The Constitutional Right Against Excessive Punishment

Youngjae Lee

NYU School of Law, yolee@law.harvard.edu

Follow this and additional works at: http://lsr.nellco.org/nyu_plltwp

Part of the Public Law and Legal Theory Commons

Recommended Citation


http://lsr.nellco.org/nyu_plltwp/3

This Article is brought to you for free and open access by the New York University School of Law at NELLCO Legal Scholarship Repository. It has been accepted for inclusion in New York University Public Law and Legal Theory Working Papers by an authorized administrator of NELLCO Legal Scholarship Repository. For more information, please contact tracy.thompson@nellco.org.
THE CONSTITUTIONAL RIGHT AGAINST EXCESSIVE PUNISHMENT

Youngjae Lee*

INTRODUCTION

The current cruel and unusual punishment 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. 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. The third category includes so-called “super due process for death” or “death is different” cases, which allow sentences of death only after procedures

---

* Alexander Fellow, NYU School of Law. I thank Rachel Barkow, Sara Sun Beale, Mitchell Berman, Stephens Bibas, Antony Duff, Richard Fallon, Noah Feldman, Richard Frase, Barry Friedman, Jerry Frug, David Gans, David Garland, Abe Howell, Kyron Huigens, Larry Kramer, Nicola Lacey, Daryl Levinson, Erik Lillquist, Bernadette Meyler, Liam Murphy, Richard Primus, Jenny Roberts, Stephen Schulhofer, Chris Serkin, Jerry Skolnick, Susan Sturm, Julie Chi-hye Suk, Nelson Tebbe, Tim Wu, David Zaring, and Ben Zipursky for helpful conversations and comments on previous drafts. All errors are mine.

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.


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 to 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).


mandated and approved over time by the Supreme Court. 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.

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* and *Lockyer v. Andrade* on California’s “three strikes” law; *Atkins v. Virginia*, holding the execution of mentally retarded criminals to be unconstitutionally excessive; and *United States v. Bajakajian*, the first Supreme Court case to invalidate a fine under the Excessive Fines Clause. Most recently, the Court held in *Roper v. Simmons* that the Constitution does not permit execution of those convicted of crimes that were committed before the offenders turned eighteen, thereby overturning *Stanford v. Kentucky*, a sixteen-year-old precedent holding the opposite. 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 crimes for which they are imposed that they becomes unconstitutional? De-

---

12 For reasons explained below, see infra note 68, 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).
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. *Ewing v. California*, 538 U.S. 11, 31 (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
spite the urgings of prominent commentators and the Court’s own repeated, albeit uncertain, gestures in the direction of a more robust proportionality regulation by the judiciary, 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

Declarations 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.). 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)).
and complex, yet largely meaningless as a constraint, except perhaps in a few instances in the capital context.19

In 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, 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 acknowledged, 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 legis-

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. Bilionis, 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, and the standard of review that the Court applied, accordingly, 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.

23 Id. at 28.

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

2005]

lative judgment, entitled to deference, that offenders who have com-
mitted serious or violent felonies and who continue to commit felonies must
be incapacitated.”

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 pun-
ishment, such as incapacitation, deterrence, retribution, and rehabilita-
tion. This idea I call the “disjunctive theory” of the constitutionality of
punishment. The second idea is the view that legislatures are entitled to
deferece 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 sub-
stantive theory, and a combination of the two produces the Ewing plural-
ity’s position.

The principle that courts should defer to legislatures in their choices
of punishments and the justifications for them is familiar and widely ac-
cepted. On the other hand, the disjunctive theory—the idea that no
punishment is excessive as long as it can be justified as a means to ad-
vance the incapacitation, deterrence, retribution, or rehabilitation ration-
ale of punishment—is a deeply flawed theory of the proportionality
ensure under the Eighth Amendment.

The disjunctive theory is wrongheaded because the Eighth Amend-
ment ban on excessive punishments should be understood as a side con-
straint. The institution of punishment is desirable for various and well-

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 Chemeris-
sky, Justice O’Connor and Federalism, 32 McGeorge L. Rev. 877, 877 (2001); H. Jefferson
Powell, The Oldest Question of Constitutiona l 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,
27 The phrase “side constraint,” is, of course, not mine. 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 mini-
mize 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.”
rehearsed reasons, including retribution, deterrence, incapacitation, and rehabilitation. However, the purpose of the Eighth Amendment ban on “cruel and unusual punishments” 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. Retributivism 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. 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 such goals are or dictate the levels of punishment as long as the government acts within the specified boundaries. At the same time, retributivism as a side con-

---

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
Excessive Punishment

straint 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 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 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.\(^\text{30}\) The noncomparative element focuses on whether one is treated in an appropriate way without regard to how others are treated. Comparative desert, on the other hand, 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

---

\(^\text{30}\) 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].
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. Finally, having been virtually neglected by contemporary theorists, the concept of desert and its relationship to justice have received renewed attention from political philosophers in the past several years.

However, such a body of thinking on this issue 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 practitio-


ners, 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. Thus, few have examined in detail the question of 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. 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

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 (1995–96).

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 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 Radin, supra note 7; 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).
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 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 punishments.[^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 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]

[^37]: Id. at 360.
[^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 states until _Robinson v. California_ was decided in 1962. 370 U.S. 660 (1962).
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 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 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 culpa-


\(^{49}\) 458 U.S. 782 (1982).

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


\(^{52}\) 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 at 14–21; Atkins, 536 U.S. at 317–20; Thompson, 487 U.S. at 833 (plurality); Tison, 481 U.S. at 155; Enmund, 458 U.S. at 797; Coker, 433 U.S. at 597–98 (plurality).
ble than, or as culpable as, a paradigmatic first-degree murderer. Age at the time of the crime, mental retardation, or lack of intent to kill could all indicate lower culpability, while “reckless indifference to the value of human life,” 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 rape\textsuperscript{55} or robbery.\textsuperscript{56}

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.”\textsuperscript{57} 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.\textsuperscript{58} 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 premeditation and delibera-

\textsuperscript{55} Coker, 433 U.S. at 598 (plurality opinion).

\textsuperscript{56} Enmund, 458 U.S. at 797.

\textsuperscript{57} 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.

\textsuperscript{58} 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 that exempting a group of criminals from the possibility of capital punishment will not reduce the deterrence value of capital punishment for other groups.

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.” However, Coker was the last case in which a sentence was declared unconstitutional for failing the harm-culpability test only, and the subsequent cases vacating death sentences always found that the sentence in question failed both tests. 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 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

59 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))).

60 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 doesn’t, 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.”).

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

62 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)).

63 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.
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.64

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,65 Solem v. Helm,66 Harmelin v. Michigan,67 United States v. Bajakajian,68 and Ewing v. California,69 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.

64 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 a situation in which, however, a court would have to face an Eighth Amendment challenge against a punishment that is considered too lenient and less than deserved.

68 524 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 is 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 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 fines 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).
69 538 U.S. at 11.
In *Solem*, striking down a sentence of life imprisonment without 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.”\(^{70}\) 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.”\(^{71}\) 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.”\(^{72}\) Third, the Court suggested that “courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions.”\(^{73}\)

The *Solem* standard went through a revision in *Harmelin*, which held that a sentence of a mandatory term of life in prison without possibility of parole for the crime of possessing 672 grams of cocaine was not cruel and unusual.\(^{74}\) 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.\(^{75}\) In his opinion, Justice Kennedy recognized “the narrow proportionality principle that has existed in our Eighth Amendment jurisprudence for 80 years.”\(^{76}\) The legal framework 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,\(^{77}\) but the second and third steps—intra- and inter-jurisdictional comparisons—became discretion-

\(^{70}\) *Solem*, 463 U.S. at 281–82, 290, 303.

\(^{71}\) Id. at 290–91, 292.

\(^{72}\) Id. at 291.

\(^{73}\) Id.

\(^{74}\) 501 U.S. at 961, 965.


\(^{76}\) *Harmelin*, 501 U.S. at 996 (Kennedy, J., concurring in part and concurring in the judgment).

\(^{77}\) Id. at 1001–04 (Kennedy, J., concurring in part and concurring in the judgment).
ary and “appropriate only in the rare case in which a threshold [proportionality analysis] leads to an inference of gross disproportionality.”

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. 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.

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” 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.” 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,” the rational judgment reflecting the state’s choice of means to advance its interests in incapacitating repeat offenders and deterring crimes. 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 will 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.

---

78 Id. at 1005 (Kennedy, J., concurring in part and concurring in the judgment).
79 Ewing, 538 U.S. at 17–20 (plurality opinion).
80 Id. at 23 (plurality opinion).
81 Id. at 25 (plurality opinion).
82 Id. at 28 (plurality opinion) (internal quotation marks omitted) (alteration in original).
83 Id. at 30 (plurality opinion).
84 Id. at 26–27.
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. 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.\(^{85}\)

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.”\(^{86}\) 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 punishment and setting them against each other, without regard to how other crimes are punished.\(^{87}\) 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.\(^{88}\)

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.\(^{89}\) The fourth type, found in Justice

---

85 See supra text accompanying notes 55–56.

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

87 I will 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.

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

89 See supra text accompanying notes 57–60.
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.90

Despite appearances, the third and fourth types are in fact quite dif-
ferent. 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 retributive or de-
terrent goal, or both, to avoid becoming “nothing more than the purpose-
less and needless imposition of pain and suffering.”91 In other words, the
purposes-of-punishment test states a necessary but not sufficient condi-
tion for a punishment to survive a constitutional challenge.92 The dis-
junctive theory in the 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 con-
ceptual 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 noncom-
parative. The Court has never explained its preference for one over the
other based on context, nor what they have to do with the idea of “pro-
portionality” 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

---

90 See supra text accompanying notes 81–84.
91 *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).
92 In *Coker*, Justice White, after repeating the *Gregg* standard that “a punishment is ‘ex-
cessive’ 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,” empha-
sized 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 punish-
ment . . . even though it may measurably serve the legitimate ends of punishment and there-
fore is not invalid for its failure to do so.” 433 U.S. at 592 n.4 (plurality opinion). The last
clause quoted directly contradicts the disjunctive theory.
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. 93 As a result, the Court has ended up muddling the precise role of the purposes-of-punishment test over time 94 and has produced theories like the disjunctive test in the process of “applying” the “proportionality principles . . . distilled in” Justice Kennedy’s Harmelin concurrence. 95

Could some of the disparate renderings of “proportionality” be explained by the differences between the capital and noncapital contexts? Perhaps so, but 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 heightened reliability in its administration—bears no obvious relation to the particular differences in the doctrine that I have noted. 96

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 mix-

---

93 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.”).

94 See supra text accompanying notes 57–64.


96 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 factfinding 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).
ture 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 crime,\textsuperscript{97} 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 no such explanation is forthcoming, or an argument why, despite the unwarranted differences, reform is not desirable.\textsuperscript{98}

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 ap-

\textsuperscript{97} 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).”).

\textsuperscript{98} 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 the Court’s 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. Co. v. Campbell, 538 U.S. 408, 426 (2003); BMW of North America, Inc. 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 Supreme 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. However, the differences between the two contexts and the different problems that the two contexts raise should be kept in mind.
propriate 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 non-comparative 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 wrongdoing deserve punishment. 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 retributivism and Oliver Wendell Holmes to describe it as “mystic.” 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 burn.”


wound, stripe for stripe.”102 The basic idea is to do to the offender what
the offender has done to the victim.103 Kant’s version of the same princi-
ple 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.”104 Under this principle, “[i]f 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.”105 The image of the
scale of justice implies the notion of moral equilibrium through punish-
ment.

Kant claims that lex talionis is the only principle that can “specify
definitely the quality and the quantity of punishment,” as “all other prin-
ciples are fluctuating and unsuited.”106 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.”107

In other words, following lex talionis frequently leads to absurd re-
sults 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.108 Moreover,

102 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).
104 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 one given by philosophers writing about Kant’s views on punishment. See, e.g.,
Honderich, supra note 99, at 11–12; Jeffrie G. Murphy, Kant’s Theory of Criminal Punish-
ment, in Retribution, Justice, and Therapy 82, 82–84 (1979); Ten, supra note 99, at 75. How-
ever, as Jeffrie Murphy has demonstrated—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).
105 Kant, supra note 104, at 105.
106 Id. at 106.
107 G.W.F. Hegel, Philosophy of Right § 101, remark (T.M. Knox trans., Oxford Univ.
108 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, su-
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.\textsuperscript{109} To be fair, Kant recognizes these difficulties as well, 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?” 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.”\textsuperscript{110}

Hegel, whose retributivist theory of punishment is based on the notion of “annulment” of the crime,\textsuperscript{111} attempts to respond to the absurdity problem of \textit{lex talionis}. His theory is very similar to Kant’s, as the “annulment,” he posits, comes about through “an injury of the injury.”\textsuperscript{112} 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.”\textsuperscript{113} 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.’”\textsuperscript{114} 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 dif-
ferent from one another in every way." 115 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 suffered by the victim of the crime. 116 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. 117

Robert Nozick has offered a contemporary restatement of retributivism:

\[
Punishment\ deserved = r \times H,
\]

where \( H \) is the magnitude of the wrongness or harm, and \( r \) is the degree of responsibility. 118 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. 119 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, 120 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

\[115\text{ Id. § 101, remark.}\]
\[116\text{ See Honderich, supra note 99, at 16; Cottingham, supra note 104, at 242; see also S.I. Benn, An Approach to the Problems of Punishment, 33 Philosophy 325, 335 (1958).}\]
\[117\text{ See Honderich, supra note 99, at 16; Benn, supra note 116, at 335; Shafer-Landau, supra note 108, at 193–94.}\]
\[118\text{ Robert Nozick, Philosophical Explanations 363–97 (1981).}\]
\[119\text{ Id. at 363.}\]
\[120\text{ Shafer-Landau, supra note 108, at 194.}\]
something of use for himself or his fellow citizens.” Hegel, too, maintains that seeing the “comparability of crime and punishment in respect of their value” is absolutely crucial because otherwise punishment turns into “only an ‘arbitrary’ connexion of an evil with an unlawful action.” 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.” Finally, Professor 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, Professor Nozick explains, it becomes difficult to distinguish retribution from revenge.

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 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. 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.

121 Kant, supra note 104, at 105.
122 Hegel, supra note 107, § 101, remark.
123 Primoratz, supra note 103, at 87; see also Ten, supra note 99, at 152–53.
125 See sources cited in supra note 29.
Chief Justice Burger succinctly described the general design of the Eighth Amendment in his Furman dissent:

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 the ends of the criminal laws cannot justify the use of measures of extreme cruelty to achieve them.126

In other words, the Eighth Amendment prohibition on cruel and unusual punishment should be understood not merely as an acontextual “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, Rep. 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 theirs ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel?”127 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,128 “atrocities” (such as those where criminals were “embowelled alive, beheaded, and quartered”129), “public dissection,”130 “burning at the stake, crucifixion, breaking on the

129 Wilkerson v. Utah, 99 U.S. 130, 135 (1878).
130 Id.
wheel," or “the rack, the thumbscrew, the iron boot, the stretching of limbs.” 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.” Yet the Eighth Amendment bans these practices, and implied in that prohibition is the view that the ban cannot be over-ridden even if we may reach the overall goals of the institution of punishment by engaging in such practices.

In the excessive punishment context, too, several cases have recognized this 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; 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; 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.

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 minimum standard of decency, without regard to the 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

---

131 In re Kemmler, 136 U.S. 436, 446 (1890).
133 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.”).
134 At least without special justification, see infra note 146.
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.\footnote{DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 200 (1989).}

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

In short, the Cruel and Unusual Punishment 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” on one hand and “constraints” on the other 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.\footnote{Nozick, supra note 27, at 28–35; cf. Hart, supra note 100, 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.”); cf. Ronald Dworkin, Taking Rights Seriously 90–94 (1977) (explaining the same concept in terms of the distinction between rights and goals).} 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,”\footnote{Morris, supra note 29, at 196–202.} and 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.\footnote{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 sacr-
C. Retributivism and the Concept 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. 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).

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. It would make no sense to say that a person deserves to go to prison because his brother stole a car unless 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.  

In the relationship between what is deserved and the basis for desert ($X$ and $F$), the key concept is “fittingness” or appropriateness. 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. 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. 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.

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

---

149 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.

150 Id. at 81–82.


152 Feinberg, Expressive Function, supra note 151, at 100, 114.

gravity of the crime increases. In other words, more serious crimes should be more harshly punished.\textsuperscript{154}

“Fittingness” has both comparative and noncomparative aspects.\textsuperscript{155} The latter demands that a person convicted of a given 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 com-

\textsuperscript{154} See Feinberg, Expressive Function, supra note 151, 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 151. 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 99, 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 153, at 602 (arguing that the expressive theory of punishment gives content to retributivism).

\textsuperscript{155} 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 Olsaretti ed., 2003), whereas R.A. Duff has used the terms “absolute proportionality” and “relative proportionality.” Duff, supra note 154, 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.
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 violation 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. 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.

That retributivism also has a comparative aspect is less obvious; in fact, certain philosophers have argued that desert is essentially a noncomparative idea. 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

---

156 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 155, at 54. This is not to deny, of course, that comparative desert requires equal treatment of equals.

157 Feinberg, supra note 155, at 311; Duff, supra note 154, at 133.

158 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 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).

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.\(^\text{160}\)

In this way, retributivism functions the way an audience at a play responds to various performers at the end of the performance.\(^\text{161}\) 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 applause, 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 appears more and more unlikely\(^\text{162}\)—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 \textit{deserve}, not just what they \textit{comparatively deserve}. It is in this

\(^{160}\) Feinberg, supra note 155, at 118; see also Duff, supra note 154, 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.”).

\(^{161}\) I borrow this example from David Miller. See Miller, supra note 155, at 30.

\(^{162}\) 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.
sense that sometimes what one deserves cannot be determined without considering both comparative and noncomparative aspects.\textsuperscript{163}

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

\textit{D. The Importance of Comparative Desert for the Purposes of Judicial Enforcement}

It is beyond the scope of this Article to fully address 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.\textsuperscript{164} 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.\textsuperscript{165} 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 sys-

\textsuperscript{163} For a similar analysis of comparative desert, see McLeod, supra note 155, at 125; Miller, supra note 155, 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.

\textsuperscript{164} Hurka, supra note 155, at 48; Shelly Kagan, Comparative Desert, in Desert and Justice, supra note 155, at 93, 99.

\textsuperscript{165} From “$\text{If } P, \text{ then } Q$,” it follows that “$\text{If not-}Q, \text{ then not-}P$.”
tem. Comparative desert, then, can be an important, if limited, instrument for enforcing noncomparative desert, especially in situations where judgments of comparative desert are more accessible to us than judgments of noncomparative desert. 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 problem seems less serious once

---

166 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 in the state being too lenient rather then too harsh. Therefore, one defense that should be available to the state that violates the comparative desert norm is to demonstrate that they are 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 15–25 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.

167 We tend to be more confident about our comparative desert judgments than noncomparative desert judgments. See infra note 169.

168 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
we recognize that the amount of the deserved punishment depends not only on the gravity of the 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.169

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.170 And, as discussed in Part III, the scheme-wide analysis has played an important role in
noncapital cases as well.\textsuperscript{171} 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 \textit{Coker v. Georgia},\textsuperscript{172} \textit{Enmund v. Florida},\textsuperscript{173} \textit{Atkins v. Virginia},\textsuperscript{174} and \textit{Roper v. Simmons}\textsuperscript{175}—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.\textsuperscript{176} 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.\textsuperscript{177}

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.\textsuperscript{178} 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 punish-

\begin{footnotesize}
\footnote{See infra text accompanying notes 224–245.}
\footnote{433 U.S. 584 (1977) (rape).}
\footnote{458 U.S. 782 (1982) (aiding and abetting murder without intent to kill).}
\footnote{536 U.S. 304 (2002) (mentally retarded criminal).}
\footnote{No. 03-633, slip op. (U.S. Mar. 1, 2005) (criminal under the age of eighteen).}
\footnote{See infra text accompanying notes 224–245.}
\footnote{Of course, a state may not observe these comparative desert norms and not be in violation of the Eighth Amendment if its departure from comparative desert norms is a result of its lenient treatment of criminals. See supra note 166.}
\footnote{For a criticism along these lines, see Karlan, supra note 35, at 893; Shafer-Landau, supra note 108, 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).}
\end{footnotesize}
ment and demand, on comparative desert grounds, that only the crimes that are 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) to be the kinds of 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.179

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.180 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. And, 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,

179 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.

influenced by the media and politicians, and support punitive measures that may go much further than what they would be willing to support, given additional information.\textsuperscript{181} 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 not as intrusive on federalism as 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” 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,\textsuperscript{182} one of which focuses on noncomparative desert and the other of which focuses on comparative desert. The first kind asks whether a state’s punishment for crime $X$ is harsher, in absolute terms, than other states’ punishments for the same crime, and was used by the Court in \textit{Solem v. Helm}.\textsuperscript{183} Comparative desert has little use for this inquiry.\textsuperscript{184} The second kind asks whether a

\textsuperscript{181} For a discussion of such evidence, see Barkow, supra note 180, at 748-54; Beale, supra note 180, at 163–64.

\textsuperscript{182} 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 federalism issues that federal-state comparisons raise is different from state-state comparisons and should be analyzed separately.

\textsuperscript{183} For a discussion of the case, see infra text accompanying notes 232–238.

\textsuperscript{184} 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’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.\(^{185}\) 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.\(^{186}\)

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*.

---

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 169, 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.

\(^{185}\) See supra notes 52–53; infra text accompanying note 193.

\(^{186}\) The fact that studies tend to show widespread agreement on comparative seriousness of crimes, see supra note 169, is further support for this conclusion.
A. Retributivism as a Side Constraint in Capital Cases

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.\textsuperscript{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 murder\textsuperscript{189} unless the person showed “reckless indifference to human life.”\textsuperscript{190} A person cannot be sentenced to death if mentally retarded,\textsuperscript{191} or for a crime committed when he was under the age of eighteen.\textsuperscript{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.\textsuperscript{193}

For instance, in \textit{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.”\textsuperscript{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 cir-
The plurality found it “difficult to accept the notion . . . that the rapist . . . should be punished more heavily than the deliberate killer.”

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. 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.” 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.*

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.

Although *Tison v. Arizona* 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 pun-

---

195 Id. at 600 (plurality opinion).
196 Id (plurality opinion).
198 Id. at 797 (quoting *Coker*, 433 U.S. at 598).
199 Id. at 798 (emphasis added).
ished.”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

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 inde-

---

201 Id. at 156 (plurality opinion).
202 Id. at 157 (plurality opinion).
204 Id. at 838 (1988) (plurality opinion).
206 Id. at 318.
207 Id. at 319.
209 Id. at 380.
pendent 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 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 go into with any 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 proce-

210 Id. at 377–80.
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.
dures 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, unpredic-
table, 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 deservingsness of different crimi-
nals.218

Similarly, Gregg v. Georgia was a case largely decided on compara-
tive desert grounds. In upholding Georgia’s sentencing scheme, the plu-
rality noted that it adequately met the requirement of Furman, which the
plurality identified as the principle that “the penalty of death not be im-
posed 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, “fo-
cus[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

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); Furman, 408
U.S. 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.”).
220 Id. at 206 (plurality opinion).
221 Id. at 198 (plurality opinion).
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.”

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 current 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, 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*, the seminal excessive punishment case, is a good illustration of the role of comparative desert in noncapital

---

224 217 U.S. 349 (1910).
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.”

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,” 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” and whether there was “any fraud [or] . . . desire to defraud, [or] intention of personal gain.” 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” 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. The Court concluded that these failures of comparative desert were not mere “different exercises of legislative judgment” but were “cruel and unusual.”

*Solem v. Helm*, which struck down a sentence of life imprisonment without possibility of parole imposed on a recidivist for passing a “no-account” check in the amount of $100, has an explicit discussion of comparative desert. The Court reasoned that “courts are competent to judge the gravity of an offense, at least on a relative scale” 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,” “accessory after the fact should not be subject to a

---

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.
231 Id. at 381.
233 Id. at 290–92.
234 Id. at 292 (emphasis added).
higher penalty than the principal,” and “negligent conduct is less serious than intentional conduct.”

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. 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. The Court, driving the comparative desert point home, concluded that “[c]riminals committing any of these offenses ordinarily would be thought more deserving of punishment” than the defendant in the case.

Finally, United States v. Bajakajian is another instructive case showing the role of comparative desert in assessing excessiveness. Decided under the Excessive Fines Clause, Bajakijan 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. 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.”

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 con-

\[235\] Id. at 292–93.
\[236\] Id. at 296–97.
\[237\] Id. at 297-99.
\[238\] 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 184.
\[240\] Id. at 339.
victed 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.

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. Both are problematic from the perspective defended in 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. 246 Michigan did not

243 Bajakajian, 524 U.S. at 339.
244 Id. at 339 n.14.
246 Harmelin v. Michigan, 501 U.S. 957, 961 (Kennedy, J., concurring in part and concurring in the judgment).
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.”247 Since the drug possession statute contained no intent requirement, possession alone was sufficient to trigger this penalty.248 Violent crimes such as second-degree murder, rape, and armed robbery did not carry such harsh mandatory sentences.249 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,”250 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.”251 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.”252 By doing away with intra-jurisdictional analysis—or, as I’ve been calling it, the system-wide analysis—except in such “rare” cases, 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 punishment 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

247 Id. at 1025–26 (White, J., dissenting).
248 Id. at 1024 (White, J., dissenting).
249 Id. at 1026 (White, J., dissenting).
250 Id. at 997 (Kennedy, J., concurring in part and concurring in the judgment).
251 Id. at 1001 (Kennedy, J., concurring in part and concurring in the judgment).
252 Id. at 1005 (Kennedy, J., concurring in part and concurring in the judgment).
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.” 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.”

This anomaly develops into an essential abandonment of the proportionality standard in Ewing v. California. 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 continue to commit felonies must be incapacitated.” Despite the plurality’s claim to have arrived at this result by applying the Harmelin principle of proportionality, 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 sys-

---

253 Id. at 1008 (Kennedy, J., concurring in part and concurring in the judgment) (emphasis added).
254 Id. at 989 (opinion of Scalia, J.).
256 Id. at 30 (plurality opinion).
257 Id. at 23–24 (plurality opinion).
tems have accorded different weights at different times to the penological goals of retribution, deterrence, incapacitation, and rehabilitation.”

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.” 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. 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.’”

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” 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.” 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,” 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.” In short, rather than engaging in an evaluation of how the crime and the punishment compared to each other,

---

258 *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in the judgment).
259 *Ewing*, 538 U.S. at 25 (plurality opinion).
260 Id. (plurality opinion).
261 Id. at 28 (plurality opinion) (quoting *Solem v. Helm*, 463 U.S. 277, 297 n.22 (1983)).
262 Id. at 28–29 (plurality opinion).
263 Id. at 29.
264 Id. at 30.
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.\(^{265}\)

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.\(^{266}\) Hence, the question became not 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.’”\(^{267}\) 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.\(^{268}\)

\(^{265}\) 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).

\(^{266}\) 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 penological 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 . . . .”).

\(^{267}\) Id. at 51–52 (Breyer, J., dissenting).

\(^{268}\) 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
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 a maximum sentence of nine years for arson causing great bodily injury and eleven years for voluntary manslaughter. 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 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.” 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.

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. He rightly observed “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.” In other words, the Court’s new test was the disjunctive theory.

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-thumbing.”).

Ewing, 538 U.S. at 44–45 (Breyer, J., dissenting).
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)).
Id. at 49–50 (Breyer, J., dissenting).
Id. at 31–32 (Scalia, J., concurring in the judgment).
Id. (Scalia, J., concurring in the judgment).
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.

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 Punishment 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 creating 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.

First, 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.”274 As is well-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.275

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.”276 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 be-

275 See, e.g., Lacey, supra note 29, at 27–33; Ten, supra note 99, at 7–8.
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.277

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 recommends that a system of punishment should distinguish among crimes by degrees of harm they cause and put corresponding “prices” on them.278 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.279

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.280 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

277 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).
278 Rawls, supra note 29, at 28.
279 Kaplow & Shavell, supra note 168, at 328–29; Becker, supra note 277, at 208.
be unconstitutionally excessive. However, it is not clear whether the utilitarian theory of punishment has sufficient safeguards to prevent even that. Given the goal of loss minimization, 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 is that it would permit the state to “punish the innocent.”

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. Therefore, the utilitarian theory

---


282 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 99, 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 276, 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 99, at 143–44; Jeremy Waldron, The Right to Private Property 78–79 (1988).

283 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 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 168, 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
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.

It should be made clear also that the argument here is against the disjunctive theory, and not the general principle of deference to legislatures in sentencing matters.\(^{284}\) 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.”\(^{285}\) 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 Congress on


\(^{285}\) *Ewing*, 538 U.S. at 28 (plurality opinion) (emphasis added) (internal quotation marks and citation omitted).
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,286 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.”287 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.”288 However, it is too quick to jump from

---

286 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).
287 Ewing, 538 U.S. (plurality opinion).
288 Id. (plurality opinion).
these truisms to the proposition that the Eighth Amendment “does not mandate adoption of any one penological theory.” 289

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. 290 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 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

290 See Hart, supra note 29, at 3–13; Rawls, supra note 29, at 20–21.
roles the legislature and the judiciary perform in our system of government. 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. Not only is it vague, the question of who deserves what and which crimes are more deserving and which less deserving are highly contestable issues. 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.

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 defendants form a discrete and insular minority. How should this tension be managed? There are two extreme

---

291 Rawls, supra note 29, at 23.
294 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).
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,\textsuperscript{295} 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.

\textsuperscript{295} Cf. Stuntz, Uneasy Relationship, supra note 17, at 66–68 (offering some suggestions as to what a proportionality-based regulation might look like).