

CLEANING UP THE EIGHTH AMENDMENT MESS

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ABSTRACT

This article criticizes the Court’s interpretation of the Eighth Amendment’s Cruel and Unusual Punishment Clause and proposes its own understanding. The Court’s jurisprudence is plagued by deep inconsistencies concerning the text, the Court’s own role, and a constitutional requirement of proportionate punishment.

In search of ways to redress these fundamental shortcomings, the article explores three alternative interpretations: 1) A textualist approach; 2) Justice Scalia’s understanding that the Clause forbids only punishments unacceptable for all offenses; and 3) a majoritarian approach that would consistently define cruel and unusual punishment in terms of legislative judgments and penal custom. As evidenced by the State constitutions they wrote, the Founders used the phrases “cruel and unusual”, “cruel or unusual”, and “cruel” interchangeably as referring to a unitary concept. An inflexible textual requirement that an unconstitutional punishment be both cruel *and* unusual would make little sense as a matter of interpretation or principle. Contrary to Justice Scalia’s view, historical evidence ranging from the English Bill of Rights to the first federal criminal code reveals that the Founders endorsed proportionality on both subconstitutional and constitutional levels. A majoritarian approach does little to cabin judicial subjectivity. In addition, the systemic insensitivity of political processes to offenders’ interests can manifest itself in undue generality, excessive pursuit of deterrence and incapacitation, inadequate funding, and desuetude. These can produce gratuitously harsh punishment that merit judicial attention.

The article proposes an understanding of the Eighth Amendment organized around the notion of cruelty. Contrary to the Court’s view, which holds that punishment may be supported solely by the utilitarian objectives of deterrence and incapacitation, the article maintains that punishment must be reasonably believed to be consistent with giving the offender his just deserts. It suggests that the term “unusual” play an evidentiary rather than a definitional role and argues for a more nuanced assessment of legislative judgments and majoritarian practice. The article applies its proposed understanding to several issues, including the abolition of the insanity defense, the use of strict liability, and *Roper v. Simmons*’ ban against the execution of juveniles younger than 18.

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INTRODUCTION.

The Court’s jurisprudence under the Eighth Amendment’s Cruel and Unusual Punishment Clause stands in disarray.¹ Public attention has focused on the Justices’ debates over whether a societal consensus against certain applications of the death penalty may be inferred from international authority or from the States that prohibit death altogether.² These are surface disputes. On a number of dimensions far more central to the

1 The Court itself has recognized the messy state of at least some aspects of its Eighth Amendment jurisprudence. *Lockyer v. Andrade*, 538 U.S. 63, 72 (2003)(describing the case law governing the constitutionality of sentences of imprisonment as creating a “thicket” and as exhibiting “a lack of clarity”); Margaret Raymond, “No Fellow in American Legislation”: *Weems v. United States and the Application of the Cruel and Unusual Punishment Clause to Sentences of Imprisonment*, U. Iowa Legal Studies Research Paper 04-05, at 1-2 & n.4 (Dec. 2004)(noting that the Justices’ consistently have disparaged the coherence of the Court’s 8th Amendment cases) online at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=634261. Scholars, too, have railed against the confused state of the Court’s jurisprudence. Raymond, at 2 (describing the Court’s cases regarding proportionality of prison sentences as “unclear, inconsistent, and unsatisfactory”); Steven Grossman, *Proportionality in Non-Capital Sentencing: The Supreme Court’s Tortured Approach to Cruel and Unusual Punishment*, 84 Ky. L. J. 107 (1996)(“the state of the law with respect to proportionality in sentencing is confused”).

2 Justices Kennedy, Stevens, Ginsburg, Souter, Breyer, and O’Connor have taken the position that international authority has some relevance. Justices Scalia and Thomas and Chief Justice Rehnquist disagree. *Compare* *v. Simmons*, 125 S.Ct. at 1198-1200 (2005)(international authorities relevant); 125 S.Ct. at 1215-16 (O’Connor, J., dissenting)(same) & *Atkins v. Virginia*, 536 U.S. 304, 317 n.21 (2002)(same) *with* , 125 S.Ct. at 1225-29 (Scalia, J., dissenting)(international authorities irrelevant), *Atkins*, 536 U.S. 347-48 (Scalia, J., dissenting)(same); *Stanford v. Kentucky*, 492 U.S. 361, 370 n.1 (1989)(plurality opinion)(same).

A colloquy between Justices Breyer and Scalia on this issue at American University on January 13, 2005 attracted much media coverage. *See, e.g.*, USA TODAY 3A (Jan. 14, 2005). The public prominence of the issue is such that political conservatives in Congress have introduced the Constitution Restoration Act of 2004, H.R. 3799, 108th Cong., 2d Sess. (2004), which provides: “a court of the United States may not rely

Clause's core meaning, the Court's work fails to satisfy minimal demands of doctrinal coherence. One would be hard pressed to identify any other area of constitutional law plagued by such confusion at its very roots.

The incoherence starts with a disjunction between the Court's decisions and the Eighth Amendment's text. The Court has defined "cruel" punishment as involving "the gratuitous infliction of pain."³ Yet none of the punishments it has invalidated qualifies as "cruel" on its own definition.⁴ The Court also has read the Eighth Amendment both as validating some extremely harsh punishments that are undeniably "unusual"⁵ and as invalidating common prison conditions.⁶ Many of the Court's decisions, then, cannot be squared with even its own explanation of the meaning of the key Eighth Amendment terms.

The Court's opinions also fail to reflect a coherent conception of its own role relative to other governmental actors. It has repeatedly declared that prevailing punishment practices largely define the meaning of cruel and unusual punishment.⁷ This deference to majoritarian judgments, which give rise to the Justices' publicized jurisdiction-counting

upon any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than the constitutional law and English common law."

The Justices also have disagreed about whether a consensus against particular applications of the death penalty in part may be inferred from States whose law does not authorize death in any circumstances. *Compare*, 125 S.Ct. at 1192 (non-death penalty states counted in assessing whether there is a societal consensus against particular applications of the death penalty) & *Atkins*, 536 U.S. at 313-15 (same) *with*, 125 S.Ct. at 1218-19 (Scalia, J., dissenting)(counting non-death penalty states "is rather like including old-order Amishmen in a consumer-preference poll on the electric car").

³ *Gregg v. Georgia*, 428 U.S. 153, 183 (1976)(joint opinion of Powell, Stewart, & Stevens, JJ., concurring).

See Hudson v. McMillian, 503 U.S. 1, 5 (1992) ("the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment").

⁴ *See infra* Part I. A. 1.

⁵ For instance, the Court has upheld a Michigan sentence of life imprisonment without parole for a first time offense of possession of cocaine. *Harmelin v. Michigan*, 501 U.S. 957 (1991). "[N]o other jurisdiction" had provided punishment "nearly as severe . . ." 501 U.S. at 1026. For other examples, *see infra* Part I. A. 2.

⁶ *See infra* Part I.A.2.

⁷ *See infra* notes 67-72 & accompanying text.

debates,⁸ conflicts with the independent role the Court has assumed in interpreting other counter-majoritarian constitutional rights. Furthermore, the Court has employed such deference selectively and without acknowledging that it is doing so, much less justifying the selectivity.⁹

Finally, the Court's cases exhibit schizophrenia on whether the Clause embraces a principle of proportionality, even though it is hard to imagine a question more central to the Clause's meaning. Proportionality lies at the very heart of the Court's death penalty jurisprudence, as illustrated by this Term's decision in *Roper v. Simmons* banning the execution of 16 and 17 year-olds.¹⁰ Yet recent decisions respecting sentences of imprisonment treat proportionality as a purely theoretical requirement stripped of enforceable content.¹¹

This Article takes a step towards a reformed understanding of the Cruel and Unusual Punishment Clause. It both chronicles the dizzying inconsistencies that inhere in the Court's cases and outlines an alternative vision. The approach offered here is not strictly textualist. Nor does it conform with Justice Scalia's purportedly originalist view.

⁸ See *supra* note 2.

⁹ See *infra* notes 75-77 & accompanying text.

¹⁰ 125 S.Ct. 1183 (2005). In its death penalty cases, the Court has pursued proportionality by requiring that the death penalty be imposed only for murders accompanied by a legislatively articulated aggravating circumstance, by mandating that sentencers be free to consider all relevant mitigating circumstances, and by precluding use of the death penalty for certain offenses and offenders. See *infra* Part I.C.1.

¹¹ *Lockyer*, 538 U.S. at 83 (2003)(Souter, J., dissenting)("If Andrade's sentence is not grossly disproportionate, the principle has no meaning."); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 Minn. L. Rev. 571, 574 (2005)("it remains very unclear when the Court will find a prison sentence unconstitutionally disproportionate and on what precise grounds."); Pamela S. Karlan, "*Pricking the Lines*": *The Due Process Clause, Punitive Damages and Criminal Punishment*, 88 Minn. L. Rev. 880, 920 (2004)(the Court has "largely abandoned a judicially enforceable constitutional requirement of proportionality under the Eighth Amendment in criminal cases"); Adam Gershowitz, Note, *The Supreme Court's Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 Va. L. Rev. 1249, 1272 (2000)("the prospects that defendants can make successful proportionality

It nonetheless is more compatible with the text and original meaning and better harmonizes with the Court's established role in interpreting constitutional civil liberties.

In brief, the understanding proposed here assigns a central role to cruelty. In support of this understanding, this Article sheds light on some hitherto unnoticed historical evidence. The State Constitutions enacted while ratification of the Eighth Amendment was pending simply prohibited "cruel punishments".¹² Tellingly, there is no evidence that this formulation was thought to carry a meaning different from that of Eighth Amendment or from the phrase "cruel *or* unusual" found in many State constitutions enacted during the Revolutionary Period.¹³ These various formulations evidently were understood as referring to the same concept. It makes sense to organize this concept around cruelty, which is the term common to all three formulations. The Article also argues that contemporary notions of justice support organizing our understanding of the Eighth Amendment around the term "cruel."

The proposal here accepts the Court's view that "cruel" punishment entails the gratuitous infliction of suffering. However, it diverges from the Court's recent decisions by refusing to give States carte blanche over the reasons that may justify the infliction of suffering. It instead reads the Cruel and Unusual Punishment Clause as imposing retributive limits, rooted in nonutilitarian respect for individual worth, on the extent to which States may pursue utilitarian goals such as deterrence and incapacitation. It shares many of the same premises as the subconstitutional sentencing philosophy of "limiting retributivism," which has been adopted as the basis for the redraft of the Model Penal

challenges are bleak").
¹² See *infra* Part I.C. 1.

Code’s sentencing provisions and for some state guideline systems.¹⁴ In light of the reasons to treat the outcomes of political processes with care and some skepticism, the interpretation proposed here assigns the term “unusual” an evidentiary rather than a definitional role. A punishment’s conformity with or departure from prevailing practice can provide useful evidence concerning whether, leaving adequate space for federalism and separation of powers concerns, a punishment is “cruel” in the required sense.

In Part I, this Article describes the current disorder in the Court’s jurisprudence. The problem is not so much with the results of particular cases as it is with the absence of any coherent structure and conception that can inform those results. Part II identifies, considers, and rejects a number of ways in which the Court’s understanding might be made more coherent. These include Justice Scalia’s alleged originalism, a “literal meaning” approach, and a majoritarian approach placing consistent reliance upon prevailing punishment practices. Part III urges adoption of an alternative understanding, outlines its general characteristics, and applies it to a number of issues such as the elimination of the insanity defense, the use of strict liability, and the death penalty for juveniles.

I. THE EIGHTH AMENDMENT MESS.

The Court’s Eighth Amendment jurisprudence needs rethinking. It would be unreasonable to expect perfect coherence among the Court’s decisions. However, one can

¹³ See *infra* Part II. A.

¹⁴ American Law Institute, Model Penal Code: Sentencing, Preliminary Draft No. 3, § 1.02 & Cmnts a – f, 4-12 (May 28, 2004). See also Richard S. Frase, *Limiting Retributivism in The Future of Imprisonment* 83-112 (M. Tonry, ed. 2004)(claiming that “some sort of limiting retributive theory is already the consensus model”); Grossman, *supra* note 1, at 168-71.

legitimately expect the Court to articulate some plausible view of the constitutional text and to explain how its decisions conform to that text or to justify why they do not do so. It is also reasonable to want the Court's decisions to reflect, if not affirmatively express, a more or less coherent understanding of the Court's own interpretive role relative to other governmental institutions. Finally, while allowing for the inevitable untidiness of decisions made by different Courts in different eras, one can reasonably expect important lines of decisions to have roughly consistent underpinnings. Unfortunately, the Court's work falls considerably short of satisfying any of these rudimentary demands.

A. The Text.

The Eighth Amendment prohibits “cruel and unusual punishments.”¹⁵ Although the Court has said that it interprets these words “in a flexible and dynamic manner”,¹⁶ flexibility does not render the text irrelevant. The Court still must explain the meaning of this phrase and how its decisions may be understood as flowing from at least a “flexible” interpretation of it. The Court, however, has embraced a highly restrictive definition of “cruel” that permits even the Founders’ examples of unconstitutional punishments. It has invoked that definition to uphold some unusual punishments while ignoring it altogether in its cases invalidating punishments. The Court also has employed the term “unusual” arbitrarily, treating as an invariable requirement in some cases and interpreting the Eighth Amendment to outlaw common conditions in its prison cases. It is difficult to identify any other area of constitutional law in which the Court’s use of the text has been as uneven,

¹⁵ U.S. CONST., Amendment XIII: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”

¹⁶ *Rhodes v. Chapman*, 452 U.S. 337, 345 (1981)(quoting *Gregg v. Georgia*, 428 U.S. 153, 171 (1976)(joint opinion)). As Justice Brennan conceded in *Furman v. Georgia*, the “Court has never attempted to explicate

inconsistent, and unexplained.¹⁷

1. "Cruel."

A "cruel" punishment is a harsh punishment, one that inflicts suffering. But harshness is a necessary, not a sufficient condition. Otherwise, virtually all punishments would be "cruel" simply because they impose unwelcome hardships. The Court has avoided this anomalous result by appealing to the idea of unnecessary suffering. A "cruel" punishment, it has declared, is one "so totally without penological justification that it results in the gratuitous infliction of suffering."¹⁸

Although this formulation focuses on punishment's objective effects, the Court has also required that the punisher bear some measure of culpability respecting punishment's lack of redeeming value. The degree of culpability, it has said, varies according to the strength of the governmental interest at stake.¹⁹ In some of its prison condition cases, it has required that the punisher act with "deliberate indifference," a subjective measure of culpability that is close if not identical to recklessness.²⁰ In *Ewing v. California*,²¹ the Justices, without discussion, embraced an objective standard of reasonableness. There the Court upheld an extreme application of California's "three strikes" law. Responding to

the meaning of the Clause simply by parsing its words." 408 U.S. at 276 n. 20.

¹⁷ Although the Court has interpreted the Eleventh Amendment contrary to its literal text, it at least has acknowledged and offered justification for doing so. *Tennessee Assistance Corp. v. Hood*, 124 S.Ct. 1905, 1909 (2004); *Seminole Tribe v. Florida*, 517 U.S. 44, 53 (1996).

¹⁸ *Gregg*, 428 U.S. at 183 (joint opinion of Powell, Stewart, & Stevens, JJ., concurring). *Hope v. Pelzer*, 536 U.S. 730, 738 (2002); *Hudson v. McMillian*, 503 U.S. 1, 5 (1992); *Rhodes*, 452 U.S. at 346; *Estelle v. Gamble*, 429 U.S. 97, 102-03 (1976). See Norval Morris, *The Future of Imprisonment* 61 (1974) ("any punitive suffering beyond societal need is, in this context, what defines cruelty.").

¹⁹ *Hudson*, 503 U.S. at 6-7; *Whitley v. Albers*, 475 U.S. 312, 321 (1986).

²⁰ *Estelle*, 429 U.S. at 104. The Court has held that more than deliberate indifference is required to show that a prison guard violates the Eighth Amendment by using excessive force. *Hudson*, 503 U.S. at 6-8; *Whitley*, 475 U.S. at 320.

²¹ 538 U.S. 11 (2003).

Ewing’s contention that the three strikes law did not promote its avowed goals, the lead opinion declared: “We do not sit as a ‘superlegislature’ to second-guess these policy choices. It is enough that the State of California has a reasonable basis for believing that dramatically enhanced sentences for habitual felons ‘advances the goals of [its] criminal justice system in any substantial way.’”²²

In short, the Court has defined a “cruel” punishment as one that, first, does not promote a legitimate penological goal as a matter of objective reality and, second, is not reasonably believed to have redeeming value by those authorizing or inflicting the punishment.

Fundamental features of the Court’s case law conflict with the meaning it has attributed to the term “cruel.” *All* of the punishments the Court has overturned are supported by arguable penological justification and therefore are not “cruel” on its own definition. The dynamic at work is as easy to understand as it is ubiquitous.

By the Court’s lights, there is nothing illegitimate about pursuing punishment for the sake of utilitarian objectives such as deterrence or incapacitation. It has frequently declared that “the Constitution ‘does not mandate any one penological theory.’”²³ More severe punishment can always be sincerely justified over less severe punishments on the ground that it carries an added deterrent impact and/or provides incapacitation. Added deterrence and incapacitation, in turn, can be defended as necessary to address the gravity of the offense, compensate for the probability that like offenses escape detection, and/or

²² 538 U.S. at 28 (quoting *Solem v. Helm*, 463 U.S. 277, 297, n. 22 (1983)).

²³ *Ewing*, 538 U.S. at 25 (plurality opinion)(quoting *Harmelin*, 501 U.S. at 998 (Kennedy, J., concurring); 538 U.S. at 35 (Stevens, J., dissenting)(proportionality “takes into account all justifications for penal sanctions.”). *See Frase, supra* note 11, at 573, 645.

reduce the incidence of future harm to an absolute minimum.²⁴ Relevant empirical evidence rarely will be available to undercut such claims. In light of the methodological difficulties of accounting for all of the relevant variables, it will be even rarer still for such evidence to qualify as conclusive and to render unreasonable a good faith belief that punishment promotes legitimate objectives.²⁵ Consequently, except perhaps in cases involving overt sadism, a punishment can never be “cruel” in the sense required by the Court’s explanation of that term’s meaning. As Justice Scalia wrote in *Harmelin v. Michigan*, “[O]ne can imagine extreme examples that no rational person, in no time or place, could accept. But for the same reason these examples are easy to decide, they are certain never to occur.”²⁶

Consider the Court's landmark 1972 decision in *Furman v. Georgia*,²⁷ which effectively invalidated all death penalty statutes then in force. A majority of the Justices did not strike down the death penalty per se. Three concurring Justices instead concluded that Georgia’s statute was unconstitutional because it gave juries unfettered sentencing discretion and because death sentences were arbitrarily and infrequently imposed.²⁸ As a matter of objective reality, it could not be said in 1972 and cannot now be said that the

²⁴ See Karlan, *supra* note 11, at 880.

²⁵ The literature on whether the death penalty deters homicide is notorious in this regard. See *infra* note 29. For an interesting recent effort to address whether marginal changes in legal rules and sentences deter generally, see Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 *Oxford J. Legal Studies* 173 (2004). In concluding that the answer is generally no, the authors reject or discount numerous studies finding to the contrary.

²⁶ 501 U.S. at 985-86 (plurality opinion).

²⁷ 408 U.S. 238 (1972).

²⁸ 408 U.S. at 256-57 (Douglas, J., concurring)(“these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on “cruel and unusual” punishments.”); 408 U.S. at 309 (Stewart, J., concurring)(“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.”); 408 U.S. at 313 (White, J., concurring)(“the death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for

death penalty, even if infrequently and haphazardly imposed, promotes no legitimate penological objective. At a minimum, it incapacitates those subject to it better than does a sentence of imprisonment by lessening the dangers that the offender will commit serious crime while imprisoned or after escape or release. An infrequently applied death penalty also might promote the utilitarian goal of general deterrence, depending on one's view of the complex mass of empirical studies in effect then and now.²⁹

The death penalty also can be said to further the legitimate retributivist objective of giving offenders their just deserts. Retributivism, which is used here not in the sense of passionate vengeance but rather as a label for the nonutilitarian theory of criminal justice in

distinguishing the few cases in which it is imposed from the many cases in which it is not.”).

²⁹ See *Gregg*, 428 U.S. at 186 (plurality opinion)(determination of the death penalty’s deterrent impact “properly rests with the legislatures”).

For studies claiming that the death penalty deters, see Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 Am. Econ. Rev. 397 (1975); Isaac Ehrlich, *Capital Punishment and Deterrence: Some Further Thoughts and Evidence*, 85 J. Pol. Econ. 741 (1977); Stephen A. Layson, *Homicide and Deterrence: A Reexamination of the United States Time-Series Evidence*, 54 S. Econ. J. 68 (1985); George A. Chressanthis, *Capital Punishment and the Deterrent Effect Revisited: Recent Time Series Econometric Evidence*, 18 J. Behavioral Econ. 81 (1989); Isaac Ehrlich & Zhiqiang Liu, *Sensitivity Analysis of the Deterrence Hypothesis: Let’s Keep the Econ in Econometrics*, 42 J. L. & Econ. 455 (1999); Hashem Dezhbakhsh, Paul H. Rubin, & Joanna M. Shepherd, *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 Am. L. & Econ. Rev. 344, 344 (2003); Naci Mocan & R. Kaj Gittings, *Getting off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & Econ. 453 (2003); H. Naci Joanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. Legal Studies ____ (2004)(forthcoming).

Numerous studies find no deterrent impact based on either new data or a reexamination of the data used in the research cited above. J. T. Sellin, *The Death Penalty* (1959); W. J. Bowers & J.L. Pierce, *The Illusion of Deterrence in Isaac Ehrlich’s work on Capital Punishment*, 85 Yale L. J. 187 (1975); Peter Passell & John B. Taylor, *The Deterrent Effect of Capital Punishment: Another View*, 67 Am. Econ. Rev. 445 (1977); Stephen A. Hoenack & William C. Weiler, *A Structural Model of Murder Behavior and the Criminal Justice System*, 70 Am. Econ. Rev. 327 (1980). Jeffrey Grogger, *The Deterrent Effect of Capital Punishment: An Analysis of Daily Homicide Counts*, 85 J. Am. Stat. Assn. 295 (1990); John K. Cochran, Mitchell B. Chamlin, & Mark Seth, *Deterrence or Brutalization? An Impact Assessment of Oklahoma’s Return to Capital Punishment*, 32 Criminology 107 (1994). Samuel Cameron, *A Review of the Econometric Evidence on the Effects of Capital Punishment*, 23 J. Socio-Econ. 197 (1994); William C. Bailey, *Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma’s Return to Capital Punishment*, 36 Criminology 711 (1998); Craig J. Albert, *Challenging Deterrence: New Insights on Capital Punishment Derived from Panel Data*, 60 U. Pitt. L. Rev. 321 (1999); James A. Yunker, *A New Statistical Analysis of Capital Punishment Incorporating U.S. Postmoratorium Data*, 82 Soc. Science Q. 297 (2002); Richard Berk, *New Claims about Executions and General Deterrence: Deja Vu All Over Again?* ____ J. Emp. Legal Studies ____ (2005)(forthcoming).

the tradition of Immanuel Kant, insists that punishment be proportionate to the offense.³⁰ Murder, the offense that triggered the possibility of death under the Georgia statute at issue in *Furman*, may be said to be different in kind from other offenses because it intentionally and permanently ends the victim's life and autonomy. Death, a punishment that differs in kind, may be said to be the most proportionate punishment for intentional murder, or at least the most culpable instances of it.³¹ This conclusion is not undermined by infrequent imposition of the death penalty. At least on one reasonable view, an offender generally does not cease to her just deserts simply because another escapes punishment.³² Even assuming that the *best* view is that the death penalty of the kind addressed in *Furman* furthers no legitimate penological objective, a contrary conclusion is neither reckless nor negligent.

A similar analysis applies to the Court's decisions invalidating punishments other than death. In *Hope v. Pelzer*,³³ the most recent such case, the Court held that Alabama prison officials had inflicted cruel and unusual punishment by handcuffing an inmate to a

30 For an illuminating general discussion, see Jeffrie G. Murphy & Jules L. Coleman, *The Philosophy of Law: An Introduction to Jurisprudence* 75-82, 109-30 (1990). The basic idea is that each individual possesses an inviolable dignity flowing from her rational autonomy. When an offender egregiously invades another's autonomy, justice requires that the offender suffer criminal punishment that is proportionate to the wrong. The gravity of the wrong, and hence the degree of required punishment, depends on the extent to which the wrong has or threatened to deprive another of her autonomy and the degree of the offender's culpability.

31 *Gregg*, 428 U.S. at 187 (plurality opinion) ("when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes."). See *Spaziano v. Florida*, 468 U.S. 447, 461 (1984) (describing retribution as the "primary justification for the death penalty."); Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 Nw. U.L. Rev. 843, 851 (2002).

32 Ernest van den Haag, *The Ultimate Punishment: A Defense*, 99 Harv. L. Rev. 1662 (1986) (making the case that "justice is independent to distributional inequalities"). Of course, equality is an essential component of any acceptable theory of justice, whether retributive or utilitarian. Inequalities in the implementation of the death penalty may become so extreme that they render the penalty unacceptable as a matter of retributive justice. For an interesting discussion, see William S. Laufer & Nien-he-Hsieh, *Choosing Equal Injustice*, 30 Am. J. Crim. L. 343 (2003). The constitutional home for addressing such extreme inequalities would seem to

hitching post for seven hours. Larry Hope, the inmate, had slept on the bus on the way to his work assignment, had not responded promptly to a prison guard's order to get off the bus, and, after an exchange of vulgarities, had physically fought the guard. While handcuffed to the post, Hope's exposed torso became sunburned, he was given water only once or twice, and he was denied bathroom breaks. According to the Court, this treatment amounted to "the gratuitous infliction of 'wanton and unnecessary' pain" and constituted an "obvious" Eighth Amendment violation.³⁴

It is not difficult to identify legitimate penological justification for Hope's punishment. The punishment's immediacy, conspicuousness, and painful nature quite conceivably could help deter violation of prison rules. By committing their offenses, Hope and other inmates had proven relatively impervious to more standard methods of punishment, such as the threat of confinement. Further, Hope's defiance of prison authority was physical as well as verbal, thereby heightening its seriousness and the need for effective deterrence. Even if this analysis is wrong, it contradicts no sound empirical evidence. Prison officials would not be culpably wrong to believe that Hope's punishment would deter and therefore was not "gratuitous."³⁵

be Equal Protection Clause, not the Cruel and Unusual Punishment Clause.

³³ 536 U.S. 730 (2002).

³⁴ 536 U.S. at 738.

³⁵ This same analysis can be applied to any other punishment the Court has invalidated. Consider *Weems v. United States*, 217 U.S. 349 (1910), the Court's first decision invalidating a punishment as cruel and unusual.

Weems, an United States Coast Guard disbursement officer stationed in the Phillipines, had falsely indicated his payment of wages to Light House Service employees. He was convicted of falsifying a public document under the criminal code applicable in the Phillipines, then a United States territory. His sentence consisted of the punishment of cardena temporal and a fine. Cardena temporal, a punishment drawn from the Penal Code of Spain, entailed imprisonment for fifteen years at "hard and painful labor" with a chain hanging from wrist to ankle. It also withdrew rights to pty and parenthood for the term of imprisonment and permanently barred voting and the holding of any public office. After a lengthy discussion of the Eighth Amendment's background, the Court invalidated the punishment on account of both its "degree and kind." 217 U.S. at 377. The punishment was "cruel," the Court reasoned, in "its excess" in relation both to punishments for similar

Not even the punishments the Cruel and Unusual Punishment Clause historically has been thought to condemn can be said to be “cruel,” as the Court has defined that term. The severe pain resulting from the rack and torture can be justified as having a deterrent impact. Even small gains in deterrence can be defended as necessary to prevent serious harms such as murder and/or to compensate for low detection rate of, say, terrorism offenses. Such claims cannot be dismissed as absurd on their face. Foreign nations such as Saudi Arabia defend extreme punishments such as amputation on precisely this ground. They can and do cite relatively low crime rates as colorable support.³⁶ A claim that torture or other extreme punishments deter might be in error but not culpably so.³⁷ What the Court has said about the meaning of the term “cruel” thus cannot explain paradigmatic Eighth Amendment violations. Nor does it square with the results of its own cases.

2. “Unusual.”

An “unusual” punishment is one that is out of the ordinary, one that is not regularly

offenses and to the penological objectives of justice, deterrence, and rehabilitation. *Id.*

Contrary to this holding’s import, the harshness of Weems’s punishment was colorably supported by legitimate penological objectives. In the interests of deterrence, a relatively severe punishment can be seen as necessary to compensate for the frequency with which the perpetration of falsity on government bureaucracies goes undetected and unpunished. In fact, the absence of extremely severe punishment could conceivably give risk-neutral offenders an affirmative incentive to falsify, depending on the probability of nondetection and prospect of gain. It is reasonable to suppose that added increments of severity purchases increased deterrence. Particularly in 1910, no empirical evidence contradicted such a supposition, which would be quite sensible with respect to offenders such as Weems. Those who hold positions of public responsibility and who commit their offenses for financial gain are more likely to be knowledgeable about the rules governing their conduct and to engage in rough cost-benefit calculations that take into account the amount of potential punishment. In light of these considerations, Weems’ punishment was not “cruel” in the sense that those who authorized or inflicted it either believed that it had no legitimate penological justification or were culpably wrong in believing that it did.

³⁶ Erika Fairchild & Harry R. Dammer, *Comparative Criminal Justice Systems* 38 (2d ed. 2001).

³⁷ For an argument in favor of torture in limited circumstances, *see* Alan M. Dershowitz, *Why Terrorism Works* 141-58 (2002). Professor Dershowitz’s proposal has attracted serious commentary and has not been dismissed as absurd on its face or recklessly wrong. *See infra* note 131.

employed.³⁸ Not surprisingly, a punishment's conformity with or departure from prevailing practice has come to play a leading role in the Court's decisions, which often revolve around the kind of jurisdiction counts found in an "Am Jur" annotation.³⁹ Virtually no punishments are "cruel" on the Court's definition. The Court thus may invalidate a punishment only by, first, characterizing it as "unusual" and, second, effectively defining the Eighth Amendment's meaning in terms of that requirement alone. The Court's cases, however, have been arbitrarily selective in their use of the term "unusual," permitting some unusual punishments and condemning common prison conditions.

*Ewing v. California*⁴⁰ exemplifies a recent decision upholding an "unusual" punishment.⁴¹ Ewing was convicted of grand theft for stealing three golf clubs worth \$399 a piece. Based upon that triggering offense and four prior felony property offenses,⁴² Ewing was sentenced to 25 years to life under California's "three strikes" law. The Court upheld this harsh sentence even though it was almost without precedent compared to

38 *Trop v. Dulles*, 356 U.S. 86, 100 n. 32 (1958). Of course, the text does not define how "unusual" a punishment must be to qualify as unconstitutional. It does not answer whether a punishment authorized by, say, only three States is "unusual" for purposes of the Eighth Amendment. Nor does the text specify the time frame to be used as a baseline for determining whether a punishment is "unusual." It does not address whether a punishment must be "unusual" in relation to those used in 1791, now, or both. While these ambiguities remain, the term's basic meaning is straightforward.

³⁹ *See, e.g., Roper*, 125 S.Ct. at 1200-04 (Appendices A – D) (counting jurisdictions); *Atkins*, 536 U.S. at 313-16 nn. 8-16. Interestingly, the Court has often explained its reliance on prevailing punishment practices not as a matter of textual fidelity but rather as a limitation on judicial subjectivity. *Stanford*, 492 U.S. at 378-79 (plurality opinion). *But see* *Thompson v. Oklahoma*, 487 U.S. 815, 822 n.7 (1988)(plurality opinion)(describing the text as "[p]art of the rationale").

⁴⁰ 538 U.S. 11 (2003).

⁴¹ For other examples of "unusual" punishments the Court has upheld, *see Harmelin*, 501 U.S. 957, 1027 (1991)(upholding mandatory sentence of life without parole for first-time offense of possessing cocaine even though "no other jurisdiction provide[d] such a severe, mandatory penalty for possession of this quantity of drugs"); *Hutto v. Davis*, 454 U.S. 370, 373 n.2 (1982)(per curiam)(upholding 40 year sentence for marijuana offenses even though it exceeded the available maximum in more than 40 states).

⁴² One of these, a robbery, also involved a threat of personal violence.

sentences in other jurisdictions. The State of California, other States filing amicus briefs on California's behalf, and the Solicitor General came up with only three instances in which prisoners elsewhere had received a similarly harsh sentence in comparable circumstances.⁴³ In his dissent, Justice Breyer found only one of these instances truly analogous, conceding "a single instance of a similar sentence imposed outside the context of California's three strikes law, out of a prison population now approaching two million individuals."⁴⁴ He concluded that: "Outside the California three strikes context, Ewing's recidivist sentence is virtually unique in its harshness for his offense of conviction, and by a considerable degree."⁴⁵

The plurality did not disagree that Ewing's sentence was "unusual," reasoning instead that Ewing's sentence was not "cruel." It explained that California had "a reasonable basis for believing that" its harsh punishment substantially furthered "the State's public-safety interest in incapacitating and deterring recidivist felons"⁴⁶ Ewing's punishment was not "cruel" because it was supported by colorable penological justification.

The plurality's explanation does not work. Consider *Atkins v. Virginia*,⁴⁷ decided one term prior to *Ewing*. There the Court held that execution of the retarded violates the Eighth Amendment. Yet such a punishment is not "cruel," as the *Ewing* plurality defined the term. The Court listed a diminished capacity "to control impulses" as a key attribute of

⁴³ 538 U.S. at 46 (Breyer, J., dissenting).

⁴⁴ 538 U.S. at 46-47.

⁴⁵ 538 U.S. at 47.

⁴⁶ 538 U.S. at 28, 29.

⁴⁷ 536 U.S. 304 (2002).

retardation.⁴⁸ States have a reasonable basis for believing that in appropriate cases death substantially furthers the legitimate goal of incapacitating murderers who pose heightened dangers because of a lack of impulse control resulting from retardation. The reasoning of *Ewing* plurality thus implies that *Atkins* was wrongly decided, even though *Ewing* plurality members Justices Kennedy and O'Connor voted with the *Atkins* majority. The constitutionality of unusual punishments thus cannot turn on whether they are "cruel" under the Court's definition: None of the punishments it has invalidated qualify and, used for purposes of deterrence rather than sadism, neither do torture nor the rack.⁴⁹ From a textual standpoint, it is inconsistent for the Court to invalidate some "unusual" punishments that are not "cruel," such as the death penalty for the retarded, but not others, such as *Ewing*'s uniquely harsh sentence.

If inconsistency between the Court's decisions and the text were confined to cases upholding unusual punishments, then perhaps it could be laid entirely at the doorstep of an incomplete or misguided definition of "cruel."⁵⁰ But the conflict between the Court's decisions and the text sweeps more broadly than this. In some contexts the Court also has read the Eighth Amendment to invalidate common punishments. This view cannot be reconciled with the literal text, which prohibits punishments that are cruel "*and unusual*."

The Court's declarations about prison conditions illustrate the incompatibility. Prisons are expensive to build and operate. State voters and legislators typically place a

⁴⁸ 536 U.S. at 318.

⁴⁹ See *supra* Part I.A.1.

⁵⁰ All that is needed, one could then argue, is a more satisfactory definition of "cruel" that will explain when an unusual punishment should be upheld and when it should be invalidated. Ideally, such a definition would square with the results of the Court's prior decisions, for instance, explaining why the Court was right both to uphold the punishment in *Ewing* and to invalidate the death penalty for the retarded in *Atkins*.

very low priority on their funding.⁵¹ A harshly anti-crime political environment, prohibitions against voting on the part of imprisoned felons,⁵² and state budgetary problems all contribute. The dynamic that underlies the resultant chronic underfunding is not confined to a few states; it is pervasive. No one should be much surprised, then, that until judicial intervention occurred in the name of the Eighth Amendment a great many prisons were extremely unhealthy, overcrowded, and violent.

Indeed, before such intervention brutal and unhealthy conditions were pervasive.⁵³ In *Rhodes v. Chapman*,⁵⁴ for instance, Justice Brennan's concurring opinion recounted the "gruesome" conditions in Alabama prisons, which included rampant everyday violence, two hundred inmates sharing a single toilet, and inmates sleeping on the floor next to urinals. Such unsafe conditions, Justice Brennan observed, are "neither aberrational nor anachronistic."⁵⁵

The Court nonetheless has read the Cruel and Unusual Punishment Clause to render widespread prison conditions unconstitutional. The Court has declared that the Clause

⁵¹ See David E. Pozen, *Managing a Correctional Marketplace: Prison Privatization in the United States and the United Kingdom*, 19 J. L. & Pol. 253, 264 (2003); Neil Devins, Book Review, 87 Cal. L. Rev. 1283, 1296-97 (1999).

⁵² George P. Fletcher, *Disenfranchisement as Punishment: Reflections on the Racial Uses of Infamia*, 46 UCLA L. Rev. 1895, 1898 (1999):

In 46 states and the District of Columbia, felons are prohibited from voting while in prison.

In addition, 32 states prohibit offenders from voting while on parole and 29 bar voting while on probation. Felons are barred for life from voting in 14 states, a prohibition that can be waived only through a gubernatorial pardon or some other form of clemency. Only four states - Maine, Massachusetts, New Hampshire and Vermont - allow prison inmates to vote.

See *Richardson v. Ramirez*, 418 U.S. 24 (1974)(California felon voting disqualification does not violate equal protection). Cf. *Johnson v. Governor of Florida*, 353 F.3d 1287 (11th Cir. 2003)(invalidating Florida felon voting disqualification statute), *reh'g en banc granted*, 377 F.3d 1163 (11th Cir. 2004).

⁵³ James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis*, 37 Harv. J. Leg. 105, 108-10 (2000)(describing state of prisons prior to federal court intervention, citing sources).

⁵⁴ 452 U.S. 337, 355-56 (1980).

⁵⁵ 452 U.S. at 356.

obligates prison officials to “provide humane conditions of confinement”⁵⁶ Under its interpretation, much of the “rampant” prison violence to which Justice Brennan referred in *Rhodes* is unconstitutional. Prison officials may not themselves use “excessive physical force against prisoners”⁵⁷ and also may not be deliberately indifferent to violence among inmates.⁵⁸ In *Rhodes*, Justice Brennan cited the “appalling” and “blatantly inadequate” health care provided in the Colorado State Penitentiary as an example of a common condition.⁵⁹ Nonetheless, two years earlier, the Court had held in *Estelle v. Gamble*⁶⁰ that the Cruel and Unusual Punishment Clause precludes deliberate indifference to an inmate’s serious medical needs, thereby in effect requiring that prison officials furnish a decent minimum of health care. The Court has extended this principle beyond health care to any prison condition that implicates health, safety, or “basic human needs”⁶¹ such as food, clothing, and housing.

These various requirements all flow naturally from idealistic precepts of humane treatment. However, they emphatically do not derive from prison practices or legislative judgments so prevalent that departures from them are “unusual.” Not surprisingly, the Court has made no serious effort to so demonstrate.⁶² Nor could it. In 1980, Justice

⁵⁶ *Farmer v. Brennan*, 511 U.S. 825, 832 (1994).

⁵⁷ *Id.* In particular, the Cruel and Unusual Punishment Clause permits prison officials to use force “in a good faith effort to maintain or restore discipline” but prohibits the use of force “maliciously and sadistically for the very purpose of causing harm.” *Whitley v. Albers*, 475 U.S. 312, 320-21 (1986). In *Whitley and Hudson v. McMillian*, 503 U.S. 1 (1992), the Court asserted that the Eighth Amendment prohibits the use of excessive force in prisons without any showing that such force was unusual.

⁵⁸ *Farmer*, 511 U.S. at 832-33.

⁵⁹ *Rhodes*, 452 U.S. at 356.

⁶⁰ 497 U.S. 97 (1976).

⁶¹ *Rhodes*, 452 U.S. at 347. *Hudson*, 503 U.S. at 9 (Clause prohibits “deprivations denying the minimal civilized measure of life’s necessities”).

⁶² *Cf.* Malcom M. Feeley & Edward L. Rubin, *Judicial Policy Making and the Modern State: How the Courts Reformed America’s Prisons* 13 (1998)(calling prison reform cases “the most striking example of judicial policy making in modern America.”). In *Estelle*, for instance, the Court declared that the Cruel and Unusual

Brennan reported in *Rhodes* that prisons or prison systems in twenty-two states then had been found unconstitutional and placed under federal court order.⁶³ This understates matters, as now fully forty-eight American jurisdictions have had some part of their prison facilities declared in violation of the Constitution.⁶⁴ Conditions that subsist in forty eight jurisdictions might be abhorrent and inhumane but they cannot be “unusual.”

3. Relationship between “cruel” and “unusual.”

To muddy the Court’s approach still further, the Justices have made conflicting declarations about the relationship between the terms “cruel” and “unusual.” The Justices sometimes have said that an unconstitutional punishment must be both cruel and unusual,

Punishment Clause condemns punishments that are *either* unusual because they “are incompatible with ‘the evolving standards of decency that mark the progress of a maturing society,’” 429 U.S. at 102 (quoting *Trop*, 356 U.S. at 101), or “which ‘involve the unnecessary and wanton infliction of pain’” 429 U.S. at 103 (quoting *Gregg*, 428 U.S. 153, 173 (1976)(joint opinion)). In support of its view that the Clause prohibits deliberate indifference to serious medical needs, the Court did point to “modern legislation codifying the common law view that ‘it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.’” 497 U.S. at 103-04 (quoting *Spicer v. Williamson*, 132 S.E. 291, 293 (N.C. 1926)). While this legislation evidences theoretical acceptance of some sort of an obligation to provide medical care to prisoners, the Court made no effort to explore the scope of the obligation legislatively recognized, much less to show the standard it announced matched the prevailing view. 497 U.S. at 103 n.8 (noting the existence but not discussing the content of state regulations “which specify, in varying degrees of detail, the standards of medical care to be provided to prisoners”). Furthermore, the Court’s failure to go beyond legislation to examine actual practice conflicts with its approach in death penalty cases. In *Furman*, the plurality concluded that the death penalty was “unusual” despite its widespread legislative adoption because, as a matter of actual practice, it was infrequently employed.

After *Estelle*, the Court extended prison officials’ obligation to other prison conditions such as inmate-to-inmate violence without discussing either legislation or actual prison practices. Further, in *Helling v. McKinney*, 509 U.S. 25, 32, 33 (1993), the Court held that an inmate’s exposure to second-hand smoke in his cell may constitute “cruel and unusual punishment” provided that on remand the inmate was able to show that, inter alia, such exposure “is contrary to current standards of decency” because it is “not [a risk] that today’s society chooses to tolerate.” If the Court had been serious about requiring that such punishments were “unusual,” it would have focused on prevailing prison practices rather than general societal attitudes respecting second-hand smoke. A prison condition does not constitute “unusual” *punishment* because it departs from the nonpunitive conditions that prevail in society. It is so only because it departs from conditions prevailing in prison.

⁶³ 452 U.S. at 353 n.1.

⁶⁴ Malcom M. Feeley & Edward L. Rubin, *I Love You, Big Brother Judicial Policymaking and the Modern State: How Courts Reformed American’s Prisons* 39-42 (1998).

just as the literal text provides.⁶⁵ On other occasions, however, Justices have questioned “whether the term ‘unusual’ has any qualitative meaning different from ‘cruel’”⁶⁶ The relationship between these two terms raises interesting questions of interpretation, which are the subject of extended discussions in Parts II & III. The Court has not done the intellectual work needed to resolve these questions, as the oscillations in its treatment of prevailing penal practice reveal.

B. The Court’s Role.

In addition to disconnection with the constitutional text, the Court’s Eighth Amendment jurisprudence suffers from inconsistency concerning its own role. According to the standard exposition found in the Court’s opinions, the official judgments of other institutions define the meaning of cruel and unusual punishment. The Cruel and Unusual Punishment Clause, the Court has said, derives its meaning from the “evolving standards of decency that mark the progress of a maturing society.”⁶⁷ These standards, in turn, are defined “to the maximum possible extent”⁶⁸ by objective standards such as “statutes passed by society’s elected representatives”⁶⁹ Although some of its opinions declare

⁶⁵ *Harmelin*, 501 U.S. at 994-95.

⁶⁶ *Trop*, 356 U.S. at 100 n. 32 (1958). See also *Furman*, 408 U.S. at 377 (Burger, C.J., dissenting) (“There was no discussion of the interrelationship of the terms “cruel” and “unusual,” and there is nothing in the debates supporting the inference that the Founding Fathers would have been receptive to torturous or excessively cruel punishments even if usual in character or authorized by law.”).

⁶⁷ *Rhodes*, 452 U.S. at 346 (quoting *Trop*, 356 U.S. at 101). See, e.g., *Atkins*, 536 U.S. at 311-12; *Hudson*, 503 U.S. at 8; *Stanford*, 492 U.S. at 369.

⁶⁸ *Coker v. Georgia*, 433 U.S. 584, 592 (1977)(plurality opinion). See also *Harmelin*, 501 U.S. at 1000 (quoting *Rummel v. Estelle*, 445 U.S. 263, 274-275 (1980)); *Gregg*, 428 U.S. at 173 (plurality opinion).

⁶⁹ *Stanford*, 492 U.S. at 370. The reliance on prevailing practice traces back to the Court’s earliest Eighth Amendment decisions. In its very first case addressing the meaning of Cruel and Unusual Punishment Clause, decided in 1866, the Court addressed a contention that it was unconstitutional to impose a fine and 30 days imprisonment at hard labor for selling liquor without a license. In *Pervear v. Commonwealth*, 72 U.S. 475 (1866), the Court declared that this punishment could not be cruel and unusual because it was “the usual mode adopted in many, perhaps all, of the States”. 72 U.S. at 480. The Court’s conclusion that the punishment did not constitute cruel and unusual punishment was arguably dictum. It was made unnecessary by the Court’s

that prevailing practice does not “wholly determine” the matter and that the Clause’s meaning ultimately hinges on the Court’s “own judgment”,⁷⁰ the Court has never invalidated punishment it has characterized as consonant with prevailing practice.⁷¹ Even theoretical authority to depart from prevailing practice is controversial, prompting Justice Scalia to complain in *Atkins v. Virginia* that: “The arrogance of this assumption of power takes one’s breath away.”⁷²

This deference to other institutions produces incoherence both within and without the Court’s Eighth Amendment case law. First, as discussed in the preceding section, the Court’s reliance on prevailing practice has been disuniform within the Eighth Amendment context. Second, the Court’s professed willingness to define the very meaning of cruel and unusual punishment in terms of prevailing practice runs contrary to the independent role it regularly assumes in interpreting other counter-majoritarian rights.

1. Internal Consistency.

alternative holding that the Eighth Amendment did not apply at all because it constrains the actions of the federal government, not state governments. 72 U.S. at 479-80. *See also* *In re Kemmler*, 136 U.S. 436 (1890)(declining to discuss the merits of an Eighth Amendment challenge because the Amendment does not apply to the States).

In *Wilkerson v. Utah*, 99 U.S. 130 (1878), its next Nineteenth Century Eighth Amendment decision, the Court rejected a challenge to death by shooting rather than by hanging. Again appealing to prevailing practices, the Court canvassed treatises on military law. 99 U.S. 130 (1878). It reasoned that a showing that shooting was a customary mode of execution in military cases was “quite sufficient” to undermine the Eighth Amendment challenge. 99 U.S. at 134-35. *See also* *Weems*, 217 U.S. at 380-81 (comparing punishment with others for similar and more serious offenses both within and without the jurisdiction); *Trop*, 356 U.S. at 100 n.32, 102-03 (plurality opinion)(citing congressional practice and international custom); *Robinson v. California*, 370 U.S. 660, 666 (1962)(interpreting California to criminalize the status of narcotics addiction, even if “contracted innocently or involuntarily” and declaring that “[i]t is unlikely that any State at this moment in history” would criminalize other such conditions, such as mental illness or venereal disease).⁷⁰ *Roper*, 125 S.Ct. at 1190, 1191; *Atkins*, 536 U.S. at 312; *Gregg*, 428 U.S. at 173 (plurality opinion); *Coker*, 433 U.S. at 597 (plurality opinion). *But see* *Stanford*, 492 U.S. at 377-78 (plurality opinion)(“emphatically reject[ing]” suggestion that the Court’s own judgment has any relevance).

⁷¹ In *Roper*, 125 S.Ct. at 1192-94; *Atkins*, 536 U.S. at 312-13; *Edmund v. Florida*, 458 U.S. 782, 789-793 (1982), and *Coker*, 433 U.S. at 593-596, the Court declared that the constitutionality of the punishment was ultimately for it to decide. In each case, however, the Court found its own judgment and prevailing practice to be in accord.

In the main, the reasoning and results of the Court's cases can be seen to accord with its professed reliance on customary punishment practices.⁷³ When the Justices have disagreed about the result in a particular case, both the majority and the dissent generally purport to follow the dictates of customary practice and ostensibly rest their disagreement largely on custom's proper characterization.⁷⁴

Still, the Court's decisions nonetheless fall considerably short of consistent adherence to prevailing practice. In its prison condition cases, the Court has read the Cruel and Unusual Punishment Clause to invalidate conditions that are neither "aberrational nor anachronistic."⁷⁵ In addition, the Court has upheld some punishments that do conflict with prevailing punishment practice, such as mandatory life imprisonment for possession of cocaine and Ewing's lengthy sentence under California's three-strikes law.⁷⁶

72 536 U.S. at 348 (Scalia, J., dissenting). See also *Roper*, 125 S.Ct. at 1217 (Scalia, J., dissenting).

73 The Court has upheld punishments based upon a conclusion that they do not sharply depart from prevailing practice. Punishments in this category include the death penalty statutes enacted in the aftermath of *Furman, Gregg*, 428 U.S. at 179-81; the execution of juveniles who were 16 or older at the time of their offense, *Stanford*, 492 U.S. at 372 (noting that only 15 of the 36 death penalty States (42%) prohibited death for such offenders), *overruled in Roper*, 125 S.Ct. at 1198; and the death penalty for felony murderers who act with reckless indifference to life, *Tison v. Arizona*, 481 U.S. 137, 154 (1987) (noting that only 11 of the 37 death penalty States (30%) prohibited such punishment).

The Court has invalidated numerous punishments based on a conclusion that they do defy customary practice. Such punishments include death for juveniles younger than 18, *Roper*, 125 S.Ct. at 1198; the death penalty for the retarded, *Atkins*, 536 U.S. at 345; the death penalty for the insane, *Ford v. Wainwright*, 477 U.S. 399, 408 (1986) (observing that "this ancestral legacy has not outlived its time," since not a single State authorizes such punishment); a life sentence without parole for relatively minor property offenses, *Solem v. Helm*, 463 U.S. 277, 300 (1983) (noting that the offender "was treated more severely than he would have been in any other State."); the death penalty for mere participation in a robbery in which an accomplice took a life, *Enmund*, 458 U.S. at 789 (such a punishment not permitted in 28 of the death penalty States (78%)); the death penalty for rapists of adult victims, *Coker*, 433 U.S. at 595-596 (asserting that only one jurisdiction, Georgia, authorized such a punishment); mandatory death sentences for first-degree murder, *Woodson v. North Carolina*, 428 U.S. 280, 292-301 (1976); and a lengthy prison sentence at hard labor for cheating the government out of pay, *Weems*, 217 U.S. at 366-367 (declaring that the punishment had "no fellow in American legislation").

74 For an account of the legerdemain in which the Justices engage to characterize prevailing practice in a way that befits their desired result, see *infra* Part II.C.1..

75 *Rhodes*, 452 U.S. at 356.

76 *Harmelin*, 501 U.S. at 994-96; *Ewing*, 538 U.S. at 28. See also *Hutto v. Davis*, 454 U.S. 370 (1982) (per curiam) (upholding 40 year sentence for possession and distribution of nine ounces of marijuana in the face of

There is nothing objectionable in principle about general deference to prevailing practice coupled with occasional exceptions. However, the Court's opinions do not explain why and when such exceptions are warranted. In its prison conditions cases, the Court has yet to acknowledge, much less justify, the discontinuity between its proclamations about the definitional role of custom and actual prison practices. Nor has the Court has offered a satisfactory explanation why officials may employ punishments that are harsher than those within the range of prevailing custom. Except respecting rare instances of sadism, the explanation offered by Justice O'Connor's plurality opinion in *Ewing v. California*⁷⁷ always applies.

The Court's Cruel and Unusual Punishment cases, then, appear internally inconsistent. Given the absence of any persuasive explanation, the Court's departures from custom have the appearance of inconsistent and result-oriented anomalies. They further raise a suspicion that the Court lacks a coherent understanding of custom's proper role and, by implication, of the Court's own role relative to the political actors who create custom.

2. *External Consistency.*

The Court's decisions also suffer from external inconsistency respecting its own role relative to other governmental actors. Its avowed deference to penal custom conflicts with the independent judgment it has exercised in interpreting other individual rights.

The Court has not defined the right to equal protection with reference to customary practice. If the Court had relied on prevailing practice in the equal protection context, it

evidence that the average sentence in this State for marijuana offenses was three years and the maximum in any other case was fifteen years); *Rummel v. Estelle*, 445 U.S. 263 (1980)(upholding life sentence for minor property recidivist when such a sentence was theoretically possible in only two other States).
⁷⁷ 538 U.S. at 28.

could not have issued its landmark decision in *Brown v. Board of Education*,⁷⁸ which invalidated race segregation then widespread in the public schools. Nor could have the Court have invalidated gender discrimination to the extent that it has.⁷⁹ Indeed, the Court has considered a history of purposeful discrimination against a particular group as one of the "indicia of suspectness" that warrants heightened judicial scrutiny.⁸⁰ This reverses the approach at work in the cruel and unusual punishment cases, where the historical pedigree and widespread nature of a particular practice tends to establish its constitutionality rather than raise a suspicion of unconstitutionality.

The Court also does not rely upon prevailing laws and practices to define the meaning of free speech. For instance, *New York Times Company v. Sullivan*⁸¹ and its progeny forced very substantial revisions in the law of defamation. Familiar first amendment doctrines such as the prohibition against viewpoint discrimination and the distinction between lesser protected commercial speech and fully protected speech do not derive from majoritarian practices. The Court has fashioned these doctrines not because they are congruent with and legitimize what a supermajority of states already do but rather because they are thought necessary to vindicate free speech values.

In a few of its substantive due process decisions the Court has used majoritarian

78 347 U.S. 483 (1954). See Tobias Barrington Wolff, *The Thirteenth Amendment and Slavery in the Global Economy*, 102 Colum. L. Rev. 973, 976 (2002) ("the Brown Court dramatically rejected custom and tradition").

79 See, e.g., *U.S. v. Virginia*, 518 U.S. 515 (1996) (invalidating longstanding all-male education at the Virginia Military Institute).

80 See, e.g., *Kimel v. Fla. Bd. Of Regents*, 528 U.S. 62, 83 (2000); *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

81 376 U.S. 254 (1964). For subsequent cases limiting established common law principles of defamation, see, e.g., *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749 (1985); *Time, Inc. v. Hill*, 385 U.S. 374 (1967).

practices to define individual rights. According to cases such as *Griswold v. Connecticut*⁸² and *Roe v. Wade*,⁸³ an unenumerated right of privacy or autonomy is implicit in the concept of ordered liberty rooted in the Due Process Clause. In these two landmark decisions, the Court gave no weight at all to prevailing legislative practices in defining the scope of constitutionally protected autonomy. In fact, the *Roe* Court expressly noted that criminal abortion prohibition it struck down was “typical of those that have been in effect in many States for more than a century.”⁸⁴ However, in some of its decisions, notably *Bowers v. Hardwick*⁸⁵ and *Washington v. Glucksberg*,⁸⁶ the Court has appealed to majoritarian judgments as defining the scope of fundamental substantive due process rights. As in the Cruel and Unusual Punishment cases, the Court has reasoned that laws and practices may violate the Constitution only when they sharply diverge from society’s legal traditions. In *Bowers* the Court upheld a criminal prohibition of homosexual sodomy ⁸⁷ and in *Glucksberg* a Washington law prohibiting physician-assisted suicide because those laws did not flout the legal practices of a supermajority of States over time and, in fact, were consistent with those practices.⁸⁸ Of course, *Lawrence v. Texas*⁸⁹ overrules *Bowers*. As the dissenters fumed, the *Lawrence* Court rejected the definitional role that both *Bowers* and *Glucksberg* had accorded to societal tradition.⁹⁰ The role of tradition in the Court’s substantive due process decisions remains unsettled.

82 381 U.S. 479 (1965).

83 410 U.S. 113 (1973).

84 410 U.S. at 116.

85 478 U.S. 186 (1986).

86 521 U.S. 702 (1997). *Cf. Montana v. Egelhoff*, 518 U.S. 37, 43-50 (1996)(plurality opinion)(using tradition to define the contours of procedural due process).

87 478 U.S. at 191-95.

88 521 U.S. at 721-28.

89 539 U.S. 558, 578 (2003).

Even assuming that the tension in the Court's substantive due process decisions should be resolved in favor of reliance on societal tradition, it does not obviously follow that the Court should employ the same approach respecting cruel and unusual punishment. The Court would need to explain why the Cruel and Unusual Punishment Clause, an enumerated right, is more analogous to the unenumerated substantive due process rights than it is to enumerated rights such as freedom of speech and equal protection. This the Court has not done.

In its Eighth Amendment decisions, then, the Court has taken a dramatically different view of its own role relative to majoritarian institutions than in other constitutional contexts. If this apparent external incongruity can be explained away, the Court's cases do not indicate how.

C. Proportionality.

Internal coherence is lacking in a third fundamental aspect of the Court's work, its treatment of proportionality. Construed in light of a principle of proportionality, the Eighth Amendment forbids punishments that are grossly disproportional to the actual or threatened harm and offender's culpability. Life imprisonment may be constitutional for intentional murder but not for a strict liability offense of overtime parking. The competing view, enthusiastically promoted by Justice Scalia, holds that the Eighth Amendment prohibits only those punishments such as torture that are "everywhere and always" cruel and unusual no matter what the context.

The Court has embraced a principle of proportionality but has applied it in an

90 539 U.S. at 595-98 (Scalia, J., dissenting).

incongruous fashion. In the death penalty context, the Court has pursued proportionality aggressively, using multiple means and prophylactic rules. Indeed, its death penalty jurisprudence is contradictory and incoherent unless understood against a background principle of proportionality. In contrast, the Court's recent cases addressing punishments other than death reduce proportionality to a purely theoretical principle devoid of practical significance.

1. The Death Penalty.

Proportionality lies at the very heart of the Court's death penalty jurisprudence. Ever since *Furman*, the Court's death penalty cases have recognized two basic principles. The first requires that legislatures narrow the class eligible to receive death by specifying aggravating circumstances beyond the elements of murder or first-degree murder.⁹¹ The second principle requires that the sentencer be free to consider any and all relevant mitigating circumstances.⁹² Justices and commentators understandably have questioned whether these principles of guided discretion and mercy cohere with one another.⁹³ While

⁹¹ Under the death penalty statutes in force when *Furman* was decided, all who committed broadly defined capital offenses such as murder or first-degree murder were eligible to receive death. Within these large categories of eligible offenders, the statutes gave no meaningful guidance on how sentencing discretion whether to impose death should be exercised. *Furman* condemned such statutes on the ground that, as applied, they resulted in the arbitrary and infrequent selection of offenders to die. The Court since has adopted the principle of guided discretion. *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998); *Loving v. United States*, 517 U.S. 748, 755 (1996); *Gregg*, 428 U.S. at 189 (plurality opinion)(sentencer's discretion must be "directed and limited"); *Jurek v. Texas*, 428 U.S. 262, 270-71 (1976)(plurality opinion). See generally Scott W. Howe, *The Failed Case for Eighth Amendment Regulation of the Capital Sentencing Trial*, 146 U. Pa. L. Rev. 795, 808-10 (1998).

⁹² The sentencer may be neither precluded from taking mitigating circumstances into account altogether nor restricted to a specified list of such circumstances. *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978)(plurality opinion).

⁹³ Toward the end of his tenure on the Court, Justice Blackmun concluded that these two principles of "reasonable consistency" and "individual fairness" cannot both be realized in practice. Announcing his judgment that "the death penalty experiment has failed," he concluded that "no sentence of death may be constitutionally imposed." *Callins v. Collins*, 510 U.S. 1141, 1144, 1145, 1146 n.2 (1994)(Blackmun, dissenting from denial of certiorari). Justice Scalia, concurring in the denial of certiorari, agreed with Justice

the principle of guided discretion presupposes that discretion is dangerous, the principle of mercy affirmatively requires it.

Whatever logical tension exists between these two principles can be dispelled by viewing them as complementary corollaries of a more general proportionality principle. By narrowing the class of eligible offenders according to specified standards, the principle of guided discretion tends to limit the penalty's imposition to cases in which the offense is particularly grave and/or the offender's culpability particularly evident. The mercy principle helps assure "that punishment [is] directly related to the personal culpability of the criminal defendant" by tending to screen out those having diminished culpability.⁹⁴

The principles of guided discretion and mercy are indirect ways of assuring proportionality. Courts could more directly implement proportionality by themselves engaging in case-by-case oversight, asking whether each death sentence is proportionate in light of that case's particular facts. Many state courts do employ such oversight as a matter of their own law, comparing each case in which a death sentence has been issued with other factually similar cases.⁹⁵ The Court has not chosen this path. It instead has required legislatures to specify aggravating circumstances and defense attorneys to present arguably mitigating evidence to juries. These requirements give legislatures, defense attorneys, and juries very considerable leeway in defining the meaning of proportionality. The Court has

Blackmun that the two principles of consistency and fairness cannot be reconciled. 510 U.S. at 1141 (Scalia, J., concurring). According to Justice Scalia, however, the better solution is to jettison the principle of mercy. 510 U.S. at 1142; *Walton v. Arizona*, 110 S.Ct. 3047, 3068 (1990)(Scalia, J., concurring). See Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 Am. Crim. L. Rev. 1151 (2003); Steven G. Gey, *Justice Scalia's Death Penalty*, 20 Fla. St. U. L. Rev. 67 (1992).

⁹⁴ *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989)

⁹⁵ Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only "The Appearance of Justice"?*, 87 J. Crim. L. & Criminology 130, App. A (1996)(listing twenty-three

relied upon these actors, not its own review or standards of its own creation. Still, the principles of guided discretion and mercy, in combination, constitute a creative and defensible means of promoting proportionality. They together help assure that imposition of the death penalty is proportionate to the offense's gravity and the offender's culpability.

The Court also has implemented proportionality more directly by prohibiting use of the death penalty for entire categories offenses and offenders. As for offenders, it has held that the Cruel and Unusual Punishment Clause prohibits the execution of the retarded,⁹⁶ the insane,⁹⁷ and juveniles below the age of 18 at the time of the offense.⁹⁸ As for offenses, it has held that death may not be constitutionally imposed for the rape of an adult woman⁹⁹ and for some felony murders.¹⁰⁰ The Court has explicitly rested all of these holdings on the ground that the Eighth Amendment forbids grossly disproportionate punishments.

2. *Other Punishments.*

In sharp contrast with its death penalty jurisprudence, the Court has treated proportionality as essentially lacking enforceable content in its modern cases concerning other punishments. In theory, the Court has embraced an Eighth Amendment principle “prohibit[ing] imposition of a sentence that is grossly disproportionate to the severity of the crime.”¹⁰¹ However, the Court has repeatedly stressed that this principle is “narrow” and

jurisdictions that use proportionality review).

⁹⁶ *Atkins*, 536 U.S. 304 (1992).

⁹⁷ *Ford*, 477 U.S. 399 (1986).

⁹⁸ *Rope*, 125 S.Ct. at 1198; *Thompson v. Oklahoma*, 487 U.S. 815 (1988).

⁹⁹ *Coker*, 433 U.S. 584 (1977).

¹⁰⁰ *Edmund v. Florida*, 458 U.S. 782 (1982).

¹⁰¹ *Rummel*, 445 U.S. at 271.

“forbids only extreme sentences” such as a life sentence for overtime parking.¹⁰² Only once in the last several decades has the Court invalidated a sentence of imprisonment as grossly disproportionate.¹⁰³ During that same period, it has upheld sentences of life imprisonment for three relatively minor property offenses,¹⁰⁴ forty years imprisonment for possession and distribution of nine ounces of marijuana,¹⁰⁵ mandatory life imprisonment without parole for a first offense of possession of cocaine,¹⁰⁶ and twenty five years to life under California’s “three-strikes” law for a triggering offense of stealing goods worth approximately \$1,200.¹⁰⁷ Even though each of these sentences was “virtually unique”¹⁰⁸ in its severity, the Court upheld them through an analysis that made intrajurisdictional and interjurisdictional comparisons with other sentences irrelevant.

It is a remarkable that the Court should have reached these results during an era when “both major parties have participated in a kind of bidding war to see who can appropriate the label ‘tough on crime’”¹⁰⁹ As a consequence, criminal penalties have become harsher, often dramatically so. “The 1980s saw several waves of anti-drug

102 *Ewing*, 538 U.S. at 21 (plurality opinion); *Rummel*, 445 U.S. at 274 n.11.

103 *Compare* *Lockyer v. Andrade*, 538 U.S. 63 (2003); *Ewing*, 538 U.S. 11 (2003); *Harmelin*, 501 U.S. 957 (1990); *Hutto v. Davis*, 454 U.S. 370 (1982)(per curiam); *Rummel*, 445 U.S. 263 (1980) with *Solem v. Helm*, 463 U.S. 277 (1983). In *Solem*, the Court invalidated a sentence of life without parole imposed under a recidivism statute. The offense that triggered the sentence was that of uttering a false check for \$100. The Court described his six prior offenses as “all nonviolent” 463 U.S. at 298.

104 *Rummel*, 445 U.S. at 277-84. Rummel received the life sentence under a recidivism statute for committing a third offense. His prior offenses consisted of fraudulent use of a credit card to obtain \$80 in goods and passing a forged check in the amount of \$28.36. His “triggering” offense consisted of felony theft for obtaining \$120.75 by false pretenses.

105 *Hutto*, 454 U.S. at 375.

106 *Harmelin*, 501 U.S. at 996, 997.

107 *Ewing*, 538 U.S. at 18-20. The defendant’s prior “strikes” consisted of three prior convictions for burglary and one for robbery.

108 *Ewing*, 538 U.S. at 47 (Breyer, J., dissenting).

109 William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 509 (2001). See Michael Tonry, *Thinking About Crime* 3-20 (2004); Sara Sun Beale, *Rethinking Federal Criminal Law: What's Law Got To Do With It? The Political, Social, Psychological and Other Non-Legal Factors*

legislation imposing significant increases in the penalties”¹¹⁰ In the 1990s, legislatures enacted “more mandatory minimums, three strikes provisions, and extend[ed] the death penalty to more offenses.”¹¹¹ Set against the backdrop of this harshly anti-crime political environment, the pattern of the Court’s decisions attests to the virtual irrelevance of proportionality outside of the death penalty context.¹¹²

3. *Inconsistency.*

The Court’s “death is different” mantra¹¹³ is inadequate to explain its very aggressive pursuit of proportionality in death penalty cases and its nearly complete disinterest elsewhere. Neither the Eighth Amendment’s text, history, values, nor early precedent supports a hard and fast distinction between the death penalty and other punishments. If proportionality is indeed part of the Eighth Amendment’s meaning, then it ought to have discernible content in cases involving both the death penalty and imprisonment. In fact, the Court first affirmed proportionality in *Weems v. United States*, which invalidated penalties other than death, including imprisonment.¹¹⁴ Conversely, if proportionality is not properly part of the Eighth Amendment’s meaning, then it should not be pursued in any context. This is the position Justice Scalia articulated on behalf of himself, Justice Thomas, and Chief Justice Rehnquist in *Harmelin v. Michigan*.¹¹⁵ For these Justices, the death penalty proportionality cases might deserve to be left intact as a

Influencing the Development of (Federal) Criminal Law, 1 Buff. Crim. L. Rev. 23 (1997).

¹¹⁰ Beale, *supra* note 110, at 24.

¹¹¹ *Id.*

¹¹² *See also supra* note 11.

¹¹³ *See, e.g., Roper*, 125 S.Ct. at 1194; *Atkins*, 536 U.S. at 338 (Scalia, J., dissenting); *Rummel*, 445 U.S. at 272; *Woodson*, 428 U.S. at 305 (plurality opinion)

matter of stare decisis but not as matter of interpretive coherence.

It is true that the death penalty is uniquely harsh and that line-drawing among sentences of imprisonment can be difficult. However, other than the ultimate finality of a death sentence, the same factors bear on the gravity of the offense and culpability of the offender in both death and non-death cases. That death is a qualitatively more severe punishment can justify applying proportionality somewhat differently in the contexts of death and imprisonment. But it cannot justify pursuing proportionality vigorously through multiple means and prophylactic rules in one context and, in effect, not at all in the other. That it is sometimes or even very often difficult to draw distinctions between terms of imprisonment hardly implies that it is *always* unduly difficult to do so. It would be difficult to draw a constitutional line between a ten and a fifteen year prison sentence. But it does not follow that the difference between a sentence of life without parole and one of five years imprisonment may never have constitutional significance.

The incongruity between the Court's treatment of death and other punishments becomes even more difficult to defend when one considers its reliance on proportionality in other constitutional contexts. Under the mantle of substantive due process, the Court has claimed authority to invalidate grossly disproportionate civil punitive damage awards.¹¹⁶ The Court also has recognized judicial authority to invalidate grossly disproportionate

114 217 U.S. 349 (1910). For a discussion of *Weems*, see *supra* note 35.

115 501 U.S. 957 (1991). For a critique of the underpinnings of this position, see *infra* Part II. B.

116 See *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Cf. *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 264 (1989)(rejecting argument that Eighth Amendment's Excessive Fines Clause prohibits grossly disproportionate civil punitive damage awards).

criminal fines under the Eighth Amendment’s Excessive Fines Clause.¹¹⁷ Like sentences of imprisonment, monetary fines differ from one another only in degree. It is hard to understand why the problems of line-drawing and judicial subjectivity preclude distinguishing among sentences of imprisonment, but not civil or criminal monetary fines.¹¹⁸

D. Summary.

The Court’s Eighth Amendment jurisprudence needs rethinking. Entire lines of decisions conflict with the text and with the Court’s independent interpretive role. The Court’s decisions are inconsistent with one another on such important dimensions as the text, its role, and the constitutional status of proportionality. For any provision, it is essential that the Court’s work reflect some cohesive and defensible understanding of the text, its own role relative to other governmental actors, and the core meaning of the provision in question. The Court’s Cruel and Unusual Punishment jurisprudence flunks each and every one of these tests.

II. ALTERNATIVES.

This Part begins to explore remedies for the disorders identified in Part I. It begins with an approach that would seek to enforce the text’s literal meaning. It next moves to Justice Scalia’s allegedly originalist view, which holds that that the Eighth Amendment condemns only “everywhere and always” unacceptable punishments such as torture and the rack. Finally, it considers an approach that would use prevailing penal practices as the consistent constitutional baseline, prohibiting markedly harsh departures from it.

¹¹⁷ U.S. v. *Bajakajian*, 524 U.S. 321, 329-31 (1998).

¹¹⁸ See *infra* note 217.

A. Textualism.

The Eighth Amendment provides that “cruel and unusual punishments [shall not be] inflicted.” The most obvious way to interpret this prohibition is to adhere to its language. Such a textualist approach has strong general appeal. It is, after all, the text that Congress approved and the State legislatures ratified. Many scholars and jurists accordingly maintain that a textualist approach maximizes the law’s legitimacy and minimizes judicial subjectivity.¹¹⁹

For a textualist approach to work, it must make sense of the individual terms found in the Cruel and Unusual Punishment Clause. Part I pointed out some of the flaws in the Court’s use of the terms “cruel” and “unusual” but the more intractable textualist problem derives from the “and” that conjoins these terms. The text unambiguously requires that prohibited punishments be both cruel and unusual. Applied with the inflexibility the literal text demands, such a requirement is insupportable both as a matter of interpretation and principle.

Three considerations make it implausible to interpret the Cruel and Unusual Punishment Clause literally in this respect. The first is that no reliable evidence supports a conclusion that the Founders understood the Clause in this way. When the Eighth Amendment was proposed and ratified, a number of State constitutions had provisions addressing impermissible punishments. The Delaware, North Carolina, New Hampshire,

¹¹⁹ See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A Matter of Interpretation: Federal Courts and the Law* 3, 22 (Amy Gutmann ed., 1997); Leslie Friedman Goldstein, *In Defense of the Text* 136-42 (1991); William N. Eskridge, Jr., *The New Textualism*, 37 *UCLA L. Rev.* 621 (1990).

and Massachusetts provisions prohibited "cruel *or* unusual" punishments.¹²⁰ Like the English Bill of Rights of 1689, the Virginia provision forbade "cruel *and* unusual" punishments.¹²¹ Interpreted literally, these provisions embrace strikingly different prohibitions. A ban against "cruel or unusual" punishments is dramatically broader. For instance, this ban would outlaw a punishment requiring that an offender write a letter of apology to the victim. While such a punishment is by no means "cruel," it would be "unusual." Despite the very significant difference in the literal language of these two sets of provisions, the available evidence indicates that the Founders understood them to capture the same meaning.¹²² If they had thought otherwise, then one would expect some recorded contemporaneous recognition of the difference's significance in a diary, letter, newspaper, or legislative record. Evidently there is none.

The history of the English Bill of Rights reinforces the conclusion that the phrases "cruel *and* unusual" and "cruel *or* unusual" were understood to capture the same meaning. Just months after the House of Lords approved the Bill's prohibition against "cruel *and* unusual punishments," a group of Lords filed a dissenting statement in the case of Titus Oates. The dissenting Lords concluded that the punishments imposed in Oates' case

120 Delaware Declaration of Rights, 1776 § 15 *reprinted in* 2 *The Roots of the Bill of Rights* 278 (B. Schwartz, ed. 1980); North Carolina Declaration of Rights, 1776, X *reprinted in* *id.* at 286; Massachusetts Declaration of Rights, 1780, XXVI *reprinted in* *id.* 343; New Hampshire Bill of Rights, 1783, XXXIII *reprinted in* *id.* at 379. See also *Several State Conventions on the Adoption of the Federal Constitution* 328 (J. Elliot, ed. 1861)(proposal of New York Ratification Convention to amend the Constitution to prohibit "cruel or unusual" punishments); *id.* at 335 (proposal of Rhode Island Ratification Convention to amend the Constitution to prohibit "cruel or unusual" punishments).

121 See *New York Bill of Rights, 1787 reprinted in The Complete Bill of Rights: The Drafts, Debates, Sources & Origins* 615 (N. H. Cogan, ed. 1997)(cruel and unusual).

122 In 1787, New York adopted a Bill of Rights that prohibited infliction of "cruel and unusual punishments." One year later, the New York Ratifying Convention ratified the Constitution but proposed amending it to prohibit "cruel or unusual" punishments. *Id.* at 613, 615. Insofar as the historical record reflects, no one remarked on the difference.

violated the Bill of Rights, which they described as providing that neither “cruel *nor* unusual punishments [be] inflicted.”¹²³ Their mistake suggests that they understood prohibitions of “cruel and unusual” and “cruel or unusual” punishments as equivalents. This history has particular salience because the Cruel and Unusual Punishment Clause was taken virtually verbatim from the English Bill of Rights and because the English Bill of Rights is thought to have been principally a reaction to the punishments in Oates’ case.¹²⁴

The State Constitutions enacted during and shortly after the Bill of Rights’ ratification also counsel against a literal interpretation. Pennsylvania and South Carolina, each enacted constitutions during 1790, while ratification of the Bill of Rights was still pending. In addition, Kentucky and Delaware enacted constitutions in 1792 during the year following the Bill of Rights’ ratification. All of these constitutions prohibited “cruel punishments”, omitting entirely any reference to the term “unusual.”¹²⁵ The 1792 Delaware Constitution uses this same language,¹²⁶ as do numerous State constitutions enacted after the Founding period.¹²⁷ There is no evidence that this formulation was understood to mean anything different from either the Eighth Amendment’s proscription of “cruel *and unusual* punishments” or the ban of the many State constitutions enacted during

¹²³ 5 The Founders’ Constitution 369 (P. B. Kurland & R. Lerner, eds. 1987)(reprinting statement of dissenting Lords in the Titus Oates’ case).

¹²⁴ See Anthony F. Granucci, “*Nor Cruel and Unusual Punishment Inflicted*”: *The Original Meaning*, 57 Cal. L. Rev. 839 (1969).

¹²⁵ Pa. Stat. Ann., Const. Art. 1 § 13 & Hist. Note (2002)(“nor cruel punishments inflicted”); S. C. Const., Art. IX § 4 (1790)(same) in *The Complete Bill of Rights* 616 (N.H. Cogan, ed. 1997).

¹²⁶ Del. Const., Art. I, § 11 (1792); 1 Ky. Rev. Stat., First Const. of Ky. (1792), Art. XII § 15 (1988). New Hampshire, the only other state to enact a constitution during or immediately following ratification of the Bill of Rights, prohibited “cruel or unusual punishments”. N.H. Const., Art. 1, XXXIII (1792). The text of the Constitutions cited in this note and in note 127 can be accessed through the website of the NBER/Maryland State Constitutions Project at <http://129.2.168.174/Constitution/>.

¹²⁷ Ala. Const., Art. 1, § 16 (1819); Miss. Const., Art. 1, § 16 (1817); R. I. Const., Art. 1, § 8 (1843); S.D. Const., Art. VI, § 23 (1889); Wash. Const., Art. I, § 14 (1889). *Cf.* Mich. Const., Art. I, § 18 (1838).

the Revolutionary period against “cruel *or unusual*” punishments.

The obvious and marked difference in the literal meaning of the state constitutional formulations, the evident absence of any perceived difference, and the affirmative evidence in the history of the English Bill of Rights together point to the same conclusion: The Founders did not understand the Cruel and Unusual Punishment Clause in a literal fashion and did not mean for a punishment’s unusual nature to be an invariable requirement of unconstitutionality. As then Chief Justice Burger remarked in his *Furman* dissent: “There was no discussion of the interrelationship of the terms ‘cruel’ and ‘unusual,’ and there is nothing in the debates supporting the inference that the Founding Fathers would have been receptive to torturous or excessively cruel punishments even if usual in character or authorized by law.”¹²⁸ The phrases “cruel and unusual”, “cruel or unusual”, and “cruel” were instead understood as referring to a single concept of inhumane or cruel punishment.

Chief Justice Burger’s observation highlights a second reason for rejecting a literal reading: It is implausible and unappealing as a matter of principle to condemn cruel punishments only when infrequently employed. According to the Court and common usage, a punishment is “cruel” if inflicts pain without reason. One might plausibly believe that cruel punishments would be unusual in a democracy, with the constraints of legislative authorization, publicity, and judicial review. But cruelty and frequency are separable concepts and the relationship between them is contingent, not necessary. As Chief Justice

¹²⁸ *Cf. Trop*, 356 U.S. at 100 n. 32 (“Whether the word ‘unusual’ has any qualitative meaning different from ‘cruel’ is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. * * * These cases indicate that the Court simply examines the particular punishment involved in light of the basic prohibition against

Burger's observation reflects, a cruel punishment is unacceptable in its own right regardless of the frequency with which it is employed.¹²⁹

In fact, a harsh punishment's frequency is often thought to *increase*, not decrease, the need for condemnation and prohibition. The example of torture illustrates the point. Some philosophers and jurists maintain that torture can be justified in extremely limited circumstances. The unusual nature of torture is said to be the key to its acceptability, prompting Professor Alan Dershowitz to call for "torture warrants" designed to sharply limit its use.¹³⁰ One of the main arguments advanced in support of a categorical prohibition against torture is the slippery slope fear that, once legitimized in principle, torture will be too commonly employed.¹³¹ The death penalty debate follows a parallel track. Again, a major argument against the death penalty concedes the punishment's acceptability when reserved for the very few worst cases. The death penalty becomes unacceptable, the argument runs, when various flaws in the penalty's implementation make it too common.¹³²

As such standard arguments against torture and the death penalty attest, harsh punishments are often viewed as unacceptable not because they are unusual but rather

inhuman treatment, without regard to any subtleties of meaning that might be latent in the word 'unusual.'").
129 As Professor Murphy and Coleman explain, "The very punishments clearly intended by the Founding Fathers to be banned by this amendment – torture and mutilation – will become acceptable if we simply begin inflicting them often enough so that they become common rather than rare! How absurd." Murphy & Coleman, *supra* note 30, at 3.

130 Dershowitz, *supra* note 37, at 141-58.

131 Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 Minn. L. Rev. 1481, 1506 (2004); Seth Kreimer, *Too Close to the Rack and Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. Pa. J. Const. L. 278, 322 (2003); Sanford Levinson, "Precommitment" and "Postcommitment": *The Ban On Torture In The Wake of September 11*, 81 Tex. L. Rev. 2013, 2044 (2003) (noting that Dershowitz's view has been characterized "as 'extremely dangerous' insofar as 'it gives legitimacy to torture, and thus opens up the space for more illicit torture.'").

132 E.g., Illinois Governor's Commission on Capital Punishment, Report of Commission on Capital Punishment i (2002) ("All members of the Commission believe, with the advantage of hindsight, that the death

because, in part, they are too common. It is implausible to believe that the Founders inhabited a moral world so vastly different from our own that were fastened to a rigid belief that fundamentally immoral punishments are, by definition, unusual. The limited evidence belies any such suggestion. In the Virginia Ratifying Convention, for instance, the Antifederalist Patrick Henry expressed concern that lack of constitutional prohibition against cruel and unusual punishments would allow Congress to “introduce the practice of France, Spain, and Germany--of torturing, to extort a confession of the crime.”¹³³ Henry’s abhorrence of torture was not premised on its infrequency. He noted that this was the civil law “practice” and feared that, under the proposed Constitution, Congress would regularize its use. Chief Justice Burger was correct in his suggestion that it is quite unlikely that the Founders would have abandoned objections to torture based upon an understanding that it is practiced with regularity.

This analysis points to a third reason why the Eighth Amendment should not be interpreted to prohibit only cruel punishments that are also unusual. The Court has repeatedly declared that the meaning of the Eighth Amendment evolves according to contemporary standards of decency.¹³⁴ Whatever the Founders’ view, the modern understanding is that the relationship between an unacceptable punishment and the frequency of its use is contingent, not definitional. The Court now relies on legislative judgments that particular punishments are indecent for reasons unrelated to the frequency of their use. In holding that the Eighth Amendment precludes execution of the retarded,

penalty has been applied too often in Illinois since it was reestablished in 1977.”).

¹³³ 5 Founders’ Constitution, *supra* note 123, at 377.

¹³⁴ See, e.g., *Atkins*, 536 U.S. at 321; *Rhodes*, 452 U.S. at 356; *Trop*, 356 U.S. at 100-01.

*Atkins v. Virginia*¹³⁵ cited the substantial and growing number of States that had categorically prohibited this punishment. It is highly unlikely that any, much less all or most, of these States were persuaded to this position because of such a punishment's infrequent imposition. The Court's opinion reflects that the bar's animating rationale instead appeals to retardation's impact on desert, deterrence, and public perceptions. The Eighth Amendment's evolving meaning should thus incorporate the widely shared modern understanding that a punishment may be fundamentally indecent without being unusual.

This by no means implies that the Court must treat prevailing punishment practices as irrelevant. In light of the uncertain nature of punishment's actual effects, such practices can furnish useful indicia of whether a punishment significantly advances legitimate penological objectives. In addition, the Court has defended reliance on prevailing practice as a check on judicial subjectivity. While these are relevant considerations, they are also defeasible. Unlike a literal reading of the text, they do not support imposition of an unyielding requirement that a constitutionally prohibited punishment be unusual.

B. Justice Scalia's Originalism.

As an alternative to literalism, the Court could adopt Justice Scalia's characteristically distinctive understanding. Justice Scalia's jurisprudence blends originalism with societal tradition. He proceeds from the familiar originalist tenet that the Eighth Amendment must be assigned the meaning it had for the state and federal legislators who made it law. As in the Court's substantive due process decisions,¹³⁶ Justice Scalia

¹³⁵ 536 U.S. 304 (2002).

¹³⁶ See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 586, 588, 596-99 (2003)(Scalia, J., dissenting); *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 292, 294 (1990)(Scalia, J., concurring); *Michael H. v. Gerald D.*, 491 U.S. 110, 122-23 (1989).

has indicated that, at least in principle, longstanding societal traditions may supplement the original meaning.¹³⁷

From this hybrid originalism, Justice Scalia draws a number of conclusions. The Cruel and Unusual Punishment Clause, he maintains, prohibits only “always-and-everywhere ‘cruel’ punishments”¹³⁸ A given punishment is either unconstitutional for all offenses or no offenses. A punishment may qualify as “always-and-everywhere” unconstitutional if it is one of “those modes or acts of punishment that had been considered cruel and unusual at the time that the Bill of Rights was adopted”¹³⁹ “[T]he rack and the thumbscrew”¹⁴⁰ satisfy this test, as does torture. An obvious corollary of this “everywhere-and-always” position is that the Cruel and Unusual Punishment Clause does not prohibit punishments that are grossly disproportionate to the offense. In *Harmelin v. Michigan*, Justice Scalia accordingly rejected a principle of proportionality as contrary to the original understanding.¹⁴¹

Justice Scalia’s view effectively drains the Cruel and Unusual Punishment Clause of contemporary import. Those punishments that the Founders did regard as per se unacceptable, such as the rack and thumbscrew, had already fallen into disuse in the Eighteenth Century and furnish no significant constraint in the modern world.¹⁴²

Analogies to punishments at the time of the founding must consider that the Founders

137 See *Atkins*, 536 U.S. at 339-340 (Scalia, J., dissenting); *South Carolina v. Gathers*, 490 U.S. 805, 825 (1989); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 861-62, 864 (1989).

138 *Atkins*, 536 U.S. at 349 (Scalia, J., dissenting).

139 536 U.S. at 339 (Scalia, J., dissenting)(quoting *Ford*, 477 U.S. at 405).

140 536 U.S. at 349.

141 501 U.S. at 966-90 (opinion of Scalia, J.).

142 See *Roper*, 125 S.Ct. at 1206-07 (O’Connor, J., dissenting).

thought physical mutilation permissible.¹⁴³ Needless to say, there is no obvious line separating the rack and torture, on the one hand, from the removal of ears and limbs, on the other.

No modern modes of punishment come to mind as falling on the rack or torture side of the line.¹⁴⁴ Terms of imprisonment are always constitutional, no matter how great their length, minor the offense, or sadistic the reason for their imposition. The death penalty is likewise constitutional regardless of the offense or offender. The Constitution's text, Justice Scalia has said, "clearly permits the death penalty to be imposed, and establishes beyond doubt that the death penalty is not one of the 'cruel and unusual punishments' prohibited by the Eighth Amendment."¹⁴⁵ The Founders simply did not regard imprisonment or the death penalty as punishments that are "always-and-everywhere" unacceptable.

Justice Scalia has declared that the Cruel and Unusual Punishment also outlaws "modes of punishment that are inconsistent with modern 'standards of decency,' as evinced by objective indicia, the most important of which is 'legislation enacted by the country's

143 Mutilation, particularly removing an ear, was an accepted punishment in the Colonies. Lawrence M. Friedman, *Crime and Punishment in American History* 40 (1993). For instance, Jefferson's 1779 Bill for Proportioning Crimes and Punishments proposed castration instead of death for the offenses of rape and sodomy and "for people who maimed or disfigured others, he proposed maiming and disfiguring in kind." *Id.* at 73. Just as the Fifth Amendment contemplates use of the death penalty, it recognizes the legitimacy of physical mutilation providing: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life *or limb* . . ." U.S. Const., Amendment V (emphasis added).

144 It is highly doubtful that even the accounts of mistreatment of prisoners in Afghanistan and Iraq would describe cruel and unusual punishment. First, it is not clear that the reported mistreatment would fit the definition of "torture" in an Eighteenth Century that countenanced amputation. Second, in light of the mistreatment's avowed purpose of extracting useful information rather than of exacting suffering as retribution for a past wrong, it arguably does not constitute "punishment." Third, an Eighteenth Century understanding probably would not support extraterritorial application of the Eighth Amendment.

145 *Callins v. Collins*, 510 U.S. 1141 (1994)(Scalia, J., concurring in denial of certiorari).

legislatures'"¹⁴⁶ However, as in the Court's substantive due process cases, he has been so demanding of the required objective support that, during his eighteen years on the Court, he has never found a punishment rendered unconstitutional by any such modern standard of decency.¹⁴⁷

In consequence of its restrictiveness, Justice Scalia's approach would remove inconsistencies in the Court's jurisprudence and make it more coherent.¹⁴⁸ It would entail rejection of the Court's death penalty jurisprudence in its entirety, thereby ending the tensions between the principles of guided discretion and mercy and between the Court's active pursuit of proportionality in its death penalty cases and its disinterest elsewhere.

At the same time it resolves some of the inconsistencies in the Court's jurisprudence, the extreme narrowness of Justice Scalia's understanding fuels disqualifying originalist and contemporary criticisms of it. Formal coherence would come at the cost of substantive defensibility.

1. Originalist Premises.

A wide array of considerations – the English Bill of Rights, the text, paradigm examples, the Founders' acceptance of proportionality, and their distrust of government -- lead to the conclusion that Justice Scalia's reading conflicts with the original understanding.

¹⁴⁶ *Atkins*, 536 U.S. at 349 (quoting *Penry v. Lynaugh*, 492 U.S. 302, 330-331 (1989)).

¹⁴⁷ See *infra* note 208. Cf. Scalia, *supra* note 137, at 864 (expressing confidence that in the "vast majority" of cases "even if the provision in question has an evolutionary content, there is inadequate indication that any evolution in social attitudes has occurred."); David M. Zlotnick, *Battered Women & Justice Scalia*, 41 *Ariz. L. Rev.* 847, 857 (1999) ("Scalia's threshold for departing from originalism is so high that while theoretically possible, its conditions could rarely, if ever, be met. Not surprisingly, Scalia has yet to concede the conditions . . . have been met while he has been a sitting Justice.").

¹⁴⁸ Given the imprimatur the Constitution's text places upon that punishment, the only live issue would seem to be whether particularly painful methods of imposing death may constitute the functional equivalent of

a. The English Bill of Rights.

The text of the Cruel and Unusual Punishment Clause was drawn essentially verbatim from that of the English Bill of Rights, enacted in 1689. The history of that Bill's enactment provides no support whatever for limiting the ban against cruel and unusual punishments to punishments that are "everywhere-and-always" unacceptable. It strongly supports the opposing view that the ban was meant to outlaw punishments that, while permissible in some circumstances, are disproportionate for the offense at hand.

The Bill was evidently inspired by objections to Titus Oates' punishments.¹⁴⁹ Oates, a Protestant cleric, had falsely sworn that he had overheard a number of Catholics hatch a "Popish Plot"¹⁵⁰ to assassinate King Charles II. Based on Oates' false testimony, fifteen of the alleged conspirators were executed. In 1685, Oates was convicted of perjury. The sentencing judge, who complained that the death sentence was unavailable for Oates' offenses, ordered that he be stripped of his clerical office, imprisoned for life, fined, pilloried, and whipped.¹⁵¹ Oates appealed to Parliament.

Although the House of Lords rejected his appeal, dissenting Lords issued a statement revealing that the English Bill of Rights' prohibition against "cruel and unusual" punishments was understood to condemn disproportionate punishments.¹⁵² That statement enumerated six objections to Oates' punishment.¹⁵³ The second addressed the punishments of life imprisonment and whipping, declaring that: "[T]here is no precedents

torture.

¹⁴⁹ 10 Journal of the House of Commons 247 (Aug. 2, 1689). *See also* Granucci, *supra* note 124, at 852-60.

¹⁵⁰ *Harmelin*, 501 U.S. at 969 (plurality opinion).

¹⁵¹ 10 How. St. Tr. 1079, 1316 (K.B. 1685).

¹⁵² Among other places, the statement is reprinted in *Weems*, 217 U.S. at 391 (White, J., dissenting).

¹⁵³ *Id.* The first objection concerned stripping Oates of "his canonical and priestly habit," which the

to warrant the punishments of whipping and committing to prison for life, *for the crime of perjury . . .*”¹⁵⁴ The dissenting Lords, then, did not condemn these punishments on the ground that they are “always-and-everywhere” impermissible. Indeed, sentences of life imprisonment are meted out today and whipping “continued in use in England until 1948.”¹⁵⁵ The dissenters instead objected based on grounds of proportionality, on the belief that such severe punishments were permissible for other offenses but not “for the crime of perjury.”¹⁵⁶

In the dissenters’ eyes, Oates’ disproportionate punishments were “cruel, barbarous, and illegal” and violated the Bill of Rights’ prohibition of cruel and unusual punishments. This should be unsurprising, given that proportionality is part of the common meaning of the term “cruel” and that prior to the adoption of the English Bill of Rights the common law prohibited excessive punishments. “Not a single peer ventured to affirm that the judgment was legal: but much was said about the odious character of the appellant . . .”¹⁵⁷ “The House of Commons [subsequently] agreed with the dissenting Lords”¹⁵⁸ and voted to overturn the judgment.

Based on this same evidence, Justice Scalia draws the opposite conclusion that it is “most unlikely that the English Cruel and Unusual Punishments Clause was meant to forbid ‘disproportionate’ punishments.”¹⁵⁹ According to Justice Scalia, illegality rather

dissenters claimed was a matter “belonging to the ecclesiastical courts only.”

154 *Id.* (emphasis added).

155 Granucci, *supra* note 124, at 859. *Cf. An Act for the Punishment of Certain Crimes against the United States*, 1st Cong. 2nd Sess., Ch. IX § 15 (1790)(forging court records punishable by “whipping not exceeding thirty-nine stripes”) *reprinted in* I Public Statutes at Large 115-16 (1856).

156 *Weems*, 217 U.S. at 391 (White, J., dissenting).

157 6 T. Macaulay, *History of England* 140-41 (1899).

158 Granucci, *supra* note 124, at 858.

159 *Harmelin*, 501 U.S. at 974 (plurality opinion).

than proportionality explains the objections to Oates' sentence. He notes that the term "unusual" was a synonym for "illegal," the term used in the original version of the English Bill of Rights.¹⁶⁰ Members of Parliament, Justice Scalia maintains, condemned Oates' life sentence and whipping because these punishments were authorized by neither legislation nor common law precedent.

This reading completely subverts Justice's Scalia's "everywhere and always" position. If the English Bill of Rights merely requires that harsh punishments be authorized by statute or common law precedent, then the category of punishments that are "everywhere-and-always" unacceptable becomes an empty set. Even sadistic torture would be permissible if legislatively authorized. At the same time, the Bill would embrace a principle of proportionality. As in Oates' case, a harsh punishment may be authorized for some grave offenses but not for lesser offenses. Justice Scalia's view of the English Bill of Rights thus neither favors treating certain punishments as per se unacceptable nor excludes a proportionality principle.

Justice Scalia's explanation of the English Bill of Rights also appears inconsistent with an undeniable part of the Eighth Amendment's original meaning. According to Justice Scalia's view, the English Bill of Rights requires only that harsh punishment be lawful, that is, authorized by statute or precedent. So interpreted, the ban furnishes no constraint whatever on legislatures. Any punishment authorized by statute would be lawful and, hence, permissible. The Cruel and Unusual Punishment Clause, by contrast, was meant primarily as a limit on legislative, not judicial, power.¹⁶¹ The Founders did not

¹⁶⁰ 501 U.S. at 973-74 (plurality opinion).

¹⁶¹ The recorded comments on the prohibition against cruel and unusual punishments speak of it as being

believe the English Bill of Rights irrelevant to their purposes, as their choice of language indicates. Either Justice Scalia's rendition of the English Bill of Rights is seriously in error or the Founders fundamentally misconceived its meaning.

Justice Scalia attempt to rescue the English Bill of Rights from such irrelevance affirmatively supports rather than excludes a proportionality principle. According to him, those who enacted the English Bill of Rights understood the term "cruel and unusual" to mean "cruel and illegal." But Justice Scalia suggests that the Founders conceived of the term "unusual" as having its ordinary meaning of "'such as [does not] occur in ordinary practice'"162 Translating "unusual" to mean extraordinary rather than illegal undermines rather than supports Justice Scalia's anti-proportionality position. A punishment may be out of the ordinary for some offenses but not others. The Oates' case illustrates this very point: Members of Parliament condemned life imprisonment and whipping for Oates' perjury offense, not for all offenses.¹⁶³

If the Founders were at all familiar with the history of the English Bill of Rights, their decision to adopt its text undermines Justice Scalia's anti-proportionality position. It indicates adoption of a proportionality requirement, not a desire to prohibit only those punishments that are "everywhere and always" unacceptable.

b. The Text.

As the Court's cases reflect, the common understanding of a "cruel" punishment is

directed to Congress. 5 The Founders' Constitution, *supra* note 123, at 377 (remarks of Patrick Henry in the Virginia Ratifying Convention); *Id.* (remarks of Abraham Holmes in the Massachusetts Ratifying Convention); Annals of Cong. 782-83 (1789)(remarks of Representative Livermore). See *Harmelin*, 501 U.S. at 975-76 (plurality opinion)("the provision must have been meant as a check not upon judges but upon the Legislature.").

¹⁶² *Harmelin*, 501 U.S. at 976 (plurality opinion).

one that is unnecessarily harsh. Part and parcel of that same understanding is that a punishment may be unnecessarily harsh for one purpose but not for another. For instance, in today's world ten years imprisonment at hard labor would be gratuitously harsh and therefore "cruel" for a minor shoplifting offense but not for homicide. The same may be said of the term "unusual." One imagines this is why the Court has said that life imprisonment for an overtime parking offense would be unconstitutional¹⁶⁴ while upholding life sentences for relatively minor property offenses and for possession of cocaine.¹⁶⁵ This same understanding traces back through to the Founders' world to at least Seventeenth Century England, as the objections to Oates' punishments reveal.¹⁶⁶ Justice Scalia's interpretation, which limits the Eighth Amendment's ban to punishments that are inhumane in all contexts, distorts the ordinary meaning of *both* of the Eighth Amendment's key terms.¹⁶⁷

c. Torture and the Rack.

The Founders made very few recorded comments about the Eighth Amendment during the ratification and amendment processes. In the Massachusetts Ratifying

163 Even Oates' defrocking was not thought to be per se unacceptable. It was regarded as a fitting punishment for an ecclesiastical body to impose, not one of the King's courts.

164 *Ewing*, 538 U.S. at 21 (plurality opinion); *Harmelin*, 501 U.S. at 1009 (White, J., dissenting); *Solem*, 463 U.S. at 310 n.2 (Burger, C.J., dissenting); *Hutto*, 454 U.S. at 375 n.3 (per curiam); *Rummel*, 445 U.S. at 274 n.11.

165 *Rummel*, 445 U.S. at 265-66; *Harmelin*, 501 U.S. at 961 (plurality opinion).

166 Other evidence indicates that it has much earlier roots. *See infra* note 174.

167 This conclusion is not inconsistent with the preceding section, which argued against an approach that relies on the literal meaning of the text partly because the Founders did not understand the conjunction "and" between the terms "cruel" and "unusual" literally. That hardly renders the terms "cruel" and "unusual" irrelevant as a guide to the Founders' understanding.

Justice Scalia argues that "it would seem quite peculiar to refer to cruelty and unusualness *for the offense in question*, in a provision having application only to a new government that had never before defined offenses, and that would be defining new and peculiarly national ones." *Harmelin*, 501 U.S. at 978 (plurality opinion) (emphasis in original). This argument rests on an implausible view that, in the eyes of the Founders, new offenses enacted by the federal government would be incommensurable with existing offenses and their

Convention, Abraham Holmes, an Antifederalist, objected that the Original Constitution did not restrain Congress “from inventing the most cruel and unheard-of punishments” and furnished “no constitutional check on them, but that the *racks* and *gibbets* may be amongst the most mild instruments of their discipline.”¹⁶⁸ Patrick Henry, a delegate to the Virginia Ratification Convention and also an Antifederalist, pressed a similar objection. He complained that, whereas the Virginia Constitution prohibited the Virginia Legislature from employing cruel and unusual punishments, the Original Constitution permitted Congress to “admit of tortures, or cruel and barbarous punishment.”¹⁶⁹ George Mason, another delegate, echoed the belief that “torture was included” in the Virginia prohibition.¹⁷⁰

Contrary to Justice Scalia’s claims, these snippets fall considerably short of revealing any intent to limit the Cruel and Unusual Punishment Clause to punishments that are “everywhere-and-always” inhumane. Holmes and Henry were Antifederalists who sought to discredit the Original Constitution by highlighting the potential for extreme abuses. Punishments such as torture and the rack, which were regarded as objectionable no matter what the context, fit this Antifederalist agenda perfectly. While the comments of Holmes and Henry indicate that the Cruel and Unusual Punishment Clause was meant to proscribe torture and the rack, they contain no whisper of an intent to limit the Clause’s reach to these examples.

In fact, Justice Scalia’s limiting interpretation makes it difficult to explain the few

punishments.

¹⁶⁸ 5 The Founders’ Constitution, *supra* note 123, at 377.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

other remaining comments recorded during the drafting and ratification processes. In the First Congress, Representative Smith protested that the phrase “cruel and unusual punishments” had “too indefinite” an import.¹⁷¹ Similarly, Representative Livermore remarked that “the clause seems to express a great deal of humanity, on which account I have no objection to it; but it seems to have no meaning in it”¹⁷² It would have been easy to reply that these objections were misguided because the phrase had the definite and limited meaning of prohibiting only those punishments already believed across-the-board unacceptable. Insofar as the record reflects, no one did so. Instead, the House of Representatives approved the Eighth Amendment “by a considerable majority”,¹⁷³ presumably in spite of the text’s perceived indeterminacy. This affords little solace for the view that the Clause prohibits only “everywhere-and-always” unacceptable punishments analogous to torture and the rack in their extremity.¹⁷⁴

An originalist should want to consult the reasons why the Founders regarded torture as unacceptable.¹⁷⁵ In line with Justice Scalia’s view, one might be tempted to answer that it is because they viewed torture as “always-and-everywhere” unacceptable. But this answer is facile because it does not explain why torture was thought per se unacceptable. The explanation, one may surmise, is that torture was thought gratuitously harsh. One

¹⁷¹ 1 Annals of Cong. 782-83 (1789).

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ Unlike Justice Scalia, Granucci acknowledges that the English Bill of Rights was meant to prohibit grossly disproportionate punishments. Granucci, *supra* note 124, at 855-60. However, he believes that the Founders misinterpreted the Bill as a prohibition only against barbarous punishments unacceptable in any context. The evidence on which he relies is quite thin. Like Justice Scalia, he relies on the Antifederalist statements discussed in the text. *Id.* at 840-42. As an explanation for how the Founders came to misread the English Bill of Rights, he suggests that the Founders misread Blackstone’s passing reference to it. However, the only support he offers for this suggestion is a 1963 decision of the Delaware Supreme Court. *Id.* at 865.

¹⁷⁵ The Founders presumably would want for ambiguities to be resolved in a manner that gives due weight

punishment – the rack, for example -- may be gratuitously harsh no matter what the offense.

But other punishments – a sentence of life imprisonment, for example -- may be gratuitously harsh for some but not other offenses. This explanation takes punishments specifically mentioned by the Founders for the extreme examples they were intended to be.

Unlike Justice Scalia’s view, this explanation permits the indeterminate language of the Cruel and Unusual Punishment Clause to reach beyond the extreme examples touted by the Antifederalists and coheres with the text and the history of the English Bill of Rights.

d. The Wide Acceptance of Proportionality.

The idea of proportionate punishments appears to have been entirely uncontroversial then, as now. The Founders were certainly familiar with the principle, which runs from Aristotle and the Bible up through the Magna Carta, the English Bill of Rights, and Blackstone.¹⁷⁶ There is no evidence that anyone disputed that a punishment’s

to the reasons they adopted the provision in question.

¹⁷⁶ The Eighteenth Century criminologist Cesare Beccaria is generally credited with the first systematic exposition of proportionality. Montesquieu, also writing in the Eighteenth Century, likewise wrote of the “essential point, that there should be a certain proportion in punishments . . .” Montesquieu, *Spirit of Laws* (1748) *excerpted in* 5 *The Founders’ Constitution*, *supra* note 123, at 370. W. Tsao, *Rational Approach to Crime and Punishment* 29-30 (1955). “Blackstone in his *Commentaries on the Laws of England* insisted that ‘punishment ought always to be proportioned to the particular purpose it is meant to serve, and by no means exceed it.’” Tonry, *supra* note 109, at 142. Blackstone was widely read in the Colonies.

As the dissenting Lords’ objections to Oates’ punishments reveal, proportionality also was part of the moral and legal vocabulary in the Seventeenth Century as well. *See supra* notes 150-61 & accompanying text. Indeed, “by the year 1400, we have expression of ‘the long standing principle of English law that the punishment should fit the crime.’” Granucci, *supra* note 124, at 844-46.

There is some dispute about the extent to which the Founders were familiar with and influenced by Beccaria. *Compare* Charles W. Schwartz, *Eighth Amendment Proportionality Analysis and the Compelling Case of William Rummel*, 71 *J. Crim. L. & Criminology* 378, 381-82 (1980) *with* Deborah A. Schwartz & Jay Wishingrad, Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. U.S. Excessive Punishment Doctrine*, 24 *Buff. L. Rev.* 783, 813-20 (1975). Whether or not Beccaria was widely read in the Colonies, the Founders were well aware of proportionality as a principle of punishment. For instance, Jefferson introduced a bill in the Virginia Legislature entitled, “A Bill for Proportioning Crimes and Punishments.” *See infra* note 176 & accompanying text. Some early state constitutions included provisions requiring that penalties be “proportioned to the nature of the offense.” *See, e.g.,* N.H. Const. art. XVIII (1784); Pa. Const. of 1776, § 38 *reprinted in* 2 *The Roots of the Bill of Rights*, *supra* note 120, at 273. *See also* Matthew W. Meskell, Note, *An American Resolution: The History of*

severity should vary according to the gravity of offense or, more generally, the reasons for punishment. The Founders would have had no ground to condemn only those punishments thought unduly harsh for all offenses. The accordion-like expansion and contraction of the death penalty in the Seventeenth and Eighteenth Centuries, which was prompted by changing perceptions of the seriousness of various offenses,¹⁷⁷ demonstrate a deep commitment to proportionality capable of inspiring much political action. So, too, does Parliament's reaction to the Titus Oates' case.

The evidence that Justice Scalia cites as indicating rejection of a proportionality principle instead merely indicates disagreement over what it requires. Then, as now, the debate centered on what proportionality requires and whether existing law authorizes unduly harsh punishments. For instance, a central theme of Jefferson's 1779 Bill for Proportioning Crimes and Punishments was the elimination of the death penalty for

Prisons in the United States from 1777 to 1877, 51 Stan. L. Rev. 839, 844 (1999) ("Pennsylvania's "Great Law" of 1682 carefully laid out a code of punishments that ascended in severity depending on the depravity and social consequences of the crimes - the same careful balancing and proportionality Beccaria urged a century later.").

Of the explicit mention of proportionality in the New Hampshire Bill Of Rights of 1783, New Hampshire Bill Of Rights, 1783 *reprinted in* 2 *The Roots of the Bill of Rights*, XVIII, *supra* note 120, at 377, Professor Parr echoes Justice Scalia in arguing that the "Framers' rejection of the New Hampshire approach is strong evidence that they declined to include a proportionality requirement in the Eighth Amendment." Stephen T. Parr, *Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishment Clause*, 68 Tenn. L. Rev. 41, 48 (2000). *Harmelin*, 501 U.S. at 977-78 (opinion of Scalia, J.). But there is no evidence that the Framers' deliberately rejected what the New Hampshire Bill of Rights makes explicit. Madison, as a Representative from Virginia, proposed what became the Eighth Amendment in the First Congress. He took the text verbatim from the Virginia provision, which in turn derived from the English Bill of Rights. There is no indication that Madison or anyone else understood the Virginia and New Hampshire provisions as having different meanings and made a deliberate choice between them, thereby "reject[ing]" the "New Hampshire approach." *Cf. Harmelin*, 501 U.S. at 979 (plurality opinion) ("The Eighth Amendment received little attention during the proposal and adoption of the Federal Bill of Rights."); L. Levy, *The Origins of the Fifth Amendment* 411 (1968) ("The history of the writing of the first American bill of rights does not bear out the presupposition that the process was a diligent or systematic one."). As the dissenting Lords' statement in the Oates' case illustrates, the English - and by inference the colonists -- understood the phrase "cruel and unusual punishment" to require that punishments be "proportioned to the offense", just as the New Hampshire Bill of Rights explicitly states.

¹⁷⁷ See Stuart Banner, *The Death Penalty* 6-9 (2002).

offenses other than murder and treason.¹⁷⁸ The Virginia Legislature narrowly rejected Jefferson's proposal. It is wildly implausible to believe that the Virginia Legislature, first, agreed with Jefferson that death is disproportionate for all offenses except treason and murder and, second, tossed proportionality aside and decided to employ such disproportionate punishments anyway. The Virginia Legislature is far more easily and naturally seen as disagreeing with Jefferson that death is proportionate only for two offenses.¹⁷⁹

Justice Scalia's treatment of other evidence likewise confuses disagreement over what proportionality requires with rejection of proportionality altogether. According to him, punishments authorized by the First Congress "believe any doctrine of proportionality."¹⁸⁰ He observes that the express proportionality provision in the New Hampshire Constitution of 1784 states: "No wise legislature will affix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason"¹⁸¹ The First Congress authorized the death penalty not only for murder and treason but also, he misleadingly reports, for "forgery of United States securities, [and] 'running away with [a] ship or vessel, or any goods or merchandise to the value of fifty dollars'"¹⁸² However,

178 T. Jefferson, A Bill for Proportioning Crimes and Punishments (1779), reprinted in *The Complete Jefferson* 90, 95 (S. Padover ed. 1943).

179 Due to Quaker influence, Pennsylvania played a leading role in curtailing use of the death penalty. Pennsylvania did not abolish the death penalty for robbery and burglary until 1790. Virginia eventually did limit the death penalty to murder but not until 1796. Friedman, *supra* note 142, at 73.

180 *Harmelin*, 501 U.S. at 980 (plurality opinion).

181 501 U.S. at 980.

182 501 U.S. at 980. Justice Scalia's description is misleading, if not disingenuous. It wrongly indicates that death was the punishment for simple theft of goods or a ship. In fact, theft of goods or a ship was punishable by death only if linked to piracy. The First Congress provided that, inter alia, the offense applies to one who "piratically and feloniously run[s] away with ship or vessel, or any goods or merchandise to the value of fifty dollars" and who is thereby "adjudged to be a pirate" *An Act for the Punishment of Certain Crimes against the United States*, § 8, Public Statutes at Large, *supra* note 153, at 113. Given that the offense targeted piracy, which was the Eighteenth Century's terrorism, the First Congress undoubtedly and with good

the only coherent reading of the evidence is that the First Congress simply disagreed with the New Hampshire Constitution's broad-brush statements about proportionality's dictates. It believed that death was proportionate for large-scale theft *in the course of piracy* and *one type* of forgery, as well as for murder and treason. Instead of rejecting a principle of proportionality, the structure of the first federal criminal code transparently reflects careful judgments about the relative seriousness of offenses and a concomitant desire to tailor punishment to social harm and culpability.¹⁸³ Whether or not it is strong affirmative support for a constitutional requirement of proportionality, it is compatible with it.

Finally, it does not seem at all likely that the Founders accepted the doctrine of proportionality but wished to deny judges authority to implement it. An important contemporary prudential objection to a constitutional requirement of proportionality

justification regarded it as more serious than ordinary theft of pty. Simple theft was not even punishable by imprisonment. § 16, *id.* at 116.

Justice Scalia also neglected to mention that while forgery of securities of the United States triggered the death penalty, alteration of judicial records so as to affect the outcome of a proceeding was only punishable by up to seven years imprisonment. *Id.* §§ 14 & 15, at 115-16. It is quite obvious that the First Congress' decision to punish by death forgery of United States securities but not judicial records reflects judgments about proportionality and the relative seriousness of these two offenses, not rejection of proportionality.

¹⁸³ It prescribes death for treason but a maximum of seven years imprisonment for failing to inform authorities of a treason committed by another. *Id.* at 112, §§ 1 & 2. Similarly, the code provides for death for murder on federal pty but only a maximum of three years imprisonment for a failure to report such a murder committed by another. *Id.* at §§ 3 & 6. Piracy is punished by death but confederacy with a pirate only by up to three years imprisonment. *Id.* at 113-15, §§ 8, 12.

Whereas the sentence for murder on federal property was death, an offender who purposely and maliciously maimed another could be punished only by a maximum of seven years imprisonment and one who committed manslaughter could receive no more than three years imprisonment. *Id.* at 113, 115, §§ 3, 7 & 13.

A large-scale theft committed in the course of piracy carried the death penalty but simple theft was not even punishable by imprisonment. *Id.* §§ 8 & 16, at 113-14, 116. The penalties for larceny in an area subject to federal jurisdiction consisted of a fine not exceeding fourfold the value of the pty stolen and up to 39 lashes with a whip.

Alteration of judicial records in a way that changed a proceeding's outcome was punishable by up to seven years imprisonment, perjury by up to three years, and obstructing service of process by up to a year. *Id.* §§ 15, 18, 22, at 115-17.

maintains that its judicial enforcement would be unacceptably subjective.¹⁸⁴ Yet, as the Court has recognized, the Eighth Amendment’s prohibition against “excessive” bail expressly adopts a proportionality principle.¹⁸⁵ That principle is plainly addressed to judges, who have always had very substantial control over bail. The Excessive Bail Clause belies a suggestion that the Founders feared that judicial implementation of proportionality would be objectionably subjective.¹⁸⁶

e. Distrust of Government.

The Founders were not so sanguine about the use of governmental power that they thought of the Bill of Rights as a symbolic constraint on imaginary, speculative, or already abandoned abuses. The inclusion of these rights in the Constitution was prompted by the objections of Antifederalists, who feared that even the representative government established by the Constitution would trench on individual rights.¹⁸⁷ To win ratification of the Original Constitution in Virginia and seven other States, Madison and other Federalists assuaged these fears by promising amendments protecting such rights.¹⁸⁸

The Bill of Rights should not and has not been read cynically as a meaningless sop to exaggerated and baseless Antifederalist fears.¹⁸⁹ Given the necessity of Antifederalist

¹⁸⁴ See, e.g., *Ewing*, 538 U.S. at 31 (Scalia, J., dissenting); *Harmelin*, 501 U.S. at 986 (plurality opinion).

¹⁸⁵ *U.S. v. Bajakajian*, 524 U.S. 321, 329-31 (1998).

¹⁸⁶ . Such worries about judicial subjectivity presuppose a familiarity with and acceptance of the idea of judicial supremacy, which were lacking in the Founders’ world. The institution of judicial review that developed after *Marbury v. Madison*, 5 U.S. 137 (1803), was without historical precedent in the late Eighteenth Century. The Founders apparently gave virtually no thought to it and the evidence does not support attributing to them any settled or widely shared view.

¹⁸⁷ For one account of this very familiar story, see A. H. Kelly, W. A. Harbison & H. Belz, *The American Constitution: Its Origins and Development* 108-10 (6th ed. 1983)

¹⁸⁸ “[E]ight States voted for the Constitution only after proposing amendments to be adopted after ratification.” *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 569 (1985)(Powell, J., dissenting).

¹⁸⁹ *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983)(“The fears of the Antifederalists were well founded.”).

support for ratification and the role of a promised Bill of Rights in securing that support, originalist precepts require taking Antifederalist distrust of government seriously. The Founders presumably meant for the Cruel and Unusual Punishment Clause to play an active role in checking government through time against a real danger of new abuses. This desire provides some evidence that they did not mean to limit that Clause to punishments that are “always-and-everywhere” unacceptable, which effectively treats the Cruel and Unusual Punishment Clause as a symbolic condemnation of past abuses.

2. *The Need for Judicial Review.*

The Court has eschewed a narrowly originalist reading of the Cruel and Unusual Punishment Clause and has declared that the Clause’s meaning evolves through time. Insofar as nonoriginalist considerations deserve weight,¹⁹⁰ they militate against adoption of a view that treats the Clause as effectively empty of concrete meaning in today’s world. Precedent, the gravity of the individual interest at stake, and the inadequacy of political processes all point to a need for meaningful judicial review. The next section takes up the discussion of these points because they also reveal the shortcomings of a third approach to the Clause, which can be called majoritarianism. They establish not only a need for a judicial check but also one that is countermajoritarian in character and does not blithely

¹⁹⁰ On one view, going beyond history is inevitable because the Founders had no settled view of the judicial role. The historical evidence is conflicting and unsettled not only on the nature of the judicial role in general but also on the meaning of specific provisions. The generality of the Cruel and Unusual Punishment Clause’s text and the exceedingly thin nature of its drafting and ratification history give future interpreters great interpretive freedom, necessitating reliance on extra-originalist considerations. On another, it is desirable to go beyond history because neither the cause of democracy nor the Constitution’s legitimacy is best served by following two hundred year old decisions for their own sake. In other words, it is undesirable and undemocratic to be ruled by “the dead hand of the past.” That the polity that adopted the Constitution and the Bill of Rights excluded African-Americans, women, and propertyless males only strengthens the point. For one of many discussions, see Michael W. McConnell, *Textualism and the Dead Hand*, 66 *Geo. Wash. L. Rev.* 1127 (1998).

accept the prevailing outcome of political processes as fixing the constitutional baseline.

C. Majoritarianism.

The Court's cases profess to rely largely on prevailing punishment practices to define cruel and unusual punishments.¹⁹¹ Consistent adherence to custom ostensibly has strong appeal. It arguably would narrow the gap that now exists between the rhetoric and results of the Court's decisions, enhance their legitimacy, curb judicial subjectivity, and treat the Clause as something other than a dead letter.

1. Minimization or Relocation of Judicial Subjectivity?

One can point to good reasons for judicial restraint and deference respecting criminal punishments. Punishment comes into play only after the accused has been convicted, thereby implicating powerful governmental interests in deterrence, incapacitation, and retribution. No objective science dictates an unassailably correct mode and level of punishment as a matter of utility or justice. The appropriate punishment for any given offense results from some artful mix of empirical prediction and moral judgment. Reasonable persons can reach significantly different conclusions about the relative weight of relevant values, the future consequences of harsher and more lenient sentences, and the appropriate punishment for offenses generally and in particular cases. It seems obvious that legislatures, sentencing judges, and juries are far better situated to make such malleable judgments than are Supreme Court Justices. These considerations, combined with the indeterminacy of the constitutional text and history, raise the specter of judicial subjectivity. These are all excellent reasons for caution about giving judges authority to declare

¹⁹¹ See *supra* Part I. B..

criminal punishments unconstitutional.

It nonetheless is by no means obvious that, as the Court claims,¹⁹² reliance on custom effectively limits judicial subjectivity. Custom's definition is itself fundamentally subjective, as indicated by the Justices' regular disagreements over basic methodological questions.

To begin, the Justices have sent conflicting messages over how many jurisdictions must embrace a given practice so that departures become unconstitutional. Like *Atkins v. Virginia* before it,¹⁹³ this Term's decision in *Roper v. Simmons*¹⁹⁴ holds that a practice's rejection by 30 States may establish its unconstitutionality. But in other cases the Court has held that rejection by a significantly greater number of States -- 39 in *Tison v. Arizona* and 40 in *Montana v. Egelhoff*¹⁹⁵ -- fails to establish unconstitutionality.¹⁹⁶ Whenever the Court wishes to set the bar high, it can invoke the cause of federalism. "Absent a constitutionally imposed uniformity inimical to traditional notions of federalism," it has warned, "some State will always bear the distinction of treating particular offenders more severely than any other State."¹⁹⁷

The Justices have also disputed how long a practice must have persisted so that

¹⁹² See *supra* note 39.

¹⁹³ 536 U.S. at 313-15 (legislative rejection by 30 states held sufficient to support holding execution of the retarded unconstitutional).

¹⁹⁴ 125 S.Ct. at 1192-94.

¹⁹⁵ 481 U.S. 137, 154, 158 (1987)(upholding death for major participation in a felony with reckless indifference to life when only 11 States permitted such punishment.).

¹⁹⁶ 518 U.S. 37, 48-49 (1996)(plurality opinion)(upholding limits on relevance of voluntary intoxication rejected by 40. See also *Ewing*, 538 U.S. at 28-30, 47 (upholding punishment "virtually unique in its harshness"); *Harmelin*, 501 U.S. at 1026-27 (upholding a sentence of life without parole that no other jurisdiction would have imposed). Cf. *Martin v. Ohio*, 480 U.S. 228, 236 (1987) ("We are aware that all but two of the States . . . have abandoned the common-law rule But the question remains whether those [two] States are in violation of the Constitution").

¹⁹⁷ *Rummele*, 445 U.S. at 282; *Harmelin*, 501 U.S. at 1000 (Kennedy, J., concurring); *Hutto*, 454 U.S. at 373.

departures from it become unconstitutional. In *Roper* and *Atkins*, the Court gave greater weight to recent legislation.¹⁹⁸ Dissenting Justices argued that the Court had matters backwards and chastised the Court for the myopia of “bas[ing] sweeping constitutional principles upon the narrow experience of [a few] years.”¹⁹⁹

The Justices have taken different and sometimes seemingly inconsistent views on how specifically legislatures must address the issue at hand. In *Roper*, Justice Scalia argued that the 20 non-death penalty States can form no part of any consensus against the use of death for juvenile offenders. Such States, he reasoned, cannot have addressed the particular issue at hand. But as evidence of support for such a punishment, Justice Scalia was willing to rely on the 13 States whose death penalty statutes do not indicate a minimum age and where authority to execute juveniles derives from provisions concerning whether juveniles may be tried as adults generally, which govern by default.²⁰⁰ In *Stanford v. Kentucky*, Justice Brennan did precisely the opposite, counting non-death States as evidencing a consensus against the executing juveniles and ignoring those States authorizing death through provisions covering felonies generally.²⁰¹

Another source of contention has been the relative weight of legislative enactments versus charging and sentencing decisions. As evidence that the death penalty violated evolving standards of decency, some of the opinions in *Furman* relied upon the increasing infrequency with which prosecutors sought and juries imposed death.²⁰² The *Furman* dissenters, for their part, sought to explain such prosecutorial and jury decisions on grounds

¹⁹⁸ *Atkins*, 536 U.S. at 314-16.

¹⁹⁹ *Atkins*, 536 U.S. at 344 (Scalia, J., dissenting)(quoting *Coker*, 433 U.S. at 614 (Burger, C.J., dissenting)).

²⁰⁰ *Thompson*, 487 U.S. at 867 & n.3 (Scalia, J., dissenting).

²⁰¹ 492 U.S. at 384-85 (Brennan, J., dissenting).

other than categorical rejection of death and relied instead on legislative authorization for the death penalty in forty States, the District of Columbia, and in federal courts.²⁰³ The wave of death penalty statutes enacted in reaction to *Furman*²⁰⁴ has prompted Justice O'Connor to warn of the "mistake" of inferring a societal consensus based upon prosecutorial and jury decisions.²⁰⁵ It is evident that some of the Justices believe that such decisions merit little, if any, weight.²⁰⁶

Even more contentious are the status of other sources such as public opinion polls,²⁰⁷ the views of professional associations,²⁰⁸ and international authorities.²⁰⁹

The Justices routinely fracture over these methodological issues, ²¹⁰ which cannot be answered by resort to the Constitution's text, history, or some other uncontroversial source. It is impossible to believe that the Justices' marked differences are pristinely methodological and uninfluenced by their "subjective" political philosophies.

202 408 U.S. at 295-301 (Brennan, J., concurring); 408 U.S. at 360-70 (Marshall, J., concurring).

203 408 U.S. at 386-90 (Burger, C.J., dissenting); 408 U.S. at 436-43 (Powell, J., dissenting).

204 "[A]t least 35 States" enacted death penalty statutes within the four years following *Furman*. *Gregg v. Georgia*, 428 U.S. at 179-80 (plurality opinion).

205 *Thompson*, 487 U.S. at 855 (O'Connor, J., concurring).

206 *Atkins*, 536 U.S. at 347 (Scalia, J., dissenting)(frequency with which juries impose death on retarded offenders entitled to no weight); *Stanford*, 492 U.S. at 374 (explaining jury and prosecutorial decisions not to seek death for juveniles on grounds other than categorical opposition).

207 *Compare Atkins*, 536 U.S. 316 n.21 (relying upon public opinion polls) *with* 536 U.S. at 326-28 (Rehnquist, J., dissenting)(such reliance is "seriously mistaken").

208 *Compare Atkins*, 536 U.S. at 316 n.21 (relying on views of professional associations) *with Stanford*, 492 U.S. at 377 (plurality opinion)(views of professional associations irrelevant).

209 *See supra* note 2.

210 *Compare Roper*, 125 S.Ct. at 1192-94 (legislative rejection by 30 states sufficient to support holding death for 16 and 17 year-olds unconstitutional) *with* 125 S.Ct. at 1218 (Scalia, J., dissenting)("Words have no meaning of the views of less than 50% of the death penalty states can constitute a national consensus."); *Atkins*, 536 U.S. at 313-15 (legislative rejection by 30 states held sufficient to support holding execution of the retarded unconstitutional) *with* (Scalia, J., dissenting); *Edmund*, 458 U.S. at 789-93 (death for felony murderers who merely participated in a robbery in which death results held unconstitutional because "only a small minority of jurisdictions -- eight -- allow the death penalty" in such circumstances) *with* 458 U.S. at 820-23 (O'Connor, J., dissenting) (characterizing the same statutory enactments as showing that "23 States permit a sentencer to impose the death penalty even though the felony murderer has neither killed nor intended to kill his victim.").

Justice Scalia has never found a break with customary practice sufficient to render a punishment unconstitutional while Justice Stevens has found a great many.²¹¹ To a very considerable extent, then, an approach that defines cruel and unusual punishment in terms of prevailing practice relocates and disingenuously hides the source of judicial “subjectivity” rather than eliminates it.

2. *The Need for a Countermajoritarian Check.*

Even assuming that a majoritarian approach does significantly limit judicial subjectivity, the appropriate level of deference accorded to prevailing punishment practice must reflect some balance between the need to constrain judicial subjectivity, on the one hand, and the need for a countermajoritarian check, on the other. An approach that defines cruel and unusual punishment in terms of prevailing practice always resolves this dilemma in favor of constraining judicial subjectivity. It provides a constraint but one that, by definition, cannot ever have a countermajoritarian dimension. It is deliberately aimed at reigning in outliers from a majoritarian consensus. This resolution is unacceptable on three interrelated grounds.

a. The individual interest.

Harsh criminal punishment has an overwhelming impact on a convict’s life. Criminal punishment is government at its most coercive. For affected individuals, the stakes are much higher than with respect to other forms of governmental regulation.

²¹¹ *Andade v. Lockyer*, 538 U.S. 63, 77 (2003) (Souter, J., dissenting); *Ewing*, 538 U.S. at 33 (Stevens, J., dissenting); *Atkins*, 536 U.S. at 306; *Harmelin*, 454 U.S. at 1009 (White, J., dissenting); *Stanford*, 492 U.S. at 382 (Brennan, J., dissenting); *Thompson*, 487 U.S. at 818 (plurality opinion); *Ford*, 477 U.S. 399 (1986); *Solem v. Helm*, 463 U.S. 277 (1983); *Enmund v. Florida*, 458 U.S. 782 (1982); *Hutto*, 454 U.S. at 381 (Brennan, J., dissenting); *Rummel*, 445 U.S. at 285 (Powell, J., dissenting); *Coker*, 433 U.S. at 586 (plurality opinion).

Criminal punishment may deprive a person of physical liberty for decades and even life itself. The Court's death penalty jurisprudence correctly recognizes that the need for judicial protection depends partly on the gravity of the individual's interest.

b. Precedent.

In other comparable constitutional contexts, the Court has assumed an active countermajoritarian role. Strong competing governmental interests and textual indeterminacy also exist in the contexts of freedom of speech, equal protection, and criminal procedure. The phrase "cruel and unusual punishment" is not qualitatively more ambiguous than the "majestic generalities"²¹² of "freedom of speech" or "equal protection of the laws." Contrary to the judicial role Justice Scalia's view of cruel and unusual punishment implies, the Court has not bowed out of these areas entirely and interpreted rights as addressed entirely to the abuses of a bygone era. Nor has the Court deferred to the prevailing outcome of political processes to establish the general constitutional baselines. It is an obvious but important point that the Court's independent interpretive role flows from these rights' countermajoritarian design of protecting outcast groups that political majorities are particularly likely to disrespect or ignore.

Insofar as the right-to-die and other substantive due process cases rely on tradition, they are distinguishable. Those cases fashion textually unenumerated rights and convicted and potential offenders are considerably less able to use political processes to protect their interests than are those who seek to vindicate parental rights or a right-to-die.

Even more analogous than freedom of speech, equal protection, and an

²¹² W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943).

unenumerated right-to-die is the unenumerated substantive due process right to be free of grossly disproportionate civil punitive damage awards.²¹³ In a series of recent cases, “the Court has articulated an increasingly robust requirement of proportionality under the Due Process Clause in punitive damages cases”²¹⁴ The Court also has read the Eighth Amendment’s Excessive Fines Clause to forbid grossly disproportionate criminal fines.²¹⁵ The problems of line-drawing and judicial subjectivity respecting criminal punishment are not qualitatively greater than respecting punitive damages and fines.²¹⁶

In terms of the gravity of the individual interest at stake and the ability of those adversely affected to protect their interests through political processes, the rationale for proportionality review is much stronger respecting criminal punishments than civil punitive damages.²¹⁷ The high awards that have been the greatest source of complaint

213 See *supra* note 116.

214 Karlan, *supra* note 11, at 920.

215 *Bajakajian*, 524 U.S. at 329-31.

216 See *infra* note 217.

217 Rachel A. Van Cleave, “Death is Different,” *Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damage – Shifting Constitutional Paradigms for Assessing Proportionality*, 12 S. Cal. Interdisciplinary L. J. 217 (2002-03); Gershowitz, *supra* note 11, at 1291-1301. In an engaging article, Professor Karlan cites several reasons

why proportionality review is relatively more attractive in punitive damages cases. First, the Court may perceive the existence of more objective indicia excessiveness in the punitive damages cases. Second, the punitive damages cases may raise reverse federalism concerns that are absent from criminal prosecutions. Third, the Supreme Court may think the level of federal intrusion can be better controlled in the civil context. And finally, criminal cases may involve sufficient oversight by politically accountable actors.

Karlan, *supra* note 11, at 920. These reasons do not persuasively justify the Court’s differential treatment of punitive damages and sentences of imprisonment. First, the “reverse federalism” concern does not support such treatment. The argument is that because punitive damages can punish a defendant’s out-of-state conduct, they represent a form of extraterritorial regulation. *Id.* at 913. The objection to extraterritorial regulation, in turn, ultimately derives from the need to prevent a State’s imposing burdens on those who are not represented in its political processes. Even though the corporate entities that have been the subject of large punitive damage awards might lack full *formal* representation in a State’s political processes, they influence those processes through lobbying, campaign contributions, and the like. As their considerable state legislative successes attest, they have plenty of *informal* effective representation. The need for a judicial check is correspondingly weak.

Professor Karlan does not consider the relative adequacy of political processes respecting convicted and would-be offenders. Such a comparison is in order given that the issue is whether rationale for judicial

have been levied against large national and multinational corporations such as State Farm Insurance,²¹⁸ BMW²¹⁹ and Phillip Morris.²²⁰ Due to their vastly superior organizational and financial resources, these entities are much better able to protect their interests in state and national political processes than are convicted and would-be criminals. Partly as a result of such corporate entities' political clout, curbing punitive damages is one part of the legislative agenda of one of the major political parties.²²¹ "A good many states have enacted statutes that place limits on the permissible size of punitive damage awards"²²² and federal legislation is a realistic possibility.²²³

intervention is stronger in one or another context. Convicted offenders typically lack formal representation and would-be offenders have formal but lack effective representation. Without elevating form over substance, it is difficult to understand how the need for judicial oversight of a dysfunctional political process is stronger in the context of punitive damages.

Second, the objective indication of damage excessiveness to which Professor Karlan appeals, the ratio between punitive and compensatory damages, *id.* at 907, deserves little weight. In both contexts, the issue is whether the damage award or the sentence is proportionate *to its justifications*. Compensatory damages do not bear a tight relationship to the punitive and deterrent justifications for punitive damages, which is why prior to being required by the Court to do so as a matter of constitutional law, some States did not require any relationship between the two as a matter of their own law. *Bankers Life & Casualty Co. v. Crenshaw*, 483 So. 2d 254, 278 (Miss. 1985); Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 La. L. Rev. 3, 32-34 (1990)(noting that the amount of the compensatory damage award was one of many factors a jury was instructed to consider and that courts generally set aside only those awards shocking to the conscience). Thus, the compensatory damage award is objective in the sense that it is not chosen by the Justices. But it sheds little information on the proportionality question. Similar objective information is available in the criminal context. For instance, the offender's age is "objective" in the same sense and it possesses a loose relationship to the deterrent, incapacitative, and retributive purposes of the sentence.

Third, the argument that punitive damages are awarded by politically unaccountable jurors ignores that jurors apply legal rules enacted by politically accountable legislators. In many states, such rules include caps on punitive damages.

218 *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

219 *BMW of North America, Inc. v. Gore*, 509 U.S. 443 (1993).

220 *Van Cleave*, *supra* note 217, at 218 & n.3.

221 *See, e.g.*, 2000 National Republican Party Platform ("We encourage all states to consider placing caps on non-economic and punitive damages in civil cases. We also support such caps in federal causes of action.") at <http://www.cnn.com/ELECTION/2000/conventions/republican/features/platform.00/#40>

222 *Cooper Indus. v. Leatherman Tool Group*, 532 U.S. 424, 432-33 (2001). *See Gershowitz, supra* note 11, at 1295-97 (recounting legislative successes of business entities lobbying for punitive damage limits).

223 In 1996, Congress passed but President Clinton vetoed legislation that would have limited punitive damage awards in products liability cases. Linda Babcock & Greg Pogarsky, *Damage Caps and Settlement: A Behavioral Approach*, 28 J. Legal Stud. 341, 44 (1999). President Bush has advocated limits on punitive damages throughout his Presidency. For instance, in January 2005, President Bush called on Congress to

Consistent with this line of analysis, the relative unresponsiveness of political processes supplies a third reason for countermajoritarian judicial review.

c. Adequacy of political processes.

Like the rights of speech and equal protection, the right against cruel and unusual punishment protects the politically unpopular. The danger that political processes will systemically discount the interests of those the right protects is arguably greater than in just about any other constitutional context, as the widespread and appalling prison conditions that existed before judicial intervention indicate. It consequently makes little sense to have a baseline built on trust that majoritarian political processes almost always will safeguard the underlying constitutional values.

Political process theory helps explain why majoritarian political processes cannot routinely be relied upon to safeguard offenders' interest in humane treatment.²²⁴ John Hart Ely's now classic book, Democracy and Distrust,²²⁵ constitutes the leading statement of political process theory. According to Ely, the Court's role in interpreting the Constitution's ambiguous individual rights is to perfect democratic processes rather than to impose substantive values.²²⁶ Perhaps this role's most important aspect is to shield

enact legislation limited the recoverability of punitive damages in medical malpractice actions. See White House News Release, *Legal Reform: The High Cost of Lawsuit Abuse* (Jan. 5, 2005) at <http://www.whitehouse.gov/news/releases/2005/01/20050105-2.html>. See also White House News Release, *The President's Framework for Improving the Medical Liability System* (April 29, 2003) at <http://www.whitehouse.gov/infocus/medicalliability/pg2.html>.

²²⁴ "Many scholars" have made the point that "[c]riminal defendants are precisely the sort of powerless and despised subgroup who will not be adequately protected through democratic political processes." Frase, *supra* note 11, at 648 & n.323 (citing sources).

²²⁵ John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980). See Akhil Reed Amar, *Intratextualism*, 112 Harv. L. Rev 747, 779 (1999)(describing Ely's book as "a modern classic" that is "perhaps the most widely read work of constitutional law of the last three decades").

²²⁶ Ely, *supra* note 225, ch. 4.

"discrete and insular minorities"²²⁷ from governmental action that fails to accord proper respect to their interests. Although societal groups such as optometrists and florists have minority status, they can protect their interests in the "pluralist's bazaar"²²⁸ of majoritarian political processes by forming coalitions with other groups. By contrast, discrete and insular minorities lack the same ability. The problem is more fundamental than their loss of this or that political battle. As the targets of prejudice, outcast minority groups are spurned as potential coalition partners. Political processes consequently deny them a fair opportunity to influence outcomes and protect their interests. Ely argues that the Court should employ heightened scrutiny in evaluating governmental action that has a disproportionate adverse effect on such pariah groups.²²⁹

It is easy to see how, on Ely's account, those convicted of crime qualify as a "discrete and insular minority."²³⁰ Although as an historical matter African Americans constitute the archetypal "discrete and insular" minority,²³¹ Ely thought that other groups could also qualify. In most states, those convicted of serious felonies are disabled from voting.²³² In addition to such formal political exclusion, which would justify skeptical judicial review of prison conditions and recidivist statutes, the stigma that surrounds criminal conviction inhibits potential targets of criminal punishment from forming interest

²²⁷ U.S. v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

²²⁸ Ely, *supra* note 225, at 152.

²²⁹ *Id.* at 145-72.

²³⁰ *See Id.* at 97 (discussing Eighth Amendment).

²³¹ *Id.*

²³² *See supra* note 52. Consequently, those who are adversely affected by recidivist statutes such as California's three-strikes law and by prison conditions formally lack representation in the political process. *See* Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 Suffolk U. L. Rev. 441, 449-60 (1999) ("Those in the military, in prisons, and in schools are classic examples of discrete and insular minorities, who have little political power."). As mentioned in the text, would-be convicts, while not formally excluded, generally do not form interest groups and would lack clout if they did.

groups. Interest groups exist to oppose criminalization of such controversial activities as abortion, unrestricted firearm possession, gambling, and medical use of marijuana. But there is no National Association of Burglars pushing for more respectful treatment of its members. Even if such groups did exist, mainstream interest groups would be loathe to ally with such disreputable partners. Political process theory accordingly would distrust the ability of majoritarian political processes to accord due weight to interests of convicted criminals.

Lawmakers face an asymmetrical calculus. In considering measures that expand criminal liability or increase punishment, they are not confronted with many of the normal incentives to take account of the interests of those who are adversely affected. On other side of the ledger, legislators who take a harshly anti-crime posture can reap political benefits and/or avoid the political cost of being tarred as “soft-on-crime.”²³³ The legislative process accordingly tends to be more responsive to prosecutorial and victim interest groups than these groups’ ability to generate political contributions or mobilize voters would suggest. The result is a political process that systemically slights the interests of accused and convicted offenders.

The point is not that the interests of convicted offenders deserve parity with those of law abiding citizens. On one reasonable view, those who have committed criminal offenses have forfeited their right to have their interests count equally. The point instead is that, as the very existence of the Eighth Amendment attests, offenders have not *entirely* forfeited their rights to be treated as persons, not mere things. Their interests merit some

²³³ See Tonry, *supra* note 109, at 3-4, 8, 15-18. *Cf. Atkins*, 536 U.S. at 347 (referring to “the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of

decent weight, which, as political process theory explains, ordinary political processes cannot be relied upon to provide as a matter of course.

This asymmetrical political dynamic at work can manifest itself in a number of ways, which create a framework for understanding the formerly widespread existence of inhumane prison conditions, the increasing use of harsh mandatory minimum sentences, and the existence of recidivist statutes having some unjustifiably draconian applications.²³⁴

First, criminal legislation is particularly susceptible to the problem of “excessive generality,” with legislatures lumping quite different kinds of conduct together.²³⁵ When representative processes function effectively and affected groups can protect their interests, legislation tends to become quite discriminating. The federal tax code with its prolix provisions and exceptions furnishes an obvious example. In contrast, when impediments exist to the formation of interest groups and to their ability to form coalitions, legislation can become overly general. In a world in which death is not a mandatory punishment for murder and few are actually executed, a pre-*Furman* statute making all murderers eligible for death suffers from excessive generality. So, too, do many strict liability offenses, which

violent crime”).

²³⁴ “Between 1993 and 1995, 24 States and the Federal Government enacted three strikes laws.” *Ewing*, 538 U.S. at 15. For some of the extreme results these statutes permit, see *Lockyer v. Andrade*, 538 U.S. 63 (2003) (two consecutive sentences of 25 years to life for triggering theft offense worth \$84 and several prior theft offenses); *Ewing*, 538 U.S. at 17-21 (25 years to life for triggering offense of theft of \$1,197 and three prior burglaries); *Solem*, 463 U.S. at 279-83 (life sentence for six nonviolent ptv offenses); *Rummel*, 445 U.S. at 265-66 (life sentence for three ptv offenses together involving approximately \$250).

²³⁵ Professor Sunstein explains that the excessive generality arises “when broad terms are applied to situations for which they could not possibly have been designed and in which they make no sense.” *The Case of the Speluncean Explorers: A Fiftieth Anniversary Symposium*, 112 Harv. L. Rev. 1883, 1885 (1999) (opinion of Cass Sunstein).

For another particularly striking example of the same political dynamic, see David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 Stan. L. Rev. 1283, 1296-98 (1995).

lump together persons having widely divergent levels of culpability.²³⁶ Still another example is mandatory minimum sentences, which preclude mitigating circumstances from affecting the sentence and which “[e]very American state during the 1970s and 1980s adopted . . . for drug crimes.”²³⁷

Second, overreliance on the utilitarian goals of deterrence and incapacitation also results from the asymmetrical political process sketched above. A central tenet of the criminal justice system is that the deterrent effect of any punishment increases along with its severity. Absent political checks that help assure that the interests of the convicted receive some weight, lawmakers can increase punishment's severity in the interests of deterrence or incapacitation without effective constraint. Public choice theory would predict that even the cost of punitive measures, which are diffusely dispersed among taxpayers, will prove an ineffective check.²³⁸ The diminishing returns of punishment do not matter. The expectation of *any* marginal return in terms of deterrence or incapacitation will suffice. The result is a climate in which recidivist statutes and mandatory minimums thrive and, more generally, there is a tendency for “the criminal law to come to be a one-way ratchet”²³⁹ of harsher punishment.

Third, lawmakers tend to skimp on the resources devoted to accused and convicted

236 *Robinson v. California*, 370 U.S. 660 (1962)(invalidating law making addiction an offense even for actors bearing no culpability for their addiction).

237 Tonry, *supra* note 109, at 81. *See* Frase, *supra* note 11, at 641 (“it is quite possible that many of these offenders deserve the mandatory penalty, but it is very unlikely that *every* eligible offender does”). The political process that led to adoption of California’s three-strikes law suggests the problem of excessive generality. *See* Karlan, *supra* note 11, at 892.

238 According to public choice theorists, the legislative process is insensitive to diffuse costs spread among large numbers of typically unorganized groups such as taxpayers. William N. Eskridge, Jr., *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 Va. L. Rev. 275, 285-91 (1988). A lawmaker is likely to weigh the political benefits of taking a strong symbolic anti-crime posture against future fiscal costs that are unlikely to produce any political backlash.

offenders since burdens may be shifted onto them largely without political cost. Prison funding furnishes the most obvious example of this phenomenon.²⁴⁰ Legislatures also may eliminate or relax culpability requirements or defenses on grounds of cost-saving and efficiency.²⁴¹

Finally, the political dynamic at work can also result in the phenomenon of desuetude. Professor Stuntz explains: “The same factors that make it hard for interest groups to organize in opposition to new criminal legislation also make it hard to organize in support of narrowing or repealing existing statutes. The result is that once crimes are in place, they tend to be permanent.”²⁴²

Political process theory puts these various problems into a larger context, explaining how they stem from a political process that systemically undervalues offenders’ interests. Citizens naturally recoil at grotesque punishments. There is no contemporary constituency for amputation or the rack. But in a political process in which offender interests are unduly discounted, cruel punishments can result from inattention. Just as political process theory furnishes a justification for judicial review of state and federal measures having a disproportionate adverse effect on aliens and other groups that are formally or effectively disenfranchised, it also supports review of criminal punishments capable of redressing extreme manifestations of excessive generality, over pursuit of deterrence and incapacitation, inadequate funding, and desuetude.

²³⁹ Stuntz, *supra* note 109, at 509.

²⁴⁰ See *supra* notes 63-64 & accompanying text.

²⁴¹ Stuntz, *supra* note 109, at 519-20.

²⁴² Stuntz, *supra* note 109, at 556.

C. Summary.

All three of the approaches discussed above could improve the law's coherence. But measured against originalist and contemporary considerations alike, they imply too narrow a judicial role. Justice Scalia's approach would effectively drain the Cruel and Unusual Punishment Clause of contemporary meaning. The textualist and majoritarian approaches tie the meaning of cruel and unusual punishments to the outcome of political processes, which warrant frequent skepticism, not invariable trust. The Court's active role in interpreting other constitutional civil liberties, the gravity of the individual liberty interests at stake, and the inadequacy of majoritarian political processes argue for meaningful judicial review that does more than merely impose prevailing punishment practices on renegades.

III. A PROPOSED UNDERSTANDING.

This Part proposes an understanding of the Cruel and Unusual Punishment Clause, which is rooted in a nonutilitarian respect for individual worth. In brief, it reads the Eighth Amendment as prohibiting punishments that are not reasonably regarded as justly deserved, including grossly disproportionate punishments. The sections below identify and defend this understanding's general characteristics and then explore how abolition of the insanity defense, strict liability, and death for juveniles would be analyzed under it.

A. General Characteristics.

The proposal here puts the notion of cruelty at the very center of the Cruel and Unusual Punishment Clause. The historical evidence is admittedly thin but the Founders used the phrases "cruel and unusual punishment," "cruel or unusual punishments," and

“cruel punishments” interchangeably to refer to a unitary concept.²⁴³ It keeps faith with this historical evidence to organize that concept around the term common to all three formulations. Reading to the Eighth Amendment to prohibit cruel punishments also comports with contemporary notions of justice. The modern understanding holds that a punishment that involves the gratuitous infliction of suffering is always unacceptable, even and sometimes especially when it is regularly employed.²⁴⁴

What, then, is a “cruel” punishment? The Court has correctly defined it as punishment that inflicts suffering without good reason.²⁴⁵ This simple statement brushes over a number of more specific features, which flow from Part I and Part II’s analysis and which give the conception offered here meaningful content. Some of these features are roughly consistent with the Court’s cases while others diverge from them.

1. Objective Reality and Culpability.

An adequate definition of “cruel” punishment must focus on both punishment’s objective effects *and* the punisher’s culpability.²⁴⁶ Imagine for a moment that the focus is

²⁴³ See *supra* Part II. A.

²⁴⁴ *Id.*

²⁴⁵ See *supra* note 3.

²⁴⁶ The conceptual tools of the criminal law are useful here. The criminal law distinguishes among act, mens rea, and attendant circumstance elements of offenses. See American Law Institute, Model Penal Code § 1.13(9) (1974). Mens rea elements concern the offender’s degree of culpability, which most criminal offenses define in terms of the offender’s subjective state of mind such as her intent. Attendant circumstance elements require the existence of a specified state of affairs and do not depend on the offender’s state of mind. An actor who sells talcum powder in the belief that it is cocaine has the mens rea needed to make her guilty of the offense of “knowingly distributing cocaine.” But the attendant circumstance element requiring that the actor sell cocaine rather than some other substance is not satisfied. The actor may be guilty of an *attempt* to commit the offense but not the offense itself. Alternatively, an actor who sells cocaine in the firm belief that it is talcum powder would lack the mens rea the offense requires. She would not be guilty of the offense even though the substance she has sold is cocaine, satisfying that attendant circumstance element of the offense.

In this context, the “attendant circumstance” element concerns whether punishment promotes a legitimate penological goal as a matter of objective reality. The “mens rea” element involves whether those authorizing or inflicting the punishment are culpably wrong in believing that punishment promotes a legitimate goal.

solely on objective effects. On this view, a punishment is “cruel” and, hence, unconstitutional if it does not promote a legitimate penological objective in point of fact. It does not matter that the punisher believes, even reasonably so, that the punishment has redeeming value. There is something important to be said in favor of such a reading of the Cruel and Unusual Punishment Clause. Whether a punishment mistakenly believed to promote a valid penological objective is “cruel” depends on whose perspective is taken. From the standpoint of the punished, such a punishment is “cruel.” Given that the Clause is an individual rights provision concerned with protecting the punished, it might reasonably be argued that the focus properly belongs on the punished, not the punisher.

The disqualifying problem with an exclusive focus on objective effects is that it does not give the punisher the decisionmaking space that federalism and the separation of powers require. Such a reading would consecrate the Court as a crime control commission charged with making binding judgments concerning the wisdom of this or that punishment. Such judgments are very frequently a matter of reasonable and legitimate disagreement, particularly insofar as they involve punishment’s future effects.²⁴⁷ They ought to be freely revisable in light of new evidence rather than ossified into constitutional law.

This analysis follows and makes explicit the Court’s approach. The Court has repeatedly recognized that the separation of powers requires that contestable judgments about efficacious punishment be left to legislatures and crime control commissions, not itself²⁴⁸ Sometimes explicitly and other times implicitly, it has required the punisher to

²⁴⁷ See *supra* Part I. A. 1 and *infra* 262-65 & accompanying text.

²⁴⁸ *Harmelin*, 501 U.S. 957, 998-1001 (1991)(Kennedy, J., concurring); *Powell v. Texas*, 392 U.S. 514, 531 (1968)(plurality opinion)(“ The long-standing and still raging debate over the validity of the deterrence justification for penal sanctions has not reached any sufficiently clear conclusions to permit it to be said that

possess culpability respecting a punishment's lack of redeeming value. As a general matter, the objective reasonableness standard the Justices embraced in *Ewing* strikes the appropriate balance between respecting the decisional discretion of legislatures and other actors, on the one hand, and avoiding intrusive state-of-mind inquiries and imposing insurmountable evidentiary burdens, on the other.²⁴⁹

While the assessment of "cruelty" must focus on the punisher's culpability, it should also consider objective effects. In rare cases, a punishment promotes legitimate objectives even though a sadistic punisher has inflicted suffering for its own sake.²⁵⁰ If the focus is solely on the punisher's state of mind, such a punishment would be "cruel." This would implausibly read the Cruel and Unusual Punishment Clause to prohibit attempted cruelty.

The best understanding of the text would insist that a "cruel" punishment satisfy two conditions. First, as a matter of objective reality, it must promote no legitimate penological objective and therefore involve the gratuitous infliction of suffering. Second, the punisher must be culpable respecting the punishment's cruel nature.²⁵¹ Such culpability generally exists when the punisher has acted either sadistically, recklessly, or

such sanctions are ineffective in any particular context or for any particular group of people who are able to appreciate the consequences of their acts."). *But see* *Furman v. Georgia*, 408 U.S. at 302 (Brennan, J., concurring)("unverifiable possibilities are an insufficient basis upon which to conclude that the threat of death today has any greater deterrent efficacy than the threat of imprisonment.")

²⁴⁹ See *supra* notes 19-22 & accompanying text.

²⁵⁰ For instance, a sadistic judge might add years onto an offender's sentence merely to see him suffer but, due to case's widespread publicity, the sentence nonetheless carries a quite significant deterrent impact.

²⁵¹ When punishment in fact furthers no legitimate objective in the mistaken belief that it does, whether it is "cruel" depends on whose perspective is taken. As argued in the text, the deference ply owing to other branches of government thus militates against reading "cruel" as a strict liability prohibition focusing only on objective effects. It suggests that for a punishment to be "cruel" the punisher must have some measure of culpability respecting the erroneous belief in the punishment's good effects.

negligently respecting the punishment's lack of justifying effects.²⁵²

3. *Proportionality.*

The Cruel and Unusual Punishment Clause contains a principle of proportionality. Such a principle finds compelling support both in history and in contemporary rationales for judicial review. A punishment may be “cruel” if it is grossly excessive in relation to the offense of conviction, not just “everywhere and always” cruel for *all* offenses. The Court's death penalty cases can be fairly criticized for their innovations respecting their methods of implementing proportionality. But they rightly have proportionality as a constitutional aim. In its recent decisions concerning sentences of imprisonment, the Court has been wrong to sap proportionality of all practical meaning.

3. *Retributive vs. utilitarian limits.*

The proposal here diverges from the Court's recent cases by limiting the reasons that may justify punishment. The Court has accepted *any* penological objective as a sufficient basis for concluding that punishment is not gratuitous.²⁵³ In contrast, the view offered here would prohibit harsh punishment from finding its justification solely in utilitarian objectives such as general deterrence and incapacitation. It instead would require that punishment be supported by the retributive objective of giving an offender his just deserts. Two interrelated considerations support this view's adoption.

a. The unenforceability of utilitarian limits.

²⁵² The Court has declined to treat the Cruel and Unusual Punishment Clause as imposing a strict liability requirement.

A state of mind requirement is sometimes also necessary to screen out wholly accidental inflictions of pain such as, say, an unforeseeable fire that do not qualify as punishment. *See* Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464 (1947) (second attempt at electrocution found not to violate Eighth Amendment since failure of initial execution attempt was "an unforeseeable accident" and "[t]here [was] no

The first is that the Cruel and Unusual Punishment Clause becomes irrelevant if utilitarian rationales may suffice. As we have seen, all of the punishments the Court has invalidated can be reasonably viewed as furthering utilitarian objectives of deterrence and/or incapacitation. These include a seldom-used death penalty, a hitching post for disobedient inmates, death for the retarded, and even torture and the rack.²⁵⁴ Large increases in punishment severity can be defended as necessary to incapacitate offenders who would otherwise inflict very serious harms or to create sufficient disincentives to commit offenses having low clearance rates. Even if large increases in severity produce only modest gains, their utilitarian value is magnified by the gravity of the offenses prevented. To conclude that punishment is excessive in relation to utilitarian objectives, the Court would have to constitutionalize its own contestable judgments regarding punishment's future costs, deterrent effects, and incapacitative benefits. It would thereby deny legislatures and other decisionmakers the decisional authority federalism and the separation of powers necessitate.

A recent article by Professor Frase illustrates the dilemma. He begins by accepting the Court's declaration that any penological objective, including an utilitarian one, may furnish a constitutionally adequate justification.²⁵⁵ Proportionality retains meaning, he contends, because a punishment may be unconstitutionally excessive relative to utilitarian objectives. This may be so either because the punishment's costs exceed its deterrent or incapacitative benefits or because it is unnecessarily burdensome or costly compared with

purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution").

²⁵³ See *supra* note 23 & accompanying text.

²⁵⁴ See *supra* Part I.A.1 and notes 48-49 & accompanying text.

²⁵⁵ Frase, *supra* note 11, at 574-76.

alternatives.²⁵⁶ Professor Frase suggests that the sentences in *Andrade*, *Ewing*, *Solem* violate utilitarian principles of proportionality.²⁵⁷ Yet the claims needed to ground these suggestions, which necessarily appeal to punishments' future costs and effects, are hedged by such terms as "seem",²⁵⁸ "may,"²⁵⁹ "likely",²⁶⁰ and "may be"²⁶¹. A Court having appropriate concern for federalism, the separation of powers, and judicial subjectivity will leave such speculations to other actors.

Consider Professor Frase's analysis of *Solem v. Helm*,²⁶² which he contends properly invalidated punishment as unconstitutional. *Solem* was sentenced as a recidivist to life without a parole for a triggering offense of passing a bad check worth \$100 and for six prior felonies involving burglary and various other nonviolent property offenses. Professor Frase argues that "life without parole also seems likely to be far more costly in human terms than the crimes it will prevent through deterrence and incapacitation (discounted by the risk of encouraging more serious crimes (reverse deterrence), and the long term disutility of disproportionate penalties)."²⁶³ This truncated analysis, which trades far more on speculation than any data, is quite debatable. It is reasonable to suppose that *Solem* was not apprehended for every offense he committed and his past convictions understate the value of incapacitating him. Furthermore, as the dissent noted, a number of *Solem*'s prior offenses carried the potential for violence so that the danger of future

256 *Id.* at 593-97.

257 *Id.* at 627-45.

258 *Id.* at 634.

259 *Id.*

260 *Id.* at 645.

261 *Id.* at 636.

262 463 U.S. 277 (1983).

263 Frase, *supra* not 11, at 639.

violence could be reasonably included in the calculus.²⁶⁴ Adding the value of the offenses prevented through Solem's incarceration to the general deterrent value of his lengthy sentence, Solem's incarceration might well be cost-justified as a purely financial matter. Professor Frase wishes to discount any incapacitive and deterrent benefits by the phenomenon of "reverse deterrence." The idea is that harsh punishment can cause offenders to kill witnesses and undermine public respect for the law.²⁶⁵ But the existence, degree, and valuation of any such "reverse deterrence" are all highly uncertain. Professor Frase's analysis is plausible and could be correct. But to accept such armchair empiricism as the basis for a constitutional ruling would be to empower the Justices to determine punishments' objective effects without leaving room for other actors to make their own reasonable determinations. This would be a serious misreading of the Clause.

Perhaps for this reason, Professor Frase maintains that a threshold constitutional violation exists when a prison sentence violates *either* retributive or utilitarian principles of proportionality.²⁶⁶ If the Court is correct that any penological objective will suffice, then punishment is constitutional unless it is excessive relative to *both* an offender's just deserts *and* utilitarian objectives. Professor Frase's resort to retributive principles as an independent limit can be seen to recognize implicitly that, unless the Justices inappropriately rely on consequentialist guesses beyond their purview, utilitarian principles themselves furnish no meaningful constitutional constraint.

In contrast, retributive justice requires no judicial foray into speculative future consequences and costs. The two primary considerations bear on an assessment of justly

²⁶⁴ 463 U.S. at 315-16.

²⁶⁵ Frase, *supra* note 11, at 595, 639.

deserved punishment: the degree of the harm inflicted or threatened and the offender's culpability. These involve the nature of the offense of the conviction and facts in the record, not guesses about reverse deterrence. In making assessments about the nature and degree of punishment these two considerations merit, the Justices do not operate in a vacuum. Screened for the problems of excessive generality, overpursuit of utilitarian objectives, and desuetude, existing practice both within and without the jurisdiction furnish objective guideposts. Some of the Court's cases give inter-jurisdictional and intra-jurisdictional comparisons precisely this role.²⁶⁷

b. Retributive limits and the role of individual rights.

Besides the need for judicially enforceable limits, a second reason supports a constitutional requirement that punishment be within the confines of retributive justice, reasonably construed. Such a requirement coheres with the widely accepted role of individual rights as constraints against the use of individuals as mere means in a grand pursuit of social welfare. Any ambitious claim that the Bill of Rights generally imposes constraints of a nonutilitarian nature²⁶⁸ is well beyond this Article's scope. The narrower point here is that, whatever its force in other contexts, the notion of a nonutilitarian constraint strongly resonates with some of the deepest elements of Eighth Amendment jurisprudence.

First, it can explain the Founders' categorical opposition to torture and the rack in a way that utilitarian considerations cannot. Torture and the rack conceivably might have

²⁶⁶ Id. at 633, 643, 645.

²⁶⁷ See, e.g., *Roper*, 125 S.Ct. at 1192-94; 125 S.Ct. at 1210-1212 (O'Connor, J., dissenting); *Ewing*, 538 U.S. at 36, 42-47 (Breyer, J., dissenting); *Harmelin*, 501 U.S. at 1004-05 (Kennedy, J., concurring); *Solem*, 463 U.S. at 290-91.

great deterrent value. They are nonetheless fundamentally unacceptable because they go substantially beyond what giving offenders their just deserts will support. They do so by violating a key premise of retributive justice, which holds that an individual possesses an inviolable worth and dignity that cannot be subordinated in the name of the public good.

Second, the Court has embraced this premise in its boilerplate description of the Eighth Amendment's most basic aims. "[T]he Eighth Amendment", the Court routinely declares, "reaffirms the duty of the government to respect the dignity of all persons."²⁶⁹

Finally, as others have observed, the Court has implicitly interpreted the Excessive Fines Clause of Eighth Amendment in exclusively retributivist terms.²⁷⁰ In *United States v. Bajakajian*,²⁷¹ the offender pled guilty to failing to report that he was carrying more than \$10,000 in cash as he left the United States. The Court held that forfeiture of the \$357,144 in his possession constituted an excessive fine in violation of the Eighth Amendment. The Court noted that that Excessive Fines Clause, by its express terms, requires that a fine be proportionate.²⁷² The forfeiture plainly was not disproportionate to the utilitarian objective of deterrence. It is reasonable to surmise that, given the ease with which cash is concealed, very few instances of the currency reporting offense result in conviction. In holding that the forfeiture constituted punishment, the Court noted that deterrence has "traditionally been viewed as a goal of punishment"²⁷³ The Court, however, ignored deterrence entirely in holding that forfeiture of the entire amount was

²⁶⁸ Cf. Ronald Dworkin, *Taking Rights Seriously* 90-100 (1978).

²⁶⁹ *Roper*, 125 S.Ct. at 1190. Also *Roper*, 125 S.Ct. at 1207 (O'Connor, J., dissenting); *Hope*, 536 U.S. at 738; *Atkins*, 536 U.S. at 311; *Trop*, 356 U.S. at 100-101. See Frase, *supra* note 11, at 646.

²⁷⁰ Karlan, *supra* note 11, at 901-02.

²⁷¹ 524 U.S. 321 (1998).

²⁷² 524 U.S. at 334-35.

grossly disproportionate. It instead focused solely on retributive considerations: The “minimal” amount of the harm and the offender’s culpability.²⁷⁴ It makes little sense to require that retributive justice support the amount of a criminal fine but not the nature and length of sentences.

To be sure, utilitarian objectives such as general deterrence and incapacitation are legitimate and important. On the view urged here, they supply reasons to make choices within a punishment range determined by a nonutilitarian notion of desert. In light of the inherent imprecision of notions of retributive justice and the discretion punishers have in giving them meaning, the constitutionally permissible range typically will be quite broad. This gives decisionmakers great leeway to pursue utilitarian objectives. Contrary to the Court’s current view, however, the pursuit of utilitarian objectives has judicially enforceable limitations. Deterrence, incapacitation, and the like cannot support harsh punishment that falls outside parameters set by individual worth and retributive justice.

4. The role of “unusual.”

Although a punishment’s “unusual” nature may furnish relevant evidence of cruelty, it is neither a necessary nor a sufficient condition of unconstitutionality. To treat it as invariably necessary would be to eliminate the Court as countermajoritarian check. In its prison conditions cases, the Court correctly has declined to treat the pervasive nature of prison violence and inadequate medical care as automatically insulating these practices from constitutional challenge. As political process theory would predict and experience

²⁷³ 524 U.S. at 329.

²⁷⁴ 524 U.S. 337-40. Both harm and culpability were “minimal” because the funds were legally obtained and could have been taken out of the country with the required disclosure. In dissent, Justice Kennedy complained that the Court’s holding permits fines that are “not much of a deterrent” 524 U.S. at 354 (Kennedy, J.,

confirms, political inattention to offenders' interests can result in inadequate funding. To address the effects of the asymmetrical political pressures at work, a correspondingly strong need exists to leave open the possibility of judicial intervention. The problems of excessive generality, overreliance on utilitarian objectives, and desuetude likewise merit judicial attention, even and perhaps especially when these problems are widespread.

Just as a marked departure from prevailing penal practice should not be required to establish a constitutional violation, neither should it automatically imply a violation. Retributive justice is a flexible concept that imposes relatively loose constraints, particularly in light of the decisional space created by the separation of powers and federalism. Harsher than customary punishments still may be within the range of constitutionally permissible punishment.

If customary practice is not determinative, then how is a punishment's constitutionality determined? On the understanding proposed here, the governing standard is whether the punisher is unreasonable to conclude that the punishment is justly deserved. A retributive view of just deserts requires that punishment be proportionate to the gravity of the offense as measured by two principal considerations: the degree to which the offender has deprived another of her autonomy and the offender's responsibility for the deprivation.²⁷⁵ Certain obvious principles flow from these basic considerations. For instance, other things equal, intentional wrongdoing generally deserves harsher punishment than unintentional wrongdoing due to the offender's greater responsibility.

dissenting).

²⁷⁵ See, e.g., Frase, *supra* note 11, at 590-92; Michael Moore, The Moral Worth of Retribution, in Responsibility, Character, and the Emotions: New Essays in Moral Psychology 179, 180 (Ferdinand Schöman ed., 1987) (explaining that retributivists are "committed to the principle that punishment should be

And, other things equal, homicide deserves harsher punishment than other offenses, particularly property offenses, because of the greater deprivation of the victim's autonomy.

Customary practice, though not dispositive, can guide the analysis of whether the punisher is grossly unreasonable to conclude that punishment is justly deserved. The logic of just deserts yields the *relative* judgment that intentional homicide merits harsher punishment than reckless aggravated battery. But logic alone cannot dictate the *absolute* judgment of how harsh the punishment for intentional homicide ought to be. If the average sentence for intentional murder is twenty-five years imprisonment, then, under retributive precepts, the average sentence for reckless infliction of serious bodily harm ought to be less. But should the average sentence for intentional murder be twenty-five or fifteen years imprisonment?

The general corpus and direction of customary penal practice, which has always been substantially driven by the perceived dictates of retributive justice, furnish a relevant baseline. Rough-hewn judgments such as whether death ought to be the presumptive or an exceptional punishment for murder can and do change through time and furnish starting points for constitutional analysis. Intra and inter-jurisdictional comparisons can provide useful benchmarks for comparison, as many of the Justices have recognized.²⁷⁶ Such benchmarks not only can be relevant indicia of accepted notions of just desert but also can defuse separation of powers and federalism concerns by incorporating deference to legislative judgments.

graded in proportion to [moral culpability]").

²⁷⁶ See, e.g., *Roper*, 125 S.Ct. at 1192-94; 125 S.Ct. at 1210-1212 (O'Connor, J., dissenting); *Ewing*, 538 U.S. at 36, 42-47 (Breyer, J., dissenting); *Harmelin*, 501 U.S. at 1004-05 (Kennedy, J., concurring); *Solem*, 463 U.S. at 290-91.

While customary practice, writ large, can provide a relevant baseline, the reasons for particular practices, punishments, and sentences must be closely scrutinized. The Court should give no weight to penal practices resulting from the problems of excessive generality, fiscal neglect, the pursuit of utilitarian objectives, and desuetude. To do otherwise would be to subvert the rationale for judicial review. Prison conditions that are the byproduct of inadequate funding do not furnish reliable evidence of the dictates of retributive justice. Nor do three-strikes recidivist statutes that are defended principally on the basis of a need for incapacitation and deterrence. Incapacitation and deterrence can help decide how harsh punishment may be within broad limits fixed by a retributive emphasis on just deserts. However, on the view of the Eighth Amendment urged here, they cannot determine what those limits are.

In short, a more nuanced approach needed. Legislative judgments should not be relied upon to define the Eighth Amendment's meaning, as the Court's rhetoric commands. Nor should they all be ignored as flawed products of a dysfunctional process. Screened for the problems of undue generality, utilitarian excess, inadequate funding, and desuetude, penal custom can furnish essential evidence of what retributive justice requires and permits.

B. Particular Applications.

To illustrate the approach outlined above, this section applies it to several Eighth Amendment issues and contrasts it with the multiple approaches warring with one another in the Court's cases. As with any general theory, the approach proposed here does not necessarily generate a uniquely correct answer to every given problem. It instead furnishes

a framework for analysis. Reasonable persons may differ over how the relevant considerations apply and the relative weight each should receive. This does not mean that the approach is hopelessly indeterminate. Like other useful intellectual constructs, it produces a range of acceptable answers. This range is often narrower than and different from that permitted by the Court's hodgepodge of approaches.

1. Abolition of the Insanity Defense.

Legislatures in five states have enacted statutes that effectively abolish the insanity defense.²⁷⁷ Under these statutes, which embrace the so-called "mens rea model," insanity exculpates only when the accused lacks the culpability the offense requires. For instance, a man who squeezes his wife's head in the delusional belief that it is his hat²⁷⁸ would not be guilty of battery because he does not possess the requisite intent to inflict bodily injury. But a man who kills his wife in the delusional belief that she is about to blow up the world would be guilty of murder. Notwithstanding his mental illness, he possesses the required intent to kill.²⁷⁹ State supreme courts have divided on whether it violates the Constitution to bar any resort to an insanity defense in such circumstances. Eventual Supreme Court resolution is a possibility.²⁸⁰

The Court's Eighth Amendment jurisprudence allows the Justices to select

²⁷⁷ Kan. Stat. Ann. 22-3220; Idaho Code 18-207(1), (3); Mont. Code Ann. 46-14-102; Nev. Rev. Stat. 193-220; Utah Code Ann. § 76-2-305(1).

²⁷⁸ Oliver Sacks, *The Man Who Mistook His Wife for a Hat: And Other Clinical Tales* (1985).

²⁷⁹ Joshua Dressler, *Understanding Criminal Law* § 25.07(C)(1) at 330 (2d ed. 1995).

²⁸⁰ *Compare* *Finger v. State*, 27 P.3d 66 (Nev. 2001)(holding that statute abolishing insanity defense violates substantive due process); *State v. Strasburg*, 110 P. 1020 (Wash. 1910)(holding abolition of insanity defense unconstitutional) *with* *State v. Bethel*, 66 P.3d 840 (Kan. 2003)(no substantive due process or Eighth Amendment violation); *State v. Herrera*, 993 P.2d 854 (Utah 1999)(no Eighth Amendment violation); *State v. Cowan*, 861 P.2d 884 (Mont. 1993)(no Eighth Amendment or substantive due process violation), cert. denied, 511 U.S. 1005 (1994); *State v. Searcy*, 798 P.2d 914 (Id. 1990); *State v. Herrera*, 895 P.2d 359 (Utah 1995)(no substantive due process violation).

arbitrarily among lines of reasoning that will support either result. The analysis partly involves asking whether the State statutes defy evolving standards of decency, as evidenced by statutes in other States, judicial decisions, jury verdicts, and other objective indicia.²⁸¹ On the one hand, the mens rea model may be said to represent merely another experimental step within a broadly defined and evolving tradition concerning the appropriate legal response to cognitive disability.²⁸² The law has been characterized by a great deal of flux, ranging from experimentation with broader and narrower tests of insanity to alterations of the burden of proof and persuasion.²⁸³ The mens rea model, it may be said, is akin to measures such as these whose constitutionality the Court has affirmed.²⁸⁴

On the other hand, the mens rea model may be characterized as a departure from the evolving tradition on the ground that it effectively eliminates rather than merely redefines the insanity defense.²⁸⁵ When someone lacks required culpability, insanity does not operate as a true defense. Instead, it precludes the prosecution from establishing one of the essential elements of the offense. Furthermore, the great bulk of cases covered by the traditional insanity defense involves persons who possess the required mental state but, due to a grossly distorted perception of reality, act for bizarre reasons. The constitutionality of the mens rea model, like many other issues the Court has decided, depends on the malleable characterization of both the rule or punishment under consideration and the evolving custom to which it relates. Such matters of characterization are not governed by neutral

²⁸¹ See *supra* notes 67-72 & accompanying text.

²⁸² *Bethel*, 66 P.3d at 851.

²⁸³ Paul H. Robinson, *Criminal Law: Case Studies & Controversies* 698-709 (2005).

²⁸⁴ *Powell v. Texas*, 392 U.S. 514, 535-36 (1968)(stating in dictum that shifting views of insanity “has always been thought to be the province of the States”); *Leland v. Oregon*, 343 U.S. 790, 797-99 (1952)(upholding measure that shifted burden to defendant, requiring that he establish insanity beyond a

standards and it not clear how nonarbitrary standards could be devised.

Another strain of the Court's Cruel and Unusual Punishment Clause caselaw focuses on whether a legitimate penological objective reasonably may be attributed to the punishment.²⁸⁶ The Justices could invoke this mode of analysis to uphold the mens rea model. Unlike the M'Naghten test,²⁸⁷ for instance, the mens rea model punishes those in the grips of mental disease who kill intentionally under the delusional belief that the killing is in legitimate self-defense. It is not unreasonable to suppose that such persons endanger others and therefore stand in need of incapacitation, which the Court has recognized as a legitimate penal objective.²⁸⁸ Alternatively, the Court could simply ignore the legitimate penal objective principle, as it has done every time it has invalidated a punishment.²⁸⁹

The approach urged here involves a more coherent analysis. The outcome does not turn on whether the mens rea model is characterized as within or without the range of customary practice. Nor can the constitutionality of the mens rea model be sustained simply by showing that it furthers the utilitarian objective of incapacitation. The central question instead is whether those from whom the mens rea model withdraws an insanity defense reasonably may be said to deserve criminal punishment as a matter of justice.

The answer depends on whether such persons are capable of and exercise the meaningful choice required to support the assignment of blame. Psychiatric evidence is relevant as well as the notion of what constitutes meaningful choice. The debatable nature

reasonable doubt).

²⁸⁵ *Finger*, 27 P.3d at 81.

²⁸⁶ See generally *supra* Part I.A.1..

²⁸⁷ M'Naghten's Case, 8 Eng. Rep. 718, 722 (1843).

²⁸⁸ *Ewing*, 538 U.S. at 23-28 (plurality opinion); *Harmelin*, 501 U.S. at 999-1000 (Kennedy, J., concurring); *Gregg*, 428 U.S. at 183 n.28 (plurality opinion).

of this latter notion explains why the Court has been correct to recognize that the Constitution does not require adoption of a particular definition of insanity.²⁹⁰ On one view, culpability cannot be assigned whenever the offense is the causal “product” of mental illness. But this view, which was incorporated into the ill-fated *Durham* “product test,”²⁹¹ might reasonably be thought too broad. The causes of any offender’s conduct always can be traced back far enough to circumstances over which he had no control, including but not limited to mental disease.²⁹² Accordingly some narrower definition of insanity might reasonably be adopted. The Court has properly acknowledged that the definition that best captures the responsibility essential to the assignment of blame is a matter on which reasonable minds may differ.

Is the mens rea model a reasonable way of distinguishing between those who do and do not possess responsibility? As mentioned above, the fact that only five jurisdictions have chosen this path furnishes some relevant evidence that the ensuing punishment is “cruel” in the required sense, particularly because the principal argument for the insanity defense always has been that punishment of the insane is incompatible with moral blame and just desert.²⁹³

But custom is by no means sufficient to support this conclusion. The reasons for

289 See *Atkins*, 536 U.S. at 350 (Scalia, J., dissenting)(criticizing the Court for “conveniently ignore[ing] a third ‘social purpose’ of the death penalty – ‘incapacitation’”).

290 See *Powell*, 392 U.S. at 535-36; *Leland*, 343 U.S. at 797-99.

291 *Durham v. U.S.*, 214 F.2d 862 (D.C. Cir. 1954).

292 Christopher Slobogin, *An End to Insanity: Recasting The Role of Mental Disability in Criminal Cases*, 86 Va. L. Rev. 1199, 1122 (2000).

293 Wayne R. LaFave, *Criminal Law* § 4.1(c), at 326 (3d ed. 2000)(“the insanity defense developed as a means of saving from retributive punishment those individuals who were so different from others that they could not be blamed for what they had done.”); Joshua Dressler, *Understanding Criminal Law* § 25.03[B], at 315 (2d ed. 1995)(“Although utilitarian arguments are sometimes posited in support of the insanity defense, the underlying rationale of the defense is primarily retributive in nature.”).

the mens rea innovation must be carefully examined. For instance, suppose that the mens rea model was adopted in response to the wide availability of efficacious psychiatric medication and treatment. Harmful acts could be laid at the doorstep of a failure to accept or continue treatment and this failure in turn justly could be characterized as willful. In this way, untreated mental illness would resemble voluntary intoxication, which in most States is often not a defense even when it causes the offender to lack the culpability an offense requires.²⁹⁴ This supposition is counterfactual: Changes in the availability and efficacy of treatment did not form the basis for the move to the mens rea model.

The impetus for the mens rea model instead came from frustration over the difficulties of formulating an insanity test and from a perception that confused juries have been misapplying it.²⁹⁵ Such concerns would support more closely screening the admissibility and content of expert testimony as well as shifting the burden of persuasion. However, they furnish no basis for a categorical conclusion that all who kill intentionally, even those in the grips of a delusional belief they are saving the world from imminent destruction, possess the degree of choice and responsibility needed to support the assignment of blame. Such an overbroad and indiscriminating judgment can be seen to suffer from the problem of excessive generality, which results from a political process that unduly discounts offenders' interests and which merits a judicial check.

Even according legislatures due latitude to make reasonable empirical and moral judgments, the mens rea model thus violates the Cruel and Unusual Punishment Clause.

²⁹⁴ Mitchell Keiter, *Just Say No Excuse: The Rise and Fall of the Intoxication Defense*, 87 J. Crim. L. & Criminology 482, 518-19 (1997).

²⁹⁵ *Bethel*, 66 P.3d at 845; *Finger*, 27 P.3d at 76-78 (citing confusion and financial cost as the legislative rationales for Nevada's statute).

This is not simply because it departs from custom, although custom turns out to be highly relevant in this context due to both the insanity defense's retributive justification and the purely utilitarian reasons for eliminating it. Custom points to and reinforces a conclusion that the mens rea model punishes some persons who, on any reasonable view, do not justly deserve it. The model dispenses with the responsibility needed to ground blame for utilitarian reasons of efficiency.

2. *Strict Liability.*

At first blush, it would seem that the Court's approach would always permit the use of strict liability and that approach urged here never would. While these conclusions capture the general thrust of each approach, they overlook the inconsistencies that inhere in the Court's approach and oversimplify the one proposed here.

Strong currents in the Court's approach lead to the conclusion that the use of strict liability is always tolerable. So-called public welfare offenses are not so uncommon that they may be said to defy evolving standards of decency.²⁹⁶ Even some serious offenses such as felony murder and statutory rape require no culpability respecting elements that trigger marked increases in punishment.²⁹⁷ In addition, strict liability bears a reasonable relationship to the legitimate penological objective of deterrence. It is not irrational to believe that strict liability has a deterrent impact by increasing conviction rates and by inducing persons to exercise a higher degree of care. It is true that the Court has sometimes

²⁹⁶ There has been "a legislative trend in the twentieth century to omit mens rea from a growing list of crimes." Catherine L. Carpenter, *On Statutory Rape, Strict Liability, and the Public Welfare Offense Model*, 53 Am. U. L. Rev. 313, 327(2003). For the seminal judicial and scholarly treatment, see *Morissette v. U.S.*, 342 U.S. 246, 252-62 (1952); Francis B. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933).
²⁹⁷ Model Penal Code 210.1, pt. II cmt. at 5 (Official Draft and Revised Comments 1980)(describing the felony murder rule as "a form of strict liability"); Carpenter, *supra* note 296, at 385-91(indicating that 30

ignored the principle relied upon in *Ewing* that a punishment is constitutional if reasonably related to deterrence or incapacitation and that strict liability can produce punishment that is disproportionate to culpability. However, outside of the death penalty context, the Court has declined to give teeth to the general theoretical prohibition against grossly disproportionate punishments.

The Court's chaotic jurisprudence nonetheless furnishes some basis for holding some strict liability offenses unconstitutional. The characterization of customary practice is malleable. With creative counting, perhaps a consensus can be manufactured against the use of strict liability for serious offenses carrying lengthy sentences.²⁹⁸ The nearly universal acceptance of felony murder and the majority treatment of statutory rape would seem to undercut such a conclusion. However, perhaps these offenses can be distinguished.²⁹⁹

The approach here, which insists upon reasonable grounds for believing that punishment is justly deserved, would seem to imply the automatic unconstitutionality of strict liability. This conclusion might be thought to necessitate too great a departure from the results of the Court's cases and from existing practice. Some therefore consequently might reject the proposed approach as producing unacceptable results.

In fact, a more sophisticated analysis is required and its end point is not always the

jurisdictions treat statutory rape as a strict liability offense).

²⁹⁸ The Court's opinion in *Staples v. United States*, 511 U.S. 600, 616-19 (1994), flirts with this idea: "Close adherence to the early cases described above might suggest that punishing a violation as a felony is simply incompatible with the theory of the public welfare offense."

²⁹⁹ Felony murder conceivably can be excluded from the universe of "strict liability" offenses on the ground that it does require culpability, namely that needed to make the offender guilty of the underlying felony. Statutory rape might be distinguished on the ground that having sexual relations with the young is inherently risky and that the use of strict liability in the context of dangerous activities, such as the use of explosives, has a long pedigree. Carpenter, *supra* note 296, at 361-71; *Staples*, 511 U.S. at 608-15; 511 U.S. at 628-635

unconstitutionality of strict liability offenses. First, as Professor Kelman has argued, at least some strict liability offenses can be viewed as requiring negligence. Instead of defining negligence through an open-ended reasonable prudence standard, which is subject to the vagaries of case-by-case application by juries, strict liability uses the vehicle of particularized rules established by the legislature.³⁰⁰ For instance, consider an offense that criminalizes the sale of adulterated milk regardless of whether the seller knew or had reason to know of the adulteration. On Kelman's view, such an offense may be viewed as decreeing that it is negligent not to take precautions to learn whether milk has spoiled. Perhaps Kelman's view is ultimately unpersuasive or applies only to some strict liability offenses. But its appeal indicates that the approach here does not automatically imply the unconstitutionality of all strict liability offenses.

Second, instead of eliminating culpability, strict liability offenses can be seen as reallocating authority to determine culpability from juries to sentencing judges. Culpability remains relevant to punishment even when a jury need not find its existence as an element of the offense. A judge who determines that the offender genuinely lacked culpability might impose such a light sanction that it does not rise to the level of "punishment" and therefore does not implicate the Eighth Amendment at all. A harsher sanction might be merited by the degree of the offender's culpability, as determined by the sentencing judge. The Sixth Amendment right to a jury trial undoubtedly constrains the allocation of authority between judges and juries.³⁰¹ But, as the Court's cases reflect, the

(Stevens, J., dissenting).

300 Mark Kelman, *Strict Liability: An Unorthodox View*, in 4 *Encyclopedia of Crime & Justice* 1512-18 (S. H. Kadish, ed. 1983).

301 *E.g.*, *U.S. v. Booker*, 125 S.Ct. 738 (2005); *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

answers to complex jury-judge allocation issues do not derive from the Eighth Amendment.

In upholding particular punishments against Eighth Amendment challenges, the Justices have relied on facts pertaining to the offender's culpability that were not part of the elements of the offense but were rather part of the overall factual story available for consideration at sentencing.³⁰²

Despite the above caveats, the proposal here would cast a suspicious eye on strict liability offenses for two reasons. First, this proposal is premised on the notion that the Constitution prohibits criminal punishment in the absence of a reasonable basis for believing that it is warranted by harm *and* fault. Second, strict liability offenses often involve problems characteristic of the political process' insensitivity to offenders' interests. They can involve the phenomenon of excessive generality by encompassing persons of greatly varying levels of culpability. They also can reflect an undue privileging of utilitarian objectives. By eliminating requirements of fault, legislatures seek to avoid the financial costs and loss of convictions that flow from necessity of persuading a jury of fault beyond a reasonable doubt.

In short, this Article's approach would not render all applications of all strict liability offenses unconstitutional. It is open to the idea that some strict liability offenses reasonably can be viewed as simultaneously requiring negligence and defining with particularity what negligence means in a given context. And it does not foreclose shifting authority to find the culpability needed to justify punishment from juries to sentencing judges. It nonetheless would regard such claimed justifications with skepticism and it

³⁰² *Ewing*, 538 U.S. at 38-40 (Breyer, J., dissenting); *Solem*, 463 U.S. at 296-97 & n.22; *Hutto*, 454 U.S. at 372 n.1.

rejects those features of the Court’s jurisprudence that allow criminal punishment to be imposed without fault in the name of efficiency.

3. *Death for Juveniles.*

In *Roper v. Simmons*,³⁰³ the Court held that it constitutes cruel and unusual punishment to execute persons who are younger than eighteen when they commit their offense. Writing for a narrow five Justice majority, Justice Kennedy found support for this result in, *inter alia*, the number of States opposed to executing such persons and an independent assessment of the underlying moral considerations. As evidence of a “national consensus against the death penalty for juveniles”,³⁰⁴ the Court counted 30 States as prohibiting it. This number, the Court reported, “compris[es] 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach.”³⁰⁵ In dissent, Justice Scalia objected to the inclusion of States that do not have a death penalty and, with characteristic passion, declared that “[w]ords have no meaning if the views of less than 50% of death penalty States can constitute a national consensus.”³⁰⁶ Both the majority and the dissent’s use of legislation furnish an illuminating contrast with the role of penal custom under the theory advanced here.

Among the twenty States Justice Scalia counted as permitting the execution of persons below the age of 18, he included thirteen whose death penalty statutes contain no

303 125 S.Ct. 1183 (2005).

304 125 S.Ct. at 1192.

305 *Id.*

306 125 S.Ct. at 1218, 1219.

minimum age.³⁰⁷ Absent legislative history indicating otherwise, these statutes do not reflect any considered judgment that the *death penalty* ought to reach those below the age of 18.³⁰⁸ It is entirely possible that the legislators simply did not focus on this particular issue and that the absence of a specific provision exemplifies the problem of excessive generality.³⁰⁹ Persons below the age of 18 cannot vote, thereby removing even this generally weak incentive for legislators to consider affected offenders' interests and strengthening the suspicion of excessive generality. Only the thirteen statutes that expressly authorize death for offenders below the age of 18 may be said with confidence to incorporate a deliberate judgment that death may be proportionate punishment in such circumstances.

The Court, too, overstated the legislative support for its preferred result. In addition to the eighteen States whose death penalty statutes expressly apply only to those 18 years of age and older, the Court's count included the twelve States that do not have a death penalty.³¹⁰ The issue at hand is whether juveniles younger than 18 may belong in the subclass of murderers who deserve death as a matter of justice. Justice Scalia exaggerated matters to say definitively that a States' rejection of the death penalty "sheds no light whatever on the point at issue".³¹¹ A judgment that no one deserves death also implies

307 In the absence of any specific provision respecting the death penalty, the State's general provisions concerning whether a juvenile may be tried as an adult apply. "Almost every State, and the Federal Government, has set a minimum age at which juveniles accused of committing serious crimes can be waived from juvenile court into criminal court." *Thompson*, 487 U.S. at 826 n.4 (plurality opinion).

308 *Roper*, 125 S.Ct. at 125 S.Ct. at 1210 (O'Connor, J., dissenting); *Stanford*, 492 U.S. at 385 (Brennan, J., dissenting); *Thompson*, 487 U.S. at 826 (plurality opinion); 487 U.S. at 850 (O'Connor, J., concurring).

309 *Cf. Thompson*, 487 U.S. at 857-58 (O'Connor, J., concurring)(refusing to permit execution of an offender below the age of 16 because Oklahoma death statute did not explicitly authorize this result).

310 125 S.Ct. at 1192. *See also Thompson*, 487 U.S. at 849 (O'Connor, J., concurring)(counting non-death States as part of a consensus against executing those below the age of 16).

311 125 S.Ct. at 1219.

that the juveniles do not deserve death. But there are many utilitarian reasons to oppose the death penalty that have nothing to do with desert. For instance, a decision to forego the death penalty on grounds of cost does not suggest, much less imply, that no one below the age of 18 deserves death as a matter of retributive justice.

Furthermore, the issue may reasonably be framed not as whether juveniles deserve death but rather as whether juveniles deserve death *given the legitimacy of the death penalty*. One possibility is that a given non-death State subjects those below the age of 18 to its most serious available punishment, such as life without parole. It not follow that such a State would wish to subject offenders younger than 18 to the qualitatively more severe punishment of death. Alternatively, a non-death State may categorically exempt those below 18 from the most serious available punishment. Although this decision does imply a presumptive desire to shield juveniles from death, the Court made no effort to show that all, most, or any of the non-death penalty States fall into this category.

As this discussion reveals, the Court's supposed reliance on prevailing penal practice amounts to a kind of parlor counting game. Justices in the majority and dissent frame the issue in a manner designed to produce the desired outcome. States are tallied up largely without regard to the reasons underlying their enactments and without regard to political dynamics that merit suspicion rather than deference. Contrary to the claims of the majority and Justice Scalia's dissent, not all fifty States have addressed whether death is a categorically disproportionate punishment for those below 18. Based upon the information contained in the Justices' various opinions, only thirty-one can be relied upon to have done so. Of these, eighteen apparently have concluded that death is categorically

disproportionate, and thirteen that it is not. Whether the former States are characterized as 60% of the States to have addressed the issue or 36% of all States, these figures do not amount to a societal consensus in favor of a categorical ban. In their dissents, Justices Scalia and O'Connor were right to treat the Court's professed discovery of such a consensus as a pretense.³¹²

Pretense aside, what is the relevance of prevailing practice in this context? It can be said that more States than not have concluded that death is a categorically disproportionate punishment for juveniles. This furnishes some support for a conclusion of unconstitutionality in light of the political dynamics of crime,³¹³ including here the inability of juveniles to vote. But it neither evidences a societal consensus, as the Court pretended, nor compels a constitutional conclusion that death is categorically disproportionate. Nor does it require a conclusion that death sometimes may be constitutionally imposed. Justice Scalia's view that societal consensus is a necessary condition of unconstitutionality is insensitive to the reasons to treat political outcomes with suspicion. The Court also cited the decisions of prosecutors and juries. It is also true that prosecutors seek and jurors impose death relatively infrequently on 16 and 17 year olds. But absent more information about the relevant pool of cases it is impossible to know whether this reflects arbitrariness and disproportionality, on the one hand, or that the few deserving juveniles are being appropriately singled out, on the other.

One feature of prevailing practice that may be relied upon as having constitutional

³¹² 125 S.Ct. at 1211 (O'Connor, J., concurring)(“objective evidence of consensus of a national consensus is weaker than in most prior cases in which the Court has struck down particular punishment” and is “not dispositive”); 125 S.Ct. at 1217 (Scalia, J., dissenting)(the Court's claim of a national consensus rests upon “the flimsiest of grounds”).

significance is the widely shared judgment that not every murderer deserves death. This judgment is so deeply entrenched that it may be properly relied upon as a constitutional baseline of justly deserved punishment. In the modern world, death is a proportionate punishment only if it is imposed on the “worst of the worst”, on the subcategory of murderers who deserve the harshest punishment as a matter of justice.

The issue in *Roper* is whether proportionality requires a categorical ban against the execution of those who are 16 or 17 when they commit their offense. The answer depends on the approach used to implement the constitutional requirement of proportionality. The most direct approach is the one which Justice O’Connor employed and which the Court uses in cases involving punishments other than death. It focuses on the particular rule or punishment at stake and, to give considerations of federalism and separation of powers their due, asks whether the rule or punishment reasonably may be believed to be proportionate. Of course, the proposal here would modify this approach to inquire whether the punishment reasonably may be believed proportionate *as a matter of retributive justice*.

On this standard, no categorical ban should be required. As Justice O’Connor argued persuasively in her dissent, a State may reasonably conclude that death is a proportionate punishment for at least some juvenile offenders.³¹⁴ It makes little sense to conclude that a State may reasonably believe that a murderer who is eighteen years and a day old sometimes merits death but may *never* so conclude respecting a juvenile who is seventeen years and 364 days old.

313 125 S.Ct. at 1193.

314 125 S.Ct. at 1212-15. The majority acknowledged but was unwilling to concede this point. 125 S.Ct. at 1197 (“Certainly it can be argued, although we by no means concede the point, that a rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates

In its death penalty cases, however, the Court has used a different and more aggressive approach to implement the constitutional command of proportionality. It has required legislatures to specify aggravating circumstances limiting the class of murderers eligible for death; directed courts to allow juries to hear and consider all relevant mitigating evidence; and precluded death as a punishment for certain offenses such as rape and for certain classes of offenders such as the retarded. This approach is imprecise and prophylactic by nature. For instance, the requirement that legislatures specify aggravating circumstances works imperfectly in identifying the most culpable murderers. The list of aggravating circumstances may not capture all of the features relevant to culpability.³¹⁵ For instance, an offender who murders his wife in front of their children would not be eligible for death in many States despite the killing's extreme brutality and the breach of the familial obligations to spouse and children.³¹⁶ Alternatively, the number and breadth of aggravating circumstances may be so encompassing that it singles out those who merit death no better than the Georgia murder statute in *Furman*, which made *all* murders eligible for death.³¹⁷ Even though the Court has given States complete freedom respecting the content and number of aggravating circumstances, their specification nonetheless does tend to promote proportionality.

It is in the context of this prophylactic approach that a categorical constitutional ban against the execution of 16 and 17 year olds becomes justifiable. A categorical ban will

sufficient depravity, to merit a sentence of death.”).

315 Howe, *supra* note 91, at 815.

316 Death penalty statutes do not treat the breach of familial obligations as an aggravating circumstance and many make only premeditated killings eligible for death. See, e.g., K.S.A. § 21-3439 (2003); 18 Pa.C.S. § 2502 & 42 Pa.C.S. § 9711 (2004).

317 Id. at 815-17.

exclude a few offenders who reasonably may be classed among the “worst of the worst.” But the overwhelming bulk of juvenile offenders may not be so classed due to their “lack of maturity”³¹⁸ greater “susceptib[ility] to . . . peer pressure”,³¹⁹ and “personality traits [that] are more transitory”³²⁰ In light of the well-known inadequacies surrounding the implementation of the death penalty generally as well as the difficulty of distinguishing between “transient [juvenile] immaturity” and “irreparable corruption”, a complete ban can be justified as a prophylactic measure. Like the aggravating circumstance requirement, it can be seen to make an imperfect but necessary contribution to proportionality. The *Roper* Court implicitly appealed to the need for prophylactic rules, speaking of the unacceptable “risk[of] allowing a youthful person to receive the death penalty despite insufficient culpability.”³²¹

A virtue of the approach to cruel and unusual punishment proposed here is that it focuses firstly and more directly on the relevant constitutional considerations. The issue is whether death may constitute a proportionate punishment for murderers who are 16 or 17 when they commit their offense. As the difference between the Court and Justice O’Connor nicely illustrates, the answer turns on the approach used to implement proportionality. Is the required proportionality best achieved through the kind of case-by-case analysis employed in which Justice O’Connor’s *Roper* opinion and the Court’s cases respecting other punishments? Through some matrix of prophylactic rules, as the Court’s opinion implicitly presumes? Through some combination of case-by-case

318 125 S.Ct. at 1195.

319 *Id.*

320 *Id.*

321 125 S.Ct. at 1197 (emphasis added).

review and prophylactic rules? What should the prophylactic rules be? Specification of aggravating circumstances, with consideration of any relevant mitigating circumstances? Comparative proportionality review in which appellate courts compare cases, seeking to assure that death is imposed only in the worst cases? It is answers to questions such as these that provide the overall framework within which the issue in *Roper* must be decided. Unfortunately, the Court has devoted more attention to creative jurisdiction counts than to the thoughtful construction of an overall framework for implementing proportionality.

IV. CONCLUSION.

In moments of candor, the Justices have confessed that the Court's Eighth Amendment case law suffers from "a lack of clarity"³²² and "incompatible sets of commands"³²³ They are right. The Court's decisions do suffer from confusion and inconsistency concerning such fundamental matters as the text, its own role, the relevance of customary penal practice, and the constitutional status of proportionality. It is time that the Court's Eighth Amendment jurisprudence evolve in the direction of greater coherence along each of these crucial dimensions.

This can be accomplishing while retaining some key aspects of the Court's work. The Court rightly has read the Eighth Amendment to condemn inhumane prison conditions despite their pervasive nature. Distrust of the political processes is appropriate and necessary in this context. The Court's death penalty cases are rightly concerned with proportionality, even if they are less than clear about the aim of and alternatives to the debatable mechanisms they use to respond to that concern. More generally, the Court has

³²² *Lockyer*, 538 U.S. at 72.

³²³ *Callins*, 510 U.S. at 1141 (Scalia, J., concurring in the denial of certiorari).

created some exemplary conceptual tools. It usefully has defined a “cruel” punishment as one involving the gratuitous infliction of suffering, required culpability on the part of the punisher so as to give separation of powers and federalism concerns adequate play, and located human dignity at the heart of the Eighth Amendment.

Other core features of the Court’s jurisprudence stand in tension with these principles and require rejection. By effectively restricting proportionality to the death penalty context, the Court has defied notions of just punishment shared by the founding and modern worlds alike. In addition, the Court’s repeated declaration that “the Constitution ‘does not mandate adoption of any one penological theory’”³²⁴ must be abandoned despite its appealing ring. If punishments may be justified solely on the basis of the utilitarian objectives of deterrence and incapacitation, then no judicially enforceable constraints exist and even torture and the rack become legitimate punishments. Finally, the Court’s statements about the role of customary penal practice are too broad and indiscriminating. Even the Court does not follow them, as its prison conditions cases reveal. In place of a selectively observed rhetoric of deference, the political dynamics of crime warrant skepticism sensitive to the problems of excessive generality, inadequate funding, desuetude, and unrestrained pursuit of deterrence and incapacitation.

In addition to preserving the valuable and rejecting the dysfunctional aspects of the Court’s jurisprudence, the vision sketched out here harmonizes important constitutional and moral values. By putting the concept of cruelty center stage, it coheres with the Founders’ evident understanding that the phrases “cruel and unusual”, “cruel or unusual”,

³²⁴ *Ewing*, 538 U.S. at 25 (quoting *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring)).

and “cruel” punishments interchangeably refer to a unitary concept. It also accords with the widely shared and persisting moral judgment that cruel punishments are unjust even and sometimes especially when regularly employed. In insisting that punishment find its justification in retributive precepts of justice, it gives expression to the notion that individuals possess a basic dignity that precludes government from using them as mere pawns in grand schemes of social engineering. This notion not only serves as the arguable premise of individual rights generally but also conforms with mainstream currents of subconstitutional sentencing theory such as the new Model Penal Code’s philosophy of limiting retributivism. It also traces back to the Founding, as do this proposal’s other building blocks, and so allows our understanding of the Cruel and Unusual Punishment Clause to evolve in a way that maintains contact with its deepest roots.