William & Mary Bill of Rights Journal

Volume 22 | Issue 1 Article 4

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Repository Citation

Scott W. Howe, *The Eighth Amendment as a Warrant Against Undeserved Punishment*, 22 Wm. & Mary Bill Rts. J. 91 (2013), http://scholarship.law.wm.edu/wmborj/vol22/iss1/4

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THE EIGHTH AMENDMENT AS A WARRANT AGAINST UNDESERVED PUNISHMENT

Scott W. Howe*

ABSTRACT

Should the Eighth Amendment prohibit all undeserved criminal convictions and punishments? There are grounds to argue that it must. Correlation between the level of deserts of the accused and the severity of the sanction imposed represents the very idea of justice to most of us. We want to believe that those branded as criminals deserve blame for their conduct and that they deserve all of the punishment they receive. A deserts limitation is also key to explaining the decisions in which the Supreme Court has rejected convictions or punishments as disproportional, including several major rulings in the new millennium. Yet, this view of the Eighth Amendment challenges many current criminal-law doctrines and sentencing practices that favor crime prevention over retributive limits. Mistake-of-law doctrine, felony-murder rules, and mandatory-minimum sentencing laws are only a few examples. Why have these laws and practices survived? One answer is that the Supreme Court has limited proportionality relief to a few narrow problems involving the death penalty or life imprisonment without parole, and it has avoided openly endorsing the deserts limitation even in cases in which defendants have prevailed. This Article presents a deeper explanation. I point to four reasons why the doctrine must remain severely stunted in relation to its animating principle. I aim to clarify both what the Eighth Amendment reveals about the kind of people we would like to be and why the Supreme Court is not able to force us to live up to that aspiration.

INTRODUCTION

Few knowledgeable persons would deny that our system of criminal justice sometimes fails to ensure fair outcomes for criminal defendants.[1] But the harder acknowledgment is that tendencies toward unfair treatment of defendants are built-in to the system. Some constitutional doctrines, such as the requirement of proof beyond a reasonable doubt[2] and the protection against self-incrimination,[3] go far towards protecting accused

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[1] *See generally, e.g.*, KERRY MAX COOK, CHASING JUSTICE: MY STORY OF FREEING MYSELF AFTER TWO DECADES ON DEATH ROW FOR A CRIME I DIDN'T COMMIT (2007) (describing an effort to clear one's name after wrongful prosecution).

[2] *See, e.g.*, Jackson v. Virginia, 443 U.S. 307 (1979) (holding that a federal habeas corpus court must consider "whether there was sufficient evidence . . . to find guilt beyond a reasonable doubt"); *In re* Winship, 397 U.S. 358 (1970) (holding that proof beyond a reasonable doubt is an essential of due process and fair treatment of a juvenile or an adult).

[3] *See, e.g.*, Griffin v. California, 380 U.S. 609 (1965).

persons. They even help some guilty defendants evade conviction.[4] Many other defendants also avoid deserved punishment through plea bargaining.[5] Nonetheless, some criminal defendants receive far more punishment than they deserve.[6]

Numerous criminal-law doctrines and sentencing laws and practices favor crime prevention over retributive limits. Examples on the liability front include felony-murder doctrine,[7] juvenile transfer rules,[8] and statutes abolishing or neutering the insanity defense.[9] Examples on the sentencing front include mandatory-minimum sentences,[10] "three-strike" laws,[11] and the practice of imposing much lengthier sentences on repeat offenders who have paid fully for their prior crimes.[12] By discounting offender deserts, these laws and practices produce injustice by design.

The prohibition on "cruel and unusual punishments" in the Eighth Amendment[13] provides hope for remedying some of these injustices. The potential for Eighth

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[4] Long before the promulgation of our Constitution, Blackstone asserted that we should give the margin of advantage to the criminal defendant: "[T]he law holds that it is better that ten guilty persons escape than that one innocent suffer." WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *358, 2546 (William Carey Jones ed., 1916).

[5] *See, e.g.*, Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 660 & n.17 (1981); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L. J. 1979, 1988, 2009 (1992).

[6] *See* Schulhofer, *supra* note 5, at 1981–82.

[7] *See generally* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 510–24 (6th ed. 2012) (explaining that the felony-murder doctrine is intended to prevent accidental killings during the commission of a felony).

[8] *See* David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 72 TEX. L. REV. 1555, 1557 (2004) ("[T]he trend to try juveniles as adults mistakenly assesses the punishment juveniles deserve by the wrong or harm they have done, ignoring their diminished responsibility for this wrong or harm.").

[9] *See, e.g.*, Delling v. Idaho, 133 S. Ct. 504, 504 (2012) (Breyer, J., dissenting) (noting that four states have abolished or severely limited the insanity defense); State v. Herrera, 895 P.2d 359, 385–87 (Utah 1995) (Stewart, Assoc. C.J., dissenting) (contending that the evisceration of the insanity defense in Utah violates the prohibition on cruel and unusual punishment and that "[i]mposing retribution on insane persons is nothing more than a blind, atavistic vengeance."); *see also infra* note 326.

[10] *See, e.g.*, MODEL PENAL CODE: SENTENCING § 6.06 cmt. at 6 (Tentative Draft No. 2, 2011) ("Empirical research and policy analyses have shown time and again that mandatory-minimum penalties . . . lead to disproportionate and even bizarre sanctions in individual cases . . . .").

[11] *See* Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 493 (1997) (contending that such laws make little sense from a deontological deserts perspective).

[12] *See* DRESSLER, *supra* note 7, at 55 (asserting that, in such a case, "a retributivist cannot justify punishing the offender more for the present offense merely because of the prior wrongs"); GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 466 (1978) ("The contemporary pressure to consider prior convictions in setting the level of . . . punishment reflects a theory of social protection rather than a theory of deserved punishment.").

[13] 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.

Amendment relief arises because the Supreme Court has declared that the clause prohibits not merely certain egregious punishments that are always improper, but also those that are disproportional as applied although not always proscribed.[14] The explanation behind a proportionality mandate focuses on retributive theory and asserts that there is injustice in inflicting punishment that exceeds retributive limits.[15] Under this view, laws and practices are unjust when they impose criminal liability or punishment beyond what the defendant deserves, even if such imposition is plausibly aimed at crime prevention or other utilitarian ends.[16]

The view that the Eighth Amendment limits excessive punishment[17] has a long pedigree in Supreme Court jurisprudence. The Court first rejected a punishment on this basis in 1910, in *Weems v. United States*,[18] striking down a fifteen-year sentence of harsh imprisonment and perpetual loss of civil liberties for minor crimes, without suggesting that the sanctions would be impermissible for serious crimes, such as rape or homicide.[19] While the mandate of *Weems*[20] lay largely dormant for more than half a century,[21] the Justices returned to it in the 1970s to begin limiting the use of the death

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[14] *See, e.g.*, Enmund v. Florida, 458 U.S. 782, 788 (1982).

[15] *See, e.g.*, Scott W. Howe, *Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 GA. L. REV. 323, 344 (1992) [hereinafter Howe, *Resolving the Conflict*] (explaining an Eighth Amendment "excessiveness theory rooted purely in retributive ideals").

[16] *See, e.g.*, Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 683 (2005) ("[T]he 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.").

[17] I use the terms "disproportionate" and "excessive" interchangeably in this Article. Some observers might urge distinctions between them based on the opinions of the Court. For example, one might contend that a punishment must be "grossly disproportionate" to qualify as "excessive." *See infra* note 228 and accompanying text. Likewise, one might contend that decisions in which the Court has prohibited the execution of a person who has become insane after his appeals have been denied suggest that a punishment can be excessive although not disproportionate. *See infra* note 101. Because these kinds of distinctions are unimportant to my themes, I do not distinguish between the terms.

[18] 217 U.S. 349 (1910).

[19] *See id.* at 366–67 ("Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense.").

[20] For more on the history and meaning of *Weems*, see Margaret Raymond, *"No Fellow in American Legislation":* Weems v. United States *and the Doctrine of Proportionality*, 30 VT. L. REV. 251, 301 (2006).

[21] The first case after *Weems* in which the Court reversed a sentence under the Eighth Amendment where the justification, at least implicitly, was excessiveness rather than per se impropriety was *Robinson v. California*. 370 U.S. 660 (1962). There, the Court overturned a conviction and ninety-day prison sentence for violation of a statute prohibiting one to "be addicted to the use of narcotics." *Id.* at 660–61 (internal quotation marks omitted). The Court

penalty. A prohibition on excessiveness best explains the Court's holding in *Furman v. Georgia*[22] and subsequent decisions requiring individualized sentencing consideration as a prerequisite to the imposition of a death sentence.[23] Likewise, the Court explicitly relied on the *Weems* idea to strike down the death penalty for rape of an adult victim in *Coker v. Georgia*[24] and, a few years later, to exempt from the death sanction a few offenders who fall within the fringes of the felony-murder rule,[25] as well as some who committed their crimes when under sixteen years of age.[26] In the non-capital context, the Court also used the excessiveness idea once in the early 1980s in *Solem v. Helm*[27] to strike down a sentence of life imprisonment without parole imposed under a South Dakota "recidivist statute."[28]

After a subsequent period of generally rejecting or ignoring excessiveness claims, the Court repeatedly endorsed the *Weems* idea in the new millennium. In the capital punishment context, the Court thrice broadened proportionality protections, beginning in 2002. In *Atkins v. Virginia*,[29] the Court exempted mentally retarded offenders from the death penalty.[30] In *Roper v. Simmons*,[31] juvenile offenders—defined as persons under age eighteen—gained protection.[32] Three years later, in *Kennedy v. Louisiana*,[33] the Court excluded offenders convicted of child rape from death eligibility.[34] In the context of non-capital crimes, the Court also expanded protections afforded to juvenile offenders. In 2010, in *Graham v. Florida*,[35] the Court prohibited a sentence of life imprisonment without parole for any nonhomicide offense committed by a juvenile.[36]

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did not cite *Weems*, but one could infer the excessiveness rationale. *See* Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE. L.J. 263, 303 (2005).

In *Powell v. Texas*, the Court declined to extend *Robinson* to invalidate the conviction of a purportedly chronic alcoholic under a Texas statute that provided: "Whoever shall get drunk or be found in a state of intoxication in any public place, or at any private house except his own, shall be fined not exceeding one hundred dollars." 392 U.S. 514, 517 (1968) (citation omitted).

[22] 408 U.S. 238 (1972) (per curiam).

[23] *See* Scott W. Howe, *The Constitution and Capital Sentencing: Pursuing Justice and Equality*, 60 FORDHAM L. REV. 749, 779–89 (1992) [hereinafter Howe, *The Constitution*].

[24] 433 U.S. 584, 592 (1977).

[25] *See* Enmund v. Florida, 458 U.S. 782, 788 (1982).

[26] *See* Thompson v. Oklahoma, 487 U.S. 815, 821 n.4 (1988).

[27] 463 U.S. 277 (1983).

[28] *Id.* Helm had been convicted of six previous crimes, but they were non-violent and relatively minor, and his seventh conviction was merely for writing a bad check for $100. *See id.* at 279–81.

[29] 536 U.S. 304 (2002).

[30] *Id.* at 304.

[31] 543 U.S. 551 (2005).

[32] *Id.*

[33] 128 S. Ct. 2641 (2008).

[34] *Id.* at 2664.

[35] 130 S. Ct. 2011 (2010).

[36] *Id.* at 2034.

Likewise, in 2012, in *Miller v. Alabama*[37] and a companion case, *Jackson v. Hobbs*,[38] the Court prohibited a *mandatory* sentence of life imprisonment without parole for any offense, including murder, committed by a juvenile.

The recent non-capital decisions concerning juveniles are especially noteworthy because the Court announced categorical limits on sentences of imprisonment.[39] In non-capital cases, the Court previously had authorized, with one unusual exception,[40] only "'narrow proportionality' review" that focused on the propriety of the sentence imposed on "the particular defendant" for the "particular crime at issue."[41] In *Solem v. Helm*,[42] for example, the Court had only concluded that the South Dakota "recidivist statute," authorizing life imprisonment without parole, was invalid as applied to Helm, in light of his background and his particular crime.[43] The recent non-capital decisions marked off categorical protections that directly affected hundreds of incarcerated juvenile offenders and that will affect more in the future.[44]

The recent proportionality cases invite questions about the expansion of Eighth Amendment doctrine in the next decade. For example, will the Court soon protect young offenders from sentences of imprisonment that exceed some given number of years? Will the Court impose similar protections for mentally retarded offenders or, at least, hold that they cannot receive *mandatory* sentences of life imprisonment without parole? Will the Court also protect a wider group by invalidating, for example, mandatory-minimum sentencing laws and three-strike statutes or, at least, reject their mandatory nature as applied to relatively low-culpability offenders? Some further expansion of proportionality doctrine seems plausible. Yet, the recent proportionality rulings extending protection, like previous ones, are narrow.[45] The Court's opinions in those cases also contain opaque tests of excessiveness along with ad hoc analysis and discussion that seem designed to closely confine proportionality protections.[46] The safest observation surely is that the Court in the near future will, at most, expand safeguards in modest ways that are not easily predicted.

The larger question about the proportionality mandate, however, concerns not simply its short-run future, but also its development over a larger sweep of history: Why

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[37] 132 S. Ct. 2455, 2475 (2012).

[38] 132 S. Ct. 548 (2011).

[39] *See, e.g.*, Carol S. Steiker & Jordan M. Steiker, Graham *Lets the Sun Shine In: The Supreme Court Opens a Window Between Two Formerly Walled-Off Approaches to Eighth Amendment Proportionality Challenges*, 23 FED. SENT'G REP. 79, 81–83 (2010).

[40] The exception was *Robinson v. California*. *See* text accompanying note 21.

[41] Graham v. Florida, 130 S. Ct. 2011, 2036 (2010) (Roberts, C.J., concurring).

[42] 463 U.S. 277 (1983).

[43] *See id.* at 296–97 (discussing the particular details of Helm's crime and his prior offenses as part of the analytical framework for concluding that his sentence was excessive).

[44] *See, e.g.*, Adam Liptak & Ethan Bronner, *Mandatory Life Terms Barred for Juveniles in Murder Cases*, N.Y. TIMES, June 26, 2012, at A1, A14 (noting that the *Graham* decision affected "about 130 prisoners" and that the 2012 decisions affected "more than 2,000" inmates).

[45] *See infra* text accompanying notes 232–42.

[46] *See infra* text accompanying notes 232–42, 251–58.

has a constitutional concept that stems from a central aspiration of justice—that criminal defendants should receive no more punishment than they deserve—produced such modest protection against injustice? Answering that question is the purpose of this Article. My conclusion, in short, is that the Court must restrain its commitment to the aspiration more than we generally wish to acknowledge.

I point to four reasons why proportionality doctrine, as articulated by the Court, must remain anemic compared to its theoretical potential. First, determining appropriate retributive limits and how they should restrain various criminal laws and term-of-year sentences is tremendously complex,[47] and the answers can change over time. The Court possesses neither the resources nor the wisdom necessary to decide all of the cases that it should take on and resolve to guide such a complicated, ongoing effort.

Second, the Court's promulgation of an extensive code of proportionality limits would thwart appropriate change by legislatures and sentencing bodies. Judgments about desert limits do not arise in a vacuum, but rather from societal norms and values.[48] Moreover, appropriate changes in societal assessments of the limits of deserved punishment can move in two directions—toward greater leniency or toward greater severity. When the Court grants proportionality protection, it may deter appropriate change in the direction of severity. This deterrent effect can also continue long into the future.

Third, widespread invalidation of disproportional sentences might undermine legitimate crime-prevention efforts. This result could follow if there were downward pressure on the already discounted sentences achieved through plea bargaining.[49] Because most criminal cases find resolution through bargained guilty pleas,[50] downward influences on those sentences would affect the overall sentencing distribution even among the many cases where no valid claim of excessiveness currently exists.

Finally, using the deserts-limitation principle to invalidate a wide array of criminal laws that aim for crime prevention at the expense of honoring retributive limits would put the Court far ahead of most citizens in honoring justice for defendants over self-interest.[51] Although society cares about justice for the accused, it also cares about crime prevention. Our criminal laws and sentencing practices reflect this conflict in our personal perspectives.[52] Although we endorse the principle of ensuring that defendants only receive punishment that they deserve, we prefer to ignore it when we perceive a serious risk to our safety.[53] Indeed, we ignore the ideal on a stunningly regular basis.[54]

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[47] The proposition that proportionality determinations in categorical cases ultimately depend on the Court's "own judgment" is a recurring theme in the Court's decisions. *See, e.g.*, Graham v. Florida, 130 S. Ct. 2011, 2026 (2010) (asserting importance of the Court's "independent judgment"); Enmund v. Florida, 458 U.S. 782, 788–89 (1982).

[48] *See infra* notes 278–81 and accompanying text.

[49] *See infra* Part III.C.

[50] *See infra* notes 295–96 and accompanying text.

[51] *See infra* notes 84–91, 311–13 and accompanying text.

[52] *See infra* notes 84–91, 311–13 and accompanying text.

[53] *See infra* text accompanying note 311.

[54] *See infra* notes 311–28 and accompanying text.

In these circumstances, as Alexander Bickel famously contended, the Justices should exercise prudence in trying to force compliance with the "moral principle."[55] The Court does best to avoid the "tyrannical tendency" of insisting on rigid adherence to an ideal that ignores the citizenry's perception of existing necessities.[56]

My project to rationalize the Court's tepid proportionality jurisprudence proceeds in three stages. Part I explains the aspiration for justice embodied in a proportionality mandate. I show that common notions of justice accord with a deserts limitation—the proposition that persons should not receive more punishment than they deserve. I also demonstrate that the only principle derived from penological theory that can explain the Court's decisions granting proportionality protection is the deserts limitation.

Despite the intuitive appeal and explanatory power of the deserts limitation, Part II demonstrates that the Court has not embraced it or even consistently endorsed it. The Court has rejected proportionality claims where the challenged punishment appeared undeserved.[57] The Court also has often obscured that the idea of disproportionality is about whether the defendant received more punishment than he deserves. Even as it has granted proportionality relief in the recent cases, the Court has continued to articulate measures of disproportionality that de-emphasize the role of retributive theory.[58] The Court's opinions suggest a desire by the Justices to avoid the logic of the deserts limitation.

Part III discusses the four reasons that the Court should avoid fully pursuing the deserts limitation and the slippery slope that comes with endorsing it. I begin with the complexity of the Court's effort to determine and articulate a code of proportionality limits. I then discuss the problematic one-way ratchet effect of a grant of proportionality protection. Discussion then focuses on the negative impact that the Court's close regulation of criminal sentences could have on the already discounted sentences imposed through plea bargaining. Part III ends by discussing the risk to the Court's continuing influence if it were to try to invalidate and then regulate on proportionality grounds a wide array of current laws and sentencing practices that the citizenry perceives as serving crime prevention.

I conclude that proportionality doctrine under the Eighth Amendment must remain severely stunted in relation to its animating ideal. A messy struggle between principle and pragmatism will prevail. The Court will grant relief on a few claims of excessiveness, but it will generally try "to avoid a clash with popular opinion and the majoritarian branches of government."[59] In the process, the Court will continue to provide rationales for granting proportionality relief that appear inconsistent and ad hoc.[60] Understanding

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[55] *See* Anthony T. Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1581, 1585 (1985).

[56] *See id.* at 1570; *see also* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 12 (1975).

[57] *See, e.g.*, Hutto v. Davis, 454 U.S. 370 (1982) (upholding a forty-year sentence for possessing with intent to distribute and distribution of nine ounces of marijuana).

[58] *See infra* Part II.B.

[59] Kronman, *supra* note 55, at 1585.

[60] *See infra* Part II.A.

the Court's work requires acknowledging that, among other obstacles to principled decisionmaking about proportionality, the Court cannot enforce an ideal that diverges too greatly from consent[61] and that we are more resistant to following our aspirations when there is a price to pay than we generally wish to portray ourselves.

I. EXCESS PUNISHMENT AS UNDESERVED PUNISHMENT

In this Part, I contend that the core explanation for the *Weems* concept of excessiveness[62] is simply the injustice of imposing more punishment on a criminal offender than he deserves. A desert limitation conforms with widely accepted notions of justice. A deserts limitation is also the only penological principle that can explain the Court's decisions granting proportionality protection.[63] These sources teach that punishment becomes disproportional because retribution carries its own limits, and those limits exist apart from whether punishment might serve other ends.

A. Penological Theories, Justice, and the Eighth Amendment

Controversy has long existed over the penological theory or theories that justify the state in punishing crime,[64] but this controversy does not prevent the conclusion that the limits on appropriate punishment are retributive. The principal consequentialist reasons typically offered to justify criminal sanctions include general deterrence, incapacitation, and rehabilitation.[65] Retribution, "defined simply as the application of the pains of punishment to an offender who is morally guilty,"[66] expresses the competing deontological justification. However, as H. L. A. Hart explained, the "General Justifying Aim" of criminal punishment warrants separate consideration from any "principles of Distribution," and "it is perfectly consistent to assert *both* that the General Justifying

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[61] An example of what happens when the Court violates this prudential philosophy is the aftermath of *Furman v. Georgia*. 408 U.S. 238 (1972) (per curiam). *See* Carol S. Steiker, Furman v. Georgia*: Not an End, But a Beginning*, *in* DEATH PENALTY STORIES 95, 105 (John H. Blume & Jordan M. Steiker eds., 2009) ("[T]he *Furman* decision itself and the continuing constitutional regulation . . . it engendered may well have helped to shore up the beleaguered practice of capital punishment—a conclusion that represents an ironic and cautionary twist to the familiar, triumphant story of a 'landmark victory' in the Supreme Court.").

[62] Weems v. United States, 217 U.S. 349, 381–82 (1910).

[63] H. L. A. HART, PUNISHMENT AND RESPONSIBILITY 9 (2d ed. 1968); *see infra* notes 146–58 and accompanying text.

[64] *See, e.g.*, DRESSLER, *supra* note 7, at 19–23.

[65] *See id.* at 15.

[66] *See* HART, *supra* note 63; *see also* Michael Moore, *The Moral Worth of Retribution*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 179, 180–81 (Ferdinand Schoenman ed., 1987) (defining retributivism as the "view that punishment is justified by the moral culpability of those who receive it"); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4–5 (1955) ("What we may call the retributive view is that punishment is justified on the grounds that wrongdoing merits punishment.").

Aim of the practice of punishment is its beneficial consequences *and* that the pursuit of this General Aim should be qualified or restricted out of deference to principles of Distribution . . . ."[67] Thus, whether or not retribution should win out over consequentialist claims as the general justifying aim, we are not foreclosed from concluding that it should win out on questions of distribution.[68]

To support a restriction on criminal punishment, retribution also need only win out in a limited way on the problem of distribution. The idea of retribution contemplates that an offender deserves punishment for wrongdoing.[69] The view that a person should not receive more punishment than he deserves—the deserts limitation—can be understood as part of this larger idea.[70] Immanuel Kant concluded that justice demands that we always pursue not only the deserts limitation, but also a larger notion.[71] He asserted that injustice exists to an intolerable degree both when a person receives more punishment than she deserves and when she receives less.[72] Yet, we could hold a less rigid view. We could concede the propriety of reducing punishment on consequential grounds even when an offender deserves something more severe.[73] This concession need not stop us from believing that there is intolerable injustice in punishing a person more than she deserves.[74] After all, the Eighth Amendment does not mandate that offenders receive all of the punishment that they deserve.[75] The Court has concluded that the Amendment prohibits excess.[76]

Excess punishment understood as injustice is inherently a retributive idea.[77] One can imagine proportionality systems that build on utilitarian theories, and some thinkers

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[67] HART, *supra* note 63, at 9.

[68] Professor Hart noted, however, that if retribution is the general justification of criminal punishment, retribution must win out on questions of distribution. *See id.* ("Retribution in General Aim entails retribution in Distribution.").

[69] *See, e.g.*, NIGEL WALKER, PUNISHMENT, DANGER AND STIGMA: THE MORALITY OF CRIMINAL JUSTICE 38–40 (1980).

[70] *See* Stephen P. Garvey, *"As the Gentle Rain from Heaven": Mercy in Capital Sentencing*, 81 CORNELL L. REV. 989, 1012–13 (1996).

[71] *See* IMMANUEL KANT, THE PHILOSOPHY OF LAW: AN EXPOSITION OF THE FUNDAMENTAL PRINCIPLES OF JURISPRUDENCE AS THE SCIENCE OF RIGHTS 195–96 (W. Hastie trans., Edinburgh, T&T Clark 1887) (suggesting a criminal be found both guilty and punishable before measuring the value of his punishment to the public).

[72] *See id.* ("The Penal Law is a Categorical Imperative; and woe to him who creeps through the serpent-windings of Utilitarianism to discover some advantage that may discharge him from the Justice of Punishment, or even from the due measure of it . . . .").

[73] *See, e.g.*, Stephen P. Garvey, *Lifting the Veil on Punishment*, 7 BUFF. CRIM. L. REV. 443, 450 (2004).

[74] *See id.*

[75] *See* Howe, *Resolving the Conflict*, *supra* note 15, at 360.

[76] *See* Howe, *The Constitution*, *supra* note 23, at 786–88.

[77] *See* Harmelin v. Michigan, 501 U.S. 957, 989 (1991) (opinion of Scalia, J., joined by Rehnquist, C.J.) ("Proportionality is inherently a retributive concept . . . .").

have advocated for them.[78] Yet, those systems need no close connection with justice for the individual. For example, instrumental considerations could sometimes justify the death penalty for an innocent person, but those who would see justice on such grounds in the state execution of an innocent person surely fall in a small and largely ignored minority.[79] Consequentialists might propose a "hybrid" system,[80] in which punishment requires a guilty person but then allows questions of how much punishment to impose to depend purely on instrumental considerations. Yet instrumental considerations could justify the death penalty for a minor offender if they could justify it for the wholly innocent person. Few commentators have stepped forward to defend such undeserved punishment as just.[81] For the state to impose more punishment than the offender deserves on instrumental grounds is to sacrifice the individual as insignificant.[82] Once instrumental considerations enter the calculus, proportionality may not maintain a close correlation with our sense of fairness to the defendant.[83]

Criminal law and punishment scholars generally agree that most citizens accept the desert limitation as consistent with justice.[84] Whether our criminal and sentencing laws actually accord with the desert limitation, citizens prefer to believe that they do.[85] We

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[78] *See generally, e.g.*, JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (London, T. Payne & Son 1789) (discussing the "principle of utility").

[79] For a hypothetical demonstrating that utilitarianism can justify serious punishment of a person known to be innocent, see DRESSLER, *supra* note 7, at 19–20. *See also* Ian P. Farrell, *Gilbert & Sullivan and Scalia: Philosophy, Proportionality, and the Eighth Amendment*, 55 VILL. L. REV. 321, 350 (2010) (discussing "vicarious punishment of an offender's friends or family members").

[80] Marc O. DeGirolami, *Against Theories of Punishment: The Thought of Sir James Fitzjames Stephen*, 9 OHIO ST. J. CRIM. L. 699, 705 (2012).

[81] Holmes argued for a utilitarian approach to criminal law, but he did not claim that it was just for the individual. OLIVER WENDELL HOLMES, JR., THE COMMON LAW 46–48 (Boston, Little, Brown & Co. 1881). For more on Holmes's view, see *infra* text accompanying notes 351–56.

[82] Stephen J. Morse, *Excusing the Crazy: The Insanity Defense Reconsidered*, 58 S. CAL. L. REV. 777, 781 (1985) ("Conviction and punishment are justified only if the defendant deserves them."); *see also* Richard W. Burgh, *Do the Guilty Deserve Punishment?*, 79 J. PHIL. 193, 197 (1982) ("[T]o render punishment compatible with justice, it is not enough that we restrict punishment to the deserving, but we must, in addition, restrict the degree of punishment to the degree that is deserved.").

[83] *See* Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1105 (2011) ("[T]o increase any of these instrumental effects [—deterrence incapacitation of the dangerous, and rehabilitation—] the distribution of criminal liability and punishment must deviate from desert, that is, it must do injustice or must fail to do justice.").

[84] *See, e.g.*, *id.* ("Laypersons see punishment as something that is properly imposed according to desert, that is, blameworthiness.").

[85] *See, e.g.*, Douglas A. Berman, *A Truly (and Peculiarly) American "Revolution in Punishment Theory,"* 42 ARIZ. ST. L.J. 1113, 1116 (2011) (noting that, in discussing criminal law doctrines such as three strikes, high drug offense penalties, and adult prosecution of juveniles, "I

want to conclude that those branded as criminals deserve blame for their conduct and, further, that they merit the punishment that they receive.[86] If we ask average citizens why it is just for the state to punish a murderer with a long prison term, they are "likely to say that he 'deserves' it."[87] Likewise, if we ask them why it is unjust for the state to punish a petty thief with the same punishment as a murderer, they are likely to say "this offender [does] not 'deserve' to be punished so severely."[88] I suggest that citizens are willing to sacrifice justice in a quest for crime deterrence, but I also suggest that, in advocating instrumental goals, they do not like to focus on the unfairness to the defendant. Surveys tend to reveal that, when asked about the purpose of prison, citizens most often cite instrumental goals.[89] However, when asked about appropriate punishment in specific cases, they recognize offender deserts as the measure of justice.[90] Correlation between the level of deserts of the offender and the severity of the sanction represents the very idea of justice for persons on the street.[91]

The structure and history of the Eighth Amendment also suggests that retributive limits, undiluted by consequentialist factors, define excess punishment. The Amendment contains clauses that expressly prohibit "excessive" bail and "excessive" fines.[92] This readily suggests that the clause against "cruel and unusual" punishment can prohibit not only certain modes of punishment, but also those that are excessive.[93] Moreover, as Chief Justice Burger recounted in his dissent in *Furman v. Georgia*, the

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often hear justifications . . . in terms that expressly sound, at least to me, to be lay assertions of moral blameworthiness.").

[86] *See, e.g.*, Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1621 (1992) ("[W]e want to believe that those we convict and punish deserve what we are doing to them . . . [because we] share the retributivist's intuition that equates justice to the individual with some showing of the offender's moral desert.").

[87] *See* ANDREW VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS 45 (1976).

[88] RICHARD J. BONNIE ET AL., CRIMINAL LAW 12 (3d ed. 2010).

[89] *See* BELDEN RUSSONELLO & STEWART, OPTIMISM, PESSIMISM, AND JAILHOUSE REDEMPTION: AMERICAN ATTITUDES ON CRIME, PUNISHMENT, AND OVER-INCARCERATION 3 (2001) (noting responses to question regarding the main purpose of prison: "To punish (21%) . . . to rehabilitate (40%) . . . to protect society (21%) . . . to deter others (12%).").

[90] *See, e.g.*, John M. Darley et al., *Incapacitation and Just Deserts as Motives for Punishment*, 24 LAW & HUM. BEHAV. 659, 659 (2000), *available at* http://psycnet.apa.org/journals/lhb/24/6/659.html (finding that, in specifying appropriate punishments for convicted defendants in hypothetical crime scenarios, subjects rely on desert considerations).

[91] *See, e.g.*, John Hospers, *Retribution: The Ethics of Punishment*, *in* ASSESSING THE CRIMINAL 181, 183 (Randy E. Barnett & John Hegel, III eds., 1977) ("'[T]reatment in accord with desert' is probably the most frequently encountered definition of the term 'justice' itself.").

[92] *See supra* note 13; *see also* United States v. Bajakajian, 524 U.S. 321, 324 (1998) ("[F]orfeiture of the entire $357,144 that respondent failed to declare [when carrying it in cash on a flight out of the country] would violate the Excessive Fines Clause of the Eighth Amendment.").

[93] *See* BENJAMIN L. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 185–86 (Boston, Marsh, Capen & Lyon 1832) ("[S]hall it be supposed, that the power to fine is restrained, but the power to imprison is wholly unrestricted by it?").

"dominant theme" of the debates over passage of the Amendment "was that the ends of the criminal laws cannot justify the use of measures of extreme cruelty to achieve them."[94] Thus, a particular punishment—such as "boiling people in oil"[95]—may be thought more effective than less torturous punishments in deterring particular crimes.[96] However, the Eighth Amendment proscribes that punishment because it is inhumane. The same can be true, then, of a punishment that exceeds offender deserts, even if it serves instrumental goals. The very purpose of the clause is to stop us from using punishments in some instances, even when we legitimately believe they will achieve valuable ends. As Youngjae Lee has noted, the Eighth Amendment "serves as a *side constraint* on the socially desirable practice of punishment."[97]

B. Supreme Court Decisions Finding Excessiveness

Supreme Court decisions granting proportionality protections confirm that the penological explanation comes from retributive theory.[98] The Court often has avoided clarifying this explanation. We will later see, for example, that the Court has begun to define disproportionality according to an amalgam of penological considerations, including crime prevention, thus denying the singular role of retributive limits.[99] However, the only principle that can explain the Court's decisions granting proportionality protection is a deserts limitation.

1. Capital Cases

In the capital context, the Court has imposed both substantive and procedural regulations under the Eighth Amendment.[100] On the substantive side, the Court has prohibited the death penalty on proportionality grounds in five circumstances[101]:

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[94] 408 U.S. 238, 392 (1972) (Burger, C.J., dissenting).

[95] Herbert L. Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071, 1076 (1964).

[96] *Id.*

[97] Lee, *supra* note 16, at 704.

[98] *See, e.g.*, Kennedy v. Louisiana, 128 S. Ct. 2641 (2008); *see also infra* text accompanying notes 157–58.

[99] *See infra* Part II.B.

[100] *See* Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital-Sentencing Trial*, 146 U. PA. L. REV. 795, 829–35 (1998) [hereinafter Howe, *The Failed Case*].

[101] I do not include in this list the Court's decisions prohibiting the execution of a duly convicted and death-sentenced inmate while that person is insane. *See* Panetti v. Quarterman, 551 U.S. 930 (2007); Ford v. Wainwright, 477 U.S. 399 (1986). As Dan Markel has noted, a rationale that may explain *Panetti* and *Ford*—a "communicative conception of retribution"—seems inherently inconsistent with the death penalty. *See* Dan Markel, *Executing Retributivism:* Panetti *and the Future of the Eighth Amendment*, 103 NW. U. L. REV. 1163, 1167 (2009). Consequently, one might conclude that the explanatory rationale instead focuses on some other sense of inhumanity associated with executing the currently insane. In any event, the "communicative conception of

- In 1977, in *Coker v. Georgia*,[102] for the rape of an adult victim not involving the taking of human life.[103]
- In 1982, in *Enmund v. Florida*,[104] against a felony murderer who did not intend to kill or actually kill, unless, as the Court later made clear in *Tison v. Arizona*,[105] he was a major participant in the felony and displayed reckless indifference to human life.
- In 2002, in *Atkins v. Virginia*,[106] against a mentally retarded offender.[107]
- In 2005, in *Roper v. Simmons*,[108] against an offender who was under age eighteen.[109]
- In 2008, in *Kennedy v. Louisiana*,[110] for the rape of child victim not involving the taking of human life.[111]

The decisions prohibiting the death penalty for rape also imply—and have been interpreted to mean—that the sanction violates the Eighth Amendment for almost all offenses not involving the taking of human life.[112]

These substantive prohibitions on the capital sanction find explanation in a deserts limitation. They cannot rest on the idea that the death penalty in these cases fails to serve instrumental ends. First, general deterrence theory would still apply in these cases. Rape or child rape is often a calculated crime[113] that the death penalty would plausibly deter more than life imprisonment, unless the death penalty never marginally deters any

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retribution" arguably calls for "a commitment to punishing only those who are both guilty and presently competent, with punishments that are not excessive to the defendant's crime and culpability." *Id.* at 1167, 1221. That view of the explanation for *Panetti* and *Ford* also coincides with my theme that retributivism "supervenes . . . other penal purposes" as the explanation for proportionality limits. *See id.* at 1221.

[102] 433 U.S. 584 (1977).

[103] *Id.*

[104] 458 U.S. 782 (1982).

[105] 481 U.S. 137 (1987).

[106] 536 U.S. 304 (2002).

[107] *Id.*

[108] 543 U.S. 551 (2005); *cf.* Thompson v. Oklahoma, 487 U.S. 815 (1988) (prohibiting the death penalty against those who offended when under sixteen years of age where the relevant capital-punishment statute specified no minimum age).

[109] *Roper*, 543 U.S. at 578.

[110] 128 S. Ct. 2641 (2008).

[111] *Id.*

[112] Although the parameters are not clear, the death penalty may still survive for certain egregious nonhomicide crimes that are committed not primarily against individuals but against the state. *See id.* at 2659 (leaving open the question whether the death penalty might still properly apply to "crimes defining and punishing treason, espionage, terrorism, and drug kingpin activity, which are offenses against the State").

[113] RAPE, ABUSE & INCEST NAT'L NETWORK, *Acquaintance Rape*, http://www.rainn.org/get-information/types-of-sexual-assault/acquaintance-rape (last visited Oct. 21, 2013) (describing the planned steps an abuser will take to disarm his victim prior to an attack).

crime.[114] Other nonhomicide crimes, such as kidnapping, robbery, or burglary seemingly would be marginally deterred by the death penalty for the same reason. Even for mentally retarded or juvenile offenders, the death penalty could have some deterrent effect on other mentally retarded or young persons contemplating violence,[115] and executing mentally retarded or young offenders could have a potent deterrent effect on potential offenders who are neither mentally retarded nor young.[116] The same could be said for those on the fringes of the felony-murder doctrine, although with less confidence.[117]

Second, incapacitation benefits would arise from executions in these cases. Executing a rapist or a murderer, including one who is mentally retarded or young, will prevent that offender from harming another person in prison. Execution will also foreclose escape by the offender and his re-offense outside of prison, and we should not forget that Coker, the offender in the previously mentioned rape case,[118] committed his crime while on escape after having earlier been convicted for two separate rapes, one involving a victim that he mercilessly beat and left for dead and the other a victim that he murdered.[119] Because the death penalty in these cases serves instrumental ends, the better explanation for its prohibition is that the offenders in these categories, while highly

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[114] *See, e.g.*, Packer, *supra* note 95, at 1079.

[115] *See* Carol S. Steiker, Panetti v. Quarterman*: Is There a "Rational Understanding" of the Supreme Court's Eighth Amendment Jurisprudence?*, 5 OHIO ST. J. CRIM. L. 285, 292 (2007); *see also* Christopher Slobogin, *Mental Illness and the Death Penalty*, 24 MENTAL & PHYSICAL DISABILITY L. REP. 667, 671 (2000) (footnote omitted) ("[E]xecutions of people with mental illness are as likely to deter as any other type of execution.").

[116] *See* HART, *supra* note 63, at 19.

[117] *See* HOLMES, *supra* note 81, at 56–58. *But see* DRESSLER, *supra* note 7, at 512 (noting that homicides during independent felonies, such as robbery, are rare).

[118] Coker v. Georgia, 433 U.S. 584 (1977).

[119] Chief Justice Burger described the situation in his dissent:

> On December 5, 1971, the petitioner, Ehrlich Anthony Coker, raped and then stabbed to death a young woman. Less than eight months later Coker kidnaped and raped a second young woman. After twice raping this 16-year-old victim, he stripped her, severely beat her with a club, and dragged her into a wooded area where he left her for dead. He was apprehended and pleaded guilty to offenses stemming from these incidents. He was sentenced by three separate courts to three life terms, two 20-year terms, and one 8-year term of imprisonment. Each judgment specified that the sentences it imposed were to run consecutively rather than concurrently. Approximately 1½ years later, on September 2, 1974, petitioner escaped from the state prison where he was serving these sentences. He promptly raped another 16-year-old woman in the presence of her husband, abducted her from her home, and threatened her with death and serious bodily harm. It is this crime for which the sentence now under review was imposed.

Id. at 605 (Burger, C.J., dissenting) (footnote omitted).

culpable, are generally not culpable enough to deserve the same sanction as aggravated murderers.[120]

Various criminal-law and death-penalty scholars who have written on the subject agree that the true explanation for these substantive prohibitions, although the Court has not clarified it, comes from retributive theory. Joshua Dressler noted the retributive basis for the prohibition against the death penalty for rape in *Coker*.[121] Carol Steiker has noted that the best understanding of the Court's decisions protecting mentally retarded and juvenile offenders "is that retribution alone is a necessary limit on the constitutional use of capital punishment."[122] Pamela Wilkins has concluded that the prohibition regarding child rapists is best explained based on retributive theory[123] and that, despite the Court's failure to acknowledge the point, the broader line of capital proportionality cases rest on a "deserts-limitation model."[124] Other scholars who have written on the subject also have pointed to retributive theory as the best explanation for these decisions.[125]

The procedural side of Eighth Amendment regulation of capital sentencing also finds explanation in retributive theory. The Court's holding in *Furman v. Georgia*[126] and subsequent decisions requiring individualized sentencing consideration as a prerequisite to the imposition of the death penalty are ultimately explained as an effort to protect against undeserved death sentences.[127] In *Lockett v. Ohio*,[128] the Court mandated

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[120] *See* Steiker, *supra* note 115, at 292 ("[R]etribution alone is a necessary limit on the constitutional use of capital punishment. Indeed, it is hard to make much sense of the Court's Eighth Amendment jurisprudence without such an understanding.").

[121] *See* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 38–39 (1st ed. 1987); *see also* DRESSLER, *supra* note 7, at 56 ("[A] compelling utilitarian argument for Coker's execution was possible.").

[122] Steiker, *supra* note 115, at 292.

[123] Pamela A. Wilkins, *Rethinking Categorical Prohibitions on Capital Punishment: How the Current Test Fails Mentally Ill Offenders and What to Do About It*, 40 U. MEM. L. REV. 423, 455–56 (2009).

[124] *Id.* at 458.

[125] *See, e.g.*, Richard A. Bierschbach, *Proportionality and Parole*, 160 U. PA. L. REV. 1745, 1756 (2012) (asserting that cases such as *Roper*, *Atkins*, and *Kennedy* suggest "the ascendency of retributive limitations on punishment"); J. Richard Broughton, Kennedy *and the Tail of Minos*, 69 LA. L. REV. 593, 601 (2009) ("Both *Coker* and *Kennedy*, though, assert what appear to be primarily retributive bases for applying a categorical exemption . . . ."); Howe, *Resolving the Conflict*, *supra* note 15, at 346 (asserting that "[t]he retributive basis for the Court's judgment [in *Coker*] was clear"); Youngjae Lee, *Desert and the Eighth Amendment*, 11 U. PA. J. CONST. L. 101, 101 (2009) (asserting that cases such as *Coker*, *Atkins*, and *Roper* are "best understood as retributivist constraint cases that prohibit the imposition of capital punishment on certain groups of offenders *because they do not deserve it*").

[126] 408 U.S. 238 (1972) (per curiam).

[127] *See, e.g.*, Scott W. Howe, *Repudiating the Narrowing Rule in Capital Sentencing*, 2012 BYU L. REV. 1477, 1520 [hereinafter Howe, *Repudiating*]; Howe, *Resolving the Conflict*, *supra* note 15, at 346–50; Howe, *The Failed Case*, *supra* note 100, at 830–35.

[128] 438 U.S. 586 (1978) (plurality opinion).

that the capital sentencer remain free to reject the death penalty based on "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[129] This mandate is hard to understand other than as an effort to pursue the same principle that explains the *Coker* line of cases. Just as the death penalty is inapplicable to categories of offenses and offenders in which the sanction is usually undeserved, the offender's deserts, based on individualized consideration, should also restrict the imposition of the death penalty.[130] Because dozens of factors might affect a deserts determination—youth, mental disability, and intoxication, to name only a few—the necessary evaluation generally could not be guided by the definition of the capital crime.[131] Therefore, the capital-sentencing hearing, governed by the *Lockett* rule, provides the refined inquiry needed to try to ensure that no person receives the death penalty who does not deserve it.[132]

Consequentialist theory also cannot work to justify the individualization mandate. There would be no reason to require a sentencing inquiry to determine whether a death sentence for a murderer deters crime better than a milder sanction. The sentencing judge would be much more poorly positioned to resolve that question than the legislature,[133] and the question is one that warrants a categorical answer rather than repeated answers by individual sentencing judges.[134] Likewise, if the pursuit of general deterrence could justify the sanction, there would be no reason to hold a hearing simply to determine whether the need for incapacitation could also justify it.[135] Any consequentialist benefit from the sanction should be enough to sustain it if consequential theory could suffice at all.[136] What would be the basis for preferring one consequentialist benefit over another? The failure of consequentialist theory to proscribe the mandatory sentence underscores the need for the prohibition to be grounded on an entirely different theory—namely, a view about retributive limits.

Scholars of capital-sentencing law recognize that *Lockett* and *Coker* serve the same principle. Jordan and Carol Steiker have emphasized that the individualized sentencing requirement connotes a retributive focus,[137] and, like the *Lockett* holding, "seems to enshrine retribution alone as a necessary condition for the constitutional imposition of the death penalty."[138] Youngjae Lee has noted this "theoretical connection" in concluding

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[129] *Id.* at 604.

[130] *See* Howe, *Resolving the Conflict*, *supra* note 15, at 349–50.

[131] *See* Howe, *The Failed Case*, *supra* note 100, at 831.

[132] *See id.* at 831–32.

[133] *See* Howe, *Resolving the Conflict*, *supra* note 15, at 341.

[134] *Id.*

[135] *See id.* at 341–42.

[136] *See id.*

[137] *See* Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 845–46 (1992) (noting that a principle of individualization requires a capital sentencer "to consider evidence relating to a defendant's reduced culpability for his or her crime").

[138] Steiker, *supra* note 115, at 293.

that the Court's mandate of individualized consideration was "driven," like the proportionality decisions, by the goal of protecting against undeserved death sentences.[139] Kyron Huigens has explained that "[t]he Court's real concern [in mandating individualized sentencing]"—and indeed the concern that actually explains *Furman*—is "proportionality in punishment."[140] In sum, the scholary commentary confirms that "[t]he overriding aim of regulating capital sentencing under the eighth amendment is to ensure that only murderers who deserve death sentences receive them . . . ."[141]

2. Non-Capital Cases

In the non-capital context, the Court has granted substantive or procedural protection based on disproportionality in five circumstances:

- In 1910, in *Weems*, to reject a sentence of fifteen years of hard incarceration and permanent loss of civil liberties for minor offenses involving document falsification by a governmental employee.[142]
- In 1962, in *Robinson v. California*, to invalidate a California statute making it a crime "to be addicted to the use of narcotics."[143]
- In 1982, in *Solem v. Helm*, to overturn a sentence of life imprisonment without parole for a seventh, non-violent felony: uttering a bad check for $100.[144]
- In 2010, in *Graham v. Florida*, to outlaw a sentence of life imprisonment without parole for a nonhomicide crime by a juvenile.[145]
- In 2012, in *Miller v. Alabama*[146] and *Jackson v. Hobbs*,[147] to proscribe a *mandatory* sentence of life imprisonment without parole for any offense committed by a juvenile.

The first four rulings involved substantive prohibitions on sentences, although only *Robinson* and *Graham* purported to apply much beyond the particular case before the Court.[148] The final ruling in *Miller* and *Hobbs* imposed only procedural protections

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[139] Lee, *supra* note 16, at 726.

[140] Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195, 1203 (2000).

[141] Howe, *The Constitution*, *supra* note 23, at 785.

[142] 217 U.S. 349, 351 (1910).

[143] 370 U.S. 660, 660 (1962). The Court in *Robinson* was not explicit about the proportionality explanation. *See supra* note 21.

[144] 463 U.S. 277, 277, 281 (1983).

[145] 130 S. Ct. 2011, 2030 (2010).

[146] 132 S. Ct. 2455 (2012).

[147] The Supreme Court consolidated *Jackson* with *Miller v. Alabama*. *See id.*

[148] For example, in *Weems*, the Court did not clarify to what extent it was proscribing against other offenders the particular sentence imposed on Weems for his crime. *See* 217 U.S. 349, 366 (1910) ("[S]uch penalties for such offenses amaze . . . ."). In *Helm*, the Court employed a narrow, fact-bound analysis that implied that the ruling was limited to Helm and few others. *See* 463 U.S. at 296–97.

without altogether prohibiting the sentences in question even against the defendants before the Court.[149] Thus, the five rulings involve a variety of problems and solutions.

The common denominator among the rulings is their grounding on a deserts limitation. The first four, involving substantive rejections of punishments, concern sanctions that are plausibly thought to serve instrumental ends.[150] One could rationally conclude that punishing even minor offenders with severe terms of incarceration could better deter other potential offenders and incapacitate the defendants than would milder sanctions.[151] Certainly, punishing a seven-time offender with long incarceration seems rationally aimed at those ends. Criminal punishment could plausibly deter drug addiction and reduce the potential for the defendant's addiction to cause him to commit further crimes.[152] Likewise, for the same reason that the death penalty could deter and incapacitate when imposed on juvenile offenders,[153] sentences of life imprisonment without parole could also provide those benefits. The Court could hardly deny that these punishments have utility, and it is in a poor position to measure how great the utility might be. For the Court to assert that these punishments are undeserved, however, is for it to render the very sort of value judgment that the protection against excessiveness calls upon the Justices to make.[154]

The fifth ruling, rejecting *mandatory* sentences of life imprisonment without parole for juveniles,[155] is also best understood in conjunction with retributive theory. This procedural mandate incorporates the essence of the individualization requirement from capital sentencing, which builds on a deserts limitation.[156] For the same reason that the adult murderer's deserts, based on individualized consideration, can limit the use of the death sanction, the juvenile murderer's deserts, based on individualized consideration, can limit the imposition of life imprisonment without parole.

Scholars recently have begun to acknowledge the retributive basis for proportionality protection in the non-capital context. For example, Youngjae Lee has concluded, regarding *Graham*, that "the Eighth Amendment right against excessive punishment is defined by the retributivist constraint."[157] Likewise, Richard Bierschbach has concluded that *Graham* appears to be part of a "trend" that "suggests the ascendancy of retributive

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[149] *See Miller*, 132 S. Ct. at 2469.

[150] *See supra* notes 101–20 and accompanying text.

[151] *See, e.g.*, DRESSLER, *supra* note 7, at 15; *cf.* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 208–09 (1981) (discussing deterrence as a rationale for revenge and retaliation).

[152] *See, e.g.*, Robinson v. California, 370 U.S. 660, 683–84 (2002) (Clark, J., dissenting) (asserting that punishment could deter drug addiction and, thus, a variety of crimes stemming from the addiction).

[153] *See supra* note 115 and accompanying text.

[154] The Justices surely can attempt to discern and pursue the community's deeper values in its necessary task of articulating moral values. *See, e.g.*, Richard H. Fallon, Jr., *Of Speakable Ethics and Constitutional Law: A Review Essay*, 56 U. CHI. L. REV. 1523, 1543 (1989).

[155] Miller v. Alabama, 132 S. Ct. 2455, 2469 (2012).

[156] *See supra* text accompanying notes 126–41.

[157] Youngjae Lee, *The Purposes of Punishment Test*, 23 FED. SENT'G REP. 58, 60 (2010).

limitations on punishment."[158] Indeed, the central penological explanation in both capital and non-capital cases for the Court's findings of disproportionality lies with the deserts limitation.

II. DE-EMPHASIZING THE DESERTS LIMITATION

In this Part, I contend that the Supreme Court has generally obscured the importance of the deserts limitation in justifying the proportionality mandate. I divide the discussion into two sections. First, I focus on the Court's approaches to identifying excessive punishment in the era from *Weems*[159] through the end of the twentieth century, when proportionality protections appeared to have stagnated after a burst of expansion in the 1970s and 1980s.[160] I then focus on the Court's approaches in the new millennium, when the expansion of protections revived.[161] I demonstrate that, before the end of the century, the Court sometimes hinted at the importance of the deserts limitation in the capital cases, but it largely avoided those suggestions in the non-capital context. I also contend that, despite the flurry of activity in the new millennium, the Justices have begun to employ an approach to identifying disproportionality in both the capital and non-capital contexts that masks the central role of retributive theory.

A. Historical Approaches

From *Weems*[162] to the end of the twentieth century, the Court employed enigmatic, incoherent, or inconsistent measures of excessive punishment. In the 1970s, it began to foster the idea that excessiveness protections should mostly restrict the death penalty.[163] Thereafter, the Court began to hint in the capital cases at the importance of offender "culpability" in resolving proportionality questions,[164] but, even in that context, avoided developing a transparent penological theory of the Eighth Amendment.[165] In the non-death-penalty context, the Court developed a methodology for identifying disproportionality that both eschewed any penological theory about excessiveness and rendered the mandate almost moribund.[166]

1. The Emergence of the "Death is Different" Idea and the Capital-Case Approaches to Proportionality

When the Justices began to focus on the Eighth Amendment to limit the death penalty in the 1970s, the Court could not turn to any previously developed framework in

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[158] Bierschbach, *supra* note 125, at 1756.
[159] 217 U.S. 349 (1910).
[160] *See infra* Part II.A.
[161] *See infra* Part II.B.
[162] Weems v. United States, 217 U.S. 349 (1910).
[163] *See infra* notes 177–82 and accompanying text.
[164] *See infra* note 184 and accompanying text.
[165] *See infra* notes 183–91 and accompanying text.
[166] *See infra* Part II.A.2.

its past opinions to determine when a punishment was excessive. In *Weems*,[167] the Court had not developed a penological theory to explain why the punishment in relation to the crimes was too severe. The Court had simply asserted, that "[t]here are degrees of homicide that are not punished so severely"[168] and that "[s]uch penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths . . . ."[169] Likewise, in *Robinson v. California*, the Court essentially asserted only that the statute making addiction to narcotics a crime was improper because one could become addicted "innocently or involuntarily."[170] Rather than explain why that unlikely possibility should altogether invalidate the statute under the Eighth Amendment, the majority only crudely analogized that "[e]ven one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."[171]

Having not established a definition of excessive punishment or a methodology for identifying it, the Court failed to explain its initial forays into regulating the death penalty under the Eighth Amendment in transparent fashion. The meaning of the Court's terse per curiam opinion in *Furman*,[172] along with the five concurring opinions, was famously uncertain.[173] Indeed, *Furman* was not widely understood for decades as having presented a problem of undeserved punishment, as opposed to one of inequality.[174] Likewise, when the Court followed *Furman* by requiring individualized sentencing in capital cases, its Eighth Amendment explanation was initially obscure.[175] The *Lockett* plurality rested its case primarily on the banal assertion that

> a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.[176]

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[167] 217 U.S. 349 (1910).
[168] *Id.* at 380.
[169] *Id.* at 366–67.
[170] 370 U.S. 660, 667 (1962).
[171] *Id.*
[172] 408 U.S. 238 (1972).
[173] *See generally, e.g.*, Steiker, *supra* note 61.
[174] *See id.*
[175] When the Court first struck down a mandatory death penalty in *Woodson v. North Carolina*, the plurality's most enlightening statement was that a mandatory statute excluded from consideration "the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." 428 U.S. 280, 304 (1976). Other rationales that the plurality offered were even less connected with penological theory or with any established view of the Eighth Amendment. *See* Howe, *Resolving the Conflict*, *supra* note 15, at 370–71.
[176] Lockett v. Ohio, 438 U.S. 586, 605 (1978).

One idea that emerged with some clarity in the 1970s was that "death is [ ] different" for Eighth Amendment purposes.[177] In *Lockett*, for example, the plurality needed to explain why a mandatory death penalty was improper when the Court had never proscribed mandatory prison sentences.[178] The plurality asserted that capital punishment is "profoundly different from all other penalties" because of the "nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence."[179] This "death is [ ] different"[180] notion continued to carry importance in proportionality doctrine for the next thirty years.[181] While the Court during that era repeatedly granted Eighth Amendment protections against the death penalty, it only once rejected a non-capital sentence as cruel and unusual.[182]

In the capital cases after the 1970s, the Justices sometimes hinted at the role of the deserts limitation in supporting both procedural and substantive protections, but the Court was hardly clear. On the procedural side, the Court repeatedly rejected capital-sentencing laws and practices for failing to satisfy the *Lockett* standard,[183] but its opinions through the mid-1980s provided little elucidation about the penological theory that justified the *Lockett* rule. Some clarification began to emerge when Justice Powell contended in a concurring opinion in 1986 that the rationale focused on the need to assess

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[177] Gardner v. Florida, 430 U.S. 349, 357 (1977). The first emphasis in a majority opinion on the distinction came in *Gardner v. Florida*. There, the Court overturned a death sentence on due process grounds because portions of a pre-sentence report on which the judge relied to sentence Gardner to death were not disclosed to the parties. *Id.* The majority asserted that "death is a different kind of punishment from any other which may be imposed in this country." *Id.*

[178] *Lockett*, 438 U.S. at 589.

[179] *Id.* at 605.

[180] *Gardner*, 430 U.S. at 357.

[181] *See, e.g.*, Graham v. Florida, 130 S. Ct. 2011, 2036 (2010) (Roberts, C.J., concurring) (noting that, in the non-capital context, the Court before 2010 had authorized only "narrow proportionality" review under which the standards for relief were "rigorous").

[182] *See* Solem v. Helm, 436 U.S. 277 (1983) (rejecting life imprisonment under the Eighth Amendment as cruel and unusual when applied to a repeat minor felony offender).

[183] *See, e.g.*, McKoy v. North Carolina, 494 U.S. 433, 439–44 (1990) (invalidating requirement that jury find mitigating circumstances unanimously); Penry v. Lynaugh, 492 U.S. 302, 328 (1989) (holding that a Texas statute did not allow the jury sufficient opportunity to reject the death penalty based on mitigating evidence of mental retardation and childhood abuse); Hitchcock v. Dugger, 481 U.S. 393, 398–99 (1987) (reversing a death sentence based on statutory interpretation by state courts that only mitigating factors appearing on a statutory list could be considered by sentencer); Sumner v. Shuman, 483 U.S. 66, 77–85 (1987) (invalidating a mandatory death penalty for intentional murder by an inmate serving a life sentence without the possibility of parole); Skipper v. South Carolina, 476 U.S. 1, 5–8 (1986) (overturning a capital sentence where the trial judge had refused to allow the sentencing jury to consider evidence of a defendant's good behavior while incarcerated pending trial); Eddings v. Oklahoma, 455 U.S. 104, 112–13 (1982) (invalidating a capital sentence imposed based on a statute interpreted by state courts to prevent consideration of a defendant's emotional disturbance and violent and tumultuous childhood).

offender "culpability,"[184] and when Justice O'Connor emphasized that same point in a concurring opinion the following year.[185] Justice O'Connor also presented that view in her majority opinion in *Penry v. Lynaugh*, where the Court rejected the Texas death statute as it applied to a defendant who offered mitigating evidence of his mental retardation and childhood abuse.[186] Justice O'Connor asserted that the principle underlying *Lockett* is that "punishment should be directly related to the personal culpability of the criminal defendant."[187] These statements were not entirely accurate both because *Lockett* allowed an assessment of general deserts based on the offender's full life, not simply his culpability for the capital crime,[188] and because *Lockett* was not offended if an offender who deserved the death penalty escaped it.[189] However, these statements at least hinted at a retributive rationale for *Furman*[190] and the individualization rule.[191]

On the substantive side in capital cases, the Court was even less explicit that proportionality was about retributive excess. In *Coker*, where the Court rejected the death penalty for rape of an adult victim,[192] the plurality stated that "a punishment is 'excessive' and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."[193] This was an opaque way of saying that a punishment is excessive if it substantially exceeds the deserts limitation.[194] Relying on its "own judgment," the Court found that the

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[184] In *Skipper v. South Carolina*, Justice Powell contended in a concurring opinion that *Lockett* was concerned with evidence "that lessens the defendant's *culpability* for the crime for which he was convicted" and that the culpability determination was "central to the fundamental justice of execution." 476 U.S. 1, 12–13 (1986) (emphasis added).

[185] *See* California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

[186] *Penry*, 492 U.S. at 328.

[187] *Id.* at 319.

[188] The Court recently made this point in *Porter v. McCollum*, when it reversed a death sentence based on ineffective assistance of counsel because counsel failed to present, among other information, evidence of Porter's heroic military service in the Korean war. 558 U.S. 30 (2009). The Court concluded that this information would have been pertinent, in part, simply because it was a highly honorable action. *See id.* at 43–44; *see also Skipper*, 476 U.S. at 4 (holding that evidence of a defendant's good behavior while incarcerated pending trial should have been admitted at sentencing, although the evidence did not relate to the petitioner's "culpability for the [capital] crime," because the jury "could have drawn favorable inferences from this testimony regarding petitioner's character").

[189] *See* Howe, *The Failed Case*, *supra* note 100, at 832–33.

[190] Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

[191] *See, e.g.*, Howe, *Repudiating*, *supra* note 127, at 1505–07, 1520–22; Howe, *Resolving the Conflict*, *supra* note 15, at 337–50.

[192] Coker v. Georgia, 433 U.S. 584 (1977).

[193] *Id.* at 592.

[194] I have previously explained the convolution as follows:

> If a punishment substantially exceeds the level of appropriate retribution for a crime, as the Court implicitly concluded in *Coker*, it would apparently violate the second prong of this test and, on that basis alone, infringe

punishment was improper under the second prong,[195] and the discussion implicitly revealed that the only consideration for the plurality under that prong was the level of appropriate retribution.[196] Because retribution is clearly an appropriate goal of punishment under the first prong, the retributive inquiry would be dispositive in all cases. Yet, the plurality's approach obscured that the inquiry was all about that question.[197]

The Court's capital cases applying *Coker* through the end of the century continued to obscure the deserts limitation as the explanation for the proportionality mandate. The Court soon protected a few felony murderers in *Enmund v. Florida*,[198] but the majority, unlike the plurality in *Coker*,[199] discussed deterrence considerations, as well as the limits of appropriate retribution, as if only the first prong of the *Coker* test remained.[200] Although Enmund won, this approach masked the point that any punishment that exceeded—or at least "grossly" exceeded[201]—retributive limits should be disproportional under *Coker*.[202] Likewise, the Court's proportionality analysis was muddled in *Thompson v. Oklahoma*, when it rejected the death penalty for fifteen-year-old offenders who were sentenced under death statutes that did not specify a minimum age.[203] Justice O'Connor's dispositive concurring opinion again discussed both deterrence and retribution as bearing on the proportionality question.[204] When the Court initially upheld the death penalty for seventeen- and eighteen-year-old offenders in *Stanford v. Kentucky*,[205]

> the Eighth Amendment. But, since retribution is plainly an acceptable goal of punishment, if a punishment serves retributive goals, it necessarily satisfies both prongs of this test. Therefore, the retributive inquiry appears to be dispositive.

Howe, *Resolving the Conflict*, *supra* note 15, at 347 n.96.

[195] *Coker*, 433 U.S. at 597.

[196] *See* DRESSLER, *supra* note 7, at 56–57.

[197] Although the plurality in *Coker* ultimately applied its own judgment about whether the punishment was disproportionate, it also claimed to find support in objective evidence, and this kind of search for societal consensus became an important distraction in later cases. *See infra* note 207 and accompanying text. The plurality looked at how many legislatures around the country authorized the death penalty for rape and how often juries actually imposed death for that crime, and concluded that the evidence confirmed its conclusion that death was "a disproportionate penalty for the crime of raping an adult woman." *Coker*, 433 U.S. at 593–97. I have argued elsewhere that the plurality's arguments that this evidence revealed a societal consensus were unpersuasive. *See* Howe, *Resolving the Conflict*, *supra* note 15, at 346 & n.89.

[198] 458 U.S. 782 (1982).

[199] 433 U.S. 584 (1977).

[200] *See Enmund*, 458 U.S. at 798–800.

[201] *Coker*, 433 U.S. at 592.

[202] In limiting the *Enmund* holding in *Tison v. Arizona*, the Court also noted with apparent approval that the *Enmund* opinion had focused on both deterrence and retribution as relevant to identifying disproportionality. *See* 481 U.S. 137, 148–49 (1987).

[203] 487 U.S. 815 (1988).

[204] *See id.* at 853.

[205] 492 U.S. 361 (1989).

and for mentally retarded offenders in *Penry v. Lynaugh*,[206] it further muddled the question of how to identify disproportionality. In both cases, the Court seemed to say that a finding of disproportionality hinged heavily on whether objective evidence established a societal consensus against the punishment in the relevant circumstance,[207] which ignored the very premise of excessiveness doctrine—that society might accept an unjustly severe punishment on instrumental grounds.[208] Thus, all of the Court's opinions concerning categorical prohibitions on the death penalty failed to reveal that the issue of central importance was whether the death penalty amounted to retributive excess.

2. The Non-Capital Cases

The Court's proportionality standards in non-capital cases between 1970 and 2000 avoided any concession that a punishment was excessive if undeserved. In *Rummel v. Estelle*,[209] the Court upheld a sentence imposed under a Texas recidivist statute of life imprisonment, with possible parole, for a third-time, minor felony.[210] A five-Justice majority seemed to assert that, in non-capital felony cases, it would defer to legislative prerogative on the length of prison sentences.[211] The dissenters contended that the Court should evaluate three criteria to determine excessiveness: (1) the gravity of the crime compared to the severity of the sentence; (2) the sentence imposed for the same offense in other states; and (3) the sentences imposed on others in the same state.[212] The majority eschewed these factors as too subjective to support judicial review of legislation.[213] Moreover, the majority concluded that the obvious instrumental objectives of deterrence and incapacitation were adequate to justify the Texas statute.[214]

After reaffirming *Rummel*'s harsh message in *Hutto v. Davis*,[215] the Court seemed to change course, although without explicitly acknowledging that disproportionality was about retributive excess. In *Solem v. Helm*, a five-Justice majority struck down a

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[206] 492 U.S. 302, 328–35 (1989).

[207] *See Stanford*, 492 U.S. at 377 (plurality opinion); *id.* at 363, 382 (O'Connor, J., concurring) (favoring consideration also of "age-based statutory classifications"); *Penry*, 492 U.S. at 333–35.

[208] *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 614–16 (1977) (Burger, C.J., dissenting) (specifying examples of why death as punishment for adult rape may not be considered excessive in many states).

[209] 445 U.S. 263 (1980).

[210] Rummel had obtained $120.75 by false pretenses. *See id.* at 266.

[211] *See id.* at 273–75 (distinguishing *Weems* because of the unusual nature of the accessories that were part of *cadena temporal*).

[212] *See, e.g.*, *id.* at 295 (Powell, J., dissenting).

[213] *See, e.g.*, *id.* at 275–76 ("[T]he lines to be drawn are indeed 'subjective,' and therefore properly within the province of legislatures, not courts.").

[214] *See id.* at 284.

[215] 454 U.S. 370 (1982) (upholding two consecutive twenty-year sentences for possession with intent to distribute and distribution of nine ounces of marijuana).

sentence of life imprisonment without parole imposed under a South Dakota "recidivist statute" for a seventh felony: passing a bad check for $100.[216] The Court clarified that the proportionality principle did apply to felony-prison sentences, even if successful challenges should be "exceedingly rare."[217] In rejecting Helm's sentence, the Court also applied the same criteria that it had eschewed as too subjective in *Rummel*.[218] In resolving the first issue, concerning the relative gravity of the offense, the majority suggested the importance of retributive considerations—"the harm caused or threatened to the victim or society[,] and the culpability of the offender."[219] Unlike in *Rummel*, the Court did not assert that the statute was fine as long as it might serve instrumental goals.[220] Nonetheless, by emphasizing the need for objective evidence and focusing as well on inter-state and intra-state comparisons of punishment,[221] the Court effectively denied that the measure of excessiveness was the deserts limitation. After all, many states might implement tough recidivist statutes on instrumental grounds—deterrence and incapacitation—as the Court acknowledged in *Rummel*.[222] The sentencing state might also impose harsh punishments for other crimes on the same instrumental rationales. Consequently, the comparisons could fail to root out many grossly undeserved sentences.

The Court later confronted the apparent conflict between *Rummel* and *Solem* and did not resolve it. In *Harmelin v. Michigan*,[223] the Court affirmed a mandatory sentence of life imprisonment without parole for possession of 650 grams of cocaine. Five Justices voted to uphold the sentence, but there was no majority opinion.[224] Justice Scalia and Chief Justice Rehnquist adopted a categorical position—"the Eighth Amendment contains no proportionality guarantee."[225] Justice Kennedy, joined by Justices O'Connor and Souter, concluded that the Eighth Amendment provided a "narrow proportionality principle,"[226] but that Harmelin's sentence did not infringe it.[227] Those three Justices declined to apply the second and third prongs of the *Solem* test on the view that application of the first prong did not lead to an inference of gross disproportionality.[228] In applying the first prong, they asserted "that the Eighth Amendment does not mandate

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[216] 463 U.S. 277, 279, 281–82 (1983).
[217] *Id.* at 289–90 (quoting *Rummel*, 445 U.S. at 272).
[218] *See id.* at 290–92.
[219] *Id.* at 293.
[220] *See generally Rummel*, 445 U.S. 263 (1980).
[221] *Solem*, 463 U.S. at 278, 298–300.
[222] *See supra* note 214 and accompanying text.
[223] 501 U.S. 957 (1991).
[224] *Id.*
[225] *Id.* at 965 (opinion of Scalia, J., joined by Rehnquist, C.J.).
[226] *Id.* at 996 (Kennedy, J., joined by O'Connor, J., & Souter, J., concurring in part and concurring in the judgment).
[227] *See id.* at 996–1009.
[228] *See id.* at 1004–05.

adoption of any one penological theory,"[229] and ultimately upheld the draconian Michigan statute because they could not say that it "ha[d] no chance of success" as a deterrent to drug dealing and the dangers flowing from it.[230] Thus, they did not simply obscure retributive excess as the measure of disproportionate punishment but purported to reject it.

B. Post-2000 Approaches

In the new millennium, the Court has continued to camouflage the central role of the deserts limitation in defining excessive punishment. The Court has expanded proportionality protections in both the capital and non-capital contexts and has now abandoned the idea that "death is [ ] different"[231] from any other sanction. However, it has perpetuated a strategy for defining disproportionality that allows it to closely confine the doctrine. The essence of the approach is to define disproportionality according to an amalgam of penological considerations, including deterrence, and, thus, to downplay the role of retributive theory. In addition, the Court has purported to weigh objective evidence of public consensus regarding punishments, a tactic that the Court can use inconsistently in future cases to further filter excessiveness claims. The use of these methodologies suggests a continuing desire by the Justices to avoid the logic of the deserts limitation.

In the three capital cases in which the Court recently granted proportionality relief—*Atkins*,[232] *Simmons*,[233] and *Kennedy*[234]—the Court used both strategies to downplay the retributive measure and cabin the breadth of the holdings. In all three cases, the Court purported to find that the death penalty in the relevant context would fail to adequately serve instrumental ends in addition to otherwise being too severe.[235] These contentions were unpersuasive. In all three contexts—involving mentally retarded offenders, juvenile offenders, and child rapists—one could rationally conclude that the death penalty might well provide a marginal deterrent and incapacitating benefit,[236] and the Court provided no empirical case to the contrary. In all three cases, the Court also purported to find objective evidence of a societal consensus against the death penalty in the relevant context.[237] Yet, again, the objective evidence failed to show that an

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[229] *Id.* at 999.
[230] *Id.* at 1008.
[231] Gardner v. Florida, 430 U.S. 349, 357 (1977).
[232] Atkins v. Virginia, 536 U.S. 304 (2002).
[233] Roper v. Simmons, 543 U.S. 551 (2005).
[234] Kennedy v. Louisiana, 128 S. Ct. 2641 (2008).
[235] *See Atkins*, 536 U.S. at 319–20; *Simmons*, 543 U.S. at 571–72; *Kennedy*, 128 S. Ct. at 2663–64.
[236] *See supra* notes 114–17 and accompanying text.
[237] *See Atkins*, 536 U.S. at 314–16; *Simmons*, 543 U.S. at 579–81; *Kennedy*, 128 S. Ct. at 2651–53.

enduring consensus had developed against using the death penalty against all of these offenders.[238] Only a minority of death-penalty states had passed laws against executing the mentally retarded;[239] twenty states permitted executing at least some juvenile offenders;[240] and an evident legislative trend was actually developing in favor of executing certain child rapists.[241] The willingness of the majority in each case to offer these feeble arguments suggests an effort to de-emphasize the importance of the deserts limitation.[242]

In the non-capital context, the Court has expanded protections, but only in a minor way and without conceding that retributive excess is the measure of disproportionality. In some respects, the Court has decisively rejected expansion. In *Ewing v. California*,[243] five Justices rebuffed a challenge to a sentence of twenty-five years to life imprisonment imposed on a minor-felony offender, under a California statute known as "Three Strikes and You're Out."[244] Justices Scalia and Thomas contended that the Eighth Amendment contains no proportionality principle.[245] A three-Justice plurality contended that the Eighth Amendment contains a "narrow proportionality principle,"[246] but that it was not violated.[247] The plurality acknowledged that the explanation for the California statute was "incapacitating and deterring repeat offenders."[248] This statement all but conceded that the punishment imposed on Ewing was more than he deserved.

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[238] For the viewpoint that changes after 1989 in societal beliefs about the death penalty generally, not changes noted under the Court's "evolving standards" analysis, largely explain the Court's willingness to expand proportionality protections beginning in 2002, see generally Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 35–57 (2007).

[239] Only eighteen of the thirty-eight death-penalty states at the time barred the execution of the mentally retarded. *See Atkins*, 536 U.S. at 342–43 (Scalia, J., dissenting).

[240] *Simmons*, 543 U.S. at 579–80.

[241] *See Kennedy*, 128 S. Ct. at 2669 (Alito, J., dissenting) (noting that, in addition to Louisiana, five states had enacted targeted capital child-rape laws in recent years, despite uncertainty created by dicta in *Coker* over their validity).

[242] In all three cases, the Court also engaged in ad hoc rationalizations that could be used to distinguish future proportionality claims. In *Atkins*, for example, the majority asserted that mentally retarded defendants, because of their impaired ability to confront the legal system, "face a special risk of wrongful execution." 536 U.S. at 305. In *Simmons*, the majority discussed extensively the opposition to the execution of juvenile offenders in the international community. *See* 543 U.S. at 575–78. In *Kennedy*, the majority contended that capital child-rape prosecutions, "by enlisting the child victim to assist it over the course of years in asking for capital punishment forces a moral choice on the child, who is not of mature age to make that choice," while also contending that because the child-rapist is often a family member, the victim "may be more likely to shield the perpetrator from discovery" where the possible penalty is death. *Kennedy*, 128 S. Ct. at 2662–64.

[243] 538 U.S. 11 (2003).

[244] *Id.* at 14.

[245] *See id.* at 31–32 (Scalia, J., concurring); *id.* at 32 (Thomas, J., concurring).

[246] *Id.* at 20.

[247] *Id.* at 30.

[248] *Id.* at 14.

Nonetheless, the plurality reiterated Justice Kennedy's statement in *Harmelin* that the Eighth Amendment "does not mandate adoption of any one penological theory."[249] As a result, as in *Harmelin*, the plurality explicitly rejected retributive excess as the standard of disproportionate punishment.[250]

The recent juvenile cases in which the Court announced protections against life imprisonment without parole also mask the true importance of the deserts limitation. In both *Graham* and *Miller*, the Court portrayed its disproportionality finding as based not simply on retributive excess, but on the inadequacy of various penological justifications including deterrence, incapacitation, and rehabilitation.[251] Yet, the arguments about the inadequacy of these consequentialist factors to justify the sentences were unconvincing, and the Court provided no empirical support for them. Just as with the death penalty, one could rationally conclude that there were instrumental benefits to be gained from imposing life imprisonment without parole on certain youthful offenders in nonhomicide cases and mandatorily on certain youthful murderers.[252] Likewise, the Court purported to find objective evidence in *Graham* of a societal consensus against life imprisonment without parole against nonhomicidal juveniles.[253] The Court also claimed to find such a consensus in *Miller*, where it rejected *mandatory* life imprisonment without parole for juvenile murders.[254] Yet the objective evidence actually failed to show a clear and enduring societal consensus on either issue. In *Graham*, the evidence revealed that thirty-eight jurisdictions permitted life imprisonment without parole for juvenile nonhomicide offenders,[255] and that 123 offenders were currently serving that sentence in eleven states.[256] In *Miller*, the dissent noted that "nearly 2,500" juvenile murderers were serving that sentence and that "over 2,000" of them received it under mandatory statutes.[257] The weakness of the majority's arguments on these points suggests that they served largely as a fig leaf to hide the central role of the deserts limitation.[258]

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[249] *Id.* at 25 (quoting Harmelin v. Michigan, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring)).

[250] In *Lockyer v. Andrade*, the Court also reversed a ruling by the Court of Appeals for the Ninth Circuit that had overturned Andrade's sentence to two consecutive terms of twenty-five years to life imprisonment under the California three-strikes law. 538 U.S. 63 (2003). The Court concluded that the Ninth Circuit had failed to properly apply provisions of the federal habeas statute requiring deference to state court decisions. *Id.* at 75–77.

[251] *See, e.g.*, Miller v. Alabama, 132 S. Ct. 2455, 2465 (2012); Graham v. Florida, 130 S. Ct. 2011, 2028–30 (2010).

[252] *See supra* notes 114–17 and accompanying text.

[253] *See Graham*, 130 S. Ct. at 2025–26.

[254] The Court made the argument in a backhanded way, contending that the "'objective indicia' . . . do not distinguish these cases from others holding that a sentencing practice violates the Eighth Amendment." 132 S. Ct. at 2471.

[255] *See* 130 S. Ct. at 2023.

[256] *Id.* at 2024.

[257] 132 S. Ct. at 2477 (Roberts, C.J., dissenting).

[258] In all three cases, the Court also engaged in ad hoc rationalizations that could be used to distinguish future proportionality claims. *See supra* note 242.

III. DANGERS OF THE DESERTS LIMITATION

In this Part, I explore why the Supreme Court would want to avoid endorsing the deserts limitation as the measure of excessive punishment. I contend that there are at least four reasons. The first is the complexity of any effort to determine and articulate a comprehensive code of desert limits. The second concerns the troublesome one-way ratchet effect of a grant of proportionality relief. The third stems from the negative impact that strict regulation of criminal sentences by the Court could have on the already reduced sanctions that result from plea bargaining. The fourth involves the possible harm to the Court's institutional standing if it were to demand adherence to an ideal that regularly has been ignored by the citizenry. Although the moral appeal of the deserts limitation has sometimes proven irresistible for the Court, I contend that these pragmatic concerns legitimately deter the Justices from endorsing and fully pursuing that principle.

A. Complexity

Fully pursuing a deserts limitation under the Eighth Amendment would pose an impossible challenge for the Court. The Justices would have to reject the definitions for a large number of crimes and defenses, amend many criminal procedure rules, and overturn a plethora of sentencing laws and practices[259] along with many individual sentences under such practices. The challenge would also be ongoing because, no matter how much rule making the Court pursued, individual punishments often could still be challenged as too severe, and because deserts limitations would surely change over time. The Court lacks the resources and wisdom to address all of the cases that it would need to take on and resolve to guide such a complicated, continuing effort.

One can start to imagine the complexity of the task of regulating substantive criminal law by considering only a single area of doctrine in which instrumental ends often trump retributive limits—mistakes of law. The general rule, of course, is that ignorance or mistake as to the existence or meaning of a criminal law is no defense to its violation.[260] This rule rests primarily on instrumental grounds, rather than on a theory of appropriate retribution.[261] However, sometimes ignorance of the law combined with its violation is blameworthy conduct.[262] But, precisely when is that true? The Court would have to decide. Would negligent or reckless ignorance suffice? Or should only purposeful ignorance work? Answers should not be the same for every kind of crime or for every kind of offender. Failure to know about a food stamp regulation may

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[259] For a list of examples of such laws and practices, see *supra* notes 7–12 and accompanying text.

[260] *See, e.g.*, People v. Marrero, 507 N.E.2d 1068, 1069 (N.Y. 1987).

[261] *See, e.g.*, HOLMES, *supra* note 81, at 48.

[262] *See* WAYNE R. LAFAVE, CRIMINAL LAW 308 (5th ed. 2010) (discussing the "early notion" that the criminal law is "knowable" and that people should know it).

not be the same as failure to know about a regulation on possession of machine guns.[263] Likewise, regarding regulations on transporting dangerous materials on the highways, the ignorance of officials of a large trucking company may not be the same as the ignorance of an individual hauling trash to a landfill.[264] When one thinks about the complexity of these problems as they arise for thousands of crimes across all the states, the task seems daunting. When one considers that the Court would also have to consider the possible retributive injustice behind many other laws—including the felony-murder rule,[265] vicarious liability doctrines,[266] and restrictions on the insanity and intoxication defenses,[267] just to name a few—the task appears overwhelming.

Regarding criminal sentences, specifying maximum deserved punishments would be even more complicated and thus equally infeasible. For any crime, the Court would potentially need to specify the maximum deserved punishment based on the harm caused. How much for a burglary in which the victim was not home? How much for an aggravated assault against a family member involving debilitating injuries? How much for selling a single dose of heroin? How much for a kidnapping and lewd and lascivious act against a fourteen-year-old? How much for being the getaway driver in a spree of three liquor store robberies? If the defendant committed multiple crimes, should special rules restrict consecutive sentences?[268] The list of possible criminal scenarios would go on and on.

Uncertainties over how to measure deserts would further complicate efforts to impose a code of desert limitations.[269] Should the Court assess only the offender's culpability for the charged offense or his life in a broader sense? If the focus is on "general deserts" or "moral merit,"[270] based on a lifetime of good and bad works, the inquiry

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[263] *Compare* Liparota v. United States, 471 U.S. 419 (1985) (holding that conviction under federal law criminalizing improper possession of food stamps requires proof that the defendant knew that he was acting in a manner that was unauthorized), *with* United States v. Freed, 401 U.S. 601 (1971) (holding that conviction under federal law criminalizing improper possession of firearms did not require proof that recipient of unregistered hand grenades knew they were unregistered).

[264] *See, e.g.*, United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558, 560 (1971) (holding, in a case involving a large commercial enterprise defendant, that proof of knowledge of existence of regulation of the Interstate Commerce Commission was not required under federal statute imposing criminal penalties on whoever "knowingly violates any such regulation").

[265] *See supra* note 7 and accompanying text.

[266] *See, e.g.*, Lockett v. Ohio, 438 U.S. 586 (1978) (Marshall, J., concurring) (holding that the death penalty cannot be applied in cases based on vicarious liability).

[267] *See supra* note 21; *infra* note 326.

[268] *See generally* Nancy J. King, *Proportioning Punishment: Constitutional Limits on Successive and Excessive Penalties*, 144 U. PA. L. REV. 101, 105 (1995) (contending that "cumulative excessiveness" review is needed).

[269] *See* LLOYD L. WEINREB, NATURAL LAW AND JUSTICE 217 (1987) ("Desert . . . is not often put to the test of specificity and even resists it.").

[270] I coined these terms in a previous article to refer to an inquiry into "the offender's *deserts* based on all aspects of his life." Howe, *Resolving the Conflict*, *supra* note 15, at 351 (emphasis added).

becomes especially complex. One might think the best course would be to stick with culpability for the charged offense, but that choice requires ignoring, for example, evidence that the offender served honorably and courageously in the war-time military or otherwise led a life involving mostly meritorious conduct.[271] Moreover, even if the focus is on culpability alone, the assessment remains difficult. If actors are generally free from determinism and, for this reason, are culpable, the Court would have to resolve when an actor is only partially culpable.[272] How much should a defendant's deserts change for a crime if he were not an average adult but, variously, a fifteen-year-old; a mentally ill adult; a mildly mentally retarded eighteen-year-old or person impaired by extended use of crack cocaine? How much should the Court reduce the offender's blameworthiness based on his poverty or his other past social deprivations?[273] The list of difficult scenarios that the Court would confront would never end.

Complications would also arise over whether and how to measure an offender's actual experience with punishment.[274] Inmates vary in their reactions to incarceration,[275] and the conditions in various prison settings also differ.[276] Yet, courts would have trouble accurately determining how much pain the particular defendant would experience or even predicting the defendant's future prison situation.[277]

The Court would also face problems over how regional differences about deserved punishment should matter. Desert limitations do not exist in a vacuum but rather in a social context.[278] For this reason, deserts limitations for a particular crime and offender can be different in divergent cultural communities.[279] European countries no longer

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[271] *See, e.g.*, Porter v. McCollum, 130 S. Ct. 447 (2009) (reversing a death sentence based on ineffective assistance of counsel in failing to present, among other things, evidence of Porter's heroic military service in the Korean War).

[272] *See* Scott W. Howe, *Reassessing the Individualization Mandate in Capital Sentencing: Darrow's Defense of Leopold & Loeb*, 79 IOWA L. REV. 989, 1012 (1994).

[273] *See* Barbara A. Hudson, *Mitigation for Socially Deprived Offenders*, *in* PRINCIPLED SENTENCING: READINGS ON THEORY & POLICY 205–07 (Andrew Von Hirsch & Andrew Ashworth eds., 2d ed. 1998) (discussing how "personal-social" characteristics can weigh on sentencing decisions).

[274] *Compare* Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 182 (2009) ("[A] successful justification of punishment must take account of offenders' subjective experiences when assessing punishment severity."), *with* Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CAL. L. REV. 907, 911 (2010) ("If retributive punishment is not about matching pain for pain but rather serves as an attempt to communicate to the offender society's condemnation by means of a deprivation of an objective good such as liberty, then the idiosyncratic experience of the offender will hardly matter—if at all.").

[275] *See* Kolber, *supra* note 274, at 208–09.

[276] *Id.* at 188.

[277] *See id.* at 195–96.

[278] *See, e.g.*, Youngjae Lee, *Desert, Deontology, and Vengeance*, 42 ARIZ. ST. L.J. 1141, 1144 (2011).

[279] *See* Stephen J. Morse, *Justice, Mercy, and Craziness*, 36 STAN. L. REV. 1485, 1493 (1984) ("[T]he usual yardsticks . . . are relative to time and place.").

punish aggravated murder with the death penalty although the death penalty is sometimes imposed for that crime in the United States.[280] Neither position appears right or wrong as a matter of deserved punishment in a transcendental sense. The question can only be judged in accordance with "contemporary community morality."[281] For the same reason, the cultural communities in different regions of the United States might view the deserved punishments for various crimes differently.[282] How should the Court take these differences into account?[283] The difficulty is in deciding what regional communities, if any, warrant deference, and how to judge whether a particular punishment reflects a valid deserts assessment within such a region, although out of line with the rest of the country as a whole.

These problems alone render infeasible the goal of fully pursuing a deserts limitation, but they do not end the complexities. Issues would arise simply because prison terms represent a continuum along which there can be no correct answer.[284] The Court could try to explain its rulings to some degree through an ordinal ranking of crime-and-offender scenarios, but a serious problem of line drawing would remain. For example, for the Court to say that the maximum permissible punishment for a burglary by a slightly mentally retarded seventeen-year-old is fifteen years imprisonment would inevitably provoke the questions: Why not thirteen years? Why not seventeen? Why not fourteen? Why not sixteen? The Court has drawn lines along continua in some contexts,[285] but it has never done so on the scale that would be required to create an extensive code of desert limitations.

B. One-Way Ratchet Effect

The Justices' promulgation of a complex code of desert limits would also inevitably stymie appropriate change by legislatures and sentencing bodies. Societal assessments of deserved punishment for crimes can change either toward greater leniency or toward

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[280] Regarding the history of the abolition of the death penalty in Europe, see generally ANDREW HAMMEL, ENDING THE DEATH PENALTY: THE EUROPEAN EXPERIENCE IN GLOBAL PERSPECTIVE (2010).

[281] BONNIE ET AL., *supra* note 88, at 13.

[282] *See, e.g.*, Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (asserting that our Constitution "is made for people of fundamentally different views").

[283] *See, e.g.*, Rummel v. Estelle, 445 U.S. 263, 282 (1980) ("Absent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State.").

[284] The Court has acknowledged this problem. *See* Solem v. Helm, 463 U.S. 277, 294 (1983) ("[T]he problem is not so much one of ordering, but one of line-drawing.").

[285] *See, e.g.*, Maryland v. Shatzer, 130 S. Ct. 1213, 1223 (2010) (holding that protections associated with assertion of *Miranda* right to counsel end fourteen days after suspect has been released from *Miranda* custody); Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (holding that the Fourth Amendment is presumptively violated when a person arrested without a warrant does not receive a probable cause determination within forty-eight hours).

greater severity.[286] When the Court limits punishment based on proportionality protection, it thwarts laws and sentencing practices that conflict in the direction of severity.[287] This continuing deterrent effect is problematic given that the very idea of a deserts limitation arises from a social context.[288] The Court often could not know when societal notions of desert had changed for the harsher once it had deterred change in that direction.

Examples of crimes for which the punishment has become greater are not hard to find, as society has taken more seriously the actual or potential harms involved. Punishments for sexual crimes against children have become noticeably more severe in recent decades.[289] Likewise, punishments for the actual and potential harms resulting from driving while intoxicated have also increased sharply.[290] There is sometimes difficulty in knowing whether punishment increases have resulted from efforts to achieve instrumental goals or because the conduct is viewed as more blameworthy, or both. However, these examples are not ones in which the increases were obviously about only instrumental ends. They may also reflect changes in societal notions of deserts. Yet, three decades ago, if the Court had set maximum deserved punishments for these offenses derived from then prevailing norms, the changes may not have been possible.

The Eight Amendment favors neither societal change toward viewing particular conduct as more blameworthy nor less blameworthy than in the past. Although a prohibition on excessiveness speaks in only one direction, social change about deserts in either direction should be honored. The difficulty is that the Court can hardly judge deserts without some reference to views about punishment that have currency in a given period, and those views may not be long-lasting. The death penalty appeared to have lost much of its popularity in the years before *Furman*,[291] but a societal shift favoring that sanction commenced immediately after the Supreme Court decision.[292] The *Furman* experience underscores that, unless the Court leaves plenty of leeway for future societal movement toward severity, its rulings can have a "one-way ratchet effect,"[293] locking in social movements toward leniency, while thwarting changing

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[286] *See* Kennedy v. Louisiana, 128 S. Ct. 2641, 2672–73 (2008) (Alito, J., dissenting).

[287] *See id.* at 2666–68.

[288] *See supra* notes 278–79 and accompanying text.

[289] *See, e.g.*, U.S. SENT'G COMM., REPORT TO THE CONGRESS: SEX OFFENSES AGAINST CHILDREN: FINDINGS AND RECOMMENDATIONS REGARDING FEDERAL PENALTIES I (1996) ("Penalties for sex offenses against children have been increased several times in recent years and are quite severe.").

[290] *See, e.g.*, *60 Minutes*: *DWI Deaths: Is it Murder?* (CBS television broadcast Jan. 4, 2009), *available at* http://www.cbsnews.com/2100-18560_162-4694666.html (discussing the increased tendency in the last decade for prosecutors to pursue serious homicide charges and courts to impose serious prison time for deaths caused by drunk drivers).

[291] Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).

[292] *See* Steiker, *supra* note 61, at 106.

[293] Justin F. Marceau, *Lifting the Haze of* Baze*: Lethal Injection, the Eighth Amendment, and Plurality Opinions*, 41 ARIZ. ST. L.J. 159, 207 (2009).

views over deserved punishment that go in the opposite direction. This problem counsels against attempts at close enforcement of the deserts limitation.

C. Further Discounts of Plea-Bargained Sentences

A third problem with widespread invalidation of undeserved sentences would arise because of the predominance of plea bargaining in our criminal-justice systems.[294] Most criminal cases in both state and federal courts find resolution through guilty pleas,[295] the vast majority of which result from explicit or implicit bargaining.[296] In many cases, those bargained sentences are already discounted below what offenders deserve for their crimes[297] and are substantially less than what they would have received after convictions at trial.[298] Although the risk of excessiveness arises mostly regarding post-trial sentences, further downward pressure on plea-bargained sentences could result if strict proportionality limitations were placed on post-trial sanctions.[299] The consequence could be the undermining of legitimate crime-prevention efforts.[300]

Critics already contend that plea bargaining extends undeserved leniency that thwarts the public interest.[301] The amount of sentencing reductions that occur through bargaining is also often enormous.[302] Some commentators have suggested that these reductions may only reflect the uncertainty of conviction at trial, and thus, may be

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[294] By plea "bargaining," I mean the creation by the judge or prosecutor, whether implicitly or explicitly, of an expectation of leniency that is subsequently honored in return for a guilty plea. "So long as defendants routinely expect to receive some form of sentencing consideration in exchange for an admission of guilt, the essence of a system of bargain justice is present." Thomas W. Church, Jr., *In Defense of "Bargain Justice,"* 13 LAW & SOC'Y REV. 509, 512 (1979).

[295] *See* Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (noting that ninety-seven percent of federal convictions and ninety-four percent of state convictions result from guilty pleas).

[296] *See* Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 HARV. L. REV. 1037, 1106 (1984) ("In the absence of concessions, most felony defendants do in fact demand a trial . . . .").

[297] *See, e.g.*, Kenneth Kipnis, *Plea Bargaining: A Critic's Rejoinder*, 13 LAW & SOC'Y REV. 555, 558 (1979) (asserting that defendants who bargain "receive less than the punishment they deserve").

[298] *See, e.g.*, Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 49 ("The reality of sentencing differentials is generally enough to deprive defendants of any real choice in plea bargaining.").

[299] *See infra* notes 302–07 and accompanying text.

[300] *See infra* notes 308–10 and accompanying text.

[301] *See, e.g.*, Alschuler, *supra* note 5, at 660, 679 (contending that plea bargains "fail to accomplish the legitimate purposes of the criminal law" and thwart "the legitimate objectives of the criminal sanction"); Gifford, *supra* note 298, at 97–98 (asserting that bargaining promotes "unwarranted leniency in sentencing"); Kipnis, *supra* note 297, at 558 (asserting that defendants who bargain receive less punishment than they "deserve"); Schulhofer, *supra* note 5, at 2009 (contending that bargaining undermines "the public interest in effective law enforcement and adequate punishment of the guilty").

[302] *See, e.g.*, Gifford, *supra* note 298, at 46–49.

deserved.[303] In this view, bargains merely reflect the "expected sentence before trial" and are "the same" for those who accept the deal and those who choose a trial.[304] Yet, this view is flawed because it describes the atypical rather than the norm. Prosecutors and judges commonly offer plea deals based not only on the uncertainty of conviction but also on other factors, especially the adjudication costs avoided.[305] Therefore, the substantial leniency extended often will have no connection with the defendant's deserts.[306]

By restricting post-trial sentences, where excessiveness most often arises, further downward pressure could also operate on plea-bargained sentences. Uncertainty exists over precisely how changes in post-trial maximums might affect the plea-bargaining process. However, absent concessions, most felony defendants will go to trial.[307] If post-trial maximums decreased and prosecutors needed to offer the same reductions in either absolute or proportional terms that they currently do to secure guilty pleas, the average length of sentences in the plea-bargained cases would also fall.

Reductions in the length of sentences imposed in the plea-bargained cases could plausibly impair legitimate crime prevention. Crime rates may not typically be sensitive to small changes in sentencing.[308] Nonetheless, significant changes could well affect deterrence efforts for many kinds of crimes.[309] The idea that putative criminal offenders respond somewhat rationally to changes in the price of crime has long been a mainstay of criminal-justice theory.[310] In this view, attempting to impose a deserts limitation on

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[303] Judge David Bazelon urged this view. *See* Scott v. United States, 419 F.2d 264, 276 (D.C. Cir. 1969).

[304] *Id.*

[305] *See, e.g.*, Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1949 (1992) ("In the typical case, the gains from trade are straightforward—savings in adjudication costs . . . ."); Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L. J. 204, 219 (1957) ("Many judges expressed the belief that a defendant pleading guilty should receive some reduction in the gravity of sentence because of the role of guilty pleas in the efficient and economical administration of criminal law.").

[306] The notion that the act of pleading guilty based on a deal by itself reduces the offender's deserts also makes no sense. *See* Alschuler, s*upra* note 5, at 662–67 (rejecting the notion that those who bargain have more remorse or are better prospects for rehabilitation).

[307] Schulhofer, *supra* note 296, at 1106.

[308] *See* Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1093–99 (2011) (explaining why deterrence effects will often not work).

[309] Although not without controversy, studies in the last decade have asserted, for example, that the death penalty has a marginal deterrent effect over life imprisonment on the commission of murder. *See* LINDA E. CARTER, ELLEN S. KREITZBERG & SCOTT W. HOWE, UNDERSTANDING CAPITAL PUNISHMENT LAW 10–11 (3d ed. 2012).

[310] *See, e.g.*, 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: OF PUBLIC WRONGS, 2169–70, *16–17 (William Carey Jones ed., 1916) ("[A]s punishments are chiefly intended for the prevention of future crimes, it is but reasonable that . . . among crimes

a tiny pool of post-trial sentences would subvert crime prevention by reducing the already discounted sentencing rates among the vast majority of cases that end with a bargained guilty plea.

D. Costs to Supreme Court Influence

Committing to the deserts-limitation principle would also put the Court greatly at odds with most citizens in pursuing justice for defendants over crime prevention. I contend that most of us are sufficiently committed to the deserts limitation that we sometimes deny irrationally our willingness to depart from it when the price becomes high. The "ideals" of a deserts limitation do not conform with what we perceive as our "need[ ]" for a sense of safety.[311] Most of us care about fairness for criminal defendants, perhaps because we fear being criminal defendants or simply because we care about justice.[312] Yet, most of us also care about crime prevention.[313] Indeed, I suggest that most of us prefer to ignore the deserts limitation when we sense a serious risk to our safety or the safety of others about whom we care. In light of this conflict in our own thinking as citizens, we can hardly expect the Court to pursue the deserts limitation as if there were no competing considerations.

The strongest demonstration that a majority of the citizenry is prepared to dispense with individual justice for criminal defendants to promote other ends is the widespread and large number of laws through which we already have abandoned the deserts limitation. The citizenry has acquiesced to, supported, or even directly enacted onerous sentencing laws that obviously pursue crime prevention at the expense of retributive limits; "three-strikes" laws for repeat offenders are a good example.[314] Between 1993 and 1995, twenty-four states and the federal government enacted these provisions by voter initiatives or statutes.[315] In California, based on a voter initiative that passed by a margin of seventy-two to twenty-eight percent,[316] citizens agreed that a person with two prior "serious"[317] felony convictions who commits even a minor third felony should receive

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of an equal malignity, those [should be most harshly punished] which a man has the most frequent and easy opportunities of committing, which cannot be so easily guarded against as others, and which therefore the offender has the strongest inducement to commit . . . .").

[311] *See* Kronman, *supra* note 55, at 1577 (explaining that our ideals are our aspirational goals and differ from our needs).

[312] *See* TOM R. TYLER & YUEN J. HUO, TRUST IN THE LAW: ENCOURAGING PUBLIC COOPERATION WITH THE POLICE AND COURTS 53–57 (2002) (pointing to empirical data indicating that the public values behavior by police and court officials that is "perceived as procedurally fair").

[313] *See* THE NATIONAL CENTER FOR STATE COURTS SENTENCING ATTITUDES SURVEY: A REPORT ON THE FINDINGS 3–5 (July 2006), *available at* http://www.ncsc.org/sitecore/content/microsites/csi/home/topics/~/media/microsites/files/csi/the%20ncsc%20sentencing%20attitudes%20survey.ashx.

[314] *See* Ewing v. California, 538 U.S. 11 (2003).

[315] *See id.* at 15.

[316] *See id.*

[317] CAL. PENAL CODE § 1170.12(c)(2)(A) (West 2011).

"an indeterminate term of life imprisonment."[318] Because such laws can impose severe penalties on even fairly low-culpability offenders, they represent an obvious effort to "protect[ ] the public safety"[319] rather than to honor retributive limits.[320]

The citizenry also has long accepted many other substantive criminal laws that aim for crime prevention at the expense of honoring retributive limits. Honest mistakes regarding crucial facts can exculpate, but they usually must be mistakes that the "reasonable" person would make, even if the defendant does not possess the capacity of the reasonable person.[321] The law permits claims of self-defense, but typically requires even the least capable individuals, as a condition for acquittal, to have acted at the level of a "reasonable" person in concluding that the risk of harm they faced was serious and imminent.[322] A "reasonableness" demand also exists in the doctrine allowing mitigation of murder to manslaughter in cases of alleged provocation.[323] These rules reveal that, although we care about offender blameworthiness, we are often not willing to honor it to the point of allowing dangerous persons to avoid conviction, blame, and punishment.

A variety of other criminal-law doctrines even more dramatically eschew retributive limits for utilitarian goals. For example, felony-murder doctrine combined with vicarious-liability rules disallow claims that participants with minor roles in felonies should not be held liable for murder, when accidental deaths are caused by their co-felons.[324] After the Hinckley acquittal,[325] statutes in many jurisdictions narrowed, neutered, or eviscerated the insanity defense, holding many defendants with severe mental defects fully responsible despite their reduced culpability.[326] Likewise, as we

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[318] *Id.* In 2012, Californians finally voted to at least modify the law, "ending a practice in which prosecutors could seek 25-years-to-life sentences for defendants even if their latest offense—their third strike—was neither serious nor violent." Marisa Lagos & Ellen Huet, *'Three Strikes' Law Changes Approved by Wide Margin*, SAN FRAN. CHRON., Nov. 7, 2012, at A14.

[319] *Ewing*, 538 U.S. at 15.

[320] Some citizens might well assert that three-strike felons "deserve" life imprisonment. However, the Supreme Court made no pretense of suggesting that such a view was plausible when it upheld the law, conceding that the obvious rationale for the law was "incapacitating and deterring repeat offenders." *Id.* at 14.

[321] *See, e.g.*, Commonwealth v. Simcock, 575 N.E.2d 1137, 1141 (Mass. App. Ct. 1991) ("[A]n honest and reasonable mistake of fact may be a defense . . . .").

[322] *See, e.g.*, State v. Simon, 646 P.2d 1119, 1122 (Kan. 1982).

[323] *See, e.g.*, Commonwealth v. Carr, 580 A.2d 1362, 1364 (Pa. Super. Ct. 1990).

[324] *See* DRESSLER, *supra* note 7, at 511–12.

[325] *See* Jonathan Sallet, *After Hinckley: The Insanity Defense Reexamined*, 94 YALE L.J. 1545, 1545, 1547–52 (1985); Fred Barbash, *Hinckley Verdict Leads ABA to Ask Narrowing of Insanity Defense*, WASH. POST, Feb. 10, 1983, at A3.

[326] Four states abolished the insanity defense. *See* IDAHO CODE ANN. § 18-207 (West, Westlaw through 2013), *amended by* MONT. CODE ANN. § 46-14-101 (West, Westlaw through Mar. 22, 2013), *amended by* 2013 Mont. Laws 209; UTAH CODE ANN. § 76-2-305 (West, Westlaw through 2012 Fourth Special Sess.); H.B. 2339, 84th Leg., 2011 Reg. Sess. (Kan. 2011) (repealing KAN. STAT. ANN. § 22-3220). Other jurisdictions retained the defense, but mandated the restrictive M'Naughton formulation and imposed the burden of proof on the defendant. *See, e.g.*, 18 U.S.C. § 17(a) (2006).

have seen, mistake-of-law doctrine generally renders ignorance of the law irrelevant as a defense,[327] regardless of whether the accused acted reasonably.[328] The widespread existence of these laws reveal our willingness to ignore justice for defendants in support of rules that we hope will help with crime prevention.

Some criminal prohibitions and punishments also exist largely if not entirely to deter other crimes. A good example is the federal statute criminalizing the willful failure to report when one is transporting more than $10,000 in cash out of the country.[329] The maximum possible penalties include up to five years in prison and up to $250,000 in fines,[330] along with the forfeiture of at least some of the transported money.[331] The rationale is to deter crimes such as tax evasion, drug trafficking, and other organized crime ventures that thrive on international money-laundering.[332] Transporting even large amounts of currency out of the country is permissible as long as the transporter reports the action.[333] At the same time, a willful transporter who fails to report will fall within the statute even if he is otherwise law-abiding.[334] He will be convicted and punished although the funds that he carries are not connected to another crime and he has no aim to engage in other illicit activity. The statute permits his lack of serious blameworthiness to be ignored in the interest of crime deterrence.

The view that the citizenry supports these laws is compelling. Virtually all of them are enforced with enough regularity that the public cannot be unaware of them. Citizens may tend to view them as imposing deserved punishment for the most part.[335] Nonetheless, these laws so obviously violate retributive limits that the denial by the citizenry of their unjustness only underscores our commitment to the desert limitation. We do not want to admit a willingness to abandon the deserts limitation because the principle helps "define the kind of people we would like to be."[336]

Insofar as we accept the deserts limitation as an aspiration, the Court cannot demand obedience across the board to an ideal that we have so long and so often ignored. In constructing an open-ended provision like the prohibition on "cruel and unusual

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[327] *See supra* notes 260–62 and accompanying text.

[328] *See generally, e.g.*, United States v. Int'l Minerals & Chem. Corp., 402 U.S. 558 (1971).

[329] *See* 31 U.S.C. § 5316(a) (2006). Proponents of criminal laws that require registration of firearms, licensing of buyers, and very restrictive eligibility criteria for firearm purchases have also urged crime prevention rather than retribution as the primary justification. *See, e.g.*, D. W. Webster et al., *Relationship Between Licensing, Registration, and Other Gun Sales Laws and the Source State of Crime Guns*, 7 INJ. PREVENTION 184, 184, 189 (2001), *available at* http://injuryprevention.bmj.com/content/7/3/184.full.pdf+html?sid=eb639a61-c5c0-41a1-b0ea-6dee2b70fa22 (finding that such laws "can affect the availability of guns to criminals").

[330] *See* 31 U.S.C. § 5322(a) (2006).

[331] *See* United States v. Bajakajian, 524 U.S. 321, 326 (1998).

[332] *See id.* at 351 (Kennedy, J., dissenting).

[333] *See id.* at 337.

[334] *See id.* at 337–38.

[335] *See, e.g.*, Berman, *supra* note 85, at 1116.

[336] Kronman, *supra* note 55, at 1577.

punishments,"[337] we may believe that the role of the Court is to attempt to discern and implement the deeper values of our society.[338] Yet the Court preserves its power as "the pronouncer and guardian of [our enduring] values"[339] by first recognizing that the central function of the nonjudicial branches is to satisfy not our aspirations, but our sense of existing need, and those needs and aspirations are often incongruent.[340] The Court must also recognize that its "expansive powers to define our moral course [is] matched only by its powerlessness to impose that course in the face of popular dissent."[341] There are plenty of examples, such as "school prayer or desegregation,"[342] to underscore that when the Justices make controversial decisions, "they cannot take public compliance for granted."[343] When we have failed our aspirations spectacularly, the Court cannot, except in small steps, move us to obey.[344]

In enforcing Eighth Amendment values, the Court can only move forward with "prudence,"[345] reminding us in limited measure of our aspirations—including the deserts limitation—and avoiding as much as possible pronouncements that subvert them. Perhaps the Court has muddled its work in the proportionality context, too often obscuring, rather than highlighting, the deserts limitation even as it has granted proportionality relief.[346] Nonetheless, we can safely say that the desert limitation is so little enforced by the Justices not because the citizenry fails to see it as the very definition of fairness, but in part because the Court endangers its own institutional standing by embracing a principle that conflicts with so many laws and practices that find popular support.

CONCLUSION

The Eighth Amendment proportionality doctrine underscores that the Supreme Court sometimes cannot do much to move us to live up to our constitutional ideals. A simple principle of justice defines the proportionality aspiration—the deserts limitation—which holds that no criminal defendant should be punished more than he deserves. This principle reflects societal notions about the core meaning of fair treatment

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[337] *See* U.S. CONST. amend. VIII.

[338] *See* Fallon, *supra* note 154, at 1543.

[339] ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 24 (2d ed. 1962).

[340] *See* Kronman, *supra* note 55, at 1577.

[341] *Id.* at 1581.

[342] TOM R. TYLER, WHY PEOPLE OBEY THE LAW 19 (1990).

[343] *Id.*

[344] This conclusion acknowledges that, within fairly broad limits, American citizens believe in obeying Supreme Court decisions even with which they disagree. *See* Tom R. Tyler, *A Deference-Based Perspective on Duty: Empowering Government to Define Duties to Oneself and to Others*, *in* THE PSYCHOLOGY OF RIGHTS AND DUTIES: EMPIRICAL CONTRIBUTIONS AND NORMATIVE COMMENTARIES 137, 150–52 (Norman J. Finkel & Fathali M. Moghaddam eds., 2005).

[345] *See* Kronman, *supra* note 55, at 1571.

[346] *See supra* Part II.

of criminal defendants by the state,[347] and it alone among penological theories can explain the decisions in which the Court has granted proportionality protection.[348] Yet, many of our criminal laws and sentencing practices violate the deserts limitation, and the Court has made no effort to overturn most of them. When the Court has granted proportionality protection, it has also generally obscured the deserts limitation as the explanation. Instead, the Justices have asserted—usually unconvincingly—that a societal consensus has arisen against the punishment and that the punishment inadequately serves any penological function, including deterrence or incapacitation.[349] The Court's ambivalence about enforcing—or even emphasizing—the deserts limitation mirrors our societal struggle with a moral principle that we know is right, but that out of self-interest we often ignore.

I have urged that the Court's unwillingness to enforce the deserts limitation clearly and consistently finds justification in four practical factors that the Justices cannot disregard. The first involves the complexity of any effort by the Justices to determine and articulate a comprehensive code of deserts limitations. The second concerns the effect of a grant of proportionality relief in potentially thwarting the evolution of legitimate social views about deserts that favor increased punishment. The third arises from the downward pressure that close regulation of criminal sentences by the Court could have on the already reduced punishments imposed through plea bargaining. The fourth concerns the danger posed to the Court's institutional standing when it tries to demand adherence to an ideal that regularly has been ignored by the citizenry based on perceptions of existing needs. Although the deserts limitation powerfully defines our aspiration for justice for criminal defendants, these four pragmatic factors weigh heavily against any effort by the Court to fully enforce it.

Given the practical arguments against endorsing the deserts limitation, should the Court simply have avoided constructing the Eighth Amendment to forbid excessive punishments beyond those deemed inherently inhumane? Justice Holmes favored that approach; he joined the dissent in *Weems*, which concluded that there was "no ground whatever" to support "the interpretation now given to the cruel and unusual punishment clause."[350] Holmes's views on the question had been largely foretold by his commentary in *The Common Law*[351] almost thirty years earlier. In the lecture on crimes, he had emphatically rejected the view that government was restricted in punishing criminals only to the limit of their deserts.[352] He asserted that the criminal law frequently "exceeds the limits of retribution, and subordinates consideration of the individual to that of the public well-being,"[353] and he discussed various criminal law doctrines that "cannot be

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[347] *See supra* notes 84–91 and accompanying text.
[348] For a discussion of these decisions, see *supra* Part I.B.
[349] *See supra* Part II.
[350] Weems v. United States, 217 U.S. 349, 409 (1910) (White, J., dissenting).
[351] *See generally* HOLMES, *supra* note 81.
[352] *See id.* at 46–48.
[353] *Id.* at 47.

satisfactorily explained on any other ground."[354] He concluded that this was "perfectly proper,"[355] because "[n]o society has ever admitted that it could not sacrifice individual welfare to its own existence."[356] In this view, the Eighth Amendment could not possibly prohibit the state from punishing criminals more than they deserve. Yet, for the Court to walk away entirely from the deserts limitation would be to ignore an ideal that is central to society's notions of justice,[357] and, in that sense, plausible as an Eighth Amendment aspiration.

Could the Court confine proportionality protections to a small category of only the most serious punishments? By clearly articulating and enforcing the deserts limitation in a restricted context, perhaps the Court could serve as "shaper and prophet,"[358] encouraging us voluntarily to pursue that ideal throughout the criminal law. In the modern era, until recently, the Court had restricted proportionality protections almost entirely to the death-penalty arena, although, even in that area, without much clarity.[359] Across the rest of criminal law, the Court had rendered proportionality doctrine almost a dead letter.[360] Of course, the Court recently ignored its earlier claim that "death is [ ] different [from all sentences of incarceration]"[361] by concluding that juvenile offenders warrant major proportionality protection from sentences of life imprisonment without parole.[362] The decision to abandon this line of separation suggests that the deserts limitation is too central to our notions of justice to remain cabined in a small corner of criminal law. Yet, the Court also remains in a struggle over how to give principle to proportionality doctrine and also to confine it. For the Court to say that the proportionality notion implements the deserts limitation and that this ideal should apply across the whole landscape of criminal law would be to embrace the unenforceable.

In the end, we should not fault the Court for its failure to articulate a clear aspiration to justify and guide its proportionality doctrine. In this area, there is no good way for the Justices to mediate between the social ideal—the deserts limitation—and the practical problems that would arise from endorsing it. Proportionality doctrine must remain anemic compared to its theoretical potential, and it must remain unprincipled. Its ad hoc nature only reflects the conflict within us, the collective citizenry. We believe in the deserts limitation as an ideal that helps define the kind of people we would like to be. Yet, we are much more resistant to following that ideal when there is a perceived price to pay than we would like to portray ourselves. And we cannot always expect the Court to try to force us to live up to our aspirations even when we think they are embodied in the Constitution.

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[354] *Id.*
[355] *Id.*
[356] *Id.* at 43.
[357] *See supra* notes 84–91 and accompanying text.
[358] BICKEL, *supra* note 339, at 239.
[359] *See supra* Part II.A.1.
[360] *See supra* Part II.A.2.
[361] Gardner v. Florida, 430 U.S. 349, 357 (1977).
[362] *See supra* notes 251–58 and accompanying text.