusual punishment¹ jurisprudence consists of roughly four categories of cases. The first category prohibits certain types of punishments, such as burning at the stake, crucifixion, drawing and quartering, and torture.² In the second are constitutionally permitted types of punishments that are nevertheless unconstitutional because they are disproportionate to the crimes for which they are imposed.³ The third category includes so-called “super due process for death”⁴ or “death is different”⁵ cases,

¹ The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII.

² See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 170 (1976) (plurality opinion); *In re Kemmler*, 136 U.S. 436, 446–47 (1890); *Wilkerson v. Utah*, 99 U.S. 130, 135–36 (1878). Some have argued that electrocution and lethal injection should be added as prohibited types of punishment. See generally Deborah W. Denno, *When Legislatures Delegate Death: The Troubling Paradox Behind State Uses of Electrocution and Lethal Injection and What It Says About Us*, 63 *Ohio St. L.J.* 63 (2002).

³ See, e.g., *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion) (holding that a death sentence for rape was grossly disproportionate and forbidden by the Eighth Amendment). A subcategory of this includes constitutional restrictions on what may be criminalized. See, e.g., *Robinson v. California*, 370 U.S. 660 (1962) (holding it unconstitutional to criminalize drug addiction).

⁴ See Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 *S. Cal. L. Rev.* 1143 (1980).

⁵ See, e.g., Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 *Harv. L. Rev.* 355, 370–71 (1995) (explaining the influence of the “death is different” argument in the Court’s capital punishment jurisprudence).

which allow sentences of death only after procedures mandated and approved over time by the Supreme Court.⁶ Finally, in the fourth category are punishments that satisfy the requirements of type, proportionality, and procedure, but are nevertheless unconstitutional because of how they are administered. Prison conditions so inhumane that they cross the constitutional line to become “cruel and unusual” fall into this group.⁷

This Article will explore the second category of cases, which has recently become increasingly prominent in a series of contentious Supreme Court decisions. These cases include *Ewing v. California*⁸ and *Lockyer v. Andrade*⁹ on California’s “three-strikes” law; *Atkins v. Virginia*,¹⁰ holding the execution of mentally retarded criminals to be unconstitutionally excessive; and *United States v. Bajakajian*,¹¹ the first Supreme Court case to invalidate a fine under the Excessive Fines Clause.¹² Most recently, the Court held in *Roper v. Simmons*¹³ that the Constitution does not permit execution of those convicted of crimes that were committed before the offenders turned eighteen, thereby overruling *Stanford v. Kentucky*,¹⁴ a sixteen-year-old precedent holding the opposite.¹⁵

The question asked in all these cases is: When are otherwise constitutionally permissible modes of punishment, such as death, imprisonment, or fines, so “excessive” or “disproportionate” in relation to the crime for which they are imposed that they become unconstitutional?¹⁶ Despite the urgings of prominent commenta-

⁶ See, e.g., *Gregg*, 428 U.S. at 206–07; *Woodson v. North Carolina*, 428 U.S. 280, 303–04 (1976) (plurality opinion); see also Steiker & Steiker, *supra* note 5, at 371–96 (giving a comprehensive summary and discussion of the Court’s capital punishment jurisprudence generally).

⁷ See, e.g., *Estelle v. Gamble*, 429 U.S. 97 (1976).

⁸ 538 U.S. 11 (2003).

⁹ 538 U.S. 63 (2003).

¹⁰ 536 U.S. 304 (2002).

¹¹ 524 U.S. 321 (1998).

¹² For reasons explained below, see *infra* note 72, this Article includes the Excessive Fines Clause jurisprudence in the second category of the cruel and unusual punishment cases.

¹³ No. 03-633, slip op. (U.S. Mar. 1, 2005).

¹⁴ 492 U.S. 361 (1989).

¹⁵ *Roper*, No. 03-633, slip op. at 20.

¹⁶ For the purposes of this Article, I will assume that the Eighth Amendment contains a proportionality limitation. This is not an uncontroversial assumption. Justices Scalia and Thomas have each questioned the existence of a proportionality guarantee.

tors¹⁷ and the Court's own repeated, albeit uncertain, gestures in the direction of a more robust proportionality regulation by the ju-

Ewing v. California, 538 U.S. 11, 31 (2003) (Scalia, J., concurring in the judgment); id. at 32 (Thomas, J., concurring in the judgment); see also Nancy J. King & Susan R. Klein, *Essential Elements*, 54 Vand. L. Rev. 1467, 1517 n.183 ("Justices and scholars continue to disagree as to whether the Framers, when modeling the Cruel and Unusual Punishments Clause upon the English Declaration of Rights of 1689, had proportionality in mind."). It is beyond the scope of this Article to attempt to resolve this long-running dispute, to which I have little new to add; so I note only the following. First, Justices Scalia and Thomas are the only Justices on the current Court who hold this view, and for a reason: their view is difficult to square with the Court's jurisprudence since *Weems v. United States*, 217 U.S. 349 (1910), in both capital and non-capital contexts. See *infra* Parts I, III. Second, the sparse text of the Cruel and Unusual Punishments Clause does not settle this issue one way or the other. Disproportionate punishments can be thought to be both cruel and unusual. The objection that the Framers knew how to use the word "excessive" (as indicated by the Excessive Fines Clause) and thus must have meant something different by "cruel and unusual" is too quick. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 978 n.9 (1991) (Scalia, J., concurring in the judgment). It is equally logical to read the ban on "cruel and unusual punishments" to encompass a ban on certain types of punishments as well as excessive punishments; there is no absurdity in stating that it would be cruel and unusual for a person to be imprisoned for twenty years for jaywalking. In other words, the proposition that "cruel and unusual" and "excessive" are different does not imply that one cannot be a subset of the other. Finally, the "original understanding" may give us some guidance, but as the taxonomy of the Eighth Amendment jurisprudence given above shows, we have moved far beyond the point at which we believe that the Eighth Amendment bans only concrete historical practices that were considered "cruel and unusual" at the time of the Amendment's ratification. It is far more plausible, and far less radical, to read the Eighth Amendment as "draw[ing] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958); see also *Roper*, No. 03-633, slip op. at 1 (Stevens, J., concurring) ("Perhaps even more important than our specific holding today is our reaffirmation of the basic principle that informs the Court's interpretation of the Eighth Amendment. If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the execution of 7-year-old children today. The evolving standards of decency that have driven our construction of this critically important part of the Bill of Rights foreclose any such reading of the Amendment." (citation omitted)); id. at 3 (O'Connor, J., dissenting) ("It is by now *beyond serious dispute* that the Eighth Amendment's prohibition of 'cruel and unusual punishments' is not a static command. Its mandate would be little more than a dead letter today if it barred only those sanctions—like the execution of children under the age of seven—that civilized society had already repudiated in 1791." (emphasis added)); *Atkins v. Virginia*, 536 U.S. 304, 311 (2002); *Stanford v. Kentucky*, 492 U.S. 361, 369–70 (1989) (Scalia, J.) (conceding that "this Court has not confined the prohibition embodied in the Eighth Amendment to 'barbarous' methods that were generally outlawed in the 18th century, but instead has interpreted the Amendment in a flexible and dynamic manner" (quotation and citation omitted)).

¹⁷ See, e.g., Nancy J. King, *Portioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. Pa. L. Rev. 101, 101 (1995); William J. Stuntz,

diciary, the answer that the Court has given us on this question over the past few decades is, to put it charitably, highly unsatisfactory and disappointing; the body of law is messy and complex,¹⁸ yet largely meaningless as a constraint, except perhaps in a few instances in the capital context.¹⁹

At the core of this meaningless muddle lies a conceptual confusion over the meaning of proportionality. *Ewing*, decided in 2003 and holding that a prison term of twenty-five years to life under California's three-strikes law was not excessive for shoplifting by a repeat offender,²⁰ strikingly shows this confusion. The *Ewing* plurality, consisting of Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy, reasoned that a "sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation" and that "[s]electing the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts."²¹ The plurality then noted that "[r]ecidivism has long been recognized as a legitimate basis for increased punishment" and that the state of California has an interest in incapacitating repeat offenders and deterring crimes.²² Although, the plurality acknowl-

Substance, Process, and the Civil-Criminal Line, 7 J. Contemp. Legal Issues 1, 30–31 (1996) [hereinafter Stuntz, Civil-Criminal Line]; William J. Stuntz, The Uneasy Relationship between Criminal Procedure and Criminal Justice, 107 Yale L.J. 1, 66–71 (1997) [hereinafter Stuntz, Uneasy Relationship].

¹⁸ See *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003) ("[O]ur precedents in this area have not been a model of clarity. Indeed, in determining whether a particular sentence for a term of years can violate the Eighth Amendment, we have not established a clear or consistent path for courts to follow." (citations omitted)).

¹⁹ This is why many commentators had all but written off the principle of proportionality under the Eighth Amendment as a source of meaningful constraint (at least in the non-capital context) even before *Ewing* was decided. See, e.g., Louis D. Bilonis, Process, the Constitution, and Substantive Criminal Law, 96 Mich. L. Rev. 1269, 1319 (1998); Barry L. Johnson, Purging the Cruel and Unusual: The Autonomous Excessive Fines Clause and Desert-Based Constitutional Limits on Forfeiture After *United States v. Bajakajian*, 2000 U. Ill. L. Rev. 461, 503; King & Klein, *supra* note 16, at 1522.

²⁰ *Ewing*, 538 U.S. at 28–31 (plurality opinion). *Ewing*'s companion case, *Lockyer v. Andrade*, dealt with a similar fact pattern but was decided under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1) (2000), and the standard of review that the Court applied was whether the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Andrade*, 538 U.S. at 71.

²¹ *Ewing*, 538 U.S. at 25 (plurality opinion).

²² *Id.* at 25–27.

edged, it was certainly the case that the wisdom of California's law was a matter of controversy, this was of no moment, as the Court does not "sit as a 'superlegislature' to second-guess these policy choices."²³ "It is enough," the plurality announced, that the state "has a reasonable basis for believing that [the punishment it imposes] 'advance[s] the goals of [its] criminal justice system in any substantial way.'"²⁴ In upholding the sentence at issue, the plurality concluded that it "reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated."²⁵

The *Ewing* Court's reasoning rests on two ideas. The first is the proposition that a sentence is not unconstitutionally excessive as long as it can be justified under any one of the traditional justifications for punishment, such as incapacitation, deterrence, retribution, and rehabilitation. I call this first idea the "disjunctive theory" of the constitutionality of punishment. The second idea is the view that legislatures are entitled to deference on the question of whether a given sentence can be justified under any of the traditional justifications of punishment. The former is a substantive theory of how much punishment is too much, while the latter is a statement of the appropriate standard of review in applying the substantive theory, and a combination of the two produces the *Ewing* plurality's position.

The principle that courts should defer to legislatures in their choices of punishments and the justifications for them is familiar and widely accepted.²⁶ The disjunctive theory—the idea that no punishment is excessive as long as it can be justified as a means to advance the incapacitation, deterrence, retribution, *or* rehabilita-

²³ Id. at 28.

²⁴ Id. (quoting *Solem v. Helm*, 463 U.S. 277, 297 n.22 (1983)).

²⁵ Id. at 30.

²⁶ In addition, it is no surprise to find it in an opinion by Justice O'Connor, as her general principle of deference to state legislatures has been much noted. See, e.g., Erwin Chemerinsky, Justice O'Connor and Federalism, 32 *McGeorge L. Rev.* 877, 877 (2001); H. Jefferson Powell, The Oldest Question of Constitutional Law, 79 *Va. L. Rev.* 633, 639–52 (1993); Edward L. Rubin & Malcolm Feeley, Federalism: Some Notes on a National Neurosis, 41 *UCLA L. Rev.* 903, 904–07 (1994); Richard A. Cordray & James T. Vradelis, Comment, The Emerging Jurisprudence of Justice O'Connor, 52 *U. Chi. L. Rev.* 389, 423–36 (1985).

tion rationale of punishment—is, by contrast, a deeply flawed theory of the proportionality guarantee under the Eighth Amendment.

The disjunctive theory is wrongheaded because the Eighth Amendment ban on excessive punishments should be understood as a side constraint.²⁷ The institution of punishment is desirable for various and well-rehearsed reasons, including retribution, deterrence, incapacitation, and rehabilitation. The purpose of the Eighth Amendment ban on “cruel and unusual punishments,” however, is to place constraints on the ways in which we pursue these ends. Therefore, a reading of the proportionality limitation in the Eighth Amendment that boils down to the position that any punishment is constitutionally permissible as long as it satisfies an accepted purpose is at odds with the general logic of the Eighth Amendment.

The Court can respond to this objection either by taking the Scalia-Thomas route and denying the existence of the proportionality limitation or by construing the Eighth Amendment as containing a proportionality constraint that does not look like any other Eighth Amendment constraint. Most justices appear unwilling to take the first route. The second route is misguided, as the Eighth Amendment ban on excessive punishment should be understood as a constitutional norm adapted from the retributivist principle that the harshness of punishment should not exceed the gravity of the crime—one should not be punished more harshly than one deserves. The disjunctive theory is flawed, then, because it allows punishments that would not be permitted under the retributivist principle.

This Article, by combining the two readings of the Eighth Amendment—as a retributivist provision and as a side constraint—will identify “retributivism as a side constraint” as the principle behind the Eighth Amendment ban on excessive punishment. Re-

²⁷ The phrase “side constraint” is, of course, not mine. See Robert Nozick, *Anarchy, State, and Utopia* 29 (1974). The idea is best understood in terms of the distinction between goals and constraints. Under the goal-constraint framework, a goal defines the desired end state toward which an activity is undertaken, while a constraint sets down the ground rules to follow in pursuit of the goal. *Id.* at 28–35. For instance, if a goal of the U.S. government is to minimize the number of terrorist acts carried out within the country, it may be pursued under the constraint “no torturing.” If a goal of U.S. foreign policy is to promote democracy in other parts of the world, it may be pursued under the constraint “no invasion of other countries without provocation.”

tributivism as a side constraint is compatible with various kinds of punishment regimes and leaves decisionmakers free to utilize, say, the deterrence theory to devise appropriate punishment, provided it does not violate the constraints determined by retributivism.²⁸ That is, as a constitutional principle, retributivism should place restrictions on the way the government pursues various goals of punishment, but should not specify what those goals are or dictate the levels of punishment as long as the government acts within the specified boundaries.²⁹ At the same time, retributivism as a side constraint is incompatible with the disjunctive theory not only because the structure of a side constraint is contrary to the logic of the disjunctive theory but also because retributivism as a side constraint precludes sentences harsher than those justified under retributivism even if they can be justified under a different rationale, such as deterrence or incapacitation.

Part I of this Article will provide a brief summary of the Supreme Court case law on excessive punishment under the Eighth Amendment. The Court's proportionality jurisprudence has been both ineffectual and incoherent, and Part I will describe how the Court's confusion over the meaning of "proportionality" has been

²⁸ I am not the first to put the two ideas "retributivism" and "side constraint" together in one phrase; similar formulations have been suggested by others. See, e.g., Mitchell N. Berman, *Justification and Excuse, Law and Morality*, 53 *Duke L.J.* 1, 26 n.52 (2003); R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 *Crime & Just.* 1, 7 (1996); Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 *J. Crim. L. & Criminology* 1075, 1091 (1997).

²⁹ The idea that retributivism should be used to limit punishment is most closely associated with Norval Morris's "limiting retributivism." See Norval Morris, *Madness and the Criminal Law 196-202* (1982). (For an explanation of how my proposal differs from Professor Morris's influential work, see *infra* note 34.) However, there is a long history behind this idea, as similar ideas have been proposed by different philosophers with different labels, such as "weak," "negative," and "mixed," each with its own nuances in meaning and connotations. See, e.g., Larry Alexander, *The Philosophy of Criminal Law*, in *The Oxford Handbook of Jurisprudence & Philosophy of Law* 815, 816 (Jules Coleman & Scott Shapiro eds., 2002) (describing "weak" retributivism); Nicola Lacey, *State Punishment: Political Principles and Community Values* 46-53 (1988) (describing "mixed theories"); J.L. Mackie, *Retributivism: A Test Case for Ethical Objectivity*, in *Philosophy of Law* 780, 781-83 (Joel Feinberg & Jules Coleman eds., 6th ed. 2000) ("negative"). The phrase "mixed theories" has come to refer to theories of H.L.A. Hart and John Rawls in punishment theory. See generally H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968); John Rawls, *Two Concepts of Rules*, 64 *Phil. Rev.* 3 (1955), *reprinted in* *Collected Papers* 20 (Samuel Freeman ed., 1999).

the source of the problem by discussing four different ways in which the Court has understood the term.

The remainder of the Article will propose retributivism as a side constraint as the principle behind the right against excessive punishment. Part II will describe features of retributivism as a side constraint, and will explain why the Eighth Amendment should be read as a side constraint and specify what “retributivism” in this context means. Part II will then examine in detail what it means to “deserve” a punishment, emphasizing the distinction between comparative and noncomparative desert.³⁰ The noncomparative element focuses on whether one is treated in an appropriate way without regard to how others are treated. Comparative desert, by contrast, involves how one is being treated in comparison to others of varying deservingness. Part II will then argue that, while both aspects of retributivism are essential to understanding what it means for one to “deserve” a punishment, a focus on the comparative aspect of retributivism as a side constraint has several advantages for the purposes of judicial enforcement.

Part III will further defend retributivism as a side constraint by applying the framework to interpret, rationalize, and evaluate the current constitutional practice. Part III will also trace the gradual emergence of the disjunctive theory in the Supreme Court jurisprudence. Part IV will then apply the theoretical framework developed in Parts II and III to criticize the disjunctive theory.

Of course, there has been no shortage of academic commentary on the Eighth Amendment, which is no surprise given the controversy surrounding capital punishment and the breadth of Eighth Amendment jurisprudence generally. In addition, philosophers, penologists, and economists have built a considerable literature on how to determine appropriate amounts of punishment.³¹ Finally, having been virtually neglected by contemporary theorists, the

³⁰ This is a familiar distinction in sentencing theory. See, e.g., Andrew von Hirsch, *Censure and Sanctions* 18 (1993) [hereinafter von Hirsch, *Censure and Sanctions*]; Andrew von Hirsch, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* 40–46 (1985) (explaining the distinction between “cardinal” and “ordinal” proportionality) [hereinafter von Hirsch, *Past or Future Crimes*].

³¹ See generally *A Reader on Punishment* (R.A. Duff & David Garland eds., 1994); *Principled Sentencing: Readings on Theory & Policy* (Andrew von Hirsch & Andrew Ashworth eds., 2d ed. 1998); *Punishment: A Philosophy & Public Affairs Reader* (A. John Simmons et al. eds., 1995).

concept of desert and its relationship to justice have received renewed attention from political philosophers in the past several years.³²

Such a body of thinking on this issue, however, has not translated into a Supreme Court jurisprudence that is coherent and effective, and much of what the Court has to say on this is confusing and contradictory. While many characterize the idea of “limiting retributivism” as a philosophical consensus among both sentencing theorists and practitioners,³³ there is surprisingly little in the literature that brings such a consensus to bear on the issue of judicial oversight of proportionality in sentencing under the Eighth Amendment, which comes heavily loaded with numerous background assumptions and problems specific to the American constitutional tradition, such as its rights discourse, norms of federalism and separation of powers, concerns about institutional competence, and its frequently uneasy and awkward relationship to international norms.³⁴ Thus, few have examined in detail the question of

³² See Serena Olsaretti, Introduction: Debating Desert and Justice, *in* *Desert and Justice* 1, 1 (Serena Olsaretti ed., 2003); Owen McLeod & Louis Pojman, Preface *to* *What Do We Deserve?: A Reader on Justice and Desert* ix (Louis P. Pojman & Owen McLeod eds., 1999). One very important exception is Joel Feinberg’s classic article analyzing the concept of desert. Joel Feinberg, Justice and Personal Desert, *in* *Doing and Deserving: Essays in the Theory of Responsibility* 55 (1970) [hereinafter Feinberg, Justice and Personal Desert]. There are a few other significant articles as well. See, e.g., George Sher, Desert (1987); John Kleinig, The Concept of Desert, 8 *Am. Phil. Q.* 71 (1971). Aside from these, the only significant debate surrounding the concept of desert in philosophy in the recent past has been about its absence, especially in John Rawls’s *A Theory of Justice*, as well as in theories of Robert Nozick and Ronald Dworkin. See Alasdair MacIntyre, After Virtue 249–51 (2d ed. 1984); Nozick, *supra* note 27, at 213–31; John Rawls, *A Theory of Justice* 310–15 (1971); Michael Sandel, Liberalism and the Limits of Justice 66–103 (1982); see also Samuel Scheffler, Responsibility, Reactive Attitudes, and Liberalism in Philosophy and Politics, *in* *Boundaries and Allegiances: Problems of Justice and Responsibility in Liberal Thought* 12, 14–21 (2001).

³³ Kate Stith & Jose A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 22 (1998) (“One widely shared understanding is that even if deterrence of crime is the general aim of a system of criminal prohibitions, ‘just desert’ (or retribution) should be a limit on the distribution of punishment.”). And the phrase has also been used in the Eighth Amendment context. See Steven Grossman, Proportionality in Non-Capital Sentencing: The Supreme Court’s Tortured Approach to Cruel and Unusual Punishment, 84 *Ky. L.J.* 107, 168–71 (1995).

³⁴ That this Article is about the Eighth Amendment and its enforcement by the judiciary partly explains why “retributivism as a side constraint” as defended here differs from Norval Morris’s “limiting retributivism.” See Morris, *supra* note 29, at 161. The

how to conceptualize the constitutional limitation on amounts of punishment and, in the process, brought together punishment theory, constitutional theory, and philosophical understandings of the concept of desert.³⁵ This Article will attempt to begin to do just that.

Finally, although Part III will describe, at some length, how retributivism as a side constraint has been implemented by the Court, there will remain a number of unanswered questions at the levels of both theory and implementation. It is beyond the scope of this Article to address all such complications, elaborations, and qualifications. The purpose of this Article is instead to seek conceptual clarity and prepare the ground for the development of a more coherent and potent jurisprudence of proportionality.

I. PROPORTIONALITY IN SENTENCING IN THE SUPREME COURT

Weems v. United States,³⁶ decided in 1910, was the first case to invalidate a sentence on proportionality grounds. Paul Weems, a public official in the Philippines, was convicted of falsification of a public document.³⁷ Upon conviction, Weems was sentenced to a fine, fifteen years of “hard and painful labor” while “carry[ing] a

same may be said about the difference between the purpose of this Article and that of Andrew von Hirsch’s work. See von Hirsch, *Past or Future Crimes*, supra note 30, at 39. My proposal differs from Professor Morris’s in substance. As discussed in Part II, I stress the comparative element of desert, while Professor Morris rejects comparative desert as a limiting principle and apparently sees desert as a noncomparative idea, which is at odds with the central claim of this Article that comparative desert is an essential element of desert. See Morris, supra note 29, at 187–96.

³⁵ I should note two excellent discussions from the 1970s. See Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. Pa. L. Rev. 989 (1978); Malcolm E. Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 Stan. L. Rev. 838 (1972). In addition, insightful commentaries on recent cases dealing with the topic can be found in Erwin Chemerinsky, *The Constitution and Punishment*, 56 Stan. L. Rev. 1049 (2004), and Pamela S. Karlan, “Pricking the Lines”: *The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 Minn. L. Rev. 880 (2004). Finally, a recent article by Professor Richard Frase proposes an approach that is very different from the one I take in this Article. Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 Minn. L. Rev. 571 (2005).

³⁶ 217 U.S. 349 (1910).

³⁷ *Id.* at 360.

chain at the ankle, hanging from the wrists,” and “certain accessory penalties,” such as “civil interdiction” and “perpetual absolute disqualification.”³⁸ The Supreme Court, asserting that “it is a precept of justice that punishment for crime should be graduated and proportioned to offense,”³⁹ struck down the sentence for violating the Eighth Amendment’s prohibition on cruel and unusual punishment.⁴⁰

Between 1910, when *Weems* was decided, and 1972, when the Court decided *Furman v. Georgia*,⁴¹ the *Weems* principle of proportionality—that the Eighth Amendment barred disproportionate sentences—was rarely cited by the Court.⁴² Once the Court held in *Gregg v. Georgia* in 1976 that the death penalty was a constitutionally permitted form of punishment,⁴³ however, the question of in which situations a death sentence is nevertheless excessive, along with the question of what procedures must be followed when imposing the penalty, came to define the course of the Court’s death penalty jurisprudence, starting with *Coker v. Georgia* in 1977.⁴⁴ Later, in *Rummel v. Estelle*⁴⁵ in 1980 and *Solem v. Helm*⁴⁶ in 1983, the Court considered the proportionality question in the imprisonment context, and extended the principle to the Excessive Fines Clause in *United States v. Bajakajian*⁴⁷ in 1998. The following Sections will review these developments.

A. Proportionality in Sentencing After *Weems*: Capital Cases

The capital track of the Supreme Court’s proportionality jurisprudence has been marked by a series of contentious and fractured decisions on the constitutional status of the death penalty. The

³⁸ Id. at 364.

³⁹ Id. at 367.

⁴⁰ Id. at 381.

⁴¹ 408 U.S. 238 (1972).

⁴² There are just a handful of exceptions. See, e.g., *Powell v. Texas*, 392 U.S. 514, 532 (1968); *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958). Of course, there was very little activity on Eighth Amendment law generally during that time, presumably in part because it was not applied to the states until *Robinson v. California* was decided in 1962. 370 U.S. 660 (1962).

⁴³ 428 U.S. 153, 187 (1976) (plurality opinion).

⁴⁴ 433 U.S. 584 (1977).

⁴⁵ 445 U.S. 263 (1980).

⁴⁶ 463 U.S. 277 (1983).

⁴⁷ 524 U.S. 321 (1998).

Court still managed enough votes to rule that death was disproportionately harsh for the crime of rape (*Coker v. Georgia*⁴⁸), for someone who does not kill or intend to kill but is convicted for aiding and abetting under a felony murder statute (*Enmund v. Florida*⁴⁹), for a crime committed when the criminal was under the age of eighteen (*Roper v. Simmons*⁵⁰), and for mentally retarded criminals (*Atkins v. Virginia*⁵¹).

Despite the twists and turns in the Court's jurisprudence in this area, it appears that we can make several generalizations about how the law treats proportionality challenges in capital cases. First, the Court reviews attitudes of legislatures and behaviors of juries to identify an objective national consensus on the sentencing practice in question.⁵² Of some relevance in such a consensus-seeking inquiry are opinions of other countries and of professional societies.⁵³ Second, the Court engages in an independent proportionality analysis to determine whether the Court agrees or disagrees with the national consensus.⁵⁴

The proportionality analysis, in turn, is usually a two-step process. The first step has two axes: harm and culpability. Along the culpability axis, the Court determines whether the criminal defendant is less culpable than, or as culpable as, a paradigmatic first-degree murderer. Age at the time of the crime,⁵⁵ mental retardation,⁵⁶ or lack of intent to kill⁵⁷ could all indicate lower culpability,

⁴⁸ 433 U.S. 584 (1977).

⁴⁹ 458 U.S. 782 (1982). The Court later qualified this in *Tison v. Arizona*, which allowed the death penalty where the defendant showed "reckless disregard for human life." 481 U.S. 137, 157–58 (1987).

⁵⁰ No. 03-633, slip op. (U.S. Mar. 1, 2005).

⁵¹ 536 U.S. 304, 321 (2002).

⁵² *Roper*, No. 03-633, slip op. at 10–13; *Atkins*, 536 U.S. at 313–17; *Stanford*, 492 U.S. at 380 (plurality opinion); *Thompson*, 487 U.S. at 823–33 (plurality opinion); *Tison*, 481 U.S. at 152–55; *Enmund*, 458 U.S. at 789–96; *Coker*, 433 U.S. at 593–97 (plurality opinion).

⁵³ *Roper*, No. 03-633, slip op. at 21–24; *Atkins*, 536 U.S. at 316 n.21; *Thompson*, 487 U.S. at 830–31 (plurality opinion); *Enmund*, 458 U.S. at 796 n.22; *Coker*, 433 U.S. at 596 n.10 (plurality opinion).

⁵⁴ *Roper*, No. 03-633, slip op. at 14–21; *Atkins*, 536 U.S. at 317–20; *Thompson*, 487 U.S. at 833 (plurality opinion); *Tison*, 481 U.S. at 155; *Enmund*, 458 U.S. at 797; *Coker*, 433 U.S. at 597–98 (plurality opinion).

⁵⁵ *Roper*, No. 03-633, slip op. at 15–17.

⁵⁶ *Atkins*, 536 U.S. at 318.

⁵⁷ *Enmund*, 458 U.S. at 798.

while “reckless indifference to the value of human life,”⁵⁸ for example, could indicate culpability equal to that of a first-degree murderer. Along the harm axis, the Court examines whether the criminal defendant has committed a crime less serious than murder, such as rape⁵⁹ or robbery.⁶⁰

The second step of the proportionality analysis considers whether executing the criminal defendant would advance either the retribution or deterrence purpose of punishment; otherwise it is “nothing more than the purposeless and needless imposition of pain and suffering.”⁶¹ The retribution prong of this inquiry is frequently redundant, given that the Court has not given us any reason to think that its assessment of relative harm and culpability of the class of criminals will differ in any way from its assessment of whether these people will get their “just deserts” by being punished to death.⁶² The deterrence question, on the other hand, appears to be driven by the premises that “capital punishment can serve as a deterrent only when murder is the result of premedita-

⁵⁸ *Tison*, 481 U.S. at 157–58.

⁵⁹ *Coker*, 433 U.S. at 598 (plurality opinion).

⁶⁰ *Enmund*, 458 U.S. at 797.

⁶¹ *Atkins*, 536 U.S. at 319 (citation and internal quotation marks omitted); *Enmund*, 458 U.S. at 798 (citation and internal quotation marks omitted); see also *Roper*, No. 03-633, slip op. at 17.

⁶² Compare *Roper*, No. 03-633, slip op. at 16 (“The susceptibility of juveniles to immature and irresponsible behavior means ‘their irresponsible conduct is not as morally reprehensible as that of an adult.’” (citation omitted)), with *id.* at 17 (“Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”); compare *Atkins*, 536 U.S. at 318 (“[Mentally retarded persons’] deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.”), with *id.* at 319 (“If the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution.”); compare *Thompson*, 487 U.S. at 835 (plurality opinion) (“[L]ess culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult.”), with *id.* at 836–37 (“Given the lesser culpability of the juvenile offender, the teenager’s capacity for growth, and society’s fiduciary obligations to its children, [the retribution rationale for execution] is simply inapplicable to the execution of a 15-year-old offender.”); compare *Enmund*, 458 U.S. at 798 (“Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed . . .”), with *id.* at 800 (“As for retribution as a justification for executing Enmund, we think this very much depends on the degree of Enmund’s culpability . . .”).

tion and deliberation”⁶³ and that exempting a group of criminals from the possibility of capital punishment will not reduce the deterrence value of capital punishment for other groups.⁶⁴

The relationship between the harm-culpability test and the purposes-of-punishment test is not entirely clear. In *Coker*, Justice White emphasized that “[a] punishment might fail the test on either ground.”⁶⁵ *Coker*, however, was the last case in which a sentence was declared unconstitutional for failing the harm-culpability test only,⁶⁶ and the subsequent cases vacating death sentences always found that the sentence in question failed both tests.⁶⁷ If a punishment fails the harm-culpability test and satisfies the purposes-of-punishment test, would the punishment be considered unconstitutional? Under *Coker*, the answer is yes, but the issue is no longer so clear-cut, as the Court has proceeded since *Coker* as if

⁶³ *Atkins*, 536 U.S. at 319 (quoting *Enmund*, 458 U.S. at 799); see also *Roper*, No. 03-633, slip op. at 18 (“The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent.” (quoting *Thompson*, 487 U.S. at 837 (plurality opinion))).

⁶⁴ *Atkins*, 536 U.S. at 320; *Thompson*, 487 U.S. at 837. Three things should be pointed out in this regard. First, it is not clear why the Court is so confident when answering the question of when capital punishment deters and when it does not, an inquiry that has bedeviled penologists for years. See, e.g., William C. Bailey & Ruth D. Peterson, Murder, Capital Punishment, and Deterrence: A Review of the Literature, in *The Death Penalty in America: Current Controversies* 135, 152–55 (Hugo Adam Bedau ed., 1997); Ruth D. Peterson & William C. Bailey, Is Capital Punishment an Effective Deterrent for Murder? An Examination of Social Science Research, in *America’s Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* 157 (James R. Acker et al. eds., 1998); see also *Roper*, No. 03-633, slip op. at 15 (Scalia, J., dissenting) (“The Court unsurprisingly finds no support for this astounding proposition [that juveniles are less susceptible to deterrence].”). Second, as a theoretical matter, the Court’s assumptions are hardly obvious. See Hart, *supra* note 29, at 18–20, 40–43 (criticizing similar arguments made by Bentham). Finally, the argument that prohibiting the death penalty for a given group will not have a deterrent effect on other groups is mysteriously absent in *Roper*, although it played a role in *Thompson*. 487 U.S. at 837 (“[E]xcluding younger persons from the class that is eligible for the death penalty will not diminish the deterrent value of capital punishment for the vast majority of potential offenders.”).

⁶⁵ See *Coker*, 433 U.S. at 592 (plurality opinion).

⁶⁶ *Id.* at 592 n.4 (“Because the death sentence is a disproportionate punishment for rape, it is cruel and unusual punishment within the meaning of the Eighth Amendment *even though it may measurably serve the legitimate ends of punishment . . .*” (emphasis added)).

⁶⁷ See *Roper*, No. 03-633, slip op. at 14–21; *Atkins*, 536 U.S. at 317–21; *Thompson*, 487 U.S. at 833–38 (plurality opinion); *Enmund*, 458 U.S. at 797–801.

the tests always go hand-in-hand. At the same time, it is hard to imagine a combination in the other direction: a punishment failing the purposes-of-punishment test and passing the harm-culpability test. As remarked above, the retribution prong of the purposes-of-punishment test and the harm-culpability test frequently seem identical. If that is indeed the case, then every punishment that fails the purposes-of-punishment test necessarily fails the harm-culpability test, and it is questionable whether we need both tests.⁶⁸

B. Proportionality in Sentencing After Weems: Noncapital Cases

Considering that *Weems*, a noncapital case, has been relied upon by the Supreme Court as a seminal case standing for the proposition that the Eighth Amendment prohibits excessive punishments, it is not surprising to see the same principle applied in other noncapital cases. Like the proportionality cases in capital sentencing, noncapital sentencing cases have been characterized by divided opinions. The key cases, including *Rummel v. Estelle*,⁶⁹ *Solem v. Helm*,⁷⁰ *Harmelin v. Michigan*,⁷¹ *United States v. Bajakajian*,⁷² and

⁶⁸ One theoretical caveat is in order, however. A punishment may fail the purposes-of-punishment test because it serves no purpose of punishment, but may pass the harm-culpability test because the punishment is less than one deserves. In such a case, the punishment would be constitutionally permitted under the harm-culpability test but still not allowed because it serves no purpose of punishment. In other words, one may argue that we need to retain the purposes-of-punishment test separate from the harm-culpability test to preserve the possibility of regulating sentences that are too lenient from the just deserts perspective yet too harsh from the utilitarian perspective. It is hard to imagine, however, a situation in which a court would have to face an Eighth Amendment challenge against a punishment that is considered too lenient and less than deserved.

⁶⁹ 445 U.S. 263 (1980).

⁷⁰ 463 U.S. 277 (1983).

⁷¹ 501 U.S. 957 (1991).

⁷² 524 U.S. 321 (1998). Although *Bajakajian* arose under the Excessive Fines Clause, I lump this case law together with the imprisonment cases, as the *Bajakajian* Court chiefly relied on *Solem* for its decision, and a distinct excessive fines jurisprudence has yet to develop. See *id.* at 336. One difference with other cases, however, is that because of the text of the clause, the question of whether there is a proportionality guarantee in this context has not been controversial. Justices Scalia and Thomas have each questioned the existence of a proportionality guarantee under the Cruel and Unusual Punishments Clause. *Ewing v. California*, 538 U.S. 11, 31–32 (2003) (Scalia, J., concurring in the judgment); *id.* at 32 (Thomas, J., concurring in the judgment). But they do not object to the existence of a proportionality standard in the excessive

Ewing v. California,⁷³ sit uneasily with each other, and there is still much uncertainty about how the case law will eventually settle, especially given the rarity of majority opinions in this area.

In *Solem*, striking down a sentence of life imprisonment without the possibility of parole imposed on a recidivist for passing a “no-account” check in the amount of \$100, the Court held “as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted.”⁷⁴ The Court specified the proportionality standard by outlining a three-step process. First, the Court should compare “the gravity of the offense and the harshness of the penalty,” the gravity of the offense being determined “in light of the harm caused or threatened to the victim or society, and the culpability of the offender.”⁷⁵ Second, the Court stated that “it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction” to see whether “more serious crimes are subject to the same penalty, or to less serious penalties.”⁷⁶ Third, the Court suggested that “courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions.”⁷⁷

The *Solem* standard went through a revision in *Harmelin*, which held that a sentence of a mandatory term of life in prison without the possibility of parole for the crime of possessing 672 grams of cocaine was not cruel and unusual.⁷⁸ There was no majority opinion, but the opinion that eventually came to assume the status of law was Justice Kennedy’s concurring opinion, joined by Justices O’Connor and Souter.⁷⁹ In his opinion, Justice Kennedy recognized “the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years.”⁸⁰ The legal framework

finer context. See, e.g., *Bajakajian*, 524 U.S. at 334; *Austin v. United States*, 509 U.S. 602, 628 (1993) (Scalia, J., concurring in part and concurring in the judgment).

⁷³ 538 U.S. at 11.

⁷⁴ *Solem*, 463 U.S. at 281–82, 290, 303.

⁷⁵ *Id.* at 290–91, 292.

⁷⁶ *Id.* at 291.

⁷⁷ *Id.*

⁷⁸ 501 U.S. at 961, 965.

⁷⁹ See, e.g., *Hawkins v. Hargett*, 200 F.3d 1279, 1282 (10th Cir. 1999); *United States v. Bland*, 961 F.2d 123, 128–29 (9th Cir. 1992); *United States v. Pavlico*, 961 F.2d 440, 447 (4th Cir. 1992).

⁸⁰ *Harmelin*, 501 U.S. at 996 (Kennedy, J., concurring in part and concurring in the judgment).

that Justice Kennedy then put forward was essentially the same as the *Solem* standard, except for one key difference. The first step of the *Solem* framework of comparing “the gravity of the offense” to “the harshness of the penalty” remained,⁸¹ but the second and third steps—intra- and inter-jurisdictional comparisons—became discretionary and “appropriate only in the rare case in which a threshold [proportionality analysis] leads to an inference of gross disproportionality.”⁸²

The latest statement from the Supreme Court, *Ewing v. California*, on California’s three-strikes law, appears, at least at first glance, not to have changed the legal standard in any significant way. The *Ewing* Court upheld a sentence of twenty-five years to life imposed under California’s three-strikes law for the crime of stealing golf clubs, the value of which amounted to about \$1,200.⁸³ No position commanded a majority other than the holding that the punishment be upheld, and the plurality opinion announcing the judgment, written by Justice O’Connor, stated that it was following the “proportionality principles . . . distilled in” Justice Kennedy’s *Harmelin* concurrence.⁸⁴

The *Ewing* opinion, however, contains a new standard—the disjunctive theory. The *Ewing* Court wrote that a “sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation”⁸⁵ and that it is “enough” that the state has a “reasonable basis for believing” that its punishment “advance[s] the goals of [its] criminal justice system in any substantial way.”⁸⁶ As noted above, this standard is a combination of two positions: that a punishment that advances any of the legitimate purposes of punishment is not excessive, and that courts should require merely a “reasonable basis for believing” that such a purpose is being advanced. In applying these “proportionality principles,” the *Ewing* Court upheld the sentence because it “reflect[ed] a rational legislative judgment, entitled to deference,”⁸⁷ the rational judgment re-

⁸¹ Id. at 1001–04 (Kennedy, J., concurring in part and concurring in the judgment).

⁸² Id. at 1005 (Kennedy, J., concurring in part and concurring in the judgment).

⁸³ *Ewing*, 538 U.S. at 17–20 (plurality opinion).

⁸⁴ Id. at 23 (plurality opinion).

⁸⁵ Id. at 25 (plurality opinion).

⁸⁶ Id. at 28 (plurality opinion) (internal quotation marks omitted) (alterations in original).

⁸⁷ Id. at 30 (plurality opinion).

flecting the state's choice of means to advance its interests in incapacitating repeat offenders and deterring crimes.⁸⁸ It is unclear, then, whether the *Ewing* Court engaged in a comparison between crime and punishment at all, even though that is what it stated that it was doing, as the real driving force behind the opinion appears to be its belief that the state legislature acted rationally. I argue in Part IV that this last subtle step taken by *Ewing* is in fact a profound change that all but defines the right against excessive punishment out of existence.

C. Sources of Confusion

Proportionality jurisprudence in both capital and noncapital contexts could use substantial clarification. At the same time, cases like *Ewing* show that proportionality has become virtually meaningless as a constitutional principle. In short, the body of law in this area is both messy and meaningless, and the core confusion is over the concept of proportionality.

The Court uses the phrase "proportionality analysis" in at least four different ways. First, it sometimes refers to the harm-culpability test in the capital context. This test compares the harm and culpability of the crime with other serious crimes, such as first-degree murder. The test is thus essentially comparative: the question is not whether rape, for example, is a serious crime, but whether it is *as serious as* the most serious crimes; not whether a mentally retarded killer is culpable, but whether he is *as culpable as* a clear-thinking adult of normal intelligence who kills on purpose.⁸⁹

Second, in the noncapital context, the proportionality analysis is generally stated in noncomparative terms. The formulation given by Justice Kennedy in his *Harmelin* concurrence is typical: "The Eighth Amendment . . . forbids only extreme sentences that are 'grossly disproportionate' to the crime."⁹⁰ This kind of proportionality analysis, in contrast to the capital context, is *noncomparative*; it invokes the image of taking a particular crime and a particular

⁸⁸ *Id.* at 26–27.

⁸⁹ See *supra* text accompanying notes 55–60.

⁹⁰ *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Solem*, 463 U.S. at 288).

punishment and setting them against each other, without regard to how other crimes are punished.⁹¹ There are also comparative analyses in the noncapital context, in the form of the intra- and inter-jurisdictional comparisons in the *Solem* test, but the *Harmelin* Court made such analyses irrelevant without a “threshold” showing of gross disproportionality.⁹²

The third and fourth types of proportionality analysis look very similar. The third type is the purposes-of-punishment test in the capital context, which asks whether the goal of deterrence or retribution is advanced by the punishment.⁹³ The fourth type, found in Justice O’Connor’s *Ewing* opinion, is the disjunctive test, which asks whether the punishment advances one of the traditional goals of punishment, such as retribution, deterrence, incapacitation, and rehabilitation.⁹⁴

Despite appearances, the third and fourth types are in fact quite different. The purposes-of-punishment test in the capital context reflects the idea that punishment should not be imposed unless it advances *some* objective—the death penalty must contribute to either the retributive or deterrent goal, or both, to avoid becoming “nothing more than the purposeless and needless imposition of pain and suffering.”⁹⁵ In other words, the purposes-of-punishment test states a necessary but not sufficient condition for a punishment to survive a constitutional challenge.⁹⁶ The disjunctive theory in the

⁹¹ I argue in Section III.B.1 that this image is incomplete as an account of what the Court actually does in these cases, but this is how the Court usually states the test.

⁹² *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring in part and concurring in the judgment).

⁹³ See *supra* text accompanying notes 61–64.

⁹⁴ See *supra* text accompanying notes 85–88.

⁹⁵ *Atkins*, 536 U.S. at 319 (internal quotation marks and citation omitted); *Thompson*, 487 U.S. at 838 (plurality opinion) (internal quotation marks and citation omitted); *Enmund*, 458 U.S. at 798 (internal quotation marks and citation omitted).

⁹⁶ In *Coker*, Justice White, after repeating the *Gregg* standard that “a punishment is ‘excessive’ and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime,” emphasized that “[a] punishment might fail the test on either ground.” 433 U.S. at 592 (plurality opinion); see also *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (plurality opinion). The *Coker* plurality went on to decide the case under the second test only, noting that “[b]ecause the death sentence is a disproportionate punishment for rape, it is cruel and unusual punishment . . . even though it may measurably serve the legitimate ends of punishment and therefore is not invalid for its failure to do so.”

noncapital context, by contrast, states a sufficient condition for constitutionality: as long as punishment advances *some* objective, it is constitutional under the *Ewing* standard.

These four types of proportionality tests illustrate two areas of conceptual trouble. First, the harm-culpability test in the capital context and the crime-punishment comparison in the noncapital context illustrate two different conceptions of proportionality: comparative and noncomparative. The Court has never explained its preference for one over the other based on context, what they have to do with the idea of “proportionality,” or how they are related to each other.

Second, the Court has never been able to generate a coherent, unitary principle controlling punishment because our institution of punishment pursues several ends, such as retribution, deterrence, incapacitation, and rehabilitation. Though the Court has a constitutional principle to enforce, it appears reluctant to restrict the government’s pursuit of any of these purposes. Since whether punishment is excessive depends on how one conceives of the purpose of punishment, it is an enormous challenge to devise an Eighth Amendment doctrine to limit punishment in a way that does not interfere with *some* of its purposes.⁹⁷ As a result, the Court has ended up muddling the precise role of the purposes-of-punishment test over time,⁹⁸ and has produced theories like the disjunctive test in the process of “applying” the “proportionality principles . . . distilled in” Justice Kennedy’s *Harmelin* concurrence.⁹⁹

Could some of the disparate renderings of “proportionality” be explained by the differences between the capital and noncapital contexts? Perhaps so, but the mere invocation of the lazy slogan that “death is different” hardly amounts to a principled distinction or a satisfactory explanation of the particular differences between the two kinds of cases. Furthermore, the traditional rationale for treating death differently—that its irrevocability justifies height-

433 U.S. at 592 n.4 (plurality opinion). The last clause quoted directly contradicts the disjunctive theory.

⁹⁷ Cf. Karlan, *supra* note 35, at 895 (“[A]s the Court recognized in its discussion of offense gravity in *Ewing v. California*, agreement about offense seriousness may be only one component in thinking about appropriate punishment, particularly once the theory of sentencing extends beyond retribution.”).

⁹⁸ See *supra* text accompanying notes 61–68.

⁹⁹ *Ewing v. California*, 538 U.S. 11, 23 (2003) (plurality opinion).

ened reliability in its administration—bears no obvious relation to the particular differences in the doctrine that I have noted.¹⁰⁰

The point is not that the same doctrinal test should apply in all proportionality cases, given that the same principle lies behind these cases. Imprisonment, death, and fines are all different types of punishment, and there may be good reasons to treat them differently, and to implement the principle of proportionality differently in different contexts. Nor is the point that there is no explanation for how the Court, through a mixture of precedential inertia, historical accidents, and shifting alliances in a highly politicized area, ended up where it is today. The point instead is that there is no reason to think, as a theoretical matter, that the principle of proportionality should generate these *particular* differences in the different doctrinal frameworks for capital and noncapital cases. Considering that the same principle—that a punishment should not be disproportionate to the crime¹⁰¹—is being applied in both capital and noncapital cases, a complete defense or rationalization of the law as it exists today must include either a principled explanation of the differences between the two types, a proposal for reform if

¹⁰⁰ See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (plurality opinion) (“Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”); *id.* at 323 (Rehnquist, J., dissenting) (“One of the principal reasons why death is different is because it is irreversible; an executed defendant cannot be brought back to life. This aspect of the difference between death and other penalties would undoubtedly support statutory provisions for especially careful review of the fairness of the trial, the accuracy of the fact-finding process, and the fairness of the sentencing procedure where the death penalty is imposed.”); see also Steiker & Steiker, *supra* note 5, at 370–71 (discussing the origin of the “death is different” argument in the Supreme Court and interpreting it as an argument in favor of requiring “heightened procedural reliability” in capital cases).

¹⁰¹ Cf. Stuntz, *Civil-Criminal Line*, *supra* note 17, at 25 (“The seriousness of the sanction implies more than careful procedures; it implies some kind of substantive proportionality rule. We already recognize this with respect to the most extreme criminal sanction. Only murderers can be sentenced to death, and even within the pool of murderers Eighth Amendment law imposes some substantive constraints. But the point is general; it is not limited to capital punishment. Just as death is different from prison (and so should be reserved for worse wrongdoers), so prison is different from damages (and should likewise be reserved for worse wrongdoers).”).

no such explanation is forthcoming, or an argument why, despite the unwarranted differences, reform is not desirable.¹⁰²

II. RETRIBUTIVISM AS A SIDE CONSTRAINT

This Part proceeds as follows: First, I give a brief introduction to different types of retributivism by giving short descriptions of some classic accounts. Second, I argue that the Eighth Amendment should be understood as a “side constraint” and that the only type of retributivism appropriate for the Eighth Amendment is, accordingly, retributivism as a side constraint. Third, I further refine the idea of retributivism through an analysis of the concept of desert by closely examining what lies behind the notion of “deserving” or “not deserving” a punishment. I also explain in this Section that retributivism has both comparative and noncomparative elements. Finally, I discuss the importance and advantages of the comparative element of desert for the purposes of judicial enforcement of retributivism as a side constraint.

A. Retributivism: The Basic Idea

The retributivist view is based on the notion of just deserts—that persons should get what they deserve, and that those who commit

¹⁰² The Court’s proportionality jurisprudence looks even more incoherent if we keep in mind the much-noted tension between the Court’s general reluctance in the Eighth Amendment proportionality cases and its relatively enthusiastic embrace of proportionality regulation of punitive damages under the Due Process Clause, an article-length topic in its own right. See *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 426 (2003); *BMW of North America v. Gore*, 517 U.S. 559, 575 (1996); see also Chemerinsky, *supra* note 35, at 1062–67; Karlan *supra* note 35, at 882. (“Here, as in several other areas, the Court’s approaches to similar questions in the civil and criminal arenas take very different turns.”); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 *Yale L.J.* 347, 359 n.21 (2003) (remarking on “the seeming disconnect between the Court’s jurisprudence in the civil and criminal contexts”); Adam M. Gershowitz, Note, *The Supreme Court’s Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 *Va. L. Rev.* 1249 (2000). To the extent that the Court’s recent regulation of punitive damages under the Due Process Clause turns on the idea of proportionality, this Article has implications for the Court’s punitive damages jurisprudence. Nevertheless, the differences between the two contexts and the different problems that they raise should be kept in mind.

wrongdoing deserve punishment.¹⁰³ Under this view, the amount of punishment should vary according to the criminal's blameworthiness; therefore, the more serious the crime, the harsher the punishment.

The retributivist notion that the guilty deserve to suffer is both obvious and mysterious. The idea of individual desert as a measure of punishment seems obvious. A ten-dollar fine for murder appears too lenient, five years in jail for jaywalking too harsh. The general intuition that the seriousness of the crime should "match" the harshness of the penalty seems so compelling as to be unassailable. The notion of proportionality, however, in the sense of a crime having some "fit" with a punishment, is also profoundly mysterious, prompting H.L.A. Hart to call it "the most perplexing feature" of retributivism¹⁰⁴ and Oliver Wendell Holmes to describe it as "mystic."¹⁰⁵ Many attempts have been made throughout history to give the idea semblance of intelligibility.

The traditional, familiar form of the retributivist notion of proportionality is the Biblical maxim of *lex talionis*. One version in the Bible reads, "If any harm follows, then you shall give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burn for burn, wound for wound, stripe for stripe."¹⁰⁶ The basic idea is to do to the offender what the offender has done to the victim.¹⁰⁷ Kant's version of the same principle formulates it as a "principle of equality (in the position of the needle on the scale of justice), to incline no more to one side than to the other."¹⁰⁸ Under this principle, "[i]f

¹⁰³ See Ted Honderich, *Punishment: The Supposed Justifications* 9 (1969); Michael Moore, *Placing Blame: A General Theory of Criminal Law* 104 (1997); C.L. Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction* 46–47 (1987).

¹⁰⁴ H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 233 (1968).

¹⁰⁵ Oliver Wendell Holmes, *The Common Law* 37 (Mark DeWolfe Howe ed., Belknap Press of Harvard University Press 1963) (1881).

¹⁰⁶ Exodus 21:23–25; see also Marvin Henberg, *Retribution: Evil for Evil in Ethics, Law, and Literature* 68–74 (1990) (discussing various versions of *lex talionis* in the Bible).

¹⁰⁷ See Igor Primoratz, *Justifying Legal Punishment* 80 (1989).

¹⁰⁸ Immanuel Kant, *The Metaphysics of Morals* 105 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996) (1797). The reading of Kant's theory of punishment I give here is the standard reading given by philosophers writing about Kant's views on punishment. See, e.g., Honderich, *supra* note 103, at 11–12; Jeffrie G. Murphy, *Kant's Theory of Criminal Punishment, in Retribution, Justice, and Therapy* 82, 82–84 (1979); Ten, *supra* note 103, at 75. However, as Jeffrie Murphy has demonstrated—

you insult him, you insult yourself; if you steal from him, you steal from yourself; if you strike him, you strike yourself; if you kill him, you kill yourself.”¹⁰⁹ The image of the scale of justice implies the notion of moral equilibrium through punishment.

Kant claims that *lex talionis* is the only principle that can “specify definitely the quality and the quantity of punishment,” as “all other principles are fluctuating and unsuited.”¹¹⁰ This is true only if “specifying definitely” includes prescribing preposterous or impossible punishments. As Hegel pointed out, “it is easy . . . to exhibit the retributive character of punishment as an absurdity” through examples like “theft for theft, robbery for robbery,” especially when imagining what “an eye for an eye, a tooth for a tooth” might mean where “the criminal has only one eye or no teeth.”¹¹¹

In other words, following *lex talionis* frequently leads to absurd results because it is unclear how the harm is to be reproduced in cases like fraud, perjury, and blackmail, or how the principle could be applied, for instance, to an indigent criminal who destroys property.¹¹² Moreover, even if the specified punishment is neither conceptually nor practically impossible, it is nevertheless morally repugnant to reproduce the same acts on the criminal in many cases, such as rape.¹¹³ To be fair, Kant recognizes these difficulties as well,

rejecting his own previous interpretation in the process—it is not clear whether the collection of remarks that Kant made on punishment can be put together as a coherent theory of punishment at all. See Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 *Colum. L. Rev.* 509 (1987); see also John Cottingham, *Varieties of Retribution*, 29 *Phil. Q.* 238, 243 (1979) (questioning the widespread view that Kant was a retributivist).

¹⁰⁹ Kant, *supra* note 108, at 105.

¹¹⁰ *Id.* at 106.

¹¹¹ G.W.F. Hegel, *Philosophy of Right* § 101 (Remark) (T.M. Knox trans., Oxford Univ. Press 1967) (1821).

¹¹² I should note that the version of *lex talionis* I describe and criticize here is the version that has been understood and criticized by many philosophers of punishment. See, e.g., John Kleinig, *Punishment and Desert* 120 (1973); Lacey, *supra* note 29, at 17–18; Primoratz, *supra* note 107, at 85–87; Ten, *supra* note 103, at 151; Russ Shafer-Landau, *Retributivism and Desert*, 81 *Pac. Phil. Q.* 189, 193 (2000). There are other, less crude versions of *lex talionis*. For the purposes of this Article, I use the popular conception of *lex talionis* as a way of clarifying the version of retributivism that I propose, and am less interested in giving the most fair interpretation of the principle of *lex talionis*. For an intriguing example of an alternative interpretation of *lex talionis*, see Jeremy Waldron, *Lex Talionis*, 34 *Ariz. L. Rev.* 25 (1992).

¹¹³ See Kleinig, *supra* note 112, at 120; Shafer-Landau, *supra* note 112, at 193; Ten, *supra* note 103, at 151.

worrying “what is to be done in the case of crimes that cannot be punished by a return for them because this would be either impossible or itself a punishable crime against *humanity* as such, for example, rape as well as pederasty or bestiality?”¹¹⁴ But his answer is to remark rather unhelpfully that the state should do to the criminal “what he has perpetrated on others, if not in terms of its letter at least in terms of its spirit.”¹¹⁵

Hegel, whose retributivist theory of punishment is based on the notion of “annulment” of the crime,¹¹⁶ attempts to respond to the absurdity problem of *lex talionis*. His theory is very similar to Kant’s, as the “annulment,” he posits, comes about through “an injury of the injury.”¹¹⁷ Like Kant, Hegel claims that this theory of punishment specifies the right amount of punishment: “[S]ince as existent a crime is something determinate in its scope both qualitatively and quantitatively, its negation”—that is, punishment—“is similarly determinate.”¹¹⁸ Hegel immediately makes clear, however, that the “identity” of crime and punishment rests not on “an equality between the specific character of the crime and that of its negation” but on an equality “only in respect of their implicit character, i.e. in respect of their ‘value.’”¹¹⁹ By using the term “value,” Hegel stresses that the focus should be on the abstract equality between the “value” of crime and the “value” of punishment “in respect of their universal property of being injuries,” or “the inner equality of things which in their outward existence are specifically different from one another in every way.”¹²⁰ Of course, putting things this way does not really clarify the matter, nor does Hegel tell us how such a conversion into the common measure of “value” is to occur.

To answer this question, some have suggested that retributivism calls for inflicting the same amount of suffering on the criminal as

¹¹⁴ Kant, *supra* note 108, at 130.

¹¹⁵ *Id.*

¹¹⁶ Hegel, *supra* note 111, § 101; see also Allen W. Wood, *Hegel’s Ethical Thought* 108–10 (1990).

¹¹⁷ Hegel, *supra* note 111, § 101.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* § 101 (Remark).

suffered by the victim of the crime.¹²¹ This proposal, however, immediately runs into difficulties in each of the three required steps: measuring one's experience of pain from the crime, measuring another's experience of pain from the punishment, and comparing the two.¹²²

Robert Nozick has offered a contemporary restatement of retributivism:

$$\text{Punishment deserved} = r \times H,$$

where H is the magnitude of the wrongness or harm, and r is the degree of responsibility.¹²³ Under this framework, r varies between 0 and 1, with 0 representing no responsibility (such as insanity) and 1 representing full responsibility (intentional crimes), with intermediate values representing other levels of mens rea.¹²⁴ Of course, this formulation leaves several difficult issues unresolved, such as how to assign numerical values to the variables, and how we should understand the equal sign in the formula,¹²⁵ but it concisely expresses the widely held view that crimes causing the same harm should be treated differently depending on the criminal's level of culpability.

The important feature of these retributivist theories for the purposes of the Eighth Amendment is the emphasis they place on the principle of proportionality as a limitation on when and how much to punish. Kant, for instance, stresses that punishment should "never be inflicted merely as a means to promote some other good for the criminal himself or for civil society," and that a person "must previously have been found *punishable* before any thought can be given to drawing from his punishment something of use for himself or his fellow citizens."¹²⁶ Hegel, too, maintains that seeing the "comparability of crime and punishment in respect of their

¹²¹ See Honderich, *supra* note 103, at 16; Cottingham, *supra* note 108, at 242; see also S.I. Benn, *An Approach to the Problems of Punishment*, 33 *Philosophy* 325, 335 (1958).

¹²² See Honderich, *supra* note 103, at 16; Benn, *supra* note 121, at 335; Shafer-Landau, *supra* note 112, at 193–94.

¹²³ Robert Nozick, *Philosophical Explanations* 363–97 (1981).

¹²⁴ *Id.* at 363.

¹²⁵ Shafer-Landau, *supra* note 112, at 194.

¹²⁶ Kant, *supra* note 108, at 105.

value” is absolutely crucial because otherwise punishment turns into “only an ‘arbitrary’ connexion of an evil with an unlawful action.”¹²⁷ Even the cruel-sounding Biblical version of *lex talionis* was a limiting principle in its historical context. As Igor Primoratz explains, the principle served to “restrain[] the vengefulness of the wronged” by commanding “for one life, take one, not ten lives; for one eye, take one, not both.”¹²⁸ Finally, Nozick considers as important moral limitations on punishment the requirements that *H*, the magnitude of wrongfulness, be more than zero, and that the punishment deserved be equal to $r \times H$. Without the requirement that there first be “a wrong,” as opposed to a mere injury, and without the formula’s internal limitation on the amount of punishment, Nozick explains, it becomes difficult to distinguish retribution from revenge.¹²⁹

Thus, one might say that there are both permissive and mandatory aspects to retributivism. The mandatory aspect expresses the view that punishment ought to be imposed on those who deserve it, while the permissive aspect allows states to impose punishment but does not require it. The next Section discusses the significance of this distinction for the purposes of the Eighth Amendment.

B. The Eighth Amendment, Retributivism, and Side Constraints

These two aspects of retributivism, permissive and mandatory, have traditionally come to represent two different types of retributivism. The former has been known in the literature as “strong” or “positive” retributivism, and the latter known as “weak,” “negative,” or “limiting” retributivism.¹³⁰ The type that is appropriate as the basis for the Eighth Amendment prohibition on excessive punishment is the “weak,” “negative,” and “limiting” kind. Retributivism under the Eighth Amendment is negative not only because it serves as a statement of what not to do, but also because it serves as a *side constraint* on the socially desirable practice of punishment.

Chief Justice Burger succinctly described the general design of the Eighth Amendment in his *Furman* dissent:

¹²⁷ Hegel, *supra* note 111, § 101 (Remark).

¹²⁸ Primoratz, *supra* note 107, at 87; see also Ten, *supra* note 103, at 152–53.

¹²⁹ Nozick, *supra* note 123, at 366–67.

¹³⁰ See sources cited in *supra* note 29.

The Eighth Amendment . . . was included in the Bill of Rights to guard against the use of torturous and inhuman punishments, not those of limited efficacy. One of the few to speak out against the adoption of the Eighth Amendment asserted that it is often necessary to use cruel punishments to deter crimes. But among those favoring the Amendment, no sentiment was expressed that a punishment of extreme cruelty could ever be justified by expediency. The dominant theme of the Eighth Amendment debates was that that the ends of the criminal laws cannot justify the use of measures of extreme cruelty to achieve them.¹³¹

In other words, the Eighth Amendment prohibition on cruel and unusual punishment should be understood not merely as an acontextual statement of “thou shalt not,” but as a constraint on our institution of punishment. The institution of punishment is desirable for a number of reasons, but the Eighth Amendment limits the ways in which we may pursue the goals of punishment.

For instance, during the debates surrounding the adoption of the Eighth Amendment, Representative Livermore of New Hampshire asked, in a frequently quoted statement, “No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel?”¹³² The answer, of course, is yes, and the resulting structure of the Eighth Amendment is that even if it is “necessary” and even if certain people “deserve” it, cruel and unusual punishments are prohibited.

Thus, although the Eighth Amendment has invited much controversy among Justices, there has been no disagreement on the proposition that the Eighth Amendment prohibits torture,¹³³ “atrocities” (such as those where criminals were “embowelled alive, beheaded, and quartered”¹³⁴), “public dissection,”¹³⁵ “burning

¹³¹ *Furman v. Georgia*, 408 U.S. 238, 391–92 (1972) (Burger, C.J., dissenting).

¹³² 1 *Annals of Cong.* 782–83 (1789), *quoted in* Anthony F. Granucci, “Nor Cruel and Unusual Punishments Inflicted:” The Original Meaning, 57 *Cal. L. Rev.* 839, 842 (1969).

¹³³ *Gregg v. Georgia*, 428 U.S. 153, 170 (1976) (plurality opinion).

¹³⁴ *Wilkerson v. Utah*, 99 U.S. 130, 135 (1878).

¹³⁵ *Id.*

at the stake, crucifixion, breaking on the wheel,¹³⁶ or “the rack, the thumbscrew, the iron boot, the stretching of limbs.”¹³⁷ These sentences are certainly cruel, but would they also be ineffective deterrents or fail to serve retributivist goals? As Herbert Packer wrote, there is “nothing irrational about boiling people in oil; a slow and painful death may be thought more of a deterrent to crime than a quick and painless one.”¹³⁸ Yet the Eighth Amendment bans these practices, and implied in that prohibition is the view that the ban cannot be overridden¹³⁹ even if we may reach the overall goals of the institution of punishment by engaging in such practices.

In the excessive punishment context, as well, several cases have recognized the normative structure of the Eighth Amendment. *Coker v. Georgia* held that sentencing a rapist to death violated the Constitution even though there were reasonable deterrence and incapacitation arguments for the sentence;¹⁴⁰ *Enmund v. Florida* limited the use of the death penalty under felony-murder statutes despite the traditional and persistent (albeit highly problematic) deterrence arguments in favor of the felony-murder rule generally;¹⁴¹ and the *Weems* and *Bajakajian* Courts struck down punishments as disproportionate even though the harshness of the punishments at issue presumably contributed to the general goal of deterrence.¹⁴²

Similarly, as Chief Justice Rehnquist has said, the Court’s Eighth Amendment cases regulating prison conditions are not based on the idea of how to serve different purposes of punishment, but on a

¹³⁶ *In re Kemmler*, 136 U.S. 436, 446 (1890).

¹³⁷ *O’Neil v. Vermont*, 144 U.S. 323, 339 (1892).

¹³⁸ Herbert Packer, *Making the Punishment Fit the Crime*, 77 *Harv. L. Rev.* 1071, 1076 (1964); see also John Braithwaite & Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* 46 (1990) (“If there is reason to deter potential offenders by punishing actual ones, why not let the punishment increase to create an ever more effective deterrent? Boiling oil for bicycle thieves.”).

¹³⁹ At least without special justification, see *infra* note 147.

¹⁴⁰ See *Coker v. Georgia*, 433 U.S. 584, 605–21 (1977) (Burger, C.J., dissenting).

¹⁴¹ See Nelson E. Roth & Scott E. Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads*, 70 *Cornell L. Rev.* 446, 450–53 (1985); James J. Tomkovicz, *The Endurance of the Felony-Murder Rule*, 51 *Wash. & Lee L. Rev.* 1429, 1448–49 (1994).

¹⁴² See *United States v. Bajakajian*, 524 U.S. 321, 351–54 (1998) (Kennedy, J., dissenting); see also *Weems v. United States*, 217 U.S. 349, 380–81 (1910).

minimum standard of decency, without regard to potential deterrence value of poor prison conditions:

[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits set on state action by the Eighth Amendment and the Due Process Clause.¹⁴³

It is certainly debatable whether the Court has been faithful to its words or aggressive enough in combating poor prison conditions,¹⁴⁴ but Chief Justice Rehnquist's statement recognizes the general logic of the Eighth Amendment.

In short, the Cruel and Unusual Punishments Clause should be and has been generally understood to impose a rule or rules with the following form: Even if the overall purposes of punishment would be advanced by doing *X* to *A*, it should not be done if doing *X* to *A* would be cruel and unusual. The familiar distinction between “goals” and “constraints” is thus instructive. According to Professor Nozick, a goal of a society simply articulates an end result that the society strives to achieve, while a constraint sets down ground rules that the society is to follow in its pursuit of these goals.¹⁴⁵ If a goal of the U.S. government is to minimize the number of terrorist acts carried out within the country, it may be pursued under various constraints, such as “no torturing,” “no eavesdropping without judicial authorization,” “no racial profiling,” and so forth. Such a goal-constraint framework is well-suited to understanding the Eighth Amendment. This also means that retributivism as a side constraint works only as a “limiting principle,”¹⁴⁶ and

¹⁴³ *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 200 (1989).

¹⁴⁴ See Malcolm M. Feeley & Edward L. Rubin, *Judicial Policy Making and the Modern State* 46–50 (1998); James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* 59–62 (2003).

¹⁴⁵ Nozick, *supra* note 27, at 28–35; cf. Hart, *supra* note 104, at 10 (“[I]n relation to any social institution, after stating what general aim or value its maintenance fosters we should enquire whether there are any and if so what principles limiting the unqualified pursuit of that aim or value.”); Ronald Dworkin, *Taking Rights Seriously* 90–94 (1977) (explaining the same concept in terms of the distinction between rights and goals).

¹⁴⁶ Morris, *supra* note 29, at 196–202.

not as a statement of an end to be pursued. That is, retributivism as a side constraint does not require that we punish the guilty; it simply states that multiple purposes of punishment may be pursued so long as no sentence that is undeservedly harsh is imposed.¹⁴⁷

C. Retributivism and the Concepts of Comparative and Noncomparative Desert

The concept of “deserving a punishment” remains vague. To understand what it means for punishment to be deserved or undeserved by an individual, it is helpful to start with an analysis of the concept of desert.

As Joel Feinberg explained in his seminal discussion, every desert statement has at least three elements. In the statement, “*S* deserves *X* in virtue of *F*,” *S* is the deserving person, *X* is what he deserves, and *F* is the desert basis—that is, the basis for *X*.¹⁴⁸ To understand how it is that a person deserves something, we must understand two relationships: the relationship between the person who is deserving and the desert basis (*S* and *F*), and that between what is deserved and the desert basis (*X* and *F*).

¹⁴⁷ Adopting such a goal-constraint framework to understand the Eighth Amendment does not necessarily commit one to the position that such constraints are cannot be overridden or that Eighth Amendment rights are “absolute.” Rights have limits, need to be specified in particular circumstances with conflicting considerations, and can be traded off, or at least sacrificed at times. What we seek to prevent with the concept of rights or constraints are situations where important interests are given up without special justification. Although there have been competing conceptions of such “rights” or “constraints,” there is widely shared agreement among rights theorists about this general picture. See, e.g., Dworkin, *supra* note 145, at 90–100; James Griffin, *Well-Being: Its Meaning, Measurement, and Moral Importance* 242–45 (1986); Joseph Raz, *The Morality of Freedom* 183–86 (1986); Jeremy Waldron, *Rights in Conflict*, in *Liberal Rights: Collected Papers 1981–1991*, at 203, 208–11 (1993); Richard H. Fallon, *Individual Rights and the Powers of Government*, 27 *Ga. L. Rev.* 343 (1993); David Lyons, *Utility and Rights*, in *Theories of Rights* 115, 117–18 (Jeremy Waldron ed., 1984); Frederick Schauer, *A Comment on the Structure of Rights*, 27 *Ga. L. Rev.* 415 (1993). All that we need in a theory of the Eighth Amendment, then, is a structure that provides for such stringency or resistance to trade-offs. For some suggestions along these lines, see Andrew Ashworth, *Sentencing and Criminal Justice* 160–97 (3d ed. 2000); von Hirsch, *Censure and Sanctions*, *supra* note 30, at 48–53; Paul H. Robinson, *Hybrid Principles for the Distribution of Criminal Sanctions*, 82 *Nw. U. L. Rev.* 19, 36–42 (1987); Anthony Bottoms & Roger Brownsword, *Dangerousness and Rights*, in *Dangerousness: Problems of Assessment and Prediction* 10 (John W. Hinton ed., 1983).

¹⁴⁸ Feinberg, *Justice and Personal Desert*, *supra* note 32, at 61.

The person who is deserving and the desert basis (*S* and *F*) are related in that the desert basis has to be an attribute of the deserving person.¹⁴⁹ It would make no sense to say that a person deserves to go to prison because his brother stole a car unless the brother's criminal behavior reflects something about his own culpability, such as his failure to prevent the crime. The focus of the retributivist inquiry is thus on the criminal, and how the criminal, through his criminal act, alters his relationship to the state. Desert is therefore an individualistic idea. One does not deserve something by virtue of someone else's deservingness, although, as discussed below, what other people deserve may be relevant in determining what one deserves. Nor does one deserve a reward or punishment because giving a reward or punishment would promote the general welfare.¹⁵⁰

In the relationship between what is deserved and the basis for desert (*X* and *F*), the key concept is "fittingness" or appropriateness.¹⁵¹ First, a response is "fitting" or "appropriate" only if it takes a form that symbolizes or expresses the society's condemnatory attitude towards the criminal conduct.¹⁵² This is why it would be inappropriate to reward criminals, whereas the infliction of suffering is seen as an appropriate response. Second, a corollary to this is that not every form of suffering or loss is an acceptable form of punishment in every society, depending on the symbolic significance the particular form of suffering or loss has in the society.¹⁵³ For instance, the sanction of "community service" may appear inappropriate for certain crimes given the mixed signals—either as a sanction or as evidence of the participant's generosity and public spiritedness—such service gives.¹⁵⁴

¹⁴⁹ *Id.* at 58–61.

¹⁵⁰ By using the term "individualistic," I do not mean to preclude the possibility of the idea of "collective responsibility" or "collective culpability." I merely seek to highlight the idea that when we state that *S* deserves *X* in virtue of *F*, *F* has to be something about *S*, and not about what good *X* brings to the society, how much *X* promotes social welfare, and so on. See *id.* at 80–81.

¹⁵¹ *Id.* at 81–82.

¹⁵² *Id.* at 67–71; Joel Feinberg, *The Expressive Function of Punishment*, in *Doing and Deserving: Essays in the Theory of Responsibility* 95, 98 (1970) [hereinafter Feinberg, *Expressive Function*]; see also discussion *infra* note 161.

¹⁵³ Feinberg, *Expressive Function*, *supra* note 152, at 100, 114.

¹⁵⁴ See Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 *U. Chi. L. Rev.* 591, 625–30 (1996).

The most important feature of the concept of “fittingness” for the purposes of this Article is this: The harshness of the punishment should reflect our level of condemnation or disapproval of the criminal act. A punishment would be excessive, then, if the degree of condemnation symbolized by the amount of punishment were too high relative to the criminal’s blameworthiness. A punishment also would be excessive in situations where it is imposed on a person who has not committed any acts for which the kind of condemnatory expression that accompanies criminal sanction would be appropriate. A corollary to all of this is that the harshness of the punishment should increase as our level of condemnation or disapproval increases, which in turn should increase as the gravity of the crime increases. In other words, more serious crimes should be more harshly punished.¹⁵⁵

“Fittingness” has both comparative and noncomparative aspects.¹⁵⁶ The latter demands that a person convicted of a given

¹⁵⁵ See Feinberg, *Expressive Function*, supra note 152, at 118; see also R.A. Duff, *Punishment, Communication, and Community* 132–33 (2001); von Hirsch, *Censure and Sanctions*, supra note 30, at 15–17; von Hirsch, *Past or Future Crimes*, supra note 30, at 44. The account given here bears obvious affinities to the “expressive theories of punishment,” which are most closely associated with Feinberg’s article. See Feinberg, *Expressive Function*, supra note 152. That the institution of punishment has an expressive dimension seems to me to be incontrovertible. Whether the expressive function of punishment justifies the institution of punishment, however, is quite another matter. See, e.g., John Braithwaite & Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* 161–64 (1990); Hart, supra note 29, at 170–73, 263; Ten, supra note 103, at 42–45; Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. Pa. L. Rev. 1363, 1414–27 (2000). I take no position on this perennial question in punishment theory, as the argument I make in this Article does not depend on the expressive function of punishment offering a sufficient moral justification for our institution of punishment. However, the point that I do depend on in this Article—about the close relationship between retributivism (understood in terms of the concept of desert) and the expressive dimension of punishment—is underappreciated and is worth reemphasizing. See, e.g., Kahan, supra note 154, at 602 (arguing that the expressive theory of punishment gives content to retributivism).

¹⁵⁶ There are many labels to describe the same distinction. In philosophy, following Joel Feinberg, the terms “comparative” and “noncomparative” are used. See, e.g., Joel Feinberg, *Noncomparative Justice*, 83 *Phil. Rev.* 297, 298 (1974); Joshua Hoffman, *A New Theory of Comparative and Noncomparative Justice*, 70 *Phil. Stud.* 165 (1993); Owen McLeod, *On the Comparative Element of Justice*, in *Desert and Justice* 123, 123 (Serena Olsaretti ed., 2003); David Miller, *Comparative and Noncomparative Desert*, in *Desert and Justice* 25, 30 (Serena Olsaretti ed., 2003). Thomas Hurka has described the same concept using the terms “individualistic” and “holistic.” Thomas Hurka, *Desert: Individualistic and Holistic*, in *Desert and Justice* 45, 45–48 (Serena

crime receive a certain amount of blame, no matter how other people are treated, while the former focuses on what the punishment for a given crime is compared to punishments for different crimes of varying degrees of blameworthiness. For example, if a criminal has been sentenced to five years in prison for stealing a car, noncomparative desert asks whether his deed is serious enough to warrant such a response by the state, regardless of how the state is treating other car thieves and criminals of more and less serious crimes. Comparative desert, by contrast, is more interested in whether the car thief is being treated the same way as other car thieves and other comparably serious criminals and how his punishment compares to punishments imposed on those who have committed more or less serious crimes.¹⁵⁷

Retributivism, defined as the view that one should receive the punishment that one deserves, has both comparative and noncomparative aspects. The noncomparative aspect is obvious: when we say that it would be clearly disproportionate to punish parking violations with one year in prison, that statement would be true even if every parking violation were treated the same way and more serious crimes were treated more harshly.¹⁵⁸ In other words, even if a sentencing scheme generates a series of sentences that are in perfect comparative desert relationship to one another, it is possible for some or all of those sentences to be too harsh from the perspective of retributivism.¹⁵⁹

Olsaretti ed., 2003), whereas R.A. Duff has used the terms “absolute proportionality” and “relative proportionality.” Duff, *supra* note 155, at 133. In sentencing theory, the same distinction is familiar due to Andrew von Hirsch’s distinction of “cardinal” proportionality and “ordinal” proportionality. von Hirsch, *Past or Future Crimes*, *supra* note 30, at 38–46.

¹⁵⁷ Comparative desert is not the same as equality. Equality has generally come to mean equal treatment for similarly situated individuals, and even in contexts such as reasonable accommodation for the disabled where “unequal” or “different” treatments are called for, the goal is generally stated in terms of guaranteeing the same baseline, starting point, equal opportunity, and so on. Comparative desert, by contrast, requires more than that: like cases are to be treated alike, and unlike cases are to be treated in an appropriately unlike way. Differential treatment is thus fundamental to comparative desert. Hurka, *supra* note 156, at 54. This is not to deny, of course, that comparative desert requires equal treatment of equals.

¹⁵⁸ Feinberg, *supra* note 152, at 311; Duff, *supra* note 155, at 133.

¹⁵⁹ Some have used the same concept in the other direction: In response to the *Furman*-like criticism that capital punishment is distributed unfairly, Ernest van den Haag argued that “[a]n unfair distribution of punishments . . . does not affect the

That retributivism also has a comparative aspect is less obvious; in fact, certain philosophers have argued that desert is essentially a noncomparative idea.¹⁶⁰ No theory of retributivism is complete without an account of the role of comparative desert, however, because what one deserves is sometimes determined in reference to what others deserve. The reason for this, in turn, is that the institution of punishment has an expressive dimension. When it punishes, it condemns the behavior it punishes as wrong, and the degree to which the behavior is condemned is expressed by varying the amount of punishment. In other words, when the state punishes, how one's punishment stands in relation to punishments for other crimes supplies a crucial piece of information as to how wrong the behavior punished is viewed by the society. This means that a punishment imposed on a criminal would be "undeserved" if it is more severe than the punishment imposed on those who have committed more serious crimes or crimes of the same seriousness, because the judgment it expresses about the seriousness of the criminal's behavior would be inappropriate.¹⁶¹

In this way, retributivism functions the way an audience at a play responds to various performers at the end of the performance.¹⁶² Assuming that a given production is good enough to merit applause, the audience members vary the length and intensity of their applause to show their relative levels of appreciation for different members of the cast. There may be noncomparative desert at work here, because if the production as a whole is not worthy of ap-

moral quality of what is distributed," meaning that those who were executed may have received what they deserved, even if others who also deserved death were not put to death. Ernest van den Haag, *Justice, Deterrence, and the Death Penalty*, in *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* 139, 152 (James R. Acker et al. eds., 1998).

¹⁶⁰ See, e.g., Samuel Scheffler, *Justice and Desert in Liberal Theory*, 88 *Cal. L. Rev.* 965, 983-87 (2000) (contending that the justification for claims of desert must be individualistic).

¹⁶¹ Feinberg, *supra* note 152, at 118; see also Duff, *supra* note 155, at 132; 4 Joel Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing* 144-55 (1988); von Hirsch, *Censure and Sanctions*, *supra* note 30, at 15-16; von Hirsch, *Past or Future Crimes*, *supra* note 30, at 40-43. See also *Furman v. Georgia*, 408 U.S. 238, 303-04 (1972) (Brennan, J., concurring) ("[O]ne purpose of punishment is to indicate social disapproval of crime. To serve that purpose our laws distribute punishments according to the gravity of crimes and punish more severely the crimes society regards as more serious.").

¹⁶² I borrow this example from David Miller. See Miller, *supra* note 156, at 30.

plause, no member of the cast may deserve any showing of appreciation. But barring such a situation—and due to “grade inflation” in standing ovations these days, it seems more and more unlikely¹⁶³—what determines how the audience greets each member of the cast is the principle of comparative desert. That is, other things being equal, generally the cast members with bigger and more difficult parts tend to receive the longer, louder, and more intense applause. The reason this has to be so is that there is a limit as to how long, loud, and intense cheering can get, and the audience has to save their longest applause for the cast member they appreciate the most. If they are too quick to unleash their most enthusiastic showing of appreciation and use it on minor characters, they may not be able to express to the ones with the leading parts how much more they appreciate them than those with lesser roles. And if such a situation unfortunately arises, those who deserve more recognition from the audience would not be receiving what they *deserve*, not just what they *comparatively deserve*. It is in this sense that sometimes what one deserves cannot be determined without considering both comparative and noncomparative aspects.¹⁶⁴

Punishment works in a similar way. For example, because the death penalty carries a social meaning as the ultimate punishment for the most serious crimes, each time the state imposes a death sentence it shows that it considers the crime at issue to be not only one of the most serious offenses committed against the society, but also an offense that is as serious as other crimes that the society considers to be the most serious. Those who commit offenses less serious than the most serious offenses and are still sentenced to death would be receiving harsher sentences than they deserve, because part of what it means for them to receive the punishment

¹⁶³ Jesse McKinley, *The Tyranny of the Standing Ovation*, N.Y. Times, Dec. 21, 2003, at Arts & Leisure Section 2, page 1. McKinley’s article is a fascinating discussion of the changing meaning of standing ovations, as well as other modes of showing audience appreciation, with illustrations of both comparative and noncomparative aspects of the practice.

¹⁶⁴ For a similar analysis of comparative desert, see McLeod, *supra* note 156, at 125; Miller, *supra* note 156, at 30–31. Many competitive events can also be thought of in this way. In the Olympic Games, for instance, a gold medal indicates a better performance than everyone else. If students’ exam performances are graded on a curve, getting an A means better performance than others with lower grades.

they deserve is that they are punished less harshly than the worst criminal.

D. The Importance of Comparative Desert for the Purposes of Judicial Enforcement

It is beyond the scope of this Article to address fully the question of implementing retributivism as a side constraint. It is, however, worth mentioning the value of recognizing that comparative desert is an essential element of desert for the purposes of judicial enforcement of retributivism as a side constraint. First, comparative desert is important not only because it is constitutive of the meaning of desert as discussed in the previous Section, but also because of its conceptual relationship to noncomparative desert. In a system in which noncomparative desert is guaranteed (that is, every crime is matched perfectly to the punishment noncomparatively deserved), then comparative desert should be guaranteed as well.¹⁶⁵ From this it follows that if an institution of punishment fails to satisfy the condition of comparative desert, then we can infer that noncomparative desert also is not satisfied.¹⁶⁶ Therefore, comparative desert has evidentiary value, as a failure in comparative desert can be an indication of a failure in noncomparative desert somewhere in the system. Comparative desert, then, can be an important, if limited,¹⁶⁷ instrument for enforcing noncomparative de-

¹⁶⁵ Hurka, *supra* note 156, at 48; Shelly Kagan, *Comparative Desert, in Desert and Justice*, *supra* note 156, at 93, 99.

¹⁶⁶ From "If *P*, then *Q*," it follows that "If not-*Q*, then not-*P*."

¹⁶⁷ I say its evidentiary value is limited for a few reasons. First, from "If *P*, then *Q*," it does not follow that "If *Q*, then *P*." In other words, in a system in which the condition of comparative proportionality is satisfied, the more blameworthy a crime is, the harsher the punishment for the crime is, but the system does not necessarily guarantee "matching" between crimes and punishments so that every criminal gets what he (noncomparatively) deserves. This means that requiring comparative desert may not be enough, as a punishment scheme may satisfy the comparative desert condition yet still be excessive because it does not satisfy the condition of noncomparative desert. Second, even if we can infer the failure of noncomparative desert from a failure of comparative desert, that does not mean that we can infer a violation of the Eighth Amendment. This is because the failure of noncomparative desert may consist of the state being too lenient rather than too harsh. Therefore, one defense that should be available to the state that violates the comparative desert norm is to demonstrate that it is being too lenient as opposed to too harsh. Third, noncomparative desert may only make sense in terms of ranges. So, if Criminal A (noncomparatively) deserves 10–20 years and Criminal B, whose crime is more serious, (noncomparatively) deserves 15–

sert, especially in situations where judgments of comparative desert are more accessible to us than judgments of noncomparative desert.¹⁶⁸ Thus, comparative desert derives its value at least partially from the value of noncomparative desert and their relationship to each other.

Second, the comparative aspect of desert helps us see that the indeterminacy problem of desert judgments is frequently overstated. How much punishment is deserved for stealing a car? Six months, two years, or five years? Stated this way, the question looks impossible to answer, but the difficulty of the translation problem¹⁶⁹ seems less serious once we recognize that the amount of the deserved punishment depends not only on the gravity of the

25 years, and both end up with 15-year sentences, then the violation of the condition of comparative desert does not show that the condition of noncomparative desert has been violated as well. These caveats do not negate the instrumental value of comparative desert; they merely caution us to be aware of its limitations as we employ it. For another caveat in the death penalty context, see *infra* note 193.

¹⁶⁸ We tend to be more confident about our comparative desert judgments than non-comparative desert judgments. See *infra* note 170.

¹⁶⁹ Some have characterized this translation problem as a problem of incommensurability. See, e.g., Louis Kaplow & Steven Shavell, *Fairness Versus Welfare* 307 n.27 (2002) (pointing out that “whatever units one may use in attempting to measure this dimension of wrongfulness, they will not translate in any obvious manner into units of tangible punishment” and describing the problem as “difficulties of commensurability”); W.G. Maclagan, *Punishment and Retribution*, 14 *Phil.* 281, 290 (1939) (“The retributive principle is impossible of application unless in the act of retribution it is possible to secure an equivalence of guilt and punishment, and that is not the case. . . . The two things that are to be measured against each other are in their very nature incommensurable.”). It is not always clear what is meant by “incommensurability” in such arguments and why it is thought to be a problem, but the most sense I can make of the argument is this: Crime and punishment are incommensurable; the two scales, the crime scale and the punishment scale, do not have anything to do with each other. The crime scale cannot be translated into the punishment scale, nor vice versa, in the way a scale of inches can be translated into a scale of centimeters. As a result of this incommensurability, crime and punishment are incomparable, which is a problem for retributivism’s requirement of equivalence between crime and punishment. (For a useful discussion of the distinction between “incommensurability” and “incomparability,” see Ruth Chang, *Introduction to Incommensurability, Incomparability, and Practical Reasoning* 1, 1–2 (Ruth Chang ed., 1997).) This criticism is mistaken because it confuses the difference between the concept of “fittingness” and the concept of “equivalence.” Retributivism, at least the version in this Article, calls for the former, not the latter, and the concept of fittingness does not require comparing the incomparables. Or, if it does, then we have to radically revise our use of the concept of desert to avoid comparing the incomparables because “comparison of the incomparables” occurs in all desert judgments.

crime but also how the state punishes other crimes of varying gravity. Of course, comparative desert judgments are by no means easy to make and are much contested, but comparative desert brings some determinacy to the task of judging how much punishment is too much.¹⁷⁰

Third, comparative desert is better suited for judicial enforcement than noncomparative desert. Two kinds of comparative desert analysis are available to the judiciary. The first is a type of over-breadth analysis that asks whether the sentencing scheme sufficiently distinguishes among offenders of different levels of seriousness. I call this inquiry “scheme-wide analysis.” Capital cases since *Gregg v. Georgia* that require states to devise procedures to ensure that only the worst offenders are sentenced to death employ this kind of analysis.¹⁷¹ And, as discussed in Part III, the scheme-wide analysis has played an important role in noncapital cases as well.¹⁷² The second kind of comparative desert inquiry asks whether the punishment in question stands in appropriate relation to punishment for crimes that are as serious as, or more serious than, the crime at issue. The cases that prohibit imposition of the death penalty for certain categories of crimes or criminals—such as *Coker v.*

¹⁷⁰ See, e.g., von Hirsch, Past or Future Crimes, *supra* note 30, at 38–46; David Miller, Principles of Social Justice, 151–55 (1999); Ten, *supra* note 103, at 154–56. In addition, social scientific studies have consistently shown widely shared views on relative seriousness of crimes. See Braithwaite & Pettit, *supra* note 138, at 178 (citing broad authority for the proposition that “[t]here is quite an impressive consensus within and even between modern societies on which types of crimes deserve most punishment and which least”). I do not mean to endorse reliance on social scientific studies in Supreme Court decisionmaking. These studies are not perfect and should be used with an understanding of their limitations. See Francis T. Cullen et al., Consensus in Crime Seriousness: Empirical Reality or Methodological Artifact?, 23 *Criminology* 99 (1985). Nor is this to say that comparative desert judgments are easy; the difficulties are well-known. See, e.g., Duff, *supra* note 155, at 135–36; Hart, *supra* note 29, at 162–63; see also Harmelin v. Michigan, 501 U.S. 957, 987–88 (1991) (Scalia, J., concurring in the judgment). The point merely is that comparative desert tends to offer far more guidance than noncomparative desert in judging what one deserves, and that the perceived level of difficulty of desert judgments depends on how the problem is framed, or which aspect—comparative or noncomparative—is stressed. See Leo Katz, Incommensurable Choices and the Problem of Moral Ignorance, 146 *U. Pa. L. Rev.* 1465, 1469–71 (1998).

¹⁷¹ Steiker & Steiker, *supra* note 5, at 372–75. See also *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) (outlawing mandatory death penalty statutes).

¹⁷² See *infra* text accompanying notes 224–45.

Georgia,¹⁷³ *Enmund v. Florida*,¹⁷⁴ *Atkins v. Virginia*,¹⁷⁵ and *Roper v. Simmons*¹⁷⁶—reflect the system-wide analysis. Again, Part III gives more detail on the role that the system-wide analysis plays in both capital and noncapital cases.¹⁷⁷ Both “scheme-wide analysis” and “system-wide analysis” get at the same fundamental issue of comparative desert, based on two assumptions: first, that a state’s sentencing system consists of numerous sentencing schemes; and second, that a state taking the principle of comparative desert seriously would build a system in which every sentencing scheme respects comparative desert and the results of those sentencing schemes stand in correct comparative desert relationships system-wide.¹⁷⁸

Fourth, the death penalty example shows why comparative desert can serve as a meaningful constraint. It may be thought that in a system in which the condition of comparative desert is satisfied, the more blameworthy a crime is, the harsher the punishment will be, but that comparative desert alone is not an adequate constraint because it does not dictate the noncomparative issue of how much overall punishment should be permitted.¹⁷⁹ As demonstrated by the death penalty example, however, comparative desert imposes a ceiling. Once we identify a certain mode of punishment as the most serious punishment, comparative desert demands that only the most serious crimes be subject to that punishment. In the same manner, we can identify the second-most serious punishment and demand, on comparative desert grounds, that only the crimes considered the most serious among the remaining crimes be subject to the second-most serious punishment. And we can classify certain types of punishments (like long prison sentences) as the kinds of

¹⁷³ 433 U.S. 584 (1977) (rape).

¹⁷⁴ 458 U.S. 782 (1982) (aiding and abetting murder without intent to kill).

¹⁷⁵ 536 U.S. 304 (2002) (mentally retarded criminal).

¹⁷⁶ No. 03-633 (U.S. Mar. 1, 2005) (criminal under the age of eighteen).

¹⁷⁷ See *infra* text accompanying notes 224–45.

¹⁷⁸ Of course, a state may fail to observe these comparative desert norms without violating the Eighth Amendment if its departure from comparative desert norms is a result of its lenient treatment of criminals. See *supra* note 167.

¹⁷⁹ For a criticism along these lines, see Karlan, *supra* note 35, at 893; Shafer-Landau, *supra* note 112, at 202. For a response, see von Hirsch, *Past or Future Crimes*, *supra* note 30, at 45–46 (arguing that creating a scale in which crimes are ranked by degree of seriousness and parity of punishment among crimes of the same degree can be of considerable guidance to lawmakers).

punishments that should be reserved only for serious crimes (like crimes involving violence against individuals, as opposed to property crimes). Of course, questions of where and how to draw these lines are contested, but the point here is only that comparative desert alone can create a downward pressure on absolute amounts of punishment.¹⁸⁰

Fifth, comparative desert can also serve as a useful corrective to counter the features of the political process that drive criminal justice systems towards harsher and harsher sentences. Our current political system has built-in incentives encouraging more and more expansive criminal liability.¹⁸¹ Politicians cannot appear weak on crime; therefore, there is an enormous political pressure to advocate and vote for tougher and tougher laws governing criminal liability and sentencing. Prosecutors, who constitute a strong lobby, have incentives to reach convictions at the lowest cost—either at trial or through pleas—which calls for broad definitions of criminal liability and high sentences. Moreover, for several reasons, including felon disenfranchisement and the stigma attached to criminals, effective lobbying on behalf of criminal defendants is difficult. In addition, there are reasons to doubt whether the results of the political process fairly reflect what “the people” want, given that voters tend to focus on the most recent and salient examples of violent crimes, influenced by the media and politicians, and support puni-

¹⁸⁰ Such downward pressures, of course, may not be enough at the low end to prevent punishments like a year in prison for jaywalking, for example. That is, a state may apply a year in prison for jaywalking and apply harsher punishments to all crimes that are more serious, while respecting the principle of comparative desert. My analysis here, then, should not be read as an argument that noncomparative desert should play no role. Such a position would be mistaken, as comparative desert is insufficient as an account of the right against excessive punishment. Rather, my position is that the limitations of comparative desert should not obscure its value in regulating our criminal justice system, and should not lead us to discount how much more attention states would be forced to give to the issue of excessiveness than now, even if the only requirement the courts place on them is comparative desert.

¹⁸¹ See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *Mich. L. Rev.* 505, 529–33 (2001); see also Michael Tonry, *Thinking about Crime: Sense and Sensibility in American Penal Culture* 196–97 (2004); Rachel E. Barkow, *Administering Crime*, 52 *UCLA L. Rev.* 715 (2005); Sara Sun Beale, *What’s Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 *Buff. Crim. L. Rev.* 23 (1997); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 *UCLA L. Rev.* 757, 771–74 (1999).

tive measures that may go much further than what they would be willing to support, given additional information.¹⁸² Comparative desert, which requires that crimes of different seriousness be treated differently, can be a useful measure to counter these features of the democratic process that produce overbroad and overly harsh criminal provisions.

Finally, enforcing comparative desert is less intrusive on federalism than enforcing noncomparative desert. Comparative desert, as noted above, is an ideal that demands internal coherence from states; it does not require them to conform to the punitive sensibilities of other states or even other countries, and therefore respects the basic proposition that criminal law is primarily a matter left to states.

There are two caveats to this general statement. First, deciding whether states are being “consistent” is not a matter of form only; the standard of “consistency” also must be informed by substantive notions of harm and culpability. In order for comparative desert to be a meaningful constraint, the federal judiciary ultimately has to police the ways in which the terms “desert” and “comparative desert” are used, and prevent non-desert concerns from being smuggled into the system by placing constraints on what kinds of arguments about desert are acceptable.

Second, taking seriously the notion that criminal law is a local matter does not necessarily imply that inter-jurisdictional comparisons or other countries’ norms are irrelevant to judicial review. There are at least two kinds of inter-jurisdictional comparisons,¹⁸³ one of which focuses on noncomparative desert and the other of which focuses on comparative desert. The first kind, used by the Court in *Solem v. Helm*,¹⁸⁴ asks whether a state’s punishment for crime *X* is harsher, in absolute terms, than other states’ punishments for the same crime. Comparative desert has little use for this

¹⁸² For a discussion of such evidence, see Barkow, *supra* note 181, at 748–54; Beale, *supra* note 181, at 163–64.

¹⁸³ It should be also noted that the phrase “inter-jurisdictional comparison” has been used to refer to state-state comparisons. But in our system of government, another inter-jurisdictional comparison is possible: federal-state comparison. The nature of the federalism issues that federal-state comparisons raise is different from the nature of those raised by state-state comparisons and should be analyzed separately.

¹⁸⁴ For a discussion of the case, see *infra* text accompanying notes 232–38.

inquiry.¹⁸⁵ The second kind asks whether a state's punishment for crime *X* is harsher or more lenient than its punishment for crime *Y* and how it compares to other states' judgment of relative seriousness of crimes *X* and *Y*. The Supreme Court's attempt to identify a "national consensus" in the capital context may be understood as a form of this inquiry.¹⁸⁶ The latter inquiry may be useful in shaping the Supreme Court's comparative desert inquiries and evaluating a state's claim that its system satisfies the comparative desert condition.¹⁸⁷

¹⁸⁵ The inquiry has little to do with comparative desert because finding out how different states treat crimes of similar seriousness tells us very little about how the punishment at issue fits into each state's schedule of punishment for crimes of differing seriousness. But then what does it have to do with noncomparative desert? The answer is far from clear. Consider State *A* and State *B* with identical comparative scales of crimes and punishments, and assume that both states meet the requirements of comparative desert. That is, the least serious crime receives the mildest sentence, the more serious the crime, the harsher the sentence becomes, and only the most serious crimes get the harshest sentences. Now assume that in State *A*, the mildest punishment is one year in jail and the harshest is the death penalty whereas in State *B*, the mildest punishment is a small fine and the harshest punishment is five years in jail. A criminal will probably be treated more severely in State *A* than in State *B* (like the way Helm was treated more severely in South Dakota than he would have been in any other state). But, from the perspective of retributivism as a side constraint, it is not obvious what the moral consequences of the differences between State *A* and State *B* are, unless a particular punishment in State *A* is so harsh that it violates the principle of noncomparative desert (say one year in jail for jaywalking), and looking at State *B* (and States *C*, *D*, and *E*, and so on) supplies some information relevant to this issue of noncomparative desert. Given that judgments of noncomparative desert tend to be far more indeterminate than judgments of comparative desert, see *supra* note 170, there are some serious questions as to whether this kind of inter-jurisdictional analysis is up to the task of generating reliable guidance in matters of noncomparative desert, especially considering the principle articulated in *Harmelin* that "divergences . . . [in] theories of sentencing and in the length of . . . prison terms are the inevitable, often beneficial, result of the federal structure." *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in the judgment). A full discussion of this problem cannot be undertaken here; I only note that a proper defense of this kind of inter-jurisdictional comparison would require an argument that deals not only with the relationship between comparative and noncomparative desert but also with the norms of federalism. Such a defense would also have to be clear about the inherent limitations of the inter-jurisdictional comparison along the lines I have noted above.

¹⁸⁶ See *supra* notes 52–53; *infra* text accompanying note 193.

¹⁸⁷ The fact that studies tend to show widespread agreement on comparative seriousness of crimes, see *supra* note 170, is further support for this conclusion.

III. RETRIBUTIVISM AS A SIDE CONSTRAINT IN THE SUPREME COURT

This Part discusses the ways in which retributivism as a side constraint has been implemented by the Court and traces the emergence of the disjunctive theory in *Harmelin* and *Ewing*.

A. Retributivism as a Side Constraint in Capital Cases

1. Comparative Desert from Coker to Roper

The Supreme Court's jurisprudence on excessive punishment in capital sentencing has created categorical exemptions from death sentences for certain crimes and groups of criminals. It is currently unconstitutional to sentence a criminal to death for the crime of rape.¹⁸⁸ It is also unconstitutional to punish by death a person who does not kill or intend to kill but is convicted under a felony-murder statute for aiding and abetting a murder¹⁸⁹ unless the person showed "reckless indifference to human life."¹⁹⁰ A person cannot be sentenced to death if mentally retarded,¹⁹¹ or for a crime committed when he was under the age of eighteen.¹⁹² The logic driving these cases can be summed up in one phrase: "X is bad, but not as bad as Y." The outcomes of these cases and the reasoning that leads up to them confirm the idea that, in the death penalty context, excessiveness can be determined largely in terms of where the crime at issue stands on the scale of seriousness in relation to other crimes.¹⁹³

¹⁸⁸ *Coker v. Georgia*, 433 U.S. 584 (1977).

¹⁸⁹ *Enmund v. Florida*, 458 U.S. 782 (1982).

¹⁹⁰ *Tison v. Arizona*, 481 U.S. 137, 158 (1987).

¹⁹¹ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

¹⁹² *Roper v. Simmons*, No. 03-633, slip op. at 5-6 (U.S. Mar. 1, 2005).

¹⁹³ Notice here that comparative desert's evidentiary value in this context is limited. See supra notes 165-68 and accompanying text. Sentencing rapists to death is perfectly consistent with the idea that rapists are less culpable than murderers because one may think that a rapist deserves one death sentence and that a murderer deserves ten death sentences. What this means is that one could not criticize a government for putting both rapists and murderers to death on the basis of comparative desert (were it to play only an evidentiary role) because the government could accept the principle of comparative desert and still treat rapists and murderers equally because one can die only once. It is only because comparative desert also partly constitutes the meaning of desert that it has the normative bite it does in the death penalty context.

For instance, in *Coker v. Georgia*, which held that a sentence of death is grossly disproportionate for the crime of rape, Justice White's plurality opinion reasoned that rape was reprehensible, but not as reprehensible as murder because it did not "involve the unjustified taking of human life."¹⁹⁴ The plurality made another comparative desert point when it noted that in Georgia, one could commit murder "with malice aforethought" but still may not be punished to death without aggravating circumstances.¹⁹⁵ The plurality found it "difficult to accept the notion . . . that the rapist . . . should be punished more heavily than the deliberate killer."¹⁹⁶

The subsequent excessive-punishment cases in capital sentencing are best understood as comparative desert decisions as well. First, in *Enmund v. Florida*, the Court considered the death penalty for accomplice liability in felony murders when there was no evidence that the defendant in question killed, attempted to kill, or intended to kill anyone during the course of the robbery in which he participated.¹⁹⁷ The Court stated that it had "no doubt that robbery is a serious crime deserving serious punishment" but that it did not "compare with murder."¹⁹⁸ Even though a murder did take place during the course of the robbery, the Court pointed out, the defendant in the case did not kill or attempt to kill, and there was no evidence of intention to kill on his part. The Court concluded:

Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to Enmund the culpability of those who killed the [victims in the case]. *This was impermissible under the Eighth Amendment.*¹⁹⁹

In other words, what was "impermissible under the Eighth Amendment" was equal treatment of unequals. It is hard to imagine a stronger affirmation of the principle of comparative desert.

¹⁹⁴ *Coker*, 433 U.S. 584, 598 (1977) (plurality opinion).

¹⁹⁵ *Id.* at 600 (plurality opinion).

¹⁹⁶ *Id.* (plurality opinion).

¹⁹⁷ 458 U.S. 782, 787 (1982).

¹⁹⁸ *Id.* at 797 (quoting *Coker*, 433 U.S. at 598).

¹⁹⁹ *Id.* at 798 (emphasis added).

Although *Tison v. Arizona*²⁰⁰ seriously limited the holding of *Enmund*, the Court did not stray from the comparative desert framework of *Coker* and *Enmund*. Instead of following the formula, “*X* is bad, but not as bad as *Y*,” the decision was driven by the argument, “*X* is bad, *and is* as bad as *Y*.” The Court anchored its decision on the principle of comparative desert when it observed that “[d]eeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and, therefore, the more severely it ought to be punished.”²⁰¹ Noting that “reckless indifference to the value of human life may be every bit as shocking to the moral sense as an ‘intent to kill,’” the Court held that the death penalty may be imposed on a person who “knowingly engag[es] in criminal activities known to carry a grave risk of death” even if he does not himself kill, attempt to kill, or intend to kill.²⁰²

The Court again addressed the question of comparative desert in *Thompson v. Oklahoma*.²⁰³ The formulation was still, “Is *X* as bad as *Y*?” where *X* is “a juvenile committing a crime” and *Y* is “an adult committing a similar crime.” The *Thompson* plurality held that those fifteen years or younger were less culpable than adults and therefore not deserving of death.²⁰⁴

Similarly, in *Atkins v. Virginia*, the Court considered the question of whether the Eighth Amendment permitted states to impose the death penalty on the mentally retarded by focusing on the relative culpability question.²⁰⁵ Even though, the Court stated, “[t]heir [mental] deficiencies do not warrant an exemption from criminal sanctions, . . . they do diminish their personal culpability.”²⁰⁶ Noting that “[s]ince *Gregg*, our jurisprudence has consistently confined the imposition of the death penalty to a narrow category of the most serious crimes” and has sought “to ensure that only the most deserving of execution are put to death,” the Court concluded that the death penalty was excessive for the mentally retarded.²⁰⁷

²⁰⁰ 481 U.S. 137, 157 (1988) (plurality opinion).

²⁰¹ *Id.* at 156 (plurality opinion).

²⁰² *Id.* at 157 (plurality opinion).

²⁰³ 487 U.S. 815, 838 (1988) (plurality opinion).

²⁰⁴ *Id.* (plurality opinion).

²⁰⁵ 536 U.S. 304, 321 (2002).

²⁰⁶ *Id.* at 318.

²⁰⁷ *Id.* at 319.

The only excessive punishment case in capital sentencing in which the Court moved away from the comparative desert framework is *Stanford v. Kentucky*.²⁰⁸ The plurality, announcing that the imposition of capital punishment on an individual for a crime committed at the age of sixteen was constitutionally permitted, based its decision exclusively on what it viewed as a lack of national consensus against the practice.²⁰⁹ Departing from precedent, the plurality declined to engage in an independent proportionality analysis, meaning that the question of comparative desert was not even raised.²¹⁰

The anomaly in the Court's jurisprudence created by *Stanford*, however, was removed by *Roper v. Simmons*, which directly overruled *Stanford*.²¹¹ The *Roper* Court stressed the comparative desert point repeatedly in reaching its decision, stating that "[juveniles'] irresponsible conduct is not as morally reprehensible as that of an adult" and that "juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment."²¹² Noting "the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders," the Court concluded that the death penalty should not be imposed on juvenile offenders because they "cannot with reliability be classified among the worst offenders."²¹³ The Court also noted that the *Stanford* Court's refusal to engage in an independent proportionality analysis "was inconsistent with prior Eighth Amendment decisions" and "is . . . inconsistent with the premises of [the Court's] recent decision in *Atkins*."²¹⁴

Reading these cases, it is difficult to avoid the conclusion that retributivism as a side constraint, and especially its comparative desert aspect, is the perspective from which the Supreme Court has addressed the question of excessiveness in the death penalty cases. This is not to say that *how* the Court arrives at answers to these questions of comparative desert has not been controversial, but the

²⁰⁸ 492 U.S. 361, 380 (1989) (plurality opinion).

²⁰⁹ *Id.*

²¹⁰ *Id.* at 377–80 (plurality opinion).

²¹¹ *Roper v. Simmons*, No. 03-633, slip op. at 20 (U.S. Mar. 1, 2005).

²¹² *Id.* at 16 (quoting *Thompson*, 487 U.S. at 835).

²¹³ *Id.* at 15.

²¹⁴ *Id.* at 20–21.

important point for the current purposes is to note *what* questions are being raised.

2. Comparative Desert and the Rest of the Death Penalty Jurisprudence Under the Eighth Amendment

A topic that I cannot discuss in depth here but should nevertheless raise is the relationship between retributivism as a side constraint in excessive punishment cases and the rest of the death penalty jurisprudence under the Eighth Amendment. After *Furman* and *Gregg*, the Supreme Court death penalty jurisprudence developed in two directions: first, determining in which situations a sentence of death is excessive (the topic this Article addresses); and second, determining what procedures must be followed when imposing a sentence of death. The current messy doctrinal landscape governing constitutional regulation of capital punishment is rather unsatisfying,²¹⁵ and there is no simple way out of the situation.²¹⁶ Nevertheless, one attractive aspect of retributivism as a side constraint as a theory of excessive punishment is that it provides the framework within which the concerns behind much of the death penalty jurisprudence can be understood.

For instance, one of the overriding concerns of *Furman v. Georgia*—that the sentence of death was being imposed in a random, unpredictable, and arbitrary manner²¹⁷—is easily explained from the perspective of retributivism as a side constraint. The principle of comparative desert is violated not only when *X* is punished as harshly as *Y* even though *X* is less deserving of punishment than *Y*, but also when punishments appear to have no relation to comparative deservingness of different criminals.²¹⁸

Similarly, *Gregg v. Georgia* was a case largely decided on comparative desert grounds. In upholding Georgia's sentencing

²¹⁵ Steiker & Steiker, *supra* note 5, at 357 (“Virtually no one thinks that the constitutional regulation of capital punishment has been a success.”).

²¹⁶ See *id.* at 414–27 (offering some suggestions).

²¹⁷ *Furman v. Georgia*, 408 U.S. 238, 293 (1972) (Brennan, J., concurring); *id.* at 309–10 (Stewart, J., concurring) (“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”); see also Steiker & Steiker, *supra* note 5, at 364–69.

²¹⁸ *Furman*, 408 U.S. at 294 (Brennan, J., concurring) (“When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment.”).

scheme, the plurality noted that it adequately met the requirement of *Furman*, which the plurality identified as the principle that “the penalty of death not be imposed in an arbitrary or capricious manner.”²¹⁹ The characteristics the plurality highlighted in upholding the Georgia statute all emphasize comparative desert; the statute narrowed the class of murderers subject to capital punishment by specifying aggravating circumstances, “focus[ed] the jury’s attention on the particularized nature of the crime and the particularized characteristics of the individual defendant,”²²⁰ and provided for an appellate review to determine “whether the sentence is disproportionate compared to those sentences imposed in similar cases.”²²¹

Comparative desert also explains the Court’s prohibition on mandatory death penalty statutes. As the plurality noted in *Woodson v. North Carolina*, the flaw in mandatory death penalty statutes is that they “treat[] all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.”²²² What is “blind” about the infliction is that it is indifferent to different levels of desert within the broad class of criminals who commit the crime for which the mandatory sentence is death. The crucial, difficult question is, of course, how much particularization and individualization is to be demanded, and retributivism as a side constraint by itself will not readily generate specific prescriptions in this regard. Nevertheless, the important point here is that the Court’s rejection of mandatory death sentences in favor of individualized consideration in capital sentencing was driven by the principle of comparative desert.

This discussion merely scratches the surface, as it is only meant to illustrate the theoretical connections between the Court’s excessiveness jurisprudence and the rest of the Court’s capital punishment jurisprudence under the Eighth Amendment. The law in this area is fairly arcane, and it is beyond the scope of this Article to fully work out the implications of retributivism as a side constraint for the Court’s capital punishment regulation generally. For cur-

²¹⁹ *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (plurality opinion).

²²⁰ *Id.* at 206 (plurality opinion).

²²¹ *Id.* at 198 (plurality opinion).

²²² 428 U.S. 280, 304 (1976) (plurality opinion).

rent purposes, I only note that the negative injunction “do not punish excessively” generates positive obligations on the part of the government to devise whatever schemes and procedures are necessary to comply with the negative injunction,²²³ and I suggest that we think about the Court’s “death is different” jurisprudence from within the perspective of the negative injunction that I have been calling retributivism as a side constraint.

B. Retributivism as a Side Constraint in Noncapital Cases

1. Comparative Desert in Weems, Solem, and Bajakajian

Comparative desert plays a crucial role in the noncapital context as well. *Weems v. United States*,²²⁴ the seminal excessive punishment case, is a good illustration of the role of comparative desert in noncapital cases. In *Weems* the defendant, convicted of falsification of a public document, was sentenced to a fine, fifteen years of “hard and painful labor” and “certain accessory penalties” such as “civil interdiction” and “perpetual absolute disqualification.”²²⁵

The Court applied both scheme-wide and system-wide analyses. The Court observed, for instance, that “the law in controversy seems to be independent of degrees,”²²⁶ because it did not distinguish those who falsify on the basis of whether “an offender against the statute injures anyone by his act, or intends to injure any one”²²⁷ and whether there was “any fraud [or] . . . desire to defraud, [or] intention of personal gain.”²²⁸ The Court then compared the sentence with punishments imposed for more serious crimes, noting for instance that “[t]here are degrees of homicide that are not punished so severely”²²⁹ and compared the sentence with punishments imposed for crimes of comparable seriousness, such as counterfeiting, noting that those punishments were far less harsh than the punishment being reviewed.²³⁰ The Court concluded that these fail-

²²³ See Jeremy Waldron, Can Communal Goods Be Human Rights?, in *Liberal Rights: Collected Papers 1981–1991* at 339, 343 (1993).

²²⁴ 217 U.S. 349 (1910).

²²⁵ Id. at 357–58, 364.

²²⁶ Id. at 365.

²²⁷ Id. at 363.

²²⁸ Id. (internal quotation marks omitted).

²²⁹ Id. at 380.

²³⁰ Id. at 380–81.

ures of comparative desert were not mere “different exercises of legislative judgment” but were “cruel and unusual.”²³¹

Solem v. Helm, which struck down a sentence of life imprisonment without the possibility of parole imposed on a recidivist for passing a “no-account” check in the amount of one hundred dollars,²³² has an explicit discussion of comparative desert.²³³ The Court reasoned that “courts are competent to judge the gravity of an offense, *at least on a relative scale*”²³⁴ and listed several general “widely shared” comparative desert principles: “nonviolent crimes are less serious than crimes marked by violence or the threat of violence,” “[s]tealing a million dollars is . . . more serious than stealing a hundred dollars,” “a lesser included offense should not be punished more severely than the greater offense,” “assault with intent to murder [is] more serious than simple assault,” “attempts are less serious than completed crimes,” “an accessory after the fact should not be subject to a higher penalty than the principal,” and “negligent conduct is less serious than intentional conduct.”²³⁵

The *Solem* Court then pointed out a number of indications that the punishment at issue in this case was undeserved. The crime was passing a “no-account” check, and under South Dakota’s recidivist statute, the defendant, who had previously been convicted of six nonviolent felonies, was sentenced to life without parole.²³⁶ The Court noted that in South Dakota, which did not have the death penalty, Helm’s sentence was “the most severe punishment that the State could have imposed on any criminal for any crime,” even though his crime was far less serious than other crimes that could be punished by life imprisonment in the state, such as “murder, . . . treason, first-degree manslaughter, first-degree arson, and kidnaping [sic],” and some of the more serious crimes such as “a third offense of heroin dealing or aggravated assault” could not be punished by life imprisonment at all.²³⁷ The Court, driving the comparative desert point home, concluded that “[c]riminals com-

²³¹ Id. at 381.

²³² 463 U.S. 277, 281–84 (1983).

²³³ Id. at 290–92.

²³⁴ Id. at 292 (emphasis added).

²³⁵ Id. at 292–93.

²³⁶ Id. at 296–97.

²³⁷ Id. at 297–99.

mitting any of these offenses ordinarily would be thought more deserving of punishment” than the defendant in the case.²³⁸

Finally, *United States v. Bajakajian* also shows the role of comparative desert in assessing excessiveness. Decided under the Excessive Fines Clause, *Bajakajian* held unconstitutionally excessive a forfeiture in the amount of \$357,144 for a violation of the law requiring persons transporting money in excess of \$10,000 outside the United States to file a report.²³⁹ The Court stressed that “[t]here was no fraud on the United States, and . . . no loss to the public fisc” and that the crime carried “a minimal level of culpability” and caused “minimal” harm—only the absence of “the information that \$357,144 had left the country.”²⁴⁰

The Court then engaged in a scheme-wide comparative desert analysis to criticize the statute under which *Bajakajian* was sentenced, which merely stated that “[t]he court, in imposing a sentence on a person convicted of an offense in violation [of the reporting statute] . . . shall order that the person forfeit to the United States any property . . . involved in such offense, or any property traceable to such property.”²⁴¹ Dismissing the government’s claim that “[f]orfeiture of the undeclared cash is perfectly calibrated to the seriousness of the defendant’s conduct,”²⁴² the Court responded that “[t]here is no inherent proportionality in such a forfeiture” and that “the harm respondent caused is [not] anywhere near 30 times greater than that caused by a hypothetical drug dealer who willfully fails to report taking \$12,000 out of the country in order to purchase drugs.”²⁴³ In other words, the Court was suggesting, the sentencing scheme failed to reflect the principle of comparative desert because it focused on the wrong determinant—the amount of money being carried out—of the seriousness of the reporting crime.

²³⁸ *Id.* at 299. The Court also compared the sentence to the sentences imposed for the commission of the crime of the same seriousness in other jurisdictions and concluded that “Helm was treated more severely than he would have been in any other State,” except possibly in Nevada. *Id.* at 300. For some concerns about this kind of analysis, see *supra* note 185.

²³⁹ *United States v. Bajakajian*, 524 U.S. 321, 324 (1998).

²⁴⁰ *Id.* at 339.

²⁴¹ 18 U.S.C. § 982(a)(1) (2000).

²⁴² Brief for the United States at 30, *Bajakajian* (No. 96-1487).

²⁴³ *Bajakajian*, 524 U.S. at 339.

The Court also employed a modest system-wide analysis and noted that the maximum fine under the statute defining the violation (as opposed to the forfeiture statute) and the sentence under the Federal Sentencing Guidelines were “but a fraction of the penalties authorized” and concluded that they show that “respondent’s culpability relative to other potential violators of the reporting provision—tax evaders, drug kingpins, or money launderers, for example—is small indeed.”²⁴⁴ Again, the main driving force of the opinion, through its scheme-wide and system-wide analyses, is the principle of comparative desert.²⁴⁵

2. *The Birth of the Disjunctive Theory: Harmelin and Ewing*

This leaves two cases remaining to be explained: *Harmelin* and *Ewing*.²⁴⁶ Both are problematic from the perspective defended in

²⁴⁴ Id. at 339 n.14.

²⁴⁵ I have made this point previously. See The Supreme Court, 1997 Term—Leading Cases, 112 Harv. L. Rev. 122, 152 (1998) (discussing the Excessive Fines Clause and proportionality in sentencing).

²⁴⁶ One case I have omitted in my discussion is *Rummel v. Estelle*, 445 U.S. 263 (1980). *Rummel* was the Court’s attempt to foreclose any chance of successfully bringing an excessiveness challenge against noncapital sentences. The defendant in *Rummel* had been sentenced to life under Texas’s recidivist statute, which provided that anyone convicted of a felony for the third time shall be imprisoned for life with eligibility for parole in twelve years. The Court, in a 5-4 vote, upheld the sentence. In an opinion by then-Justice Rehnquist, the Court listed a number of reasons for upholding the sentence. The Court first distinguished the line of death penalty cases prohibiting excessive punishments, calling them “of limited assistance” given “the unique nature of the death penalty.” Id. at 272. As to *Weems*, the seminal excessiveness case dealing with a noncapital sentence, the Court distinguished the case as well, pointing out that the punishment at issue in *Weems* was “unique.” Id. at 274. The Court then based its decision on institutional competence, separation of powers, and federalism grounds. The Court expressed that it was reluctant to review legislatively mandated terms of imprisonment because the line-drawing involved in such reviews was “subjective,” and such “subjective” judgments should be made by legislatures, not courts. Id. at 275–76. Responding to the defendant’s argument that the Court should compare his sentence to sentences for an equivalent crime in other states, the Court brushed the inquiry aside as being too complex for courts to engage in and as being inconsistent with “traditional notions of federalism,” which allow punishments of differing severity in different states for the same crimes. Id. at 282–83. In short, the opinion is a statement of noninterference, practically equivalent to a proof against the existence of excessive punishment in federal courts. The continuing significance of *Rummel* today is unclear. *Solem*, decided three years later, is impossible to square with *Rummel*. Neither is *Rummel* consistent with the current position of the Supreme Court, which is that there is a narrow principle of proportionality under the Eighth Amendment that has been valid since *Weems* and controls both noncapital and capital

this Article, *Ewing* more so than *Harmelin* because *Harmelin* stays within the framework of retributivism as a side constraint (although barely), whereas *Ewing* all but abandons it.

Harmelin involved a mandatory sentence of life without parole for the crime of drug possession by a first-time offender.²⁴⁷ Michigan did not have the death penalty, so it was the most serious punishment available, otherwise reserved for first-degree murder and “manufacture, distribution, or possession with intent to manufacture or distribute 650 grams or more of narcotics.”²⁴⁸ Since the drug possession statute contained no intent requirement, possession alone was sufficient to trigger this penalty.²⁴⁹ Violent crimes such as second-degree murder, rape, and armed robbery did not carry such harsh mandatory sentences.²⁵⁰ Such factors should have been sufficient to raise serious proportionality concerns, especially from the perspective of comparative desert, but this was not the view adopted by the *Harmelin* Court. Although the opinion was important in that it reaffirmed “the existence of the proportionality rule for both capital and noncapital cases,”²⁵¹ Justice Kennedy’s formulation of the proportionality test was at best puzzling and at worst a contradiction in terms.

The Court announced that the Eighth Amendment prohibited “extreme sentences that are ‘grossly disproportionate’ to the crime.”²⁵² The Court, however, also denied the relevance of comparisons of the sentence being reviewed with sentences imposed for other crimes within the state and the sentences imposed for the same crime in other states unless it was “the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.”²⁵³ By doing away with the intra-jurisdictional analysis—or, as I’ve been calling it, the system-wide analysis—except in such “rare” cases,

cases. Although the case continues to be cited by the Court as good law, much of the rationale of the opinion remains deeply at odds with the cases decided since then.

²⁴⁷ *Harmelin v. Michigan*, 501 U.S. 957, 961 (Scalia, J., concurring in part and concurring in the judgment).

²⁴⁸ *Id.* at 1025–26 (White, J., dissenting).

²⁴⁹ *Id.* at 1024 (White, J., dissenting).

²⁵⁰ *Id.* at 1026 (White, J., dissenting).

²⁵¹ *Id.* at 997 (Kennedy, J., concurring in part and concurring in the judgment).

²⁵² *Id.* at 1001 (Kennedy, J., concurring in part and concurring in the judgment).

²⁵³ *Id.* at 1005 (Kennedy, J., concurring in part and concurring in the judgment).

the *Harmelin* plurality made irrelevant an important source of information in determining whether the punishment being reviewed is deserved, which, as I have been emphasizing, has both comparative and noncomparative elements. The *Harmelin* Court's "proportionality test" is thus incomplete and inadequate to answer its own question: the test asks whether a sentence is grossly disproportionate to punishment, but the question cannot be answered without comparing the punishment at issue to punishments for other crimes.

There are also statements in the opinion that significantly undermine its own standard of proportionality. Toward the end of the opinion, the Court makes a sudden, unexplained shift from a proportionality analysis to a policy analysis. Justice Kennedy states that "[r]easonable minds may differ about the efficacy of Michigan's sentencing scheme," and, while acknowledging that "[t]he accounts of pickpockets at Tyburn hangings are a reminder of the limits of the law's deterrent force," he says, "we cannot say the law before us has no chance of success and *is on that account . . . disproportionate*."²⁵⁴ In other words, the Court starts out with a statement that grossly disproportionate sentences are unconstitutional but ends with a non sequitur that what really matters is whether "the law . . . has [any] chance of success" for deterrence purposes. The flaw of this line of reasoning, as Justice Scalia succinctly points out, is that "[p]roportionality is inherently a retributive concept," and "it becomes difficult even to speak intelligently of 'proportionality,' once deterrence and rehabilitation are given significant weight."²⁵⁵

This anomaly developed into an essential abandonment of the proportionality standard in *Ewing v. California*.²⁵⁶ *Ewing* considered a sentence of twenty-five years to life for the crime of stealing golf clubs by a recidivist under California's three-strikes statute. The Court upheld the sentence on the ground that the sentence "reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who

²⁵⁴ Id. at 1008 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added).

²⁵⁵ Id. at 989 (Scalia, J., concurring in part and concurring in the judgment).

²⁵⁶ 538 U.S. 11, 14 (2003) (plurality opinion).

continue to commit felonies must be incapacitated.”²⁵⁷ Despite the plurality’s claim to have arrived at this result by applying the *Harmelin* principle of proportionality,²⁵⁸ the Court’s analysis in fact proceeded according to a new theory, which I have been calling the disjunctive theory.

The germ of the disjunctive theory of the Eighth Amendment—that a punishment is constitutionally permitted as long as there is a punishment theory that justifies the punishment—is found in the *Harmelin* opinion, which states that one of the principles governing the Court’s proportionality review is that “the Eighth Amendment does not mandate adoption of any one penological theory,” as “[t]he federal and state criminal systems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation.”²⁵⁹

After citing *Harmelin* for the proposition that retribution, deterrence, incapacitation, and rehabilitation are all legitimate aims of punishment, the *Ewing* plurality stated that “[s]ome or all of these justifications may play a role in a State’s sentencing scheme” and that “[s]electing the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.”²⁶⁰ The plurality then noted that “[r]ecidivism has long been recognized as a legitimate basis for increased punishment” and that California has an interest in incapacitating repeat offenders and deterring crimes.²⁶¹ The plurality concluded by announcing the disjunctive theory: “It is enough that the State . . . has a reasonable basis for believing that [the punishments it imposes] ‘advance the goals of [its] criminal justice system in any substantial way.’”²⁶²

It is unclear what the relationship is between the *Ewing* Court’s “rational legislative judgment” test and the *Harmelin* concurrence’s gross disproportionality test. The Court showed some attempt to structure its opinion as a *Harmelin* proportionality analysis when it argued that “Ewing’s theft should not be taken lightly”

²⁵⁷ Id. at 30 (plurality opinion).

²⁵⁸ Id. at 23–24 (plurality opinion).

²⁵⁹ *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in the judgment).

²⁶⁰ *Ewing*, 538 U.S. at 25 (plurality opinion).

²⁶¹ Id. (plurality opinion).

²⁶² Id. at 28 (plurality opinion) (quoting *Solem v. Helm*, 463 U.S. 277, 297 n.22 (1983)).

and that “[i]n weighing the gravity of Ewing’s offense, we must place on the scales not only his current felony, but also his long history of felony recidivism.”²⁶³ The Court quickly abandoned the framework, however, and applied a different test.

The manner in which the Court bent the proportionality test beyond recognition is easily seen in its statements that “our proportionality review of Ewing’s sentence must take . . . into account” the “State’s choice of [a] legitimate penological goal,” that “Ewing’s sentence is justified by the State’s public-safety interest in incapacitating and deterring recidivist felons,”²⁶⁴ and that “Ewing’s . . . long [sentence] . . . reflects a rational legislative judgment, entitled to deference, that offenders who have committed serious or violent felonies and who continue to commit felonies must be incapacitated.”²⁶⁵ In short, rather than engaging in an evaluation of how the crime and the punishment compared to each other, as the *Harmelin* gross-disproportionality test appeared to call for, the Court simply changed the subject and asked whether the legislature’s policy judgment bore a rational relationship to a legitimate government purpose. Some may argue that the *Ewing* Court remained within the proportionality framework and merely applied an extremely deferential version of the proportionality test, but given the emphasis the Court placed on California’s deterrence and incapacitation rationales in virtually every paragraph of the opinion, it is impossible to read the opinion in that way.²⁶⁶

There are several reasons why the Court’s analysis took the particular, twisted form it did. First, a traditional proportionality analysis of focusing on the gravity of the crime did not do the job for its purposes because recidivism, the primary “harm” it was identifying as the target of the three-strikes law, was not a type of crime but a social problem involving criminals that criminal law was being used to control.²⁶⁷ Hence, the question became not

²⁶³ Id. at 28–29 (plurality opinion).

²⁶⁴ Id. at 29.

²⁶⁵ Id. at 30.

²⁶⁶ Cf. Karlan, *supra* note 35, at 901 (stating that *Harmelin* and *Ewing* differ from *Bajakajian* in that *Bajakajian* is a retributivist opinion whereas *Harmelin* and *Ewing* focus on deterrence and incapacitation).

²⁶⁷ See *Ewing*, 538 U.S. at 26 (plurality opinion) (“California’s justification is no pretext. Recidivism is a serious public safety concern in California and throughout the Nation.”); *id.* at 29 (“To give full effect to the State’s choice of this legitimate pe-

whether an individual committing a particular criminal act was culpable enough to justify the government's deprivation of his liberty, but whether the regulation advanced one of the purposes of punishment.

Second, as Justice Breyer noted in his dissent, “[n]o one argue[d] for Ewing’s inclusion within the ambit of the three strikes statute on grounds of ‘retribution.’”²⁶⁸ This statement by itself, and how small a role this observation played in every *Ewing* opinion, including the dissents, should give us pause. If my argument in this Article has been correct, then Justice Breyer’s statement should have been, at least presumptively, dispositive. In other words, it was not possible for the Court to apply the proportionality test and uphold the sentence because there was no retributive argument available.²⁶⁹

It was no surprise that no one attempted to defend the sentence on retributivist grounds. From the perspective of retributivism as a side constraint, Ewing’s punishment is highly problematic, and its problems are evident from both scheme-wide and system-wide analyses. In California, the kind of sentence that Ewing received is reserved for first-degree murderers, and California punishes more serious crimes less harshly, such as maximum sentences of nine years for arson causing great bodily injury and eleven years for voluntary manslaughter.²⁷⁰ The scope of the recidivist statute was very broad as well, raising comparative desert concerns at the level of the sentencing scheme. Under the law, anyone who had two or

nological goal, our proportionality review of Ewing’s sentence must take that goal into account. Ewing’s sentence is justified by the State’s public-safety interest in incapacitating and deterring recidivist felons . . .”).

²⁶⁸ *Id.* at 51–52 (Breyer, J., dissenting).

²⁶⁹ This is not to say that Ewing’s long criminal history was irrelevant in judging his culpability. Some theories of retributivism allow for enhanced sentences for offenses committed by repeat offenders. See von Hirsch, Past or Future Crimes, *supra* note 30, at 77–91; Andrew von Hirsch, Desert and Previous Convictions in Sentencing, 65 *Minn. L. Rev.* 591 (1981). But none would justify the kind of dramatic increase that Ewing faced. See Paul H. Robinson, Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice, 114 *Harv. L. Rev.* 1429, 1436 (2001) (“By committing an offense after a previous conviction, an offender might be seen as ‘thumbing his nose’ at the justice system. Such disregard may justify some incremental increase in punishment over that deserved by a first-time offender, but it seems difficult to justify the doubling, tripling, or quadrupling of punishment because of nose-thumbng.”).

²⁷⁰ *Ewing*, 538 U.S. at 44–45 (Breyer, J., dissenting).

more prior “serious” or “violent” felony convictions was subject to “an indeterminate term of life imprisonment” the next time he was convicted of a “felony.”²⁷¹ The class of crimes that could be classified as a “felony” triggering the recidivist statute covered a wide range of behaviors of varying seriousness, from petty theft with a prior conviction to assault with a deadly weapon and vehicular manslaughter, but did not cover some arguably more serious crimes, such as reckless driving, selling poisoned alcohol, and child neglect.²⁷²

Hence, Justice Scalia was right to comment in his concurring opinion that “the game is up” once the judgment that “Ewing’s sentence is justified by the State’s public-safety interest in incapacitating and deterring recidivist felons” had any role in the decision.²⁷³ He rightly observed that “why that has anything to do with the principle of proportionality is a mystery” and again correctly suggested that the true test being applied by the plurality was that “all punishment should reasonably pursue the multiple purposes of the criminal law.”²⁷⁴ In other words, the Court’s new test was the disjunctive theory.

IV. WHAT’S WRONG WITH THE DISJUNCTIVE THEORY

The *Ewing* Court’s theory of excessive punishment is that any punishment can be constitutionally upheld as long as it can be justified *under any one of the traditional justifications of punishment*. I call this position the “disjunctive theory” because it permits punishment under the Eighth Amendment as long as it can be justified under the retributivism, deterrence, rehabilitation, *or* incapacitation theory of punishment. The disjunctive theory has two problems. First, it cannot function as a side constraint. Second, it permits all punishments that are justified under the utilitarian theory.

²⁷¹ Id. at 15–16 (plurality opinion) (quoting Cal. Penal Code § 667(e)(2)(A) (West 1999); id. § 1170.12(c)(2)(A) (West Supp. 2002)).

²⁷² Id. at 49–50 (Breyer, J., dissenting).

²⁷³ Id. at 31–32 (Scalia, J., concurring in the judgment).

²⁷⁴ Id. (Scalia, J., concurring in the judgment).

A. The Disjunctive Theory and the Eighth Amendment as a Side Constraint

The disjunctive theory fundamentally conflicts with the basic structure of the Eighth Amendment as a side constraint on our institution of punishment. The institution of punishment may be considered desirable for a number of reasons, but the Eighth Amendment places a limitation on how we may pursue the purposes of punishment. Therefore, the disjunctive theory, which interprets the Eighth Amendment prohibition on excessive punishment merely as a rule that says no punishment is excessive as long as some purpose of punishment is advanced, is a strange reading of the provision, to say the least.

To return to the formulation introduced above, each of the various regulations under the Cruel and Unusual Punishments Clause has the same structure: Even if the overall purposes of punishment would be advanced by doing *X* to *A*, it should not be done because doing *X* to *A* would be cruel and unusual. This structure is nonsensical from the perspective of the disjunctive theory because that theory dictates that the analysis come to an end if a legitimate purpose of punishment is advanced, period. In other words, the disjunctive theory essentially dissolves the constraint part of the goal-constraint framework that characterizes much of the Eighth Amendment jurisprudence. In the process, the theory creates an Eighth Amendment prohibition that does not behave like any other Eighth Amendment constraint.

B. Problems with the Idea of Utilitarianism as an Alternative Constraint

The disjunctive theory is also problematic because it allows punishments that are justified under the utilitarian theory, and both as a normative theory of excessive punishment and as an interpretive theory of the Eighth Amendment, the utilitarian theory falls short.

As Judge Richard Posner once remarked in an article defending the use of economics in interpreting the Constitution, “the Eighth Amendment has no clear economic interpretation.”²⁷⁵ As is well-

²⁷⁵ Richard A. Posner, *The Constitution as an Economic Document*, 56 *Geo. Wash. L. Rev.* 4, 38 (1987).

known, the utilitarian theory of punishment subscribes to the notion that the issue of whether someone should be punished, and in what way, should be considered in terms of the consequences that the punishment would bring for the overall good of the society. The purpose of punishment, under this view, is not to give each criminal what he or she deserves, but to deter future crimes, to incapacitate criminals by keeping them “off the streets,” or to rehabilitate criminals so they would become better citizens.²⁷⁶

For the utilitarian theory, then, the idea of excessive punishment is derived from the idea of minimizing loss and avoiding waste. The basic idea is, as Jeremy Bentham succinctly stated, “all punishment is mischief: all punishment in itself is evil” and that punishment should be allowed “as far as it promises to exclude some greater evil.”²⁷⁷ From this idea, a number of prescriptions of general applicability can be drawn.

First, punishment should be severe enough to outweigh the benefits the crime would bring to the criminal. Second, the more harmful the crime is, the more severe the punishment can be because the cost of the punishment we are willing to live with increases in direct proportion to the amount of harm it prevents. Third, when there are two crimes that a criminal might choose from, punishments for the two crimes should be set so that the criminal would be induced to pick a less serious crime—that is, the less serious crime should carry the less severe penalty. Fourth, the less certain the punishment is, the more severe it needs to be to sufficiently deter potential criminals. Fifth, the longer the period between the crime and the punishment, the more severe the punishment should be. These are general principles only, of course, and depending on the way the costs and benefits shake out in a given situation, they may be violated to obtain the optimal result.²⁷⁸

From these principles, one could generate a utilitarian theory of excessiveness. The utilitarian theory considers punishment to be evil, prescribes that it be used as sparingly as possible, and recom-

²⁷⁶ See, e.g., Lacey, *supra* note 29, at 27–33; Ten, *supra* note 103, at 7–8.

²⁷⁷ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 158 (J.H. Burns & H.L.A. Hart eds., Clarendon Press 1996) (1789).

²⁷⁸ *Id.* at 158–70. These ideas were updated by Gary Becker in his theory of optimal sanctions. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 *J. Pol. Econ.* 169, 209 (1968).

mends that a system of punishment should distinguish among crimes by the degrees of harm they cause and put corresponding “prices” on them.²⁷⁹ In other words, built into the utilitarian principle of proportionality are various sources of downward pressure on sentences, and such pressures may be enough in most instances to prevent outrageously harsh sentences and to generate a schedule of punishments that resembles the one designed on the basis of desert.²⁸⁰

The problem of the utilitarian theory as a theory of excessive punishment under the Eighth Amendment, however, is that it will still yield results that conflict with the principle of comparative desert in many situations—there will be times when a criminal will get more than he deserves and other times when he gets less than he deserves, depending in each instance on the resulting increase or decrease in the overall social well-being. That is, given two crimes of differing seriousness, *A* and *B*, there is no requirement within the utilitarian framework that whichever is the more serious crime will be punished more harshly. If *A* causes the harm of one hundred units and *B* causes the harm of two hundred units, the utilitarian theory would favor punishing *B* more harshly than *A* sometimes, but not other times; it depends as much on the probability of conviction as on the seriousness of the crimes.²⁸¹ If my analysis in Part III is correct, the utilitarian theory’s inability to guarantee comparative desert should raise doubts as to its ability to serve as a theory of the Eighth Amendment principle of proportionality.

In addition, despite the sharpness of disagreement among justices in multi-opinion cases like *Harmelin*, it appears that there has been agreement on one proposition: life imprisonment for parking violations would be unconstitutionally excessive.²⁸² However, it is not clear whether the utilitarian theory of punishment has sufficient safeguards to prevent even that. Given the goal of loss mini-

²⁷⁹ Rawls, *supra* note 29, at 28.

²⁸⁰ Kaplow & Shavell, *supra* note 169, at 328–29; Becker, *supra* note 278, at 208.

²⁸¹ See, e.g., Kaplow & Shavell, *supra* note 169, at 329–31.

²⁸² *Harmelin v. Michigan*, 501 U.S. 957, 986 n.11 (1991) (Scalia, J., concurring in part and concurring in the judgment); *id.* at 1018 (White, J., dissenting); *Rummel v. Estelle*, 445 U.S. 263, 274 n.11 (1980) (plurality opinion); *id.* at 288 (Powell, J., dissenting).

mization, as long as the multivariable calculus works out to the right number, there is no upper limit on the amount of punishment that is tied to the gravity of the crime, and the punishment can be set high or low based on factors that may have nothing to do with the seriousness of one's crime.

So for example, in situations where a particular type of crime that is extremely difficult to detect is causing a lot of damage, a well-publicized punishment is considered a reliable device to induce deterrence, and the difficulty of detection is so extreme that no one has been apprehended for the crime, the utilitarian theory may justify punishing an innocent person with an extreme sanction. Utilitarianism is notoriously unable to rule out such situations, and this is the truth behind the common objection to the utilitarian theory of punishment that it would permit the state to "punish the innocent."²⁸³

In other words, because everything within the utilitarian theory of punishment depends on the result of a Benthamite multivariable equation in a given situation, if the overall result is a sufficient drop in the social loss to balance out the increase in suffering to the criminal, then no further question need be asked, no matter how wide the disparity between crime and punishment may be.²⁸⁴ There-

²⁸³ See H.J. McCloskey, *A Non-Utilitarian Approach to Punishment*, 8 *Inquiry* 249 (1965); see also Hart, *supra* note 29, at 76; Honderich, *supra* note 103, at 50–51. It was, after all, Bentham himself who advised that we increase punishment "beyond that quantity which, on other accounts, would be strictly necessary" in situations "where the punishment proposed is of such a nature as to be particularly well calculated to answer the purpose of a moral lesson." Bentham, *supra* note 277, at 171. So, even if a particularly high amount of disutility is assigned to, say, the punishment of an innocent person, as long as the aggregate pleasures add up to outweigh the pain then there is no reason to feel a sense of loss or tragedy. See Hart, *supra* note 29, at 12 ("We should be conscious of choosing the lesser of two evils, and this would be inexplicable if the principle sacrificed to utility were itself only a requirement of utility."); Ten, *supra* note 103, at 143–44; Jeremy Waldron, *The Right to Private Property* 78–79 (1988).

²⁸⁴ One source of complication here is that utilitarians modify their theories in various ways to take into account the fact that not everyone in the world sees the world the way they do. For instance, Kaplow and Shavell acknowledge the existence of what they call a "taste for fairness" and include it as one of the variables in their analyses. Kaplow & Shavell, *supra* note 169, at 11–12. Similarly, Jeremy Bentham lists as a factor the possible unpopularity of a punishment in cases where the people "happen to conceive, that the offence or the offender ought not to be punished at all, or at least ought not to be punished in the way in question." Bentham, *supra* note 277, at 164. Gary Becker, too, counts the possibility that "judges or juries may be unwilling to

fore, the utilitarian theory is unattractive as either an interpretive theory of the Eighth Amendment or as a normative theory of punishment. The disjunctive theory, which allows the utilitarian theory to serve as a theory of excessive punishment, is thus defective as well.

C. The Disjunctive Theory and the Principle of Deference to Legislatures

The point of all this discussion is not that the *Ewing* and *Harmelin* Courts committed themselves to absurd results dictated by the logic of the disjunctive theory. The point is rather to understand what is wrong with the disjunctive theory, why the disjunctive theory allows outcomes like *Ewing* and *Harmelin*, how the rationale of the cases may be applied and extended by lower courts and the future Supreme Court, and how problematic these cases are from both interpretive and normative perspectives.

Note that the argument here is against the disjunctive theory, and not the general principle of deference to legislatures in sentencing matters.²⁸⁵ As noted in the Introduction, the *Ewing* Court's theory in fact has two components, the disjunctive theory and the policy of deference to legislatures. Its version of the disjunctive theory is quite deferential in that all it requires is "a reasonable basis for believing" that the punishment at issue "advances the goals of [the state's] criminal justice system in any substantial way."²⁸⁶ The deferential nature of the *Ewing* Court's disjunctive theory renders the prohibition on excessive punishment probably only as strong as a rational basis inquiry would permit, which is not very strong at all. It is, however, possible to subscribe to the disjunctive theory of punishment without deferring to the legislature on whether any of the traditional goals of punishment is *actually* being promoted by the law in question. It is also possible to subscribe to the retributivist theory this Article defends and still defer to Con-

convict offenders if punishments are set very high" as one of the factors to consider in his analysis. Becker, *supra* note 278, at 184.

²⁸⁵ Cf. Dworkin, *supra* note 145, at 138–40 (distinguishing between skepticism and deference); Mitchell N. Berman, *Constitutional Decision Rules*, 90 Va. L. Rev. 1, 51–60 (2004) (distinguishing between "operative propositions" and "decision rules").

²⁸⁶ *Ewing*, 538 U.S. at 28 (plurality opinion) (emphasis added) (internal quotation marks and citation omitted).

gress on when the retributivist side constraint has been actually violated. The two issues are hence orthogonal. A court can in theory be quite aggressive in its application of the disjunctive theory,²⁸⁷ but the argument I make in this Part is that adjusting the level of deference will not solve the problem. In other words, my criticism of the *Ewing* Court should not be confused with a similar but analytically distinct criticism that the Court has reduced the Eighth Amendment guarantee of proportionality to a mere rational-basis scrutiny. My quarrel here is with the disjunctive theory in all its forms, not just the particularly deferential version employed by the *Ewing* Court.

CONCLUSION

This Article has defended two propositions. First, the source of the current unsatisfying state of the Eighth Amendment jurisprudence prohibiting excessive punishment is the Court's confusion about the meaning of proportionality, as evidenced especially by its slide into the disjunctive theory. Second, the Eighth Amendment prohibition on excessive punishment should be understood as a side constraint that embodies retributivism in its both comparative and noncomparative aspects.

The disjunctive theory, despite its flaws, may be tempting for some because the issue of defining excessive punishment turns on controversial criminal justice policy issues. It may be thought that the Court should decline to intervene in these sorts of policy debates.

I do not deny the truth of the proposition that “[a] sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation.”²⁸⁸ Nor do I deny the proposition that “[s]electing the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.”²⁸⁹ It is too quick,

²⁸⁷ A portion of Justice Breyer's dissenting opinion illustrates how the disjunctive theory may be applied more strictly. See *Ewing*, 538 U.S. at 47–52 (Breyer, J., dissenting). Pamela Karlan shows how in her recent article on felon disenfranchisement. See Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 *Stan. L. Rev.* 1147 (2004) (arguing that criminal disenfranchisement statutes may be unconstitutional under *Ewing*).

²⁸⁸ *Ewing*, 538 U.S. at 25 (plurality opinion).

²⁸⁹ *Id.* (plurality opinion).

however, to jump from these truisms to the proposition that the Eighth Amendment “does not mandate adoption of any one penological theory.”²⁹⁰

There is a difference between the principle that the Constitution does not mandate adoption of any one penological theory in determining *how legislatures are to set appropriate sentences* and the principle that the Constitution does not mandate adoption of any one penological theory in determining *how the judiciary is to set limits on sentences devised by legislatures*. The former statement is obviously true, and retributivism as a side constraint is perfectly consistent with it, as a side constraint only places limitations on one’s pursuit of goals, not the definition of the goals themselves. The goals of incapacitation, deterrence, retribution, and rehabilitation can all be pursued under a regime with retributivism as a side constraint, as long as such pursuits do not violate the side constraint.

Retributivism as a side constraint is foreclosed by the latter statement, but the statement cannot be true. In order to judge whether a punishment is excessive or not, we must confront questions such as why we have the institution of punishment, how it is justified, how appropriate punishments are to be determined, and who is to be punished for what sorts of conduct; this cannot be done without “penological theories” that the Court has tried so hard to avoid. The Court’s continued refusal to subscribe to a “penological theory” can only be understood, therefore, as an abdication of its responsibility to enforce the Eighth Amendment and its ban on excessive punishments.

All of this is another way of saying that the Court should not confuse the distinction so clearly laid out by H.L.A. Hart—and John Rawls, in an equally influential argument—between the general justifying aim of punishment and the principles of distribution of punishment regarding who may be punished and by how much.²⁹¹ Yes, the institution of punishment may be designed to serve different aims, and, yes, the judiciary should not dictate which aims of punishment the government should pursue. But the fact that there

²⁹⁰ *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in judgment).

²⁹¹ See Hart, *supra* note 29, at 3–13; Rawls, *supra* note 29, at 20–21.

may be various legitimate aims should not be imported directly into our thinking to determine the principles of distribution of punishment. As Rawls pointed out, different theories of punishment may be appropriate for different institutions, given the different roles the legislature and the judiciary perform in our system of government.²⁹² The basic distinctions articulated by Rawls and Hart may not tell us how courts should decide particular Eighth Amendment cases, but they should counsel us against blindly accepting the Court's glossing over of the monumental shift in perspective when it jumps from the premise of the variety of penological objectives to the conclusion that the Court should give the various penological goals equal weight in judging which punishments violate the Constitution.

Many questions remain, to be sure, and I do not mean to suggest that implementation of retributivism as a side constraint can take place without controversy or difficulty. Retributivism as a side constraint, despite the help it gets from comparative desert, remains a vague idea. Furthermore, the questions of who deserves what and which crimes are more deserving and which less deserving are highly contestable issues.²⁹³ The vagueness and contestability of the concept of proportionality do strengthen the separation of powers norm that determinations of specific prison terms for crimes traditionally have been and should be "properly within the province of legislatures, not courts" and that courts should generally defer to legislatures in this realm.²⁹⁴

In the end, the limited role of the judiciary should be kept in mind when shaping the doctrine and adjusting the level of deference to legislatures at the implementation stage, which can mitigate the worry that retributivism as a side constraint may be unduly intrusive. At the same time, there is a well-respected line of argument that justifies aggressive judicial oversight to protect the interests of criminal defendants on the familiar ground that criminal de-

²⁹² Rawls, *supra* note 29, at 23.

²⁹³ For the latest discussion of the difficulties of proportionality determinations, see Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 *Va. L. Rev.* 1957 (2004).

²⁹⁴ *Rummel v. Estelle*, 445 U.S. 263, 275–76 (1980).

endants form a discrete and insular minority.²⁹⁵ How should this tension be managed? There are two extreme non-solutions, from a judge-made sentencing guidelines specifying maxima for all crimes to a regime of extreme deference to legislatures. There are, however, much less radical options in between these two poles,²⁹⁶ and the truism that legislatures get to decide amounts of punishment is no reason for the Court to evade its responsibility to enforce the Eighth Amendment, which appears to be the position adopted by the *Ewing* Court.

The purpose of this Article has not been to provide all the answers but to clear the ground and create a framework within which questions of proportionality in punishment are worked out. Without an understanding of exactly what we are trying to prevent with a prohibition on excessive punishment, we cannot even begin to know what questions to ask when we try to determine how such a prohibition is to be enforced.

²⁹⁵ See, e.g., Stuntz, *Civil-Criminal Line*, supra note 17, at 20 (“A lot of constitutional theory has been shaped by the idea, made famous by *Carolene Products* footnote four, that constitutional law should aim to protect groups that find it hard or impossible to protect themselves through the political process. If ever such a group existed, the universe of criminal suspects is it.”). Of course, the existence of such systematic bias in the political process, traditionally an argument in favor of judicial intervention, see John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980), need not always point in the direction of judges. See Rachel E. Barkow, *Recharging the Jury: The Criminal Jury’s Constitutional Role in an Era of Mandatory Sentencing*, 152 U. Pa. L. Rev. 33, 125–26 (2003).

²⁹⁶ Cf. Stuntz, *Uneasy Relationship*, supra note 17, at 66–68 (offering some suggestions as to what a proportionality-based regulation might look like).