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PROPORTIONALITY AS A PRINCIPLE OF LIMITED GOVERNMENT

ALICE RISTROPH†

ABSTRACT

This Article examines proportionality as a constitutional limitation on the power to punish. In the criminal context, proportionality is often mischaracterized as a specifically penological theory—an ideal linked to specific accounts of the purpose of punishment. In fact, a constitutional proportionality requirement is better understood as an external limitation on the state’s penal power that is independent of the goals of punishment. Proportionality limitations on the penal power arise not from the purposes of punishment, but from the fact that punishing is not the only purpose that the state must pursue. Other considerations, especially the protection of individual interests in liberty and equality, restrict the pursuit of penological goals. Principles of proportionality put the limits into any theory of limited government, and proportionality in the sentencing context is just one instance of these limitations on state power. This understanding of proportionality gives reason to doubt the assertion that determinations of proportionality are necessarily best left to legislatures. In doctrinal contexts other than criminal sentencing, proportionality is frequently used as a mechanism of judicial review to prevent legislative encroachments on individual rights and other exercises of excessive power. In the criminal sentencing context, a constitutional proportionality requirement should serve as a limit on penal power.

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TABLE OF CONTENTS

Introduction.....	264
I. The Limits of Penological Theory	271
A. Utilitarian Proportionality	272
B. Just Deserts, <i>Lex Talionis</i> , and Other Retributive Ideals	279
C. Political Proportionality	284
II. Proportionality in Constitutional Doctrine	292
A. Beyond Punishment	292
B. Proportionality and the Pocketbook.....	297
C. Death, Prison, and Gross Disproportionality	300
III. Beyond Penology: Skepticism and Conduct.....	314
Conclusion	330

INTRODUCTION

Incarceration and capital punishment involve direct exercises of force against the human body that occur almost nowhere else in domestic politics in a liberal state. Because liberal democratic governments trace their legitimacy to something other than superior physical force, and because liberal democratic governments claim to protect the lives and liberties of their subjects, the imposition of these sanctions may be one of the most illiberal practices of a liberal state. For a variety of reasons, penal sanctions are often practically and perhaps morally necessary. But punishment's inherent tension with liberal ideals suggests a need for principled restrictions on the scope of the penal power.

In fact, few such restrictions apply to American sentencing practices. Nominally, the Supreme Court considers the Eighth Amendment's prohibition of "cruel and unusual punishments" to require that penalties be proportionate to offenses.¹ But that proportionality requirement has been attenuated in recent years. Only a minimal proportionality principle seems to restrict a *legislature* as it prescribes the range of sentences for a given crime. In March 2003, the Supreme Court found that lengthy prison sentences mandated by California's "three strikes" law did not violate the proportionality requirement of the Eighth Amendment, even if those

1. The proportionality requirement of the Eighth Amendment was first recognized by the United States Supreme Court in *Weems v. United States*, 217 U.S. 349, 377 (1910) (striking down a criminal sentence as "cruel in its excess of imprisonment"); see also *id.* at 367 ("[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense.").

sentences were imposed for seemingly minor offenses such as shoplifting three golf clubs or the theft of approximately \$150 worth of children's videotapes.² In *Blakely v. Washington*³ and *United States v. Booker*,⁴ the Court found some aspects of state and federal sentencing guidelines—guidelines that originated as legislative efforts to ensure proportionality in *judicial* sentencing—unconstitutional under the Sixth Amendment.⁵ Although sentencing guidelines are typically aimed more at consistency (proportionality relative to other sentences) and less at restrictions on severity (proportionality relative to the instant criminal offense), the concerns of the *Blakely* and *Booker* Courts about which decisionmakers are involved in the sentencing process are linked to concerns about the severity of criminal sentences. In both cases, marginal increases in severity triggered the Court's constitutional scrutiny of the defendants' sentences.⁶ Further, regardless of one's view of the conceptual underpinnings of the Court's rejection of mandatory sentencing guidelines, that rejection provides the occasion for extensive revisions to federal and state criminal sentencing law. Rethinking sentencing in the wake of *Blakely* and *Booker* should prompt reconsideration of the constitutional status of proportionality.

This Article examines proportionality as a limitation of state power in a constitutional liberal democracy. One source of confusion

2. *E.g.*, *Lockyer v. Andrade*, 538 U.S. 63, 77 (2003) (upholding a sentence of two consecutive terms of twenty-five years to life for petty theft of nine videotapes); *Ewing v. California*, 538 U.S. 11, 30–31 (2003) (upholding a sentence of twenty-five years to life for felony theft of golf clubs).

3. 124 S. Ct. 2531 (2004).

4. 125 S. Ct. 738 (2005).

5. The Court's somewhat unusual *Booker* decision did not strike down the Federal Sentencing Guidelines altogether. *Id.* at 738. One majority found that the Sixth Amendment prohibited applications of the Guidelines to increase a defendant's sentence solely on the basis of facts found by a judge rather than a jury. *Id.* at 749–51. A second majority held that the appropriate remedy was to strike down only the provision of the Sentencing Reform Act making the Guidelines mandatory; under the newly advisory Guidelines system, the maximum penalties for most federal offenses are much higher and judicial fact-finding does not increase sentences above an otherwise applicable legal ceiling. *Id.* at 756–57. Justice Ginsburg was the only Justice in both majorities.

6. As explained in greater detail in Part III, *infra*, recent Sixth Amendment sentencing decisions promise at the minimum certain procedural protections against disproportionate sentences. *United States v. Booker*, 125 S. Ct. 738 (2005); *Blakely v. Washington*, 124 S. Ct. 2531 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The same decisions may also assume a substantive proportionality requirement, but that reading is more debatable, and the constitutional home of a substantive proportionality requirement is more likely to be the Eighth Amendment or the Due Process Clauses of the Fifth and Fourteenth Amendments.

about proportionality in the criminal context has been the characterization of proportionality as an ideal linked to particular theoretical accounts of the purpose of punishment—usually, retributive accounts. In fact, proportionality is better understood as an external limitation on the state's power to incarcerate or execute individuals, and this limitation applies whether the state is punishing to exact retribution, to deter, to incapacitate, or (as is most often the case) to pursue some amalgam of ill-defined and possibly conflicting purposes.

Much turns on whether proportionality is understood as limited to penal purposes or as independent of those purposes. The arguments most frequently raised against a proportionality requirement for criminal sentences focus on institutional competence, legislative prerogative, and the difficulty of developing an objective standard.⁷ To a significant degree, these arguments depend on the assumption that proportionality is inextricably linked to a theory of penal purpose. For example, concerns about institutional competence have more force if one thinks that proportionality review requires an inevitably partisan choice among competing penological theories. But if proportionality review is an attempt to specify the outer limits of the penal power—not an attempt to direct the legislature's choices within the boundaries of that power—the institutional competence challenge to proportionality review is less persuasive. Of course, judicially imposed limits on legislative action will sometimes have countermajoritarian consequences and will thus continue to be controversial. But courts and scholars have tended to overstate the degree to which proportionality review requires judges to meddle in affairs traditionally and properly left to legislative bodies.⁸

At present, both proportionality concerns and other sentencing issues enjoy considerable judicial and academic attention.⁹ The

7. See *infra* notes 193–215 and accompanying text.

8. For example, the Supreme Court has repeatedly asserted a principle of “legislative primacy” as a reason for the judiciary to avoid searching proportionality review. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring) (citing “the primacy of the legislature” as one of four principles commanding judicial deference on questions of proportionality); *Rummel v. Estelle*, 445 U.S. 263, 275 (1980) (stating that proportionality determinations involve a “basic line-drawing process that is pre-eminently the province of the legislature”).

9. At about the same time that the Supreme Court announced a minimal Eighth Amendment proportionality guarantee in *Ewing v. California*, 538 U.S. 11, 21 (2003) (but before the Supreme Court decisions in *Blakely* and *Booker*), the American Law Institute issued a report on proposed changes to the sentencing provisions of the Model Penal Code (MPC).

Supreme Court's retreat from proportionality review of prison sentences has coincided with a more searching proportionality review of death sentences¹⁰ and of civil punitive damage awards.¹¹ Several recent articles discuss this apparent inconsistency.¹² Most of the recent commentators on proportionality in the criminal sentencing context argue, as I do, for a constitutional proportionality requirement that is broader than the minimalist standard that the Court currently

MODEL PENAL CODE 1-6 (Sentencing Report 2003) [hereinafter MPC SENTENCING REPORT]. This report criticized the existing MPC sentencing provisions for omitting a proportionality requirement. *Id.* at 34-36. The Eighth Amendment proportionality debates seem to have been overshadowed, at least temporarily, by the controversy over the Court's recent cases requiring all facts determinative of sentence severity to be found by juries (or admitted by defendants) rather than found by judges. I argue that although these jury sentencing decisions do not use the language of proportionality, the Court's concern with marginal increases in the severity of sentences suggests an implicit assumption that sentences will be proportionate to offenses. See *infra* Part III. The commentary on *Blakely* is already voluminous, and *Booker* is likely to ensure that scholars focus on Sixth Amendment sentencing issues for some time. The academy's reaction to *Blakely* is evident in the titles of some of the earliest articles to address the decision. See, e.g., Douglas A. Berman, *The Blakely Earthquake and Its Aftershocks*, 16 FED. SENT'G REP. 307 (2004); Frank O. Bowman, *Train Wreck? Or Can the Federal Sentencing System Be Saved? A Plea for Rapid Reversal of Blakely v. Washington*, 41 AM. CRIM. L. REV. 217 (2004).

10. See *Roper v. Simmons*, 125 S. Ct. 1183, 1200 (2005) (holding that the death penalty is disproportionate punishment for offenders under eighteen years of age at the time of the offense); *Atkins v. Virginia*, 536 U.S. 304, 317-19 (2002) (holding that the death penalty is an excessive punishment for mentally retarded offenders).

11. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (reversing a judgment for \$145 million in punitive damages on the grounds that the award "was neither reasonable nor proportionate to the wrong committed"); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585-86 (1996) (reversing a judgment for \$2 million in punitive damages as "grossly excessive").

12. See, e.g., Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1070-79 (2004) (arguing for both procedural consistency and a unified approach to proportionality for all forms of punishment); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: "Proportionality" Relative to What?*, 89 MINN. L. REV. 571, 607-09 (2005) (arguing that the "retributive proportionality" and "utilitarian proportionality" limits placed on punitive damage awards by the Supreme Court could be used similarly to define constitutional limits on prison sentences); Pamela S. Karlan, *"Pricking the Lines": The Due Process Clause, Punitive Damages, and Criminal Punishment*, 88 MINN. L. REV. 880, 882-83 (2004) (arguing that a proportionality determination is inherently subjective and that the Supreme Court gives more decisionmaking authority to juries in criminal sentencing than punitive damage awards because criminal punishments are institutionally limited by the role of the executive in a criminal proceeding); Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 699 n.102 (2005) (noting the tension between the Court's disparate use of proportionality in the Eighth Amendment cases and the Due Process cases); Rachel A. Van Cleave, *"Death Is Different," Is Money Different? Criminal Punishments, Forfeitures, and Punitive Damages—Shifting Constitutional Paradigms for Assessing Proportionality*, 12 S. CAL. INTERDISC. L.J. 217, 272-78 (2003) (arguing that the Supreme Court should apply consistent criteria to all forms of punishment, regardless of whether that punishment is a deprivation of life, liberty, or property).

applies.¹³ But these advocates of proportionality review have damaged their own cause by linking proportionality to particular penological theories.¹⁴ By divorcing proportionality from considerations of penal purpose, I offer a response to the concern about institutional competence. A central challenge of this Article is to find a way to specify the limits of the penal power without adopting a particular theory of the justification of that power.

An argument for a not-specifically-penological principle of proportionality might run thus: The power to incarcerate or execute is not absolute. It is always limited by general political principles—such as respect for individual liberty and equality—that stand independent of penal purposes. More specifically, each individual's interest in liberty means that restrictions on liberty must be proportionate to the conduct that allegedly justifies the restriction. The power to punish¹⁵ does not even exist absent certain conditions: this power comes into being only after an individual engages in specific conduct that has been criminalized.¹⁶ When the power to punish comes into being, it is

13. Most arguments for proportionality review are variants of the call for the "constitutionalization" of substantive criminal law, a call famously made by Henry M. Hart almost 50 years ago and subsequently echoed by many others. See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *LAW & CONTEMP. PROBS.* 401, 409–11 (1958); Herbert L. Packer, *The Aims of the Criminal Law Revisited: A Plea for a New Look at "Substantive Due Process,"* 44 *S. CAL. L. REV.* 490, 494–95 (1970) (arguing for the subjection of criminal sanctions to a rational basis test that focuses on economic costs and moral arguments, particularly for so-called victimless crimes); William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 *J. CONTEMP. LEGAL ISSUES* 1, 29–38 (1996) (arguing that constitutional limits on criminal substance, such as a rule against strict liability or a doctrine of desuetude, would prevent the manipulation, and ultimately the impotence, of constitutional limits on criminal procedure). These calls have gone unheeded for the most part. General constitutional restrictions on the substantive criminal law are, like proportionality review, often rejected by courts as improper judicial meddling in matters of legislative prerogative. For an overview of the failed quest for a substantive constitutional criminal law, see Louis D. Bilonis, *Process, the Constitution, and Substantive Criminal Law*, 96 *MICH. L. REV.* 1269, 1272–99 (1998).

14. See, e.g., Frase, *supra* note 12, at 588–596 (finding proportionality requirements in both retributive and utilitarian theories of punishment); Lee, *supra* note 12, at 704–709 (arguing that the prohibition of cruel and unusual punishments establishes a retributive proportionality principle as a side constraint on the power to punish).

15. The power to punish is composed of subsidiary powers exercised by various state actors. The power to *authorize* punishment in the first instance—the power to define activity as criminal—is distinct from the power to *impose* punishment. The first power is exercised by the legislature against all those subject to the criminal laws. The second power is exercised by the judiciary and then by the executive, and it is exercised only against those individuals who are convicted and sentenced, and who actually serve their sentences.

16. This principle underpins the void-for-vagueness doctrine of *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972). The *Papachristou* Court explicitly rejected legislative authorization of a generalized power to punish: "It would certainly be dangerous if the

not unlimited. What I will call *liberty-interest proportionality* is thus based on a claim that the scope of the penal power (and of the subsidiary powers exercised by the legislative, judicial, and executive branches) bears some relation to the conduct that gives rise to this power. This understanding of proportionality in criminal sentencing is parallel to proportionality requirements in a variety of other contexts. Proportionality is often invoked to limit an exercise of state power according to the scope of the conduct or injury that the state seeks to address.¹⁷

Similarly, each individual in a liberal democracy has an interest in equal treatment before the law. *Equality-interest proportionality* is the requirement that similarly situated defendants convicted of similar crimes receive similar sentences. This type of proportionality seems to be more widely accepted than liberty-interest proportionality; it was equality-interest proportionality that motivated the federal government and many states to adopt the sentencing guidelines approaches that *Blakely* and *Booker* have now rejected.¹⁸ Equality-interest proportionality is perhaps more accurately called uniformity,¹⁹ but to follow common practice, I will refer to uniformity as a variant of proportionality.²⁰

Part I reviews a number of theoretical accounts of proportionality in punishment to distinguish between specifically penological arguments for proportionality and more general political arguments for proportionality. The Supreme Court uses the term *penological* to refer to theoretical accounts of punishment that

legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *Id.* at 165 (quoting *United States v. Reese*, 92 U.S. 214, 221 (1875)).

17. See *infra* Part II.

18. See, e.g., *Blakely v. Washington*, 124 S. Ct. 2531, 2540 (2004) (citing Wash. Rev. Code 9.94A (2000)) (noting that Washington's sentencing guidelines were based on concerns about "proportionality to the gravity of the offense and parity among defendants"); see also Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4-5 (1988) (noting Congressional intent to reduce sentencing disparities among similarly situated defendants).

19. One of the architects of the Federal Sentencing Guidelines, then Circuit Judge Stephen Breyer, described "uniformity and proportionality" as central (but competing) goals of a sentencing system. "Uniformity essentially means treating similar cases alike," whereas proportionality, as Breyer described it, requires "treat[ing] different cases differently." Breyer, *supra* note 18, at 13. In other words, uniformity requires that all similarly situated murderers get similar sentences, and proportionality requires that murders and thefts be punished differently.

20. See *infra* note 162 for a discussion of *Pulley v. Harris*, 465 U.S. 37 (1984), and "comparative proportionality review."

include claims about the appropriate purpose of punishment; I use the word in the same way. Political arguments for proportionality consider the structure and justification of the entire political system, not just the specific practice of punishment.²¹ Political proportionality is, in essence, the consequence of the limits of penological theory—given society's commitments to political ideals unrelated to the problem of crime, any justification of punishment will go only so far. Part II shifts the focus from theory to constitutional doctrine to examine political proportionality in an array of constitutional contexts. With respect to incarceration and capital punishment, the Supreme Court has created only minimal requirements of liberty-interest proportionality, but has been somewhat more inclined to require equality-interest proportionality. When neither imprisonment nor execution is at stake, the Court has been considerably more supportive of proportionality requirements. The Court has been especially solicitous to what might be called property-interest proportionality—limitations on state power to take property from civil or criminal litigants.

After examining the conceptual basis of political proportionality in Part I, and the doctrinal support for political proportionality in Part II, this Article turns, in Part III, to consider how one might implement political proportionality in the criminal sentencing context. One source of inspiration may be the jurisprudence of constitutional criminal procedure, in which limitations on the penal power are not dependent upon the state's purpose in punishing. Instead, courts have viewed the law of criminal procedure as an external limitation on the power to punish. Proportionality, I argue, is best understood as a similar external limitation. To implement a proportionality requirement without reference to penological purpose, one might look to *Booker* and other recent Sixth Amendment sentencing decisions that insist on a close link between proven criminal conduct and the imposed sentence. Conduct is much better suited than penology to serve as the determinant of the outer limits of the power to punish.

21. As explained in more detail below, this proportionality principle is *political* in the sense that it relates to the distribution of government power within a political system. See *infra* pp. 284–87. It is not “political” in the way that many legal scholars like to use that adjective: majoritarian and/or partisan (as in “the political branches”).

I. THE LIMITS OF PENOLOGICAL THEORY

Proportionality is often conflated with the principle of just deserts.²² For example, Justice Scalia has argued that the Eighth Amendment contains no “guarantee against disproportionate sentences”²³ because proportionality “is inherently a concept tied to the penological goal of retribution,”²⁴ and the Constitution “does not mandate adoption of any one penological theory.”²⁵ It is certainly the case that the requirement that punishments be proportional to offenses has been articulated most often in the context of particular penological theories. It is not the case that proportionality is defended more extensively by retributive theories than by any other penal theory; nor is it the case that proportionality depends on any particular view of the purpose of punishment. In this Part, I examine arguments for proportionality as they appear in a range of theories of punishment: deterrence, incapacitation, rehabilitation, and retribution. Many philosophical accounts of the proportionality principle entail two separate requirements: a floor, or a minimum amount of punishment for a given crime, and a ceiling, or a maximum punishment for the crime. Although the various arguments for a floor are linked to the particular penal purpose embraced by the theory, the arguments for a ceiling are often based on broader political principles of utility, individual rights, or human dignity. Accordingly, proportionality as a ceiling on punishment can and should be understood as a limitation on government power that is independent of any specific penological theory. I refer to this nonpenological principle as *political proportionality*.²⁶ Political proportionality is compatible with a range of penological theories, but it is not dependent on any one of them.

22. See, e.g., Hyman Gross, *Proportional Punishment and Justifiable Sentences*, in SENTENCING 272 (Hyman Gross & Andrew von Hirsch eds., 1981) (“The principle of proportion between crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable.”).

23. *Ewing v. California*, 538 U.S. 11, 31 (2003) (Scalia, J., concurring) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 985 (1991) (Scalia, J., concurring)).

24. *Id.*

25. *Id.* (quoting *id.* at 25 (plurality opinion) (quoting *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring in part and concurring in the judgment))).

26. See *infra* text accompanying note 81.

A. *Utilitarian Proportionality*

The most sustained and detailed arguments for proportional punishments come not from retributive theorists, but from their philosophical adversaries: advocates of utilitarian theories of punishment.

Jeremy Bentham is known as the father of utilitarianism and as a leading theorist of punishment, but on both counts he owes much to Cesare Beccaria. The Italian Beccaria published his best-known work, *Of Crimes and Punishments*, when Bentham was only sixteen (though already graduating from Oxford).²⁷ In that book, Beccaria argues that government and justice must be based on the principle of utility—the greatest happiness for the greatest number.²⁸ Though this phrase is commonly attributed to Bentham as the “fundamental axiom” of utilitarianism, it is a translation of Beccaria’s “la massima felicità divisa nel maggior numero.”²⁹ The familiar invocation of “pleasure and pain” as the “moving powers of sentient beings” was also used first by Beccaria.³⁰

Utilitarianism is, of course, a theory of politics that reaches far beyond the practice of punishment. Though Beccaria’s short treatise is focused primarily on crime and punishment, it articulates broad political principles that apply to the structure of government more generally. Penal institutions and practices are only a subset of the institutions and practices that make up a political system. Beccaria clearly considers punishment as part of a larger political context, and consequently, he offers two different kinds of arguments for proportional punishments. He sometimes argues for proportional punishments on specifically *penological* grounds—on the basis of the special purpose of punishment—but more often, he argues for proportionality on broader *political* grounds.

27. CESARE BECCARIA, *OF CRIMES AND PUNISHMENTS* (Jane Grigson trans., Marsilio Publishers 1996) (1764). Both Beccaria and Bentham were prodigies of sorts; Beccaria was only twenty-five when he wrote *Of Crimes and Punishments*, which was first published in 1764. Jeremy Bentham was admitted to the bar at age twenty-one in 1769 and allegedly began to read Beccaria at about that time. See Ross Harrison, *Introduction to JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT* x (J.H. Burns & H.L.A. Hart eds., Cambridge Univ. Press 1988) (1776); see also *Principal events in Bentham’s life*, in BENTHAM, *A FRAGMENT*, *supra*, at xxiv.

28. See BECCARIA, *supra* note 27, at 77.

29. Harrison, *supra* note 27, at vi, xiv.

30. BECCARIA, *supra* note 27, at 74.

Beccaria rejects retributive theories of punishment and argues for a system of publicly engineered penalties that would deter crimes and generate greater utility:

[T]he purpose of punishments is neither to torture and afflict a sentient creature nor undo a crime already done. . . . The aim, then, of punishment can only be to prevent the criminal committing new crimes against his countrymen, and to keep others from doing likewise. Punishments, therefore, and the method of inflicting them, should be chosen *in due proportion to the crime* so as to make the most efficacious and lasting impression on the minds of men, and the least painful impressions on the body of the criminal.³¹

Punishment must be severe enough to create a “lasting impression on the minds of men,” but not so severe that it becomes torture. In other words, Beccaria’s proportionality requirement can be conceptualized as two subsidiary requirements, each with a separate justification. The minimum punishment, or the floor, is determined by deterrence concerns. But the ceiling on punishment is an antitorture principle that is based on humanist concerns rather than calculations of torture’s efficacy as a deterrent.³²

Beccaria’s objections to cruelty, and thus his call for a ceiling on the sanction, stem from general principles of human dignity and individual freedom.³³ Put differently, utility maximization is not Beccaria’s only concern: “[T]hough a punishment may have a good

31. BECCARIA, *supra* note 27, at 49 (emphasis added); see also *id.* at 74 (“Therefore the obstacles to crimes should be stronger according to the degree in which those crimes are contrary to the public good, and the degree of incentives which causes them.”). But see Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 996 n.164 (2003) (“Cesare Beccaria is generally credited with the first rigorous exposition of proportionality as a theorem of retribution.”). Although Beccaria does not use the language of retribution, Judge Hoffman seems to assume that because Beccaria insists on guilt, he is necessarily a retributivist. After all, a typical complaint lodged against utilitarian theories of punishment is that in some circumstances, they would permit a state to punish an innocent person as a scapegoat. But guilt is not an exclusively retributive notion. There is a difference between the claim that the guilty must be punished and the claim that only the guilty can be punished. Retributivists typically make both claims, but many nonretributivists make the latter claim. See also *infra* Part III for a discussion of constitutional guilt.

32. Beccaria does argue at one point that torture is ineffective, BECCARIA, *supra* note 27, at 35–40, but he makes this claim to criticize the practice of investigative torture, not to denounce excessive sentences.

33. For Beccaria, human dignity, individual freedom, and utilitarianism are not mutually exclusive. He says that if he can demonstrate that the death penalty is “neither useful nor necessary,” he will “have won the cause of humanity.” *Id.* at 53. I emphasize his concerns for individual freedom and human dignity here only to show that his objections to excessive punishments are not strictly deterrence-based.

result, it is not on that account always just; to be just a punishment must be necessary”³⁴ *Of Crimes and Punishments* is filled with references to the cruelty of extant penal practices.³⁵ Cruelty is “useless,” but beyond its disutility, it provokes in Beccaria “horror and disgust.”³⁶ Beccaria remains aware of a truth often forgotten by those who view punishment as a moral and constructive activity: every act of punishment, justified or not, is an interference with individual freedom. “Everything beyond” what is necessary to deter “is superfluous, and therefore tyrannical.”³⁷ The ceiling on acceptable punishment is a restriction on excessive, tyrannical government power. In fact, Beccaria concludes his essay with the claim that it is (in part) proportionality that distinguishes punishment from violence: “In order that punishment should never be an act of violence committed by one or many against a private citizen, it is essential that it be . . . as little as the circumstances will allow, proportionate to the crime, and established by law.”³⁸

In contrast to these general political claims, some of Beccaria’s arguments for proportionality depend on his particular account of the purpose of punishment. For example, he argues that different crimes must be punished differently, or would-be offenders will have no incentive to limit themselves to the least harmful offenses. This particular demand for proportionality is based on specific penological assumptions: that punishment aims to deter, and that altering incentives will change the behavior of would-be wrongdoers. Thus, adumbrating yet another of Bentham’s themes, Beccaria argues that the death penalty is objectionable because it is too crude an instrument; it cannot be adjusted to fit the particular offense. No wise government should apply the same penalty to “the man who kills a

34. *Id.* at 62.

35. *See, e.g., id.* at 8 (“[V]ery few men have examined and set themselves against the cruelty of punishments and the irregularity of criminal procedure”); *id.* at 29 (“Among the evident yet time-honored abuses . . . must be counted the custom of leveling secret accusations.”); *id.* at 34 (“The torture of an accused man while the case against him is being prepared is a cruelty consecrated by long usage among the majority of nations”).

36. *Id.* at 49.

37. *Id.* at 50; *see also id.* at 119 (“In order that punishment should never be an act of violence . . . it is essential that it be . . . as little as circumstance will allow, proportionate to the crime, and established by law.”).

38. *Id.* at 119 (emphasis omitted).

pheasant, the man who murders another man, or the man who falsifies an important document”³⁹

This last argument for proportionality is a specifically *penological* argument in the sense that it is based on a claim about the purpose of punishment. Similarly, Beccaria’s argument for a floor or minimum is also a penological argument. But most of Beccaria’s arguments for a ceiling on the permissible sanctions for a given crime are *political* arguments that do not require acceptance of a deterrence theory of punishment.

On the implementation of his proportionality principle, Beccaria is somewhat vague.

Were geometry adaptable to the infinite and obscure combinations of the actions of men, doubtless there would be a corresponding scale of punishments which would descend from the [most severe] to the lightest But the wise legislator will be content to indicate the chief divisions on the scale without upsetting its order and inflicting punishments of the lowest degree for crimes of the first degree.⁴⁰

Adapting geometry to “the infinite and obscure combinations of the actions of men” is, of course, Bentham’s delight. With occasional nods to Beccaria, Bentham devises a sort of moral mathematics both for proportionality in punishment and for utilitarianism more generally. Pleasures and pains are the instruments with which the legislator must work, and these instruments can be measured according to four primary qualities: intensity, duration, certainty (or uncertainty), and propinquity (or remoteness).⁴¹ It is unnecessary to address here Bentham’s lengthy instructions on how to use these

39. *Id.* at 74. Beccaria frequently acknowledges his debt to Montesquieu, *see, e.g., id.* at 9, and on this point Montesquieu’s influence seems particularly clear.

It is an essential point that there should be a certain proportion in punishments, because it is essential that a great crime should be avoided rather than a smaller

. . . .

In China, those who add murder to robbery are cut in pieces: but not so the others; to this difference it is owing that though they rob in that country they never murder.

In Russia, where the punishment of robbery and murder is the same, they always murder.

BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 89–90 (Thomas Nugent trans., Hafner Publ’g 1962) (1748).

40. BECCARIA, *supra* note 27, at 75–76.

41. JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 29 (Prometheus Books 1988) (1781).

qualities (as well as two subsidiary qualities, fecundity and purity⁴²) to conduct a utilitarian analysis of any human act. Instead, consider Bentham's rules for allocating the pain of punishment to individual offenses. Bentham is even more explicit than Beccaria in his description of proportionality as a number of separate requirements, some mandating a minimum punishment, others determining a maximum punishment.

The first rule of proportionality (for which Bentham cites Beccaria) requires that "[t]he value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence."⁴³ Bentham explains further that when assessing proportionality, it is necessary to consider the "value" of punishment rather than its "quantity": "For the word *quantity* will not properly include the circumstances either of certainty or proximity . . ."⁴⁴ And the quantity of punishment is itself composed of two separate factors: intensity and duration.⁴⁵

Bentham identifies several other rules: greater "mischiefs" should incur greater penalties; punishments should be incrementally increased to give would-be mischief doers an incentive to do as little mischief as possible; punishment ought never to be "more than what is necessary" to deter in accordance with the rules previously specified; and punishments for similar crimes should be roughly similar, taking into account the particular circumstances of the individual offender.⁴⁶ Most of these rules, Bentham recognizes, "mark out the limits . . . *below* which a punishment ought not to be *diminished*."⁴⁷ Only the rule that punishments ought not to exceed "what is necessary" specifies "the limits on the side of increase."⁴⁸ Or, to use the terminology I invoked earlier, there are reasons for a

42. *Id.* at 30–32.

43. *Id.* at 179.

44. *Id.* at 183.

45. *Id.* at 187. These various elements of the *value* of punishment suggest a weakness in any proportionality analysis that looks only at the length of a prison term—and not at the prison conditions and other variables that can affect the severity of a particular individual's punishment.

46. *Id.* at 182. Different individuals will experience similar penalties as different degrees of hardship, Bentham argues. "The same *nominal* punishment is not, for different individuals, the same *real* punishment." JEREMY BENTHAM, PRINCIPLES OF PENAL LAW (1771), *reprinted in* 1 THE WORKS OF JEREMY BENTHAM 401 (John Bowring ed., 1843) [hereinafter BENTHAM, PRINCIPLES OF PENAL LAW].

47. BENTHAM, *supra* note 41, at 182.

48. *Id.*

punishment floor, and there are (possibly different) reasons for a ceiling.⁴⁹

As with Beccaria, Bentham's arguments for minimum punishment are linked to the specific purpose of punishment (deterrence), but his insistence on a maximum permissible punishment is often based on a broader political claim about pain as disutility. "Punishment, whatever shape it may assume, is an evil."⁵⁰ Error on the minimum side "is least likely to occur," but overly severe punishment "is that to which legislators and men in general are naturally inclined."⁵¹ The maximum limit on punishment, a rule to be enforced in most cases by judges in review of legislatures,⁵² is the proportionality rule for which "we should take the most precautions."⁵³

Proportionality is thus well-established within deterrence theories of punishment. But two other oft-cited utilitarian purposes of punishment, incapacitation and rehabilitation, seem to lack any internal proportionality principle.⁵⁴ In fact, the American Law Institute's recent Sentencing Report blames the separate pursuits of incapacitation and rehabilitation for disproportionately severe criminal sentences imposed in the United States today.⁵⁵ If sentencing policymakers invoked utilitarian principles consistently, however, the same political arguments for an upper limit on punishment advanced by Beccaria and Bentham would apply to a penal system that seeks to incapacitate or rehabilitate offenders.

49. See BENTHAM, *PRINCIPLES OF PENAL LAW*, *supra* note 46, at 399 ("Punishments may be too small or too great; and there are reasons for not making them too small, as well as for not making them too great.").

50. *Id.* at 390.

51. *Id.* at 401. Bentham here suggests a possible response to those who would resist proportionality review on procedural justice grounds—those who argue that criminal laws produced by majoritarian political procedures must not be second-guessed by activist judges. Criminal sentencing may be an area in which democratic processes are likely to produce unjust results. See *infra* Part III.

52. BENTHAM, *supra* note 41, at 182.

53. BENTHAM, *PRINCIPLES OF PENAL LAW*, *supra* note 46, at 401.

54. Rehabilitation and incapacitation are most frequently justified in consequentialist, utilitarian terms: it serves the greater good to rehabilitate or incapacitate offenders. *But see* Franklin E. Zimring, *Principles of Criminal Sentencing, Plain and Fancy*, 82 NW. U. L. REV. 73, 75 (1987) (suggesting that in some contexts, such as juvenile justice, rehabilitation may be a moral obligation rather than simply a utilitarian aim).

55. See MPC SENTENCING REPORT, *supra* note 9, at 35 ("[I]t is difficult to place a ceiling upon the goal [of] general incapacitation in the absence of a limiting principle derived from retributive theory . . .").

Incapacitation is simply a way to prevent future crimes—like specific deterrence, it is targeted at the individual offender, but unlike a deterrence strategy, it tries to make crimes physically impossible rather than consequentially unattractive.⁵⁶ To the extent that contemporary criminologists, political leaders, or legal scholars advocate punishment for the sake of incapacitation, they do so subject to the limitations imposed by other political values, including other utilitarian values. The surest form of incapacitation is death, and the surest way to incapacitate every convicted offender would be to impose capital punishment for all crimes. Almost no one advocates such an approach, for incapacitation is hardly society's only consideration.⁵⁷ Even for strict utilitarians, factors such as the high social costs of capital punishment and mass incarceration necessitate limits to the pursuit of incapacitation. And of course liberal utilitarians—those who would pursue general utilitarian aims only insofar as they are consistent with categorical liberal principles—would also insist on proportionality as an external limitation on the power to incapacitate.

Rehabilitation, to the extent that it is still a viable penal theory,⁵⁸ is also limited by broader political concerns that would impose a limit on the maximum punishment. Contemporary proponents of rehabilitative punishments insist that proportionality principles should curtail the extent to which the state can restrict liberty in its efforts to rehabilitate.⁵⁹ Additionally, many who advocate

56. See, e.g., BENTHAM, *PRINCIPLES OF PENAL LAW*, *supra* note 46, at 367 (noting that incapacitation through “physical restraint” is but one method of preventing “the recurrence of similar offences”).

57. In very recent history, the Bush administration asserted an all-but-absolute right to incapacitate in certain contexts. The administration argued that it could detain suspected terrorists and “enemy combatants” indefinitely in the interests of public safety. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 519–21 (2004) (rejecting the government’s argument that national security interests precluded judicial review of detention of alleged “enemy combatants”). This detention is not quite equivalent to penal incapacitation, for many detainees, including Hamdi at the time that he brought his petition for a writ of habeas corpus, had not been charged, much less convicted, of criminal offenses. *Id.* at 510–11. Beyond the context of terrorism, many recent laws seek to increase the power of the state to incapacitate certain classes of offenders. For a survey and critique of these laws, see generally Paul H. Robinson, *Punishing Dangerousness: Cloaking Preventive Detention as Criminal Justice*, 114 HARV. L. REV. 1429 (2001).

58. See, e.g., Francis A. Allen, *The Decline of the Rehabilitative Ideal*, in *PRINCIPLED SENTENCING* 23, 22–30 (Andrew von Hirsch & Andrew Ashworth eds., Ne. Univ. Press 1992) (addressing the scope and causes of the “modern decline of penal rehabilitationism”).

59. See, e.g., Edward Rubin, *Just Say No to Retribution*, 7 BUFF. CRIM. L. REV. 17, 50 (2003) (arguing that proportionality “serves to limit the punishments prescribed by utilitarian or instrumental theories of punishment, such as deterrence, incapacitation, and rehabilitation”).

rehabilitative punishments emphasize that other penological principles—usually, retributive requirements of desert—must first be satisfied before the state can exercise its penal power at all.⁶⁰

B. *Just Deserts, Lex Talionis, and Other Retributive Ideals*

Though utilitarian theorists give the most comprehensive accounts of proportionality by far—my description of Bentham's views of proportionality is a very brief summary of a very long discussion—it is retributive theorists who are most commonly associated with the principle of proportional punishments. Arguments for proportionality in retributive theories are more often specifically penological arguments than are the utilitarian arguments for proportionality. Nevertheless, most retributive accounts of punishment are parts of larger political theories, and as such, they contain further political arguments for limitations on punishment that stand independent of the penal purpose of retribution.

Retributive theories typically portray punishment as the wrongdoer's "just deserts." A principle of just deserts can, but need not, demand proportionality between *offense* and sanction; what the principle really demands is a correspondence between *desert* and sanction.⁶¹ A criminal sentence should be more or less severe in accordance with the wrongdoer's culpability. Notably, the general rule of just deserts does not itself prescribe how "desert" is to be determined. Desert is an inescapably moral issue, and the determination of an offender's just deserts will depend on a number of moral judgments. One may judge desert by assessing the moral gravity of the particular offense or may focus upon the individual characteristics of the particular offender. Thus, just deserts might be compatible with individualized sentencing: one might say that defendants who were provoked, or who suffer mental impairments, or who repent their crimes and cooperate with authorities thereafter, deserve less severe punishments.

60. See, e.g., David O. Brink, *Immaturity, Normative Competence, and Juvenile Transfer: How (Not) to Punish Minors for Major Crimes*, 82 TEX. L. REV. 1555, 1568 (2004) ("The retributive formula . . . determines the length or severity of punishment, [but] it does not otherwise tell us how to punish. . . . Provided that we punish all and only the guilty and that our punishments are proportional to their desert, we should punish in ways designed to rehabilitate the offender and deter crime.").

61. See, e.g., Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195, 1203 (2000) ("The question is only whether, roughly speaking, the punishment imposed is accurate with respect to the person's desert.").

A second retributive principle that is often associated with proportionality is *lex talionis*, or the law as retaliation.⁶² In common parlance, *lex talionis* is called the principle of “an eye for an eye.”⁶³ Although *lex talionis* can be interpreted to require an element of proportionality, it is not first and foremost a principle of proportionality.⁶⁴ As typically invoked, *lex talionis* is rather a bundle of claims about the nature of crime, the proper method of punishment, and the effect that punishment should have on the offender. Kant, one of the most prominent advocates of *lex talionis*, explains the principle as one of reciprocity and equality.

But what kind and what degree of punishment does public justice take as its principle and norm? None other than the principle of equality in the movement of the pointer on the scales of justice Thus any undeserved evil which you do to someone else among the people is an evil done to yourself. If you slander him, you slander yourself; if you rob him, you rob yourself; if you strike him, you strike yourself; and if you kill him, you kill yourself. But it should be understood that only the *law of retribution (ius talionis)* can determine exactly what quality and quantity of punishment is required, and it must do so in court, not within your private judgment.⁶⁵

Of course, Kant does not mean that when you rob someone else, you literally rob yourself—were that true, state-imposed punishment would be unnecessary, for each criminal act would automatically entail its own penalty. Rather, Kant means to highlight what is objectionable about crime: it fails to adhere to the dictate of the categorical imperative that one always act in such a way that the maxim guiding one's action could be universalized into a law for everyone.⁶⁶ Punishment is essentially “an exercise in universalization”—it demonstrates to the offender “what it would be

62. *Lex talionis* is compatible with nonretributive theories of punishment as well. See *infra* note 68.

63. “And if any mischief follow, then thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe.” *Exodus* 21:23–25 (King James).

64. See Jeremy Waldron, *Lex Talionis*, 34 ARIZ. L. REV. 25, 47 n.46 (1992) (“Proportionality may or may not be a byproduct of the application of *lex talionis*.”).

65. IMMANUEL KANT, *THE METAPHYSICS OF MORALS, reprinted in KANT: POLITICAL WRITINGS* 131, 155 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. 1991).

66. See IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 30 (James W. Ellington trans., Hackett Publ'g 1981) (1785) (“Act only according to that maxim whereby you can at the same time will that it should become a universal law.”).

like for him if everyone” acted according to the same maxim that permitted his crime.⁶⁷

A key aspect of *lex talionis* as presented by Kant is the similarity in method between punishment and crime. In other words, “an eye for an eye, a tooth for a tooth” is a claim that punishments must match crimes not only in magnitude, but also in method—“burning for burning.”⁶⁸ Because the method of punishment shares key features with the crime, the punishment requires the punished to live by his own maxim, to experience life under the law that he prescribed for himself when he committed his offense. To the extent that proportionality between crime and punishment is an incidental requirement of Kant’s *lex talionis*, it is a *penological* proportionality requirement and not a *political* one—proportionality is intrinsically linked to the purpose of punishment. But it is not clear whether this specifically penological proportionality requirement is still politically viable. The insistence that punishments borrow from the methods of the corresponding offenses has been subjected to considerable ridicule.⁶⁹ In any event, this strict version of *lex talionis* is probably not

67. Waldron, *supra* note 64, at 29.

68. See *supra* note 63. Note that *lex talionis* is compatible with utilitarian theories of punishment. For example, Bentham suggest that “offenses against honor” might require punishments in kind: “For an insult offered to a woman, the man might be muffled up in the headdress of a woman, and the like insult might be inflicted on him by the hand of a woman.” BENTHAM, *PRINCIPLES OF PENAL LAW*, *supra* note 46, at 381. Such methods are designed “to transfer to the insolent offender the contempt which he wished to fix upon the innocent.” *Id.*

69. The ridicule is often initiated with the question whether the state should impose rape as punishment for rapists. *Lex talionis* can be interpreted in such a way as to exclude rape for rapists, but only at considerable cost to the integrity of the principle. Professor Jeremy Waldron has argued that *lex talionis* requires only that “the act of punishment be the same as the act that constituted the offense.” Waldron, *supra* note 64, at 32. This requirement can be satisfied, Waldron argues, as long as the punishment shares the “wrong-making characteristics” of the crime. *Id.* at 37. The wrong-making characteristics of the crime can be defined at a fairly abstract level. So, for example, stealing is wrong because it renders property rights insecure and produces economic uncertainty. *Lex talionis* could be satisfied, Waldron suggests, by giving a thief “a taste of economic uncertainty in other ways: for example, sentencing him to community service on days determined arbitrarily, unpredictably and at the last minute by a probation officer.” *Id.* at 44. This version of *lex talionis* is certainly consistent with Kant’s account. Kant finds *lex talionis* satisfied if “a high-ranking official convicted of violence” were sentenced to make an apology and endure “painful solitary confinement.” KANT, *supra* note 65, at 156. “[A]part from the resultant discomfort, the perpetrator’s vanity would also be painfully affected, and this humiliation would provide an appropriate repayment of like with like.” *Id.* Notwithstanding this broad interpretation of *lex talionis*, it seems to me that the principle is of little use given the vast range of criminalized activities and the relative uniformity of criminal sanctions. One must generalize “wrong-making” to an almost meaningless abstraction in order to find incarceration, fines, and probation sufficient to capture the “wrong-making

possible in a penal system that relies almost exclusively on a few standard sanctions: fines, community supervision, and imprisonment.

Does Kant also offer a political argument for proportionality? He certainly articulates arguments for limits on punishment that are based on broad principles of justice unrelated to penal purpose. Wrongdoers must be punished as much as they deserve, but no more than they deserve.⁷⁰ In other words, the fact that an individual has violated the categorical imperative and committed a crime does not give the sovereign *absolute* power over that individual. Even just punishment is an infliction of pain, and just punishment is just only insofar as it corresponds to the moral desert of the punished. Anything beyond that is a violation of the individual's "inherent personality" that fails to treat him as an end in himself as required by the categorical imperative.⁷¹

Other retributivists have developed similar arguments, explaining that desert serves as a "limiting principle"⁷² or as a "side constraint."⁷³ One could play with the word "just" in "just deserts"—although the phrase is typically used to mean "the deserts that are in

characteristics" of such diverse crimes as drug possession, financial fraud, physical assault, lying to federal agents, production of child pornography, and so on.

70. See KANT, *supra* note 65, at 154–55:

[W]hat kind and what degree of punishment does public justice take as its principle and norm? None other than the principle of equality in the movement of the pointer on the scales of justice . . . it should be understood that only the *law of retribution (ius talionis)* can determine exactly what quality and quantity of punishment is required

71. *Id.* at 155 ("For a human being can never be manipulated just as a means of realising someone else's intentions and is not to be confused with the objects of the law of kind. He is protected against this by his inherent personality . . ."); see also Don E. Scheid, *Kant's Retributivism*, 93 *ETHICS* 262, 272 (1983) (noting that for Kant, the purposes of punishment must "be pursued in a morally acceptable way, that is, in a way which gives full moral respect to the persons to whom the penal system is applied").

72. Norval Morris, *Desert as a Limiting Principle, in* PRINCIPLED SENTENCING, *supra* note 58, at 201, 201. For Morris, desert determines both upper limits on punishment, NORVAL MORRIS, *THE FUTURE OF IMPRISONMENT* 73 (1974), and, for especially serious offenses, lower limits, *id.* at 74. The American Law Institute has proposed a codification of Morris's "limiting retributivism" into the sentencing provisions of the Model Penal Code. See MPC SENTENCING REPORT, *supra* note 9, at 41 ("[B]road support has been voiced for the theory of limiting retributivism as the philosophical cornerstone of sentencing decisions under the revised Model Penal Code.").

73. See, e.g., Lee, *supra* note 12, at 704 ("Retributivism under the Eighth Amendment . . . serves as a side constraint on the socially desirable practice of punishment."). "Side constraints" is Robert Nozick's term for absolute or near-absolute individual rights that constrain the actions of other individuals and of states. See ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 28–31 (1974) (noting that to understand rights as side constraints means that one cannot violate those rights in pursuit of other goals).

accordance with justice,” it might also mean “*only* what is deserved.” Punishment may extend as far as desert, but no farther. Importantly, these arguments against punishments that exceed desert are arguments about human dignity and individual rights, not arguments about penal purpose. It is desert that justifies punishment at all, according to these authors, but desert can justify only so much.

Some contemporary accounts of retributivism focus on notions of equality as much as (or more than) they address desert. In one well-known account of egalitarian retributivism, Herbert Morris posited that wrongdoers exempt themselves from the burdens of self-restraint imposed by the criminal law.⁷⁴ Punishment must then be imposed to restore the equal distribution of the law’s burdens. Proportionality is intrinsic to such egalitarian retributivism: since punishment restores a just distribution, the scope of punishment must necessarily correspond to the scope of the inequality of burdens and benefits created by the offending act.⁷⁵ Egalitarian retributivism could be said to contain both a specifically penological proportionality requirement—one intrinsic to the task of restoring equality—and a broader political requirement that punishments, qua deprivations, be no more severe than necessary to achieve the goal of restored equality.⁷⁶

74. Herbert Morris, *Persons and Punishment*, reprinted in SENTENCING, *supra* note 22, at 95 (“[I]t is just to punish those who have violated the rules and caused the unfair distribution of benefits and burdens. A person who violates the rules has something others have—the benefits of the system—but by renouncing what others have assumed, the burdens of self-restraint, he has acquired an unfair advantage.”). See also WOJCIECH SADURSKI, GIVING DESERT ITS DUE: SOCIAL JUSTICE AND LEGAL THEORY 225–227 (1985) (explaining that punishment is “a method of restoring an overall balance of benefits and burdens”).

75. Sadurski suggests that we view retributive justice as “the proportional relations between inputs and outputs”—the inputs are crimes, the outputs punishments. SADURSKI, *supra* note 74, at 221; see also *id.* at 229 (“[C]riminal law reflects the hierarchy of protected values: the more precious the value, the bigger the benefit of non-self-restraint acquired by the criminal. The intuitively just principle that more serious crimes should be punished more heavily is not, therefore, violated by the proposition about punishment as a restoration of the balance of benefits and burdens.”).

76. See Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 SETON HALL L. REV. 288, 296 (1993) (“[T]rue retributivism is, at its core, a deeply egalitarian theory of punishment.”). Muller addresses proportionality in passing and, like some other commentators, see *supra* note 22, seems to assume that it is a concept specific to retributive theories. See Muller, *supra*, at 297 (“[T]he idea of proportionality between the seriousness of the offense and the amount of punishment is central to retributivism. . .”); see also *id.* at 340 (“The retributivist [in contrast to the utilitarian] would insist that the punishment bear some sense of proportion to the . . . nature of the criminal’s wrongdoing.”). Nevertheless, Muller’s arguments against excessive sentences, and for mercy in some instances, are explicitly based on the “equal inherent worth” of the offender as a human being. See *id.* at 296. This rationale for a limitation on

Thus, to many retributivists, moral desert provides both a floor and a ceiling for punishment. To understand why punishment below the floor is unacceptable, one must look to the argument for punishment: society needs to make criminals experience the wrongness of their own acts by inflicting on them harm similar in kind and degree. But to understand why punishment above the ceiling is unacceptable, one must look beyond the theory of punishment, to broader arguments such as the Kantian instruction to respect persons as ends in themselves.⁷⁷

C. Political Proportionality

Proportional punishments are required in a wide variety of penological perspectives, including the mainstream penological theories typically advanced in American legal and political discourse.⁷⁸ But even if a state were to abandon retribution,

sentence severity is not necessarily retributive; presumably, one need not be a retributivist to believe that all human beings have equal inherent worth.

77. I do not mean to suggest that every retributive theory of punishment can be interpreted to include a political argument for proportionality. For example, Hegel certainly demands proportionality in punishment, but his argument seems dependent on his particular account of the purpose of punishment—and on his unusual claims about the metaphysical effects of crime. Hegel argues that crime, or wrong, has a continuing presence (“a *positive external existence*”) even after the moment the wrong is committed. G. W. F. HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* 123, § 97 (H. B. Nisbet trans., Cambridge University Press 1991) (italics in Nisbet’s translation). Punishment serves to negate the crime and restore the world to its wronged state. *See id.* § 97, Addition (“The criminal act . . . is itself negative, so that the punishment is merely the negation of the negation.”) Hegel’s argument requires proportionality but not the strong form of *lex talionis*—the scope of the punishment must correspond to the scope of the injury, but the method of punishment need not correspond to the method of crime. Hegel, like other retributive theorists, assumes commensurability between diverse injuries, but Hegel is particularly explicit about this commensurability requirement. He assumes that we can measure the scope of wrong generated by, say, a physical assault, and choose a corresponding punishment that inflicts injury of the same scope. “The cancellation [*Aufheben*] of crime is *retribution* in so far as the latter, by its concept, is an infringement of an infringement, and in so far as crime, by its existence [*Dasein*], has a determinate qualitative and quantitative magnitude, so that its negation, as existent, also has a determinant magnitude. But this identity . . . is not an *equality* in the specific character of the infringement, but in its character *in itself*—i.e., in terms of its *value*.” *Id.* at 127, § 101; *see generally id.* at 121–32, §§ 95–104.

78. Restorative justice, a penological paradigm not previously discussed in this Article, arguably does not contain a proportionality requirement. Some commentators have suggested that restorative justice actively resists at least some versions of proportionality in criminal sentencing. *See, e.g.,* Sara Sun Beale, *Still Tough on Crime? Prospects for Restorative Justice in the United States*, 2003 UTAH L. REV. 413, 433 (“Almost all the sentencing guidelines reflected core principles that are in conflict with the restorative justice movement, namely, proportionality”); John Braithwaite, *A Future Where Punishment is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743 (1999) (noting that the restorative justice model

deterrence, rehabilitation, and incapacitation in favor of some other penal purpose, basic principles of liberal democracy would still impose a proportionality requirement as an upper limit on criminal sentences. This political proportionality is a consequence not of penological theory itself, but rather of *the limits* of penological theory. No penological theory does (or could) grant a liberal government absolute power over an individual who breaks the law.⁷⁹ Principles that may justify punishment are not the only principles that should inform choices about penal practices. Alongside retribution, utility maximization, and other goals that may lead to the imposition of punishment, basic liberal principles of liberty and equality demand restrictions on the manner and degree of punishments. A proportionality requirement is thus a consequence of competing political principles, and such a requirement is essential to any liberal account of punishment. In this Section, I explore proportionality as a component of political theories of state power.

Robert Nozick claims that the fundamental question of political philosophy is “whether there should be any state at all.”⁸⁰ The very identification of this question as fundamental indicates an already-existing ideological commitment: a suspicion of power, a default assumption that states need to be justified. (Why is the fundamental question not “whether there should be any liberty at all”?) But this particular ideological commitment is very widely held—most people do *not* start by wondering whether there should be any such thing as liberty. Liberals are not alone in thinking that coercive state power needs to be justified. Those who spend (waste?) time pondering such matters tend to hold the view that state power is at least potentially an interference with individual liberty. As such, a coercive state must be scrutinized, argued for, and defended rather than accepted automatically.

To the anarchist, the initial suspicion of power cannot be eradicated and no state can be justified. To the totalitarian, not only power but absolute power is justifiable. Between anarchy and totalitarianism lies limited government. The kind of proportionality

“involves rejection of a justice that balances the hurt of the crime with proportionately hurtful punishment”).

79. See *supra* note 57. It is important to recognize that even the death penalty does not give a liberal state absolute power over the condemned. Liberal justifications for capital punishment insist that the condemned retains various rights up to and beyond execution. For example, death row inmates may not be tortured or abused, and their corpses must be treated with dignity.

80. NOZICK, *supra* note 73, at 4.

requirement that underwrites the American political system and its legal institutions, including the law of sentencing, is a consequence of two ideological commitments: the view that state power always needs to be justified, and the commitment to limited government rather than to no state or a total state.

To elaborate, it is relatively uncontroversial that (1) state power must be justified; (2) some (limited) power *can* be justified; and (3) absolute power is never justified. From these claims flows a proportionality principle that is broadly political, not specifically penological. The state is a set of institutions that exercise a wide range of powers. Each particular power must be justified, and the justification must apply to each exercise of the power. For example, an abstract justification of the power to raise armies does not necessarily justify full-time and indefinite compulsory military servitude for all adult citizens. Instead, the principle of political proportionality holds that the scope of state power should be proportional to the occasions for the power.

The adjective *political* deserves some specification here, for the word is often used by lawyers to mean “majoritarian.” Thus the judiciary is often contrasted to the “political branches,” and legal questions are distinguished from political ones. This use of the term makes “political proportionality” seem ill-suited to serve as the basis of judicial review of criminal sentences. I use the term “political” as it is used by “political” scientists—and indeed, as it is used by almost everyone who is not a lawyer. *Political* means simply, of a polity. Thus I mean to contrast political proportionality—a requirement of a political system—with penological proportionality—a requirement of a penal theory.

Political here also serves to emphasize that this kind of proportionality is determined by the members of a particular polity; it is not dictated by some transcendent authority. To borrow from John Rawls, this proportionality requirement is “political and not metaphysical.”⁸¹ Again, the fact that a proportionality standard is a human artifact does not mean that it must be an exclusively majoritarian project, or that to involve the judiciary is antidemocratic. When Rawls says that justice is political and not metaphysical, he

81. JOHN RAWLS, *POLITICAL LIBERALISM* 97 (1993). Rawls argues that a political account of justice is necessarily distinct from a “comprehensive moral doctrine,” *id.* at 90–91, and that justice must be political rather than metaphysical because citizens in a diverse, pluralistic society will never agree on any single transcendent moral authority, *id.* at 97.

does not mean that judges have nothing to say about justice. Here is further reason to resist the use of the term *political* to exclude the judiciary: it tends to obscure the importance of separation of powers and the judiciary's role in providing checks on the majoritarian branches.

The relation between proportionality and separation of powers should be underscored. It is fundamental to theories of limited government that government bodies cannot be trusted to impose and observe limitations on their own powers. Accordingly, limitations on power must come from outside the body that exercises power—from the people and from other government institutions. So proportionality as a limit on (for example) legislative power cannot be left to legislative determination. The phrase “separation of powers” is used sloppily today, as a shorthand assertion that the judiciary should just leave the legislature alone, or that Congress should leave the President to do as he pleases.⁸² But as the political scientist Richard Neustadt observed, our constitutional design creates a system of “separated institutions sharing powers.”⁸³ Separation of powers does not mean that each branch of government can exercise its specific powers without limitation, as though individual liberty were likely to be protected by fierce competition among three tyrants. To the contrary, separation of powers means that power itself is separated, divided and distributed across different political institutions and across the branches. The power to punish is one governmental power for which such fragmentation is particularly important.

The proportionality relationship identified here is between *power* (such as the power to punish) and the source of the power. In this regard, it differs from penological proportionality, which focuses on the relationship between *the sanction itself* and some determinant (the offender's desert, the harm of the crime). In considering whether

82. This spin on “separation of powers” was invoked to explain Harriet Miers's withdrawal from consideration for the Supreme Court. After members of Congress demanded that the White House produce documents related to Miers's service there, Miers explained that “[p]rotection of the prerogatives of the Executive Branch and continued pursuit of my nomination are in tension.” In response, President Bush claimed that “Harriet Miers's decision [to withdraw from consideration] demonstrates her deep respect for this essential aspect of the constitutional separation of powers...” See Timothy Williams, *Bush's Pick for Court Withdraws Her Name; Miers, Under Attack from Both Parties, Calls Process 'Burden,'* INT. HERALD TRIBUNE, October 28, 2005, at 1.

83. RICHARD NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* 29 (1960) (emphasis omitted).

political proportionality can serve as the basis of a practical constitutional standard, it will be important to remember that it is the outer scope of *the power to punish* that courts must determine, not the precise severity of a particular offender's punishment.

For one example of proportionality as a limitation on government power, consider John Locke—by many accounts, the venerable godfather of American liberal tradition⁸⁴—on punishment. According to Locke, the power to punish arises as soon as, but no sooner than, the law of nature is violated. The power to punish is thus always limited in scope by the scope of the transgression.

[I]n the State of Nature, one Man comes by A Power over another; *but yet no Absolute or Arbitrary Power*, to use a Criminal . . . according to the passionate heats, or boundless extravagancy of his own Will, but only to retribute to him, so far as calm reason and conscience dictates, *what is proportionate to his Transgression*, which is so much as may serve for Reparation and Restraint.⁸⁵

Note that Locke no sooner announces the power to punish than he emphasizes that it is not “absolute or arbitrary.” Note also that Locke uses the terms retribute, reparation, and restraint to justify punishment, and in fact elsewhere adopts additional justifications, including deterrence.⁸⁶ Locke's proportionality requirement is not dependent upon a single penological purpose, or even on his hybrid theory of penal purpose, but upon the natural liberty and equality that provide the background against which the right to punish sometimes arises.

In the passage cited above, Locke's justification for punishment and his limitations on punishment are matters of natural right; they do not depend upon the existence of a social contract or civil society. The social contract ultimately transforms the natural authority to

84. See, e.g., LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 5–6 (1963) (arguing that American democracy “begins with Locke” and “stays with Locke, by virtue of an absolute and irrational attachment it develops for him”); see also *id.* at 8 (describing the American South as “an alien child in a liberal family, tortured and confused, driven to a fantasy life which, instead of disproving the power of Locke in America, portrays more poignantly than anything else the tyranny he has had”).

85. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 272, § 8 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (I have added emphasis, and, for the sake of clarity, I have removed Locke's original italics). References to Locke herein include section numbers after the page number.

86. See, e.g., *id.* at 274–75, § 12 (“Each Transgression may be punished to that degree, and with so much Severity as will suffice to make it an ill bargain to the Offender, give him cause to repent, and terrifie others from doing the like.”).

punish into the state's *political* authority to punish, and it transforms the natural limitations on punishment into *political* limitations that restrict the state's power to punish. In other words, Locke's proportionality begins as a matter of natural law. Of course, liberalism as practiced in contemporary America is not necessarily based on a shared theory of natural law. Rawls's "political liberalism" is at least as good an explanation of why American society adopts the views of individual rights and legitimate government that it does.⁸⁷ But for the purposes of my argument, it does not matter whether American society is more Lockean or more Rawlsian. The key point is that once one has accepted basic principles of individual freedom and equality—for whatever philosophical or pragmatic reason—those principles create a presumption against the exercise of force that any justification for punishment must overcome. The principle of proportionality is a requirement that the power to punish reaches only as far as the injury to be addressed.⁸⁸

The political nature of the proportionality requirement may be largely overlooked in legal scholarship because punishment tends to be theorized as an independent practice, divorced from important background assumptions about liberty, utility, and individual rights.⁸⁹ It is important to resist this tendency, for any theory of punishment needs to be placed in the context of a larger political theory. Punishment is the quintessential example of state coercion. Punishment theory must not limit itself to the particular moral or economic interests that might be served by such coercion; it needs to

87. See generally RAWLS, *supra* note 81.

88. Cf. Francis A. Allen, *A Matter of Proportion*, 4 GREEN BAG 2d 343, 344 (2001) (noting that the principle of proportionality in punishment used to be "understood in much the same way as other limitations on governmental powers set forth in the bills of rights of American federal and state constitutions").

89. For example, Professor Jeffrie Murphy has explained that two very different accounts of punishment emerge from Kant's work depending upon whether one focuses strictly on the famous passages on punishment in Part I of *The Metaphysics of Morals* or instead collects Kant's observations about punishment across all of his writings. See Jeffrie G. Murphy, *Does Kant Have a Theory of Punishment?*, 87 COLUM. L. REV. 509, 518 (1987) ("Is the above account in fact what we find consistently defended and amplified in the text of the *Rechtslehre*? Hardly!"). When one considers all of Kant's writings other than Part I of *The Metaphysics of Morals*, it is clear that for Kant, "justified punishment is a deterrence system functioning to maintain a system of ordered liberty of action. To set any more morally ambitious goal for punishment would be to adopt an unacceptable theory of the role of the state and would represent an attempt to play God . . ." *Id.* at 517.

draw upon political theory more generally to explain how other political principles circumscribe the use of coercion.⁹⁰

I do not mean to suggest that all theorists of punishment have overlooked this point. In *The Aims of the Criminal Law*, Henry M. Hart emphasizes the larger political context in which punishment takes place. “A penal code that reflected only a single basic principle would be a very bad one. Social purposes can never be single or simple, or held unqualifiedly . . . and an effort to make them so can result only in the sacrifice of other values which also are important.”⁹¹ Hart argues that background conditions unrelated to penal purposes—such as individual rights—impose constraints on the way a state determines guilt and imposes punishments.

Or, in the words of the other Hart:

[I]n relation to any social institution, after stating what general aim or value its maintenance fosters we should enquire whether there are any and if so what principles limiting the unqualified pursuit of that aim or value. Just because the pursuit of any single social aim always has its restrictive qualifier, our main social institutions always possess a plurality of features which can only be understood as a compromise between partly discrepant principles.⁹²

In the same essay, H.L.A. Hart famously insisted that the “General Justifying Aim” of punishment was a separate question from questions about the appropriate distribution of punishment (who to punish, and how much).⁹³ A proportionality principle guides the distribution of punishment, and as Hart recognized, such a principle might be dictated by a retributive account of the general justifying

90. In Professor Murphy’s terms, it is important to distinguish between *moral* and *political* justifications for punishment. Even if one is certain that punishment is morally just, one still needs an argument for why “the pursuit of these [moral] goals is *part of the legitimate business of the state.*” *Id.* at 510; see also Guyora Binder, *Punishment Theory: Moral or Political?*, 5 *BUFF. CRIM. L. REV.* 321, 371 (2002) (“[T]here is reason to hope that debate about utility and autonomy in criminal lawmaking will become more productive once it is redefined as a political debate about institutions rather than a moral debate about the conduct of criminals and officials.”); Don E. Scheid, *Kant’s Retributivism*, 93 *ETHICS* 262, 265–271 (1983) (assessing whether Kant’s legal justification for punishment is consistent with his moral theories).

91. Hart, *supra* note 13, at 401.

92. H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 10 (1968).

93. See *id.* at 4, 8–13.

aim of punishment, but it might also be dictated by considerations entirely external to the general justifying aim.⁹⁴

In short, punishment does not take place in a vacuum and it should not be theorized in a vacuum. Consideration of the larger political context reveals the limits of penal theory—one sees that there are some exercises of force that no penal theory can justify. Political proportionality is a claim about the limits of penal theory in a liberal state. It is not a theory of punishment, but a theory of the relationship between state power and individual right. As described in Part III, individual criminal defendants should be able to invoke proportionality as a constitutional limitation on their sentences.

Before elaborating the details of this constitutional right of criminal defendants, it is worth examining the extent to which constitutional doctrine has *already* embraced proportionality as a principle of limited government. In a number of doctrinal areas beyond criminal sentences, the Supreme Court has used the concept of proportionality to limit state power when that power arises and is exercised in response to specified conduct. In contrast, the Court has been more reluctant to embrace proportionality in the context of criminal sentences. But even the criminal sentencing decisions that first developed the notion of proportionality are better understood as evaluations of the scope of the power to punish in light of individual rights—as decisions about political proportionality—than as vindications or rejections of particular penological theories.

94. “[I]t is perfectly consistent to assert *both* that the General Justifying Aim of the practice of punishment is its beneficial consequences *and* that the pursuit of this General Aim should be qualified or restricted out of deference to principles of Distribution which require that punishment should be only of an offender for an offense. Conversely it does not in the least follow from the admission of the latter principle of retribution in Distribution that the General Justifying Aim of punishment is Retribution though of course Retribution in General Aim entails retribution in Distribution.” *Id.* at 9. I would not follow Hart in calling a requirement that punishment be imposed only on the guilty a principle of “retribution in distribution.” A guilt requirement is justifiable on utilitarian grounds as well as not-necessarily-retributive liberal grounds (such as the principle of notice).

II. PROPORTIONALITY IN CONSTITUTIONAL DOCTRINE

A. *Beyond Punishment*

For the most part, the United States Constitution itself does not speak explicitly of “proportionality.”⁹⁵ But it establishes government powers and limits those powers. As courts interpret and apply the Constitution, they often rely on the concept of proportionality to assess the scope of government powers. To be sure, proportionality as a constitutional principle is not as frequently invoked in the United States as it is in some other constitutional democracies. For instance, courts in Germany and Canada use well-established proportionality tests as tools to limit state power.⁹⁶ But even if American courts invoke proportionality less often than do foreign courts, the concept—and sometimes the language—of proportionality appears from time to time in American constitutional decisions. In several constitutional contexts unrelated to criminal punishment, the extent of a state power is determined in part by the scope of the problem or conduct that gave rise to the specific power. A brief survey of these doctrinal areas demonstrates that a general proportionality requirement underlies the very concept of limited government and the application of that concept in American constitutional law.⁹⁷

95. The U.S. Constitution twice uses the term *proportion*: Article I, section 9, clause 4 provides that “No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.” U.S. CONST. art. I, § 2. Section 2 of the Fourteenth Amendment specifies the apportionment of representatives to states, and provides that when male citizens lose their right to vote for reasons other than “participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.” U.S. CONST. amend. XIV, § 2.

96. For a description of the proportionality principle under the German constitution, see David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 689 n.135 (2005) (“Germany is credited with the invention of proportionality review . . .”). Under the Canadian Charter of Rights and Freedoms, intrusions on individual rights may be upheld if the intrusions are “demonstrably justified in a free and democratic society.” Canadian Charter of Rights and Freedoms, Canada Act, 1982, ch. 11, §§ 1–4, sched. B (U.K.), as reprinted in R.S.C., No. 44, (Appendix 1985). Canadian courts apply the “*Oakes* test” to evaluate intrusions on individual rights; that test includes an inquiry into whether the means chosen by the government are proportional to its purpose. *Regina v. Oakes*, [1986] S.C.R. 103, 114. For a comparative constitutional law analysis of proportionality, see Vicki C. Jackson, *Ambivalent Resistance and Comparative Constitutionalism: Opening Up the Conversation on “Proportionality,” Rights and Federalism*, 1 U. PA. J. CONST. L. 583, 602–24 (1999).

97. For an overview of “proportionality” tests in several areas of constitutional law, see K.G. Jan Pillai, *Incongruent Disproportionality*, 29 HASTINGS CONST. L.Q. 645, 655–93 (2002). Professor Pillai examines proportionality standards in the contexts of the Fifth Amendment’s

Proportionality principles—sometimes explicit, sometimes implicit—underlie the familiar evaluative mechanisms with which courts adjudicate claims that a state actor has exceeded its power. When a court requires that a coercive or intrusive state action be “narrowly tailored” to serve a “compelling state interest,” it enforces the principle that state power must be proportional to the interest that allegedly justifies the power. Richard Frase has recently noted that “narrow tailoring” is a form of proportionality requirement.⁹⁸

But the notion that state power is limited by proportionality considerations extends beyond the rare circumstances in which courts will require “narrow tailoring.” In fact, proportionality is explicitly invoked in other contexts. For example, to decide whether “exactions” are permissible under the Fifth Amendment’s Takings Clause, the Supreme Court applies a “rough proportionality” analysis.⁹⁹ Exactions are required dedications of private property for public use as a condition of permission to develop the property. The government’s power to exact property from a private landowner must be proportional in scope to the effects of the proposed development. “No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”¹⁰⁰ Here, a government power (the power to condition permission to develop on the dedication of private property to public use) arises when private conduct results in or is likely to

Takings Clause, the Eighth Amendment’s Cruel and Unusual Punishments and Excessive Fines Clauses, and the Fourteenth Amendment’s Due Process Clause in an attempt to clarify the meaning of the “congruence and proportionality” standard announced in *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997).

98. See Frase, *supra* note 12, at 618. Frase argues that proportionality underlies an even broader array of constitutional rules, including not only the Eighth Amendment and the Due Process Clause but also Fourth and Fifth Amendment exclusionary rules, Fourth Amendment “reasonableness,” public forum rules under the First Amendment, and balancing under the Dormant Commerce Clause. See *id.* at 598–621.

99. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702–03 (1999); *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

100. *Dolan*, 512 U.S. at 391. The *Dolan* Court characterized its decision as a protection of individual rights against government power:

[S]imply denominating a governmental measure as a “business regulation” does not immunize it from constitutional challenge on the ground that it violates a provision of the Bill of Rights. . . . We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these . . . circumstances.

Id. at 392.

result in unwanted social consequences (as when a proposed development creates an impact on the surrounding area). The scope of the newly arisen power is limited by the scope of the condition that gave rise to the power.¹⁰¹

A particularly controversial proportionality requirement has been used to determine the scope of Congress's powers under Section Five of the Fourteenth Amendment. In *City of Boerne v. Flores*,¹⁰² the Court found the Religious Freedom Restoration Act to be an unconstitutional legislative attempt to alter the substantive rights protected by the Fourteenth Amendment.¹⁰³ Section Five of the Fourteenth Amendment gives Congress power "to enforce, by appropriate legislation, the provisions of this article." According to the Court, this enforcement power is remedial and preventive; legislation adopted under Section Five "must be judged with reference to the historical experience . . . it reflects."¹⁰⁴ That is, Section Five enforcement powers arise in conjunction with particular social or political problems (e.g., discriminatory conditions), and the scope of those powers is determined by the scope of the relevant problems. "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."¹⁰⁵

101. The *Del Monte Dunes* Court noted that, although "rough proportionality" is a test specific to the exactions context, "in a general sense concerns for proportionality animate the Takings Clause." 526 U.S. at 702. For the purposes of this Article, the more specific proportionality test used to evaluate exactions is the better illustration of political proportionality. The exactions test creates a link between private conduct (the conduct of the property owner) and government power. In the criminal context, there should be a similar link between the criminal conduct and the power to punish.

102. 521 U.S. 507 (1997).

103. *Id.* at 536. The Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb-2000bb-4 (1993), was Congress's response to *Employment Division v. Smith*, 494 U.S. 872 (1990), in which the Court held that facially neutral laws that happened to inhibit religious practices were not subject to heightened scrutiny. *Id.* at 878-79. The RFRA attempted to "overrule" *Smith*; it provided that in order to enforce facially neutral laws that substantially burdened religious exercise, a state or local government had to demonstrate that the law was the least restrictive means of serving a compelling government interest. 42 U.S.C. §§ 2000bb-2000bb-4.

104. *City of Boerne*, 521 U.S. at 525 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)).

105. *Id.* at 520. Similarly,

[w]hile preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved. The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.

Id. at 530 (citation omitted).

The congruence and proportionality standard of *City of Boerne* is a useful illustration of the Court's familiarity with proportionality as a means of restricting government power in accordance with specific injuries or problems that give rise to the power. Take, for example, the different results in two recent cases involving the Americans with Disabilities Act ("ADA"). In *Board of Trustees v. Garrett*,¹⁰⁶ the Court found that Congress had exceeded its Section Five powers by permitting suits against states for employment discrimination under Title I of the ADA.¹⁰⁷ Congress had in fact amassed substantial evidence of discrimination against disabled persons by states, but most of the evidence related to "the provision of public services and public accommodations," not to employment discrimination.¹⁰⁸ The Court found that the remedy created by Congress (abrogation of state sovereign immunity) was not proportional to the specific problem to be addressed (discrimination against the disabled by state employers).¹⁰⁹

In contrast, congressional abrogation of state sovereign immunity in Title II of the ADA was upheld in *Tennessee v. Lane*.¹¹⁰ Title II aims at exactly the kind of discrimination that the *Garrett* Court found Congress to have demonstrated most completely: discrimination against the disabled in the provision of public services and public accommodations.¹¹¹ Thus the *Lane* Court found the same remedy that had been at issue in *Garrett* (abrogation of state sovereign immunity) to be "congruent and proportional" when applied to a problem that the Court viewed as more substantial (failure to provide equal access to public services and accommodations).¹¹² Together, *Garrett* and *Lane* illustrate that the

106. 531 U.S. 356 (2001).

107. *Id.* at 374.

108. *Id.* at 371 n.7.

109. *Id.* at 374.

110. 541 U.S. 509 (2004). George Lane, a wheelchair-bound paraplegic and one of the two plaintiffs, had been called to answer criminal charges in a courtroom on the second floor of a Tennessee courthouse that had no elevator. On one occasion, Lane crawled up two flights of stairs to get to the courtroom, but on a second trip to the courthouse for a hearing, Lane refused to be carried up the stairs or to crawl again. He was arrested and jailed for failure to appear, and subsequently filed suit against the state under the ADA for failure to provide access to the courts. *Id.* at 513-14.

111. 42 U.S.C. §§ 12,131-12,165.

112. *Lane*, 541 U.S. at 531. Although the Court found Title II of the ADA to pass muster under the congruence and proportionality test, other doctrinal considerations may also have contributed to the different outcomes in *Garrett* and *Lane*. The *Lane* Court noted that Title II was not only a prohibition of "irrational disability discrimination" but also an effort "to enforce

Court is familiar with, and willing to employ, a broad proportionality principle that determines the scope of legislative power with reference to the specific problem that gives rise to the power.¹¹³

In drawing a comparison between a political proportionality requirement for criminal sentences and the “congruence and proportionality” test of *City of Boerne*, I do not mean to endorse that particular doctrinal development in the Court’s equal protection jurisprudence. The test was initially used to strike down several antidiscrimination laws one after the other¹¹⁴ and has been the target of considerable scholarly critique.¹¹⁵ In many ways, a proportionality requirement may be both easier to implement and more useful in the context of criminal sentences than in the context of federal antidiscrimination efforts. Here, the reference to *City of Boerne* and its progeny is merely a demonstration that nonpenological proportionality is already well-established in constitutional doctrine.

a variety of other basic constitutional guarantees, infringements of which are subject to more searching judicial review.” *Id.* at 522–23.

113. Justice Scalia joined the *City of Boerne* majority in its original statement of the congruence and proportionality test, and he subsequently voted with the majority in every case in which the *City of Boerne* standard was used to strike down antidiscrimination legislation. See *Board of Trustees v. Garrett*, 531 U.S. 356, 372–74 (2001) (applying *City of Boerne* and finding that Title I of the Americans with Disabilities Act was not a valid exercise of Congress’s Section Five enforcement powers); *United States v. Morrison*, 529 U.S. 598, 619–20 (2000) (applying *City of Boerne* and finding that the Violence Against Women Act was not a valid exercise of Congress’s Section Five enforcement powers); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 82–83 (2000) (applying *City of Boerne* to strike down the Age Discrimination in Employment Act as applied against state and local governments). When the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2000), was sustained under the congruence and proportionality test, Justice Scalia dissented. *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 741 (2003) (Scalia, J., dissenting). Justice Scalia dissented again in *Tennessee v. Lane*, and went so far as to reject the congruence and proportionality test outright: “1 yield to the lessons of experience. The ‘congruence and proportionality’ standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking.” 541 U.S. at 557–58 (Scalia, J., dissenting).

114. See *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (holding Title I of the Americans with Disabilities Act unconstitutional insofar as it subjected states to private suits in federal court); *United States v. Morrison*, 529 U.S. 598, 627 (2000) (striking down the Violence Against Women Act); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 92 (2000) (striking down the Age Discrimination in Employment Act’s abrogation of state sovereign immunity). But the last two statutes scrutinized under the test were found to be congruent and proportional responses to discrimination and thus legitimate exercises of Congressional power. See *Lane*, 541 U.S. 509, 533–34 (2004) (upholding Title II of the Americans with Disabilities Act); *Hibbs*, 538 U.S. 721, 740 (2003) (upholding the Family and Medical Leave Act of 1993).

115. For an overview of the effects of *City of Boerne* and its progeny on equal protection jurisprudence, see generally Robert C. Post & Reva B. Siegel, *Equal Protection By Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000).

It might be argued that it is the uniquely remedial nature of Section Five enforcement powers that makes proportionality an appropriate measure of those powers, and that proportionality should not be similarly used to constrict the legislative power to prescribe criminal sanctions. The *City of Boerne* Court emphasized that Congress has no power to define substantive rights under the Fourteenth Amendment, but courts have traditionally recognized an almost completely unfettered legislative power to define the substantive criminal law. To make this argument, however, is to assume one's conclusion, for what is at stake in the debate over proportionality is, in part, the scope of the power to define substantive criminal law. Legal academics sometimes speak of "substantive criminal law" as including only those laws defining activity as criminal, "criminal procedure" as those laws governing the apprehension of suspects and determination of guilt, and "the law of criminal sentencing" as a third category.¹¹⁶ But a penalty is a necessary (though perhaps not sufficient) condition of any criminal law, and thus sentences are as much the "substance" of criminal law as the categories of prohibited behavior.¹¹⁷ As elaborated in Part III, proportionality principles have implications for both substantive criminal law and constitutional criminal procedure.

In any event, the Court has enthusiastically embraced proportionality as a limitation on exercises of state power in one context much more akin to criminal sentences than Fourteenth Amendment remedies: punitive damages in civil tort suits.

B. Proportionality and the Pocketbook

There does not seem to be much doubt that when money is at stake, proportionality matters. For several years, the Supreme Court

116. See, e.g., Kevin C. McMunigal, *The Craft of Due Process*, 45 ST. LOUIS U. L.J. 477, 480 (2001) (noting "the contrast between the Supreme Court's jurisprudence in the area of criminal procedure and roughly contemporaneous developments in other areas of law critical to the resolution of criminal cases: substantive criminal law, the law of sentencing and the law of evidence").

117. The intersection of sentencing and the substantive criminal law is particularly evident in *Robinson v. California*, 370 U.S. 660 (1962), in which the Court found a jail sentence of ninety days to be "cruel and unusual punishment" for the offense of "be[ing] addicted to the use of narcotics." *Id.* at 662, 667. *Robinson* is considered one of the Supreme Court's very few "substantive criminal law" decisions, but importantly, it was the imposition of the *sentence* that gave the Court a constitutional basis to strike down the law. See also William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 66-67 (1997) (discussing sentencing as part of the substantive criminal law).

has reviewed and sometimes invalidated jury awards of punitive damages in civil tort suits to ensure that the punitive element of the awards is proportional to the offensive conduct being punished.¹¹⁸ For much longer, the Court has reiterated the principle that punitive or exemplary damages should correspond to “the enormity of [the] offense.”¹¹⁹ And in the criminal context, the Court has found the Excessive Fines Clause of the Eighth Amendment to include a proportionality requirement for monetary sanctions.¹²⁰

The Court has not suggested that the need for proportionality review in the context of civil punitive damages is conditioned on a particular penological theory. To the contrary, the Court has explicitly recognized proportionality in this context as essential to protect individual rights—namely, the property interest identified in the Due Process Clause of the Fourteenth Amendment. Punitive damage awards are unconstitutional if they are so “excessive as to amount to a deprivation of property without due process of law.”¹²¹ To protect this property interest, the Court considers three factors first identified in *BMW of North America, Inc. v. Gore*¹²²: “the degree of reprehensibility of the defendant’s misconduct,” “the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award,” and “the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.”¹²³

The Court recently applied the *Gore* test to reverse a \$145 million punitive damage award in *State Farm Mutual Insurance Co. v. Campbell*,¹²⁴ and there the distinction between penological purposes and arguments for proportionality is even more explicit. The Court noted, almost as an aside, that punitive damages “are aimed at

118. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (reversing a judgment for \$145 million in punitive damages on the grounds that the award “was neither reasonable nor proportionate to the wrong committed”); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585–86 (1996) (reversing a judgment for \$2 million in punitive damages as “grossly excessive”); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 453, 482 (1993) (affirming a \$10 million punitive damage award against a challenge that the award was “grossly excessive”).

119. *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851); see also *Gore*, 517 U.S. at 575–76 (citing cases).

120. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

121. *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909).

122. 517 U.S. 559 (1996).

123. *State Farm*, 538 U.S. 408 at 418 (citing *Gore*, 517 U.S. at 575).

124. *Id.* at 408.

deterrence and retribution”¹²⁵ and may be imposed “to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.”¹²⁶ Immediately thereafter, the Court shifted gears and announced that “it is well established that there are procedural and substantive constitutional limitations on these awards.”¹²⁷ As *State Farm* presented the argument, the limitations are based in the Due Process Clause and are independent of theories of deterrence or retribution. Indeed, when an award is excessive, its alleged punitive purpose will be deemed irrelevant: “To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.”¹²⁸

Money has also generated searching proportionality review in the criminal context. In *United States v. Bajakajian*,¹²⁹ the Court applied the Excessive Fines Clause of the Eighth Amendment for the first time.¹³⁰ “The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.”¹³¹ As with the civil proportionality requirement of *Gore* and *State Farm*, there is no suggestion that proportionality in the context of criminal fines is linked to a particular theory of punishment. Rather, the Excessive Fines Clause announces an individual right, traced in Justice Thomas’s majority opinion all the way back to the Magna Carta and traditional concerns about abuses of government power.¹³² To defend that right, the *Bajakajian* Court announced a standard of *de novo* review for appellate courts considering excessiveness challenges.¹³³ The Court did not offer a general framework for reviewing fines for excessiveness, but it considered roughly the same kinds of factors

125. *Id.* at 416.

126. *Id.* (quoting *Gore*, 517 U.S. at 568).

127. *Id.*

128. *Id.* at 417.

129. 524 U.S. 321 (1998).

130. *See id.* at 327 (“This Court has had little occasion to interpret, and has never actually applied, the Excessive Fines Clause.”). The Eighth Amendment provides that “Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.” U.S. CONST. amend. VIII.

131. *Bajakajian*, 524 U.S. at 334.

132. *Id.* at 335.

133. *Id.* at 336 n.10. Just before announcing the standard of *de novo* review, the majority opinion reiterated the importance of judicial deference in the context of proportionality review. *Id.* at 336.

identified in *Gore* for proportionality review of civil damages and in *Solem v. Helm*¹³⁴ for proportionality review of criminal sentences. Specifically, the *Bajakajian* Court considered the gravity of the offense (determined in part with reference to civil sanctions for similar conduct), the harm caused by the offense, and the severity of the punishment.¹³⁵

The punitive damages and Excessive Fines cases, along with the Takings Clause exactions cases, indicate strong support for what might be called property-interest proportionality. In some circumstances, a harm, injury, or offense will give the state power to encroach upon private property rights, but the resultant power must be proportional to the triggering harm, injury, or offense. Proportionality is required even when the property seizure is punitive and regardless of the state's particular punitive purpose. As a few commentators have now noted, the proportionality review applied to monetary penalties has not been matched when freedom rather than money is at stake.¹³⁶

C. *Death, Prison, and Gross Disproportionality*

These examples show that proportionality is well-established in American constitutional doctrine as a device by which to limit government power when it encroaches on individual property rights, and as a device to limit congressional power when it encroaches on the powers of the states. With respect to nonmonetary criminal sanctions, the role of proportionality is less clear. Most criminal defendants who have challenged their sentences as disproportionate have hung their arguments on the Eighth Amendment's prohibition

134. 463 U.S. 277 (1983). For a more detailed discussion of *Solem v. Helm*, see *infra* text accompanying notes 186–192.

135. *Bajakajian*, 524 U.S. at 337–40. Since *Bajakajian*, the Court has not considered another challenge to a criminal fine under the Excessive Fines Clause.

136. See, e.g., Chemerinsky, *supra* note 12, at 1062 (“[T]he Court’s decisions provide that taking away too much money is unconstitutional, but too many years in prison is not.”); Karlan, *supra* note 12, at 882 (“So it’s interesting that, having sharply cut back on proportionality review of criminal sentences, the Court has identified a proportionality principle for criminal fines”); Van Cleave, *supra* note 12, at 200 (“Yet, ironically, the Court has not shown the same concern about excessiveness and disproportionality [as it has in the monetary realm] when the punishment is imprisonment, a deprivation of liberty.”); Adam M. Gershowitz, Note, *The Supreme Court’s Backwards Proportionality Jurisprudence: Comparing Judicial Review of Excessive Criminal Punishments and Excessive Punitive Damages Awards*, 86 VA. L. REV. 1249, 1252 (2000) (“It thus appears that the Supreme Court has not only analyzed excessive criminal punishment claims separately from excessive punitive damages verdicts, but it has also promulgated different levels of proportionality review for the two areas.”).

of “cruel and unusual punishments.” This strategy is understandable enough, but in recent years it has had two unfortunate consequences. First, proportionality analysis in the criminal context often devolves into inevitably inconclusive historical arguments over the extent to which a concern about excessiveness was implicit in the original meaning of the phrase “cruel and unusual punishments.”¹³⁷ Second, those who reject historical or originalist approaches have turned to penological purpose as an anchor to give meaning to the Cruel and Unusual Punishments Clause.¹³⁸ These arguments have led the Court to overlook proportionality as an implication of basic rights to liberty and life enshrined in the Constitution and in liberal democratic principles more generally.

The muddle is only about twenty-five years old. From 1910 until 1980, the Court seemed to recognize that the Eighth Amendment contained not one but two proportionality principles: a liberty-interest proportionality requirement that incursions on liberty (or life) be proportionate to the offense for which they were imposed, and an equality-interest proportionality requirement that punishments be imposed consistently and nonarbitrarily.¹³⁹ These proportionality principles were considered to be separate from but consistent with the Eighth Amendment’s prohibition of certain modes of punishment, such as torture.

The Court’s first clear statement of a proportionality requirement in the Eighth Amendment came in *Weems v. United States*.¹⁴⁰ There, the Court overturned a sentence of fifteen years of

137. See *Solem*, 463 U.S. at 312 & n.5 (Burger, C.J., dissenting) (noting that “historians and scholars have disagreed about the Framers’ original intentions” with respect to the Cruel and Unusual Punishments Clause, and citing sources).

138. See *infra* notes 172–222 and accompanying text.

139. As Professor Joseph Raz has pointed out, equality is often mistakenly identified as an independent principle when it is actually the consequence of the general applicability of other principles. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 220 (1986) (“Every moral and every political theory which claims either that it is a complete theory, or even merely that it is complete regarding some issue, contains a principle of equality in this sense.”). If what I have called liberty-interest proportionality were universally realized, then the need for equality-interest proportionality would disappear. Even though the principle of liberty-interest proportionality contains within it equality-interest proportionality, I find it useful to speak of both forms of proportionality. The distinction helps explain the different ways the Supreme Court speaks of proportionality. Moreover, in practice liberty-interest proportionality is hard to achieve, and courts may use equality-interest proportionality as a proxy for liberty-interest proportionality. If one is unsure of the demands of liberty-interest proportionality in a particular case, one can consider what other jurisdictions do in similar cases.

140. 217 U.S. 349 (1910).

“cadena” (a combination penalty that involved imprisonment, hard labor, and permanent loss of civil rights) for making a false entry in an official document.¹⁴¹ “[I]t is a precept of justice that punishment for crime should be graduated and proportioned to offense.”¹⁴² The *Weems* opinion says almost nothing about penal purposes—except to recognize the possibility that without constitutional limitations, a state might use cruelty in its “zeal for a purpose, either honest or sinister.”¹⁴³ Because even criminal laws with “honest purposes” can be cruel, the prohibition on cruel and unusual punishment is “essential to . . . the maintenance of individual freedom.”¹⁴⁴

To support its conclusion that the Eighth Amendment prohibition of “cruel and unusual punishments” was *both* an antitorture provision *and* a proportionality requirement, the *Weems* Court considered the context in which the Bill of Rights was adopted. Patrick Henry and other supporters of the Eighth Amendment were motivated by more than a fear of torture; they also sought to protect individuals against much more mundane abuses of government power, including the power to punish.

Henry and those who believed as he did would take no chances. Their predominant political impulse was distrust of power, and they insisted on constitutional limitations against its abuse. But surely they intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their jealousy of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation.¹⁴⁵

On this reading of history, the Eighth Amendment is consistent with other constitutional provisions that seek to limit government power

141. *Id.* at 357, 366–67.

142. *Id.* at 367.

143. *Id.* at 373.

144. *Id.* (quoting *Kepner v. United States*, 195 U.S. 100, 122 (1904)). The *Weems* Court observed that the Philippine bill of rights’ prohibition on cruel and unusual punishment was “intended to carry to the Philippine Islands those principles of our government which the President declared to be established as rules of law for the maintenance of individual freedom.” *Id.* at 368 (quoting *Kepner*, 195 U.S. at 124).

145. *Id.* at 372. The *Weems* Court went on to note that a proportionality requirement for penalties is essential when the legislature has near-absolute power to define what activity is criminal. *Id.* For a discussion of the interrelationship between defining crime and fixing sentences, see *infra* Part III.

even in its ordinary modes of operation.¹⁴⁶ But since *Weems*, the Court has not again acknowledged as explicitly that the principles of limited government and the liberty interests of individuals necessitate a proportionality requirement for criminal sentences.¹⁴⁷

Individual liberty was nonetheless the basis of the Court's decision in *Robinson v. California*,¹⁴⁸ which held that legislatures may not impose any criminal sentence for "status offenses."¹⁴⁹ Now characterized as a protection of "ordered liberty" through substantive due process,¹⁵⁰ *Robinson* invalidated a ninety-day jail sentence imposed for the offense of drug addiction.¹⁵¹ The Court noted that a ninety-day sentence, "in the abstract," is clearly not a categorically prohibited form of punishment, but the Eighth Amendment is not simply a restriction on modes of punishment.¹⁵² Even a short jail sentence can be cruel and unusual if imposed for a physiological condition rather than an action.¹⁵³ *Robinson* makes clear that the Eighth Amendment limits not only the methods used to punish, but also the severity of punishment. When the state seeks to imprison an individual, reviewing courts must ask what the imprisonment is for—what conduct might have triggered the power to punish.¹⁵⁴

146. Justice (Edward) White dissented in *Weems*; he argued that the text and history of the Cruel and Unusual Punishments Clause showed that it prohibited only "illegal" (not legislatively authorized) punishments or certain "inhuman" bodily punishments. 217 U.S. at 389–96 (White, J., dissenting). Justice Scalia has advanced a similar historical argument. See, e.g., *Harmelin v. Michigan*, 501 U.S. 957, 966–85 (1991) (opinion of Scalia, J.). Debates about the original meaning of the Eighth Amendment are far from settled, however. As noted, the *Weems* majority also relied on historical analysis. One leading article on the original meaning of the Eighth Amendment argues that proportionality was a component of the British ban on "cruel and unusual punishments," and if the American Framers left proportionality out of the Eighth Amendment, they almost surely did so unintentionally. Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted": *The Original Meaning*, 57 CAL. L. REV. 839, 860–65 (1969).

147. The Court reiterated the *Weems* holding in *Solem v. Helm*, 463 U.S. 277, 286–92 (1983), but was less explicit in *Solem* about the individual liberty interest that underlies the Eighth Amendment proportionality requirement.

148. 370 U.S. 660 (1962).

149. *Id.* at 666–67.

150. See, e.g., Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 292 n.313 (1982) (treating *Robinson* as part of the "ordered liberties" doctrine).

151. *Robinson*, 370 U.S. at 661, 667.

152. *Id.* at 667.

153. *Id.* at 666–67.

154. Later Supreme Court decisions characterize *Robinson* as a key proportionality decision. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Robinson*, 370 U.S. at 666–67).

A proportionality requirement that fixes a ceiling on penalties for a specific offense protects the liberty interest of the individual defendant. In addition, each individual has an interest in being treated equally by the criminal law. Equality-interest proportionality motivated several of the many opinions filed in *Furman v. Georgia*,¹⁵⁵ the 1972 decision invalidating the death penalty as then applied.¹⁵⁶ Justice Douglas found the prohibition on cruel and unusual punishment to forbid "selective and irregular" penalties as well as "barbaric" ones.¹⁵⁷ "[I]t is 'cruel and unusual' to apply the death penalty—or any other penalty—selectively to minorities whose numbers are few . . . and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board."¹⁵⁸ Similarly, Justice Brennan noted that "the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments."¹⁵⁹ Justice Stewart agreed: "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual."¹⁶⁰

In *Furman*, there was majority support for a principle of equality-interest proportionality and for the conclusion that the death penalty as then applied was unconstitutional under that principle. But no majority agreed that the death penalty was per se disproportionate to any offense (or per se cruel and unusual for other reasons). Consequently, states passed new capital punishment statutes that purported to ensure that the penalty would not be arbitrarily applied. Just four years after *Furman*, Georgia's revised statute passed muster before the Court.¹⁶¹ One of the features of the Georgia statute singled out for the Court's approval was its guarantee of appellate review to ensure that each death sentence was "proportional to other sentences

155. 408 U.S. 238 (1972) (per curiam).

156. *Id.* at 240–41. *Furman* was decided 5–4, and each of the nine Justices filed a separate opinion.

157. *Id.* at 242, 245 (Douglas, J., concurring).

158. *Id.* at 245.

159. *Id.* at 274 (Brennan, J., concurring). Justice Brennan found three principles inherent in the Cruel and Unusual Punishments Clause: First, "a punishment must not be so severe as to be degrading to the dignity of human beings." *Id.* at 271. Second, "the State must not arbitrarily inflict a severe punishment." *Id.* at 274. Third, "a severe punishment must not be unacceptable to contemporary society." *Id.* at 277.

160. *Id.* at 309 (Stewart, J., concurring).

161. *Gregg v. Georgia*, 428 U.S. 153, 207 (1976).

imposed for similar crimes.”¹⁶² Additionally, *Gregg v. Georgia* reiterated the general proportionality requirement first announced in *Weems*: a “punishment must not be grossly out of proportion to the severity of the crime.”¹⁶³

One year later, proportionality in Georgia’s capital punishment scheme came before the Court a third time in *Coker v. Georgia*.¹⁶⁴ The Court granted a writ of certiorari to consider the claim that the death penalty was an unconstitutionally disproportionate punishment for the crime of rape. Although the *Coker* Court engaged in a kind of equality-interest analysis by looking across the states (and even to international law¹⁶⁵) to see how many other jurisdictions imposed capital punishment for rape, its decision ultimately rested on the interest of the individual defendant in life and liberty.¹⁶⁶ “We have the abiding conviction that the death penalty, which ‘is unique in its severity and irrevocability,’ is an excessive penalty for the rapist who, as such, does not take human life.”¹⁶⁷

The *Coker* opinion is not as clear as it could be, and it has prompted considerable confusion about the need to consider purposes of punishment when interpreting the Eighth Amendment. In fact, a misreading of *Coker*’s holding may be one of the most important factors contributing to the Court’s retreat from proportionality review in recent years. *Coker* interpreted *Gregg* to hold that a punishment was unconstitutionally excessive “if it (1) makes no measurable contribution to acceptable goals of punishment

162. *Id.* at 203. The Court later held—or, at least, strongly suggested—that this sort of proportionality review of death sentences was not, in fact, a constitutional requirement. *Pulley v. Harris*, 465 U.S. 37, 43–44 (1984). For two perspectives on the scope of the *Pulley v. Harris* holding, compare Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (with Lessons From New Jersey)*, 64 ALB. L. REV. 1161, 1170 (2001) (arguing that *Pulley* definitely ended the Constitutional requirement of comparative review), with Evan J. Mandery, *In Defense of Specific Proportionality Review*, 65 ALB. L. REV. 883, 899 (2002) (arguing that it is unclear what sort of proportionality review the Court considered and whether it rejected anything more than a mere procedural requirement).

163. *Gregg*, 428 U.S. at 173 (citing *Trop v. Dulles*, 356 U.S. 86, 100 (1958); *Weems v. United States*, 217 U.S. 349, 367 (1910)).

164. 433 U.S. 584 (1977).

165. “[O]ut of 60 major nations in the world surveyed in 1965, only 3 retained the death penalty for rape where death did not ensue.” *Id.* at 596 n.10.

166. *See id.* at 593–97 (“These recent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy . . .”).

167. *Id.* at 598 (quoting *Gregg*, 428 U.S. at 187 (citation omitted)). Notably, two of the three defendants in *Furman* and its companion cases were sentenced to death for rape rather than murder. *Furman v. Georgia*, 408 U.S. 238, 252–53 (1972) (Douglas, J., concurring).

and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime."¹⁶⁸ This rule clearly identifies two separate and independent standards for "excessiveness"—failure to serve penal purposes and gross disproportionality. A showing that a punishment fails to serve penal purposes is sufficient to render it unconstitutional, but such a showing is not necessary to show unconstitutionality on the separate grounds of disproportionality. Further demonstrating that penal purposes and proportionality were separate inquiries, the *Coker* Court acknowledged that legitimate penal purposes might sometimes dictate disproportionate punishments. "Because the death sentence is a disproportionate punishment for rape, it is cruel and unusual punishment within the meaning of the Eighth Amendment *even though it may measurably serve the legitimate ends of punishment . . .*"¹⁶⁹ When proportionality and penal purpose conflicted, it was proportionality that was to guide the Court's Eighth Amendment analysis.

But later decisions seemed to overlook the *or* in *Coker's* rule and to collapse the two inquiries. As a result, whether a punishment serves a legitimate penal purpose has become an increasingly central question—now, it may be the *only* question—in proportionality review. In *Enmund v. Florida*,¹⁷⁰ the Court reversed a death sentence for a defendant who participated in a robbery that resulted in murder, but did not himself kill or intend to kill.¹⁷¹ To decide whether the death penalty was disproportionate in such a situation, the Court looked only to penal purpose: "Unless the death penalty when applied to those in *Enmund's* position measurably contributes to [retribution or deterrence], it is 'nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment."¹⁷² More recent decisions have followed this mode of analysis and treated the question, "Is the punishment

168. *Coker*, 433 U.S. at 592. The *Coker* Court referred to *Gregg* but did not give a page citation. In fact, *Gregg's* statement of the rule does not directly mention penal purposes: "First, the punishment must not involve the unnecessary and wanton infliction of pain. Second, the punishment must not be grossly out of proportion to the severity of the crime." *Gregg*, 428 U.S. at 173 (citations omitted).

169. *Coker*, 433 U.S. 592 n.4 (emphasis added).

170. 458 U.S. 782 (1982).

171. *Id.* at 788.

172. *Id.* at 798 (quoting *Coker*, 433 U.S. at 592).

disproportionate?” as equivalent to the question “Does this punishment serve any legitimate penal purpose?”¹⁷³

The equation of disproportionality with failure to serve a penal purpose may be one of the most important causes of the Court’s increased reluctance to conduct proportionality review of criminal sentences. Penal purpose is widely viewed as a matter of legislative discretion, and there is great distaste for any judicial review that requires courts to supervise or second-guess legislatures’ penological aims.¹⁷⁴ Courts are slightly less deferential to legislatures in capital cases, given the widespread assumption that the unique severity of death requires more searching judicial review. But the penological purpose approach to proportionality has undoubtedly produced a retreat from the notion that the Eighth Amendment prohibits disproportionately severe *prison* sentences.

In *Rummel v. Estelle*,¹⁷⁵ the Court upheld a life sentence imposed under a Texas “recidivist statute” for the commission of three felony offenses, each of which involved obtaining goods or cash by fraud or false pretenses.¹⁷⁶ The total value of the property involved in all three felonies was about \$230.¹⁷⁷ Rejecting the defendant’s argument that a life sentence was disproportionate to these offenses, the Court noted that the proportionality review applied in *Furman*, *Gregg*, and *Coker* was limited to the context of capital punishment. “Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to *Rummel*.”¹⁷⁸ Justice Rehnquist’s majority opinion implied that proportionality review had

173. See, e.g., *Roper v. Simmons*, 125 S. Ct. 1183, 1196–98 (2005) (noting that “the penological justifications for the death penalty apply to [juveniles] with lesser force than to adults” and concluding that “the death penalty is disproportionate punishment for offenders under 18”); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (“We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty . . . [W]e therefore conclude that such punishment is excessive . . .”).

174. See, e.g., *Rummel v. Estelle*, 445 U.S. 263, 275–76 (1980) (noting that with respect to the appropriate severity of a criminal penalty, “the lines to be drawn are indeed ‘subjective,’ and therefore properly within the province of legislatures, not courts”).

175. 445 U.S. 263 (1980).

176. *Id.* at 264–66.

177. The first offense involved fraudulent use of a credit card to obtain \$80 worth of goods and services. The second offense involved a forged check for \$28.36. The third offense involved obtaining \$120.75 by false pretenses. *Id.* at 265–66.

178. *Id.* at 272.

little or no place in the context of prison sentences.¹⁷⁹ (The majority did acknowledge that a proportionality principle might “come into play in the extreme example . . . [in which] a legislature made overtime parking a felony punishable by life imprisonment.”¹⁸⁰) The *Rummel* majority found the Texas statute to be a reasonable exercise of legislative discretion to pursue legitimate penological objectives.¹⁸¹ The statute’s “primary goals are to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses . . . to segregate that person from the rest of society.”¹⁸² The point at which permanent segregation is appropriate is “largely within the discretion of the punishing jurisdiction.”¹⁸³ Two years later, in a brief opinion in *Hutto v. Davis*,¹⁸⁴ the Court reaffirmed *Rummel* and upheld a forty-year prison sentence for possession of less than nine ounces of marijuana.¹⁸⁵

A strong proportionality principle in the context of prison sentences made its last, brief stand in *Solem v. Helm*¹⁸⁶ in 1983. After stating the general principle that “a criminal sentence must be proportionate to the crime for which the defendant has been convicted,”¹⁸⁷ *Solem* announced a three-part test for proportionality that indicated a concern for both the liberty interests and the equality interests of individual defendants.¹⁸⁸ First, a reviewing court should consider “the gravity of the offense and the harshness of the

179. *See id.* at 274 (“[O]ne could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.”). Since *Rummel*, Chief Justice Rehnquist, Justice Scalia, and Justice Thomas have been the only Justices to state explicitly that the Eighth Amendment does not require proportionality in criminal sentences. *See Ewing v. California*, 538 U.S. 11, 32 (2003) (Thomas, J., concurring) (“In my view, the Cruel and Unusual Punishments Clause of the Eighth Amendment contains no proportionality principle.”); *Harmelin v. Michigan*, 501 U.S. 957, 966–85 (1991) (Scalia, J., joined only by Chief Justice Rehnquist) (arguing that the Framers did not intend the Cruel and Unusual Punishments Clause to require proportionality).

180. *Rummel*, 445 U.S. at 274 n.11.

181. *Id.* at 278, 284–85.

182. *Id.* at 284.

183. *Id.* at 285.

184. 454 U.S. 370 (1982).

185. *Id.* at 371, 374. The *Davis* Court quoted extensively from the *Rummel* opinion and offered few new principles to guide proportionality analysis. *Id.* at 372–74.

186. 463 U.S. 277 (1983).

187. *Id.* at 290.

188. *Id.* at 290–92.

penalty.”¹⁸⁹ This prong of the test draws from the principle expressed in *Weems*, *Robinson*, and *Coker* that the liberty interest of an individual can be infringed by a punishing state only in proportion to the individual’s offense. Next, the *Solem* Court found, “it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction.”¹⁹⁰ Finally, “courts may find it useful to compare the sentences imposed for commission of the same crime in other jurisdictions.”¹⁹¹ These second two prongs of the test consider both liberty interests and equality interests. If the same jurisdiction punishes more serious crimes with the same penalty or less serious penalties, “that is some indication that the punishment at issue may be excessive.”¹⁹²

A deeply divided Court stepped away from the *Solem* test (but no majority overruled *Solem*) in *Harmelin v. Michigan*.¹⁹³ Five Justices voted to uphold a mandatory life sentence for a first-time offender’s possession of 672 grams of cocaine.¹⁹⁴ The majority agreed on relatively few points, among them that “[t]here can be no serious contention, then, that a sentence which is not otherwise cruel and unusual becomes so simply because it is ‘mandatory,’”¹⁹⁵ and that the “individualized” proportionality review necessary for capital sentences was not required for a mandatory sentence of life in prison.¹⁹⁶ Justice Scalia filed a long separate opinion, joined only by the Chief Justice, to make a historical argument that “*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee.”¹⁹⁷ But the most damage to the liberal, not-necessarily-penological proportionality principle was probably done by Justice Kennedy’s concurrence. Justice Kennedy reviewed the Court’s proportionality jurisprudence and isolated four principles “that give content to the uses and limits of proportionality review.”¹⁹⁸ Three of these four principles link proportionality to the purposes of

189. *Id.* at 290–91.

190. *Id.* at 291.

191. *Id.* at 291–92.

192. *Id.* at 291.

193. 501 U.S. 957 (1991).

194. *Id.* at 994–97 (Scalia, J., joined by Rehnquist, C.J., and O’Connor, Kennedy, and Souter, JJ.).

195. *Id.* at 995.

196. *Id.*

197. *Id.* at 965, 966–94 (opinion of Scalia, J.).

198. *Id.* at 998 (Kennedy, J., concurring).

punishment—the liberal, political proportionality principle had all but disappeared.¹⁹⁹ From his four principles, Justice Kennedy drew a “gross disproportionality” standard: “The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.”²⁰⁰ According to Justice Kennedy, reviewing courts should first ask whether the sentence is “grossly disproportionate” to the offense, and if it is, only then apply the latter two prongs of the *Solem* test (intra- and interjurisdictional comparisons).²⁰¹ Unless the sentence is grossly disproportionate, a court should defer to legislative choices of how best to pursue penological goals.²⁰²

The last few Supreme Court decisions to grapple with proportionality in the criminal context have been similarly enmeshed in considerations of penological purposes. Although the Court has not necessarily deferred to legislative determinations of whether *capital* punishment serves legitimate purposes, it tends to defer to legislatures when prison sentences are at stake. In *Atkins v. Virginia*,²⁰³ the Court emphasized that the Eighth Amendment protects individuals from “excessive sanctions”²⁰⁴ and found the death penalty unconstitutionally excessive when imposed on any mentally retarded defendant.²⁰⁵ The *Atkins* Court appeared to view “excessive”

199. The first principle is that “the fixing of prison terms for specific crimes involves a substantive penological judgment that, as a general matter, is ‘properly within the province of legislatures, not courts.’” *Harmelin v. Michigan*, 501 U.S. 957, 998 (1991) (Kennedy, J., concurring) (quoting *Rummel v. Estelle*, 445 U.S. 263, 275–76 (1980)). Second, “the Eighth Amendment does not mandate adoption of any one penological theory.” *Id.* at 999. Third, different theories of sentencing and different sentencing practices “are the inevitable, often beneficial, result of the federal structure.” *Id.* Fourth, “proportionality review by federal courts should be informed by ‘objective factors to the maximum possible extent.’” *Id.* at 1000 (quoting *Rummel*, 445 U.S. at 274–75).

200. *Id.* at 1001 (Kennedy, J., concurring) (quoting *Solem v. Helm*, 463 U.S. 277, 288 (1983)).

201. *Id.* at 1005 (Kennedy, J., concurring).

202. *Id.* Justice Kennedy did not specifically limit this revised *Solem* test to noncapital sentences, but his invocations of the value of deference to the legislature focus on the noncapital context. *See id.* at 998 (Kennedy, J., concurring) (“[T]he fixing of prison terms . . . involves a substantive penological judgment that, as a general matter, is properly within the province of legislatures, not courts.” (internal quotations omitted) (citation omitted)); *id.* at 999 (“[M]arked divergences . . . in the length of prescribed prison terms are the inevitable, often beneficial, result of the federal structure.”).

203. 536 U.S. 304 (2002).

204. *Id.* at 311.

205. *Id.* at 321.

as synonymous with “disproportionate,” relying on earlier proportionality decisions to demonstrate the right against excessive sanctions.²⁰⁶ Penological purpose served as the litmus test for proportionality: the Court reasoned that because capital punishment could serve neither deterrence nor retribution when imposed on a mentally retarded defendant, the death penalty would always be unconstitutionally excessive if imposed on such a defendant.²⁰⁷

In *Ewing v. California*,²⁰⁸ a case factually similar to *Rummel* in many respects, the Court upheld a life sentence imposed under a “three strikes” law on a defendant for theft of golf clubs worth about \$400 each.²⁰⁹ By *Ewing*, penological purpose had become the starting point of proportionality review, but as a reason to decline to do much review at all. The majority opinion began by observing the many important purposes served by California’s three strikes statute,²¹⁰ and then emphasized the importance of deference to the legislature on questions of penological purpose.²¹¹ The *Ewing* Court then adopted the framework described in Justice Kennedy’s *Harmelin* concurrence, announcing that a “narrow proportionality principle” applied to “noncapital sentences.”²¹² Under this narrow principle, *Ewing*’s sentence was not “grossly disproportionate” to his current felony and his “long history of felony recidivism.”²¹³ Again, the concept of proportionality as a liberal principle independent of penal theory seems to have been eclipsed completely by judicial deference to legislative penology. The Court emphasized the need for “proper deference to the policy judgments that find expression in the legislature’s choice of sanctions.”²¹⁴ This claim is a long way from *Coker*’s recognition that a sentence may be disproportionate “even though it may measurably serve the legitimate ends of punishment.”²¹⁵

206. *Id.* at 311.

207. *Id.* at 318–20.

208. 538 U.S. 11 (2003).

209. *Id.* at 19–20.

210. *Id.* at 14.

211. *Id.* at 24 (“Though three strikes laws may be relatively new, our tradition of deferring to state legislatures in making and implementing such important policy decisions is longstanding.”).

212. *Id.* at 20 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 996–97 (Kennedy, J., concurring in part and concurring in judgment)).

213. *Id.* at 29.

214. *Id.*

215. *Coker v. Georgia*, 433 U.S. 584, 592 n.4 (1977).

Lockyer v. Andrade,²¹⁶ a habeas case decided alongside *Ewing*, similarly reiterated that “the gross disproportionality principle” should govern judicial review of criminal sentences.²¹⁷

The “narrow proportionality” principle—perhaps better described as the gross disproportionality rule—is limited to noncapital sentences. *Ewing* is not mentioned at all in *Roper v. Simmons*, the Supreme Court’s recent rejection of capital punishment for any defendant who was less than 18 years old at the time of the offense.²¹⁸ Instead of *Ewing*’s rule that only “grossly disproportionate” sentences will be struck down, *Atkins*’s seemingly broader rule against “excessive sanctions” serves as the basis for Justice Kennedy’s opinion for the *Simmons* majority.²¹⁹ After stating that juveniles have lesser culpability than adult defendants, Justice Kennedy turned again to “penological justifications for the death penalty.”²²⁰ “In general we leave to legislatures the assessment of the efficacy of various criminal penalty schemes,”²²¹ but such deference is not warranted here: “neither retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders.”²²²

Again, the reluctance of the *Roper* majority to defer to legislative judgments about how best to serve penological purposes is probably limited to the death penalty context. In noncapital criminal proportionality decisions of recent years, the Court shows a distaste for substituting (or appearing to substitute) judicial assessments of

216. 538 U.S. 63 (2003).

217. *Id.* at 77. The specific question before the Court in *Andrade* was whether California state courts, in upholding Leandro Andrade’s prison term of fifty years to life, had acted “contrary to . . . clearly established federal law.” *Id.* at 70–71 (citing 28 U.S.C. § 2254(d)(1)). Justice O’Connor, writing for the majority, observed that “our precedents in this area have not been a model of clarity.” *Id.* at 72. All that is “clearly established,” Justice O’Connor found, is the “gross disproportionality principle” articulated in Justice Kennedy’s *Harmelin* concurrence. *Id.* at 73. The majority found that Andrade’s sentence did not violate the gross disproportionality principle. *Id.* at 77.

218. *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

219. *Id.* at 1190 (“As the Court explained in *Atkins*, the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions.”). Justice Kennedy has authored key discussions of proportionality in several contexts: he authored the *Roper* majority opinion, the majority opinion in *City of Boerne v. Flores*, announcing the “congruence and proportionality” requirement for Congressional action under Section Five of the Fourteenth Amendment, and a concurrence in *Harmelin v. Michigan* that first announced the “gross disproportionality” test later adopted by the Court in *Ewing v. California*.

220. *Id.* at 1186.

221. *Id.* at 1196.

222. *Id.*

appropriate penal strategy for legislative ones.²²³ Although the notion that “death is different” is often invoked to explain the different constitutional rules that govern capital sentencing,²²⁴ it is not clear that death’s difference would matter with respect to proportionality judgments. The Court has not explained why the institutional competence concerns raised in the context of arguably disproportionate prison sentences are not equally important in the context of arguably disproportionate death sentences.

In fact, the worry about institutional competence is misplaced regardless of whether the sentence at issue is prison or death. Constitutional proportionality is a requirement of a liberal government, a consequence of individual interests in life, liberty, property, and equality—and the judiciary plays an important role in assessing and protecting those individual interests. Decisions about constitutional proportionality need not be (and should not be) decisions about penological theory.²²⁵ Neither William James

223. For example, advocates have raised proportionality challenges to lengthy prison terms, and especially “life without parole” or LWOP sentences, imposed on juvenile offenders, but have had very little success. *See, e.g., Harris v. Wright*, 93 F.3d 581, 583–85 (9th Cir. 1996) (applying the “gross disproportionality” test to reject an Eighth Amendment challenge to a life without parole sentence imposed on a juvenile offender). *See generally* Wayne A. Logan, *Proportionality and Punishment: Imposing Life Without Parole on Juveniles*, 33 WAKE FOREST L. REV. 681, 684 (1998) (noting that proportionality challenges to LWOP sentences for juveniles have had only “limited” success in state courts and no success in the federal courts).

224. *See, e.g., Rummel v. Estelle*, 445 U.S. 263, 272 (1980) (“Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel.”).

225. At the same time, it is unlikely that the Court could enforce constitutional rights with no conceptual account of what punishment is. The Constitution speaks of punishment on several occasions: Article I, § 3, clause 7; Article I, § 8, clause 6; Article I, § 8, clause 10; Article III, § 3, clause 2; amendment VIII; amendment XIII. Consequently, the Court has often had to decide whether a legal consequence is a punishment within the meaning of the Constitution. *See, e.g., Hamdi v. Rumsfeld*, 542 U.S. 507, 556 (2004) (Scalia, J., dissenting) (“It is unthinkable that the Executive could render otherwise criminal grounds for detention noncriminal merely . . . by asserting that it was incapacitating dangerous offenders rather than punishing wrongdoing.”); *United States v. Bajakajian*, 524 U.S. 321, 328 (1998) (assessing whether a statute mandating currency forfeiture inflicted punishment); *Kansas v. Hendricks*, 521 U.S. 346, 360–66 (1997) (assessing whether a sex offender civil confinement statute imposed punishment); *Austin v. United States*, 509 U.S. 602, 619 (1993) (considering which statutory forfeitures should be considered punishment); *Trop v. Dulles*, 356 U.S. 86, 94–97 (1958) (assessing whether a statute providing for denationalization imposes punishment). But we can, and should, define punishment without adopting a particular theory of penological purpose. The very notion that a “punishment” could be “cruel and unusual” indicates that the Eighth Amendment assumes a positive definition of punishment rather than a normative one—in other words, punishment is not defined in terms of the purposes that allegedly legitimate it. I develop this argument more

Rummel, nor Jerry Buckley Helm, nor Gary Albert Ewing claimed a right to be punished retributively, or a right to be punished under a Benthamite framework. Instead, each claimed that the power exercised over him was an infringement of his liberty interest that could not be justified by the scope of his offense. The fuss about penological theories in the Court's recent proportionality decisions is a distraction from the underlying claim in each case: that the particular sanction exceeds the state's legitimate power, given the offense that is the predicate for the power.

III. BEYOND PENOLOGY: SKEPTICISM AND CONDUCT

Because both the goals of punishment and the means to achieve those goals are considered matters of legislative prerogative, the "penological purpose" approach to a constitutional proportionality requirement in criminal sentencing has greatly narrowed the scope of that requirement. This close association of proportionality with the purposes of punishment is neither desirable nor necessary.²²⁶ In the first place, there is little consensus on the appropriate or legitimate purposes of punishment. More importantly, to the extent that there is broad support for certain professed aims of punishment—such as retribution and deterrence—these purposes are defined at a level of generality that is unlikely to limit sanctions in any meaningful way. In this Part, I first elaborate the practical and philosophical shortcomings of penological proportionality, then examine how the Court might operationalize the concept of political proportionality by focusing on the conduct that constitutes a criminal offense. A focus

fully elsewhere. See Alice Ristrophi, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 168–70 (2006).

226. Scholars arguing for a stronger constitutional proportionality requirement have, like the Court, tended to focus on the purposes of punishment (although academic commentators are typically much less deferential to legislative judgments about the goals of punishment and the best means to achieve those goals). For example, Professor Frase argues for a proportionality analysis that accommodates various penological purposes, including both retributive and utilitarian goals. See Frase, *supra* note 12, at 588–90. Frase identifies two different utilitarian proportionality principles—ends proportionality and means proportionality—and argues that both should figure into Eighth Amendment analysis. *Id.* at 592–97. The argument for a more searching means-ends analysis seems unlikely to persuade the Court unless it also addresses the Court's concern about institutional competence. In *Hutto v. Davis*, 454 U.S. 370 (1982), the Court explicitly rejected an argument for a "less restrictive means" analysis in proportionality review of criminal sentences. See *id.* at 373 n.2 (rejecting the lower court's "less restrictive means" analysis and noting that this analysis had been implicitly rejected in *Rummel*, because "the lines to be drawn are indeed 'subjective,' and therefore properly within the province of legislatures, not courts" (quoting *Rummel*, 445 U.S. at 275–76)).

on conduct is much more likely to provide a workable proportionality principle that the Supreme Court would and could enforce. In fact, conduct-based proportionality appears to underlie existing case law on the constitutional restrictions on sentencing procedures. More generally, the constitutional law of criminal procedure provides a model for limitations on penal power that do not presume any normative theory of punishment.

Proportionality is hardly a strictly retributive principle; it is clearly demanded by almost every major theory of punishment, including an array of utilitarian theories.²²⁷ It is equally clear that the precise demands of proportionality will vary from one theory to another. Some retributive theories may insist that death is the only proportional punishment for murder, whereas utilitarian theories might prescribe a far less severe sentence. Disagreement about where to draw the parameters of proportional punishment does not in itself render constitutional proportionality analysis impossible. In the narrow context of capital punishment, the Supreme Court has accommodated this disagreement by adopting an “overlapping consensus”²²⁸ approach—sentences that are disproportionate under any accepted penological theory are unconstitutional.²²⁹

This overlapping consensus approach to proportionality has led the Court to reject the death penalty for certain classes of offenders.²³⁰ But it has not produced meaningful proportionality review of prison sentences, and it is unlikely to do so in the future. Notwithstanding the efforts of many commentators, including the American Law Institute, to use retributivism as a “limiting principle,”²³¹ the claim

227. See *supra* Part I.

228. “Overlapping consensus” is John Rawls’s term; the Court does not use it. JOHN RAWLS, *A THEORY OF JUSTICE* 387–88 (1971); RAWLS, *supra* note 81, at 15.

229. See, e.g., *Roper v. Simmons*, 125 S. Ct. 1183, 1196 (2005) (“[N]either retribution nor deterrence provides adequate justification for imposing the death penalty on juvenile offenders.”); *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (“We are not persuaded that the execution of mentally retarded criminals will measurably advance the deterrent or the retributive purpose of the death penalty.”).

230. *Roper*, 125 S. Ct. at 1200 (striking down the death penalty as applied to juvenile offenders); *Atkins*, 536 U.S. at 321 (striking down the death penalty as applied to mentally retarded offenders); *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (striking down the death penalty as applied to defendants who did not kill or intend to kill); *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (striking down the death penalty as applied to defendants who committed rape but not murder).

231. See, e.g., MPC SENTENCING REPORT, *supra* note 9, at 36–37 (noting that the early revisions to the MPC borrow from Norval Morris’s theory of “limiting retributivism”); Frase, *supra* note 12, at 590 (“[Limiting retribution], emphasizing limits on excessive measures, is

that a prison sentence serves retributive purposes is, for the most part, nonfalsifiable. Most retributivist theories focus on the offender's desert, and desert is a highly subjective moral notion that is ill-suited to serve as a constitutional standard. It is not surprising that the Court has upheld very lengthy prison terms when the state asserts that the offender "deserves" such punishment²³²—how would this claim be disproved? Of course, the claim that the death penalty serves no retributive purposes for juveniles or the mentally disabled is highly contested and perhaps also nonfalsifiable. Thus it is not surprising that the Court's determination that certain classes of offenders will never deserve the death penalty has been decried as the unwarranted imposition of the Justices' subjective moral judgments.²³³

consistent with both the text of the Eighth Amendment and the role of constitutional guarantees."); Morris, *supra* note 72, at 201 ("My view is different: It is that desert is not a defining principle, but is rather a limiting principle.").

232. The two California three strikes cases, *Ewing* and *Andrade*, are particularly interesting on the question of desert. The state of California identified retribution as well as deterrence and incapacitation as purposes of the long mandatory sentences imposed under the three strikes statute. See, e.g., Cal. Penal Code §667(b) (West 1999) (identifying the purposes of the three strikes statute, including to "ensure greater punishment"); Respondent's Brief on the Merits, *Ewing v. California*, at 8, 18, 21 (arguing that the California law is justified due to the "enhanced blameworthiness" and "aggravated . . . culpability" of the repeat offender). The *Ewing* majority opinion based its decision to uphold the statute on the California legislature's alleged decision to adopt *incapacitation* as its central penological aim. See *Ewing v. California*, 538 U.S. 11, 25–26 (2003) ("When the California Legislature enacted the three strikes law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime. Nothing in the Eighth Amendment prohibits California from making that choice."); see also *id.* at 14 ("California's three strikes law reflects a shift in the State's sentencing policies toward incapacitating and deterring repeat offenders who threaten the public safety . . ."). But the notion that the three strikes law was aimed at incapacitation *instead* of retribution was apparently supplied to counsel by one of the Justices at oral argument. See Transcript of Oral Argument, *Ewing v. California*, at *44–45 ("QUESTION: I would have thought that your response . . . would have been that . . . it depends on what you want your penal goals to be. California has decided that disabling the criminal is the most important thing. . . . QUESTION: I mean, proportionality—you necessarily have to look upon what the principal objective of the punishment is."). There is nothing obviously false about the claim that repeat offenders, after a certain number of triggering offenses, *deserve* life imprisonment. California made this claim repeatedly before the Supreme Court decided the three strikes law was better justified in terms of incapacitation.

233. Justice Scalia expresses this view with characteristic vehemence in his dissenting opinion in *Roper v. Simmons*. See 125 S. Ct. at 1230 (Scalia, J., dissenting) (suggesting that the majority opinion rests on little more than "a show of hands on the current Justices' current personal views about penology"). But Justice Scalia does not appear to argue that it is impossible for judges to determine whether an individual deserves a penalty. Instead, he is as certain that capital punishment for juvenile offenders *will* serve penological purposes as the majority is certain that it *will not*. "The Court's contention that the goals of retribution and deterrence are not served by executing murderers under 18 is . . . transparently false." *Id.* at 1225.

Whether a sentence serves deterrent purposes is, in theory, a more useful inquiry. It is easier to define and measure deterrence than it is to define and measure desert. And yet deterrence is also unlikely to produce a proportionality standard with enough bite to prohibit very lengthy prison sentences. Empirical researchers have been investigating the deterrent effects of criminal sanctions for years.²³⁴ Whether because this research is inconclusive, because it is thought to be untrustworthy, or for some other reason, the studies have had little impact on criminal justice policy and on constitutional standards for criminal law.²³⁵

Penological theory thus produces the following problem: Although all or almost all theories of punishment demand some form of proportionality, these theories cannot themselves provide a constitutional standard for meaningful proportionality review. Rather than abandoning proportionality as a constitutional limitation on punishment, or becoming resigned to the very weak proportionality principle of *Ewing*, one should consider whether the theory of political proportionality developed in Part I might serve as the basis of a constitutional standard. Is political proportionality a principle capable of producing doctrine? If one were agnostic about the purposes of punishment or uncommitted to any particular theory of punishment—if one were a *penological skeptic*—could one nevertheless articulate the parameters of proportionality?

What might be called penological skepticism is a view that accepts the practice of punishment as an unavoidable component of a political system, but refuses to embrace any particular theoretical justification for this type of exercise of state power.²³⁶ The penological

234. See generally DERYCK BEYLEVELD, *A BIBLIOGRAPHY ON GENERAL DETERRENCE RESEARCH* (1980) (collecting statistical research to assess the deterrent effect of punishment).

235. See, e.g., Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 29 (1997) (noting the failure of empirical research to influence U.S. criminal justice policy); see also Charles S. Lanier & James R. Acker, *Capital Punishment, the Moratorium Movement, and Empirical Questions*, 10 PSYCHOL. PUB. POL'Y & L. 577, 591 (2004) ("Although the empirical research concerning whether the death penalty deters homicide more effectively than life imprisonment has been exhaustive and consistent, its role in judicial and public policy decisions has been less definitive.").

236. Many scholars have examined various skeptical traditions in American legal thought—positivism, legal realism, the legal process school, conventionalism, and critical legal studies are all products of skepticism in one form or another. See, e.g., Michael Moore, *Moral Reality*, 1982 WIS. L. REV. 1061, 1064–67 (1982) (describing the influence of skepticism on legal process theorists, conventionalists, positivists, and law and economics scholars, among others); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 827 (1988) ("The skeptical

skeptic is not necessarily a punishment abolitionist, but neither is this skeptic a champion of any normative justification for punishment. Penological skepticism need not insist that the various justifications for punishment are “wrong.”²³⁷ In the spirit of all good skeptics, the penological skeptic simply *doubts*. As a consequence, the penological skeptic distrusts the coercive penal power and seeks to limit it, but does not attempt to base those limitations on a theoretical justification of punishment.²³⁸

Can a skeptic have anything to say about punishment under the Constitution? In fact, to the extent that there exists a body of constitutional criminal law, it is based on penological skepticism. I refer, of course, to constitutional criminal *procedure*. A skeptical attitude seems to underlie both the text of the constitutional provisions that protect the accused and the jurisprudence that has interpreted those provisions.²³⁹ The Fourth Amendment prohibition of unreasonable searches and seizures assumes no theory of punishment; nor does the Fifth Amendment privilege against self-incrimination. These provisions, along with the Due Process requirement that guilt be proved beyond a reasonable doubt and the Sixth Amendment rights to a jury trial, to confrontation, and to assistance of counsel, are certainly restrictions on the state’s power to

vein in American thinking about law runs from Holmes to the legal realists to the critical legal studies movement . . .”).

237. How would one show that retributivism is “wrong”? One can argue against it on liberal grounds—for instance, there is a strong argument that even if punishment is morally justified, the liberal state has no business using physical force to satisfy (highly contested) moral demands. See Murphy, *supra* note 89, at 510 (“A complete theory of punishment must concern itself not merely with the moral desirability of the goals sought by punishment . . . but also with the equally important question of whether the pursuit of these goals is *part of the legitimate business of the state* . . .”). But for many retributivists, the demand for retribution boils down to a first principle—people who do bad things deserve to be punished. This first principle is an article of faith; it cannot be proved or disproved but only shared or rejected.

238. One could also say that penological skepticism is based on a positive account of punishment—punishments are simply the penalties that the state imposes in response to crime—rather than a normative account that builds justifying aims into the definition of punishment. As noted above, the Eighth Amendment’s contemplation that “punishments” can be “cruel and unusual” certainly seems to imply a positive understanding of punishment. See *supra* note 225.

239. At any rate, the moral theories that scholars often find to underlie the rules of substantive criminal law are not generally associated with the procedural rights of criminal defendants. See Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 553 (1997) (noting that “so-called substantive criminal law” and “criminal procedure” are relatively isolated in American law, and that it is only substantive criminal law that “associate[s] itself with moral philosophy as best it can”).

punish: they mandate that the state may not impose punishment except when it has satisfied certain procedural requirements. But one would be hard-pressed to show that any of these constitutional limitations on the penal power assume that punishment will serve retributive, deterrent, or other purposes.²⁴⁰

With respect to substantive limitations on criminal sentences, a penological skeptic would clearly reject any proportionality principle based on deterrence or retributive theories. But a skeptic could embrace political proportionality, a limitation on penal power that considers punishment as a practice situated within a larger political system that serves many nonpenological goals. A skeptic could embrace a proportionality requirement that was an external constraint on the practice of punishment and hence unrelated to the purpose of penal practices. The constitutional demand that individuals must be proven guilty beyond a reasonable doubt before they are punished is unconcerned with the reasons for which the state punishes; it is an external constraint.²⁴¹ Because skepticism seems to underlie the law of constitutional criminal procedure, one might find ways to “operationalize” the political proportionality principle in the constitutional law of sentencing procedures.

In a controversial line of cases that has received even more attention than the recent Eighth Amendment proportionality

240. The Supreme Court’s musings on retribution and deterrence just don’t appear in its decisions on constitutional criminal procedure. When those decisions attribute a purpose to the criminal justice system, that purpose is typically “effective law enforcement.” See, e.g., *California v. Acevedo*, 500 U.S. 565, 574 (1991) (holding that probable cause to search a vehicle extends to containers found within the vehicle, and rejecting a distinction between the vehicle and containers within it as an impediment to “effective law enforcement”); *Tennessee v. Garner*, 471 U.S. 1, 19 (1985) (“We would hesitate to declare a police practice of long standing ‘unreasonable’ if doing so would severely hamper effective law enforcement.”); *Kolender v. Lawson*, 461 U.S. 352, 365 (1983) (suggesting that the Fourth Amendment strikes a balance between “the public interest in effective law enforcement and the equally public interest in safeguarding individual freedom and privacy”). Neither federal courts nor, to my knowledge, academic commentators have attempted to explore or explain in detail what it means to enforce a law or what it means for enforcement to be effective. “Effective law enforcement” could encompass retributive or utilitarian accounts of punishment, but it need not embrace either of those theories. In fact, one could understand “enforcing the law” to be the act of ensuring that the law’s terms are observed. Many criminal laws do not even contain explicit proscriptions (such as “do not steal”); instead, they define offenses and provide for penalties for those who commit those offenses. Thus, to enforce the law could mean no more than to ensure that those who commit the specified behavior are given the specified penalty. There is no theory of punishment here, no account of why the state attaches penalties to this behavior or what it hopes the penalties to accomplish.

241. See the discussions of a guilt requirement, *supra* notes 31 and 94.

decisions, the Supreme Court has interpreted the Sixth Amendment to require that certain facts determinative of the severity of punishment be found by a jury rather than by a judge.²⁴² These cases stand for the general proposition that the Sixth Amendment is implicated not only by the question of guilt or innocence, but also by marginal increases in the severity of the penalty. One could read these cases to demonstrate an implicit assumption of proportionality: If the Constitution contained no proportionality principle, it would not be offended by marginal increases in the sentence imposed on a defendant who has been proven guilty of *some* criminal conduct. But regardless whether one adopts this reading of the recent Sixth Amendment decisions, those decisions provide clues for the implementation of a political proportionality principle.

One of the first decisions in this line of cases, *Apprendi v. New Jersey*,²⁴³ established that any fact (other than the fact of a prior conviction) “that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”²⁴⁴ After an incident in which Charles Apprendi fired on an African American family in Vineland, New Jersey, Apprendi pled guilty to second-degree possession of a firearm, an offense with a statutory penalty range of five to ten years.²⁴⁵ The trial judge held an evidentiary hearing and found by a preponderance of the evidence that Apprendi’s offense had been motivated by racial bias.²⁴⁶ Under a New Jersey “hate crime” law that permitted the imposition of enhanced sentences for racially motivated crimes, the trial judge sentenced Apprendi to twelve years on the firearm possession count.²⁴⁷ The Supreme Court found that this

242. This line of cases began in 1998 with *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and has since produced six other Supreme Court decisions: *Jones v. United States*, 526 U.S. 227 (1999); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Harris v. United States*, 536 U.S. 545 (2002); *Ring v. Arizona*, 536 U.S. 584 (2002); *Blakely v. Washington*, 124 S. Ct. 2531 (2004); and *United States v. Booker*, 125 S. Ct. 738 (2005). The Court addressed similar issues in *Monge v. California*, 524 U.S. 721 (1998), but decided that case primarily on Double Jeopardy Clause grounds rather than Sixth Amendment grounds.

243. 530 U.S. 466 (2000).

244. *Id.* at 490. Although the *Apprendi* majority referred repeatedly to the right to a jury trial, it rested its analysis on the Fourteenth Amendment Due Process Clause and not explicitly on the Sixth Amendment. *Id.* at 469, 476.

245. *Id.* at 469–70. Apprendi was charged with, and pled guilty to, other offenses as well, but only the constitutionality of the sentence on the firearm possession count was at issue before the Supreme Court. *Id.* at 470, 474.

246. *Id.* at 470–71.

247. *Id.* at 471.

sentence violated Apprendi's due process right to a jury determination of guilt beyond a reasonable doubt.

Arguably, there is an assumption of proportionality that underlies the Court's *Apprendi* analysis. The Constitution has long been understood to require that guilt of a "crime" must be proven to a jury beyond a reasonable doubt.²⁴⁸ In *Apprendi*, the Court used the severity of the penalty (or more specifically, a marginal increase in the severity of the penalty) to determine what constituted a "crime" and therefore what had to be proved to a jury beyond a reasonable doubt. Since racial hatred was the basis of an increased sentence, racial hatred must be (in effect if not in label) an element of the offense for which Charles Apprendi was punished. *Apprendi* thus assumes a necessary relationship between the definition of a crime and the quantity of the penalty. The principle of proportionality likewise insists on a relationship between the scope of an offense and the severity of the penalty. But in most theories of proportionality, the crime is defined first, and a proportional sentence is then prescribed. *Apprendi* reversed that analysis and used increases in penalties to determine changes in the substantive definition of an offense.²⁴⁹

I would not overemphasize the demand for proportionality in the sentencing decisions. Standing alone, the assumption of proportionality in *Apprendi* and subsequent sentencing decisions does not reveal whether the Constitution has any substantive (as opposed to procedural) proportionality requirement. Read narrowly, these cases stand only for the proposition that if facts trigger an

248. See *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975) (holding that because Maine law provided that "heat of passion on sudden provocation" reduced murder to manslaughter, the prosecution was required to prove beyond a reasonable doubt the absence of such passion); *In re Winship*, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

249. This reversal of typical proportionality reasoning is most clear in Justice Thomas's *Apprendi* concurrence. *Apprendi*, 530 U.S. at 499 (Thomas, J., concurring). After noting that "[t]his case turns on the seemingly simple question of what constitutes a 'crime,'" *id.*, Justice Thomas analyzed historical evidence and concluded that "a 'crime' includes every fact that is by law a basis for imposing or increasing punishment," *id.* at 518. The Court has extended the *Apprendi* analysis to capital sentencing, holding that facts necessary to the imposition of a death sentence must be found by a jury, *Ring v. Arizona*, 536 U.S. 584, 609 (2002), and to state and federal sentencing guideline statutes, holding that mandatory guidelines are unconstitutional insofar as they allow judges to find "sentencing factors" that increase the penalty beyond the maximum that could be imposed in the absence of the sentencing factor, *United States v. Booker*, 125 S. Ct. 738, 756–57 (2005); *Blakely v. Washington*, 124 S. Ct. 2531, 2543 (2004).

increase in the maximum penalty imposed on an individual, those facts must be evaluated in accordance with the procedural protections of the Sixth and Fourteenth Amendments. After all, *Apprendi* says nothing about whether two years or fifty years is a more appropriate enhancement for racial bias. It says only that if racial bias results in *any* increase beyond the penalty that could be imposed in the absence of racial bias, then racial bias must be proven to a jury beyond a reasonable doubt.

Thus one might adopt the view that any penalty prescribed by the legislature is constitutionally acceptable as long as the jury determines all facts relevant to that penalty. Just as the Constitution provides few if any *a priori* restrictions on what conduct may be criminalized, it provides few if any *a priori* restrictions on what penalty may be attached to criminalized conduct. This may well be the view of Justices Thomas and Scalia, given that each voted with the majority in *Apprendi* and has also rejected an Eighth Amendment proportionality requirement.²⁵⁰ Justice Scalia's majority opinion in *Blakely v. Washington* flirts with proportionality concerns, but may ultimately decide that jury participation eliminates any risk of disproportionality.²⁵¹ Consider Justice Scalia's rejection of "legislative labeling" as an attempt to evade the requirement that juries determine guilt:

[One alternative] is that the jury need only find whatever facts the legislature chooses to label elements of the crime, and that those it labels sentencing factors—no matter how much they may increase the punishment—may be found by the judge . . . [A] judge could sentence a man for committing murder even if the jury convicted him only of illegally possessing the firearm used to commit it—or of making an illegal lane change while fleeing the death scene. Not even *Apprendi*'s critics would advocate this absurd result. The jury could not function as circuitbreaker in the State's machinery of justice if it were relegated to making a determination that the defendant at some point did something wrong, a mere preliminary to a judicial inquisition into the facts of the crime the State *actually* seeks to punish.²⁵²

250. *Ewing v. California*, 538 U.S. 11, 32 (2003) (Thomas, J., concurring); *Apprendi*, 530 U.S. at 498 (Scalia, J., concurring); *id.* at 499 (Thomas, J., concurring); *Harmelin v. Michigan*, 501 U.S. 957, 966–94 (1991) (opinion of Scalia, J.). As far as I am aware, no Justice has explicitly contemplated a Sixth Amendment proportionality requirement.

251. 542 U.S. 296, 308–09 (2004).

252. *Id.* at 306–07 (citation omitted).

It is difficult to say what is “absurd” about a murder sentence (presumably, a very severe sentence) for an illegal lane change if not its disproportionality. Thus, one could read this passage to evoke a concern for substantive proportionality—a worry that there is something necessarily wrong with the imposition of a murder-sized sentence for an illegal lane change.

One could argue, however, that Justice Scalia is concerned not with substantive proportionality but with sentences whose proportionality has not been properly evaluated through legislative and judicial processes. On this view, judgments about the severity of criminal sentences must be made by democratically accountable legislatures and sanctioned by juries. *Apprendi* itself suggests such an argument. As the *Apprendi* majority acknowledged in a footnote, states could try to satisfy *Apprendi*’s rule without actually increasing the facts that prosecutors must prove to juries: “[A] State could, hypothetically, undertake to revise its entire criminal code . . . extending all statutory maximum sentences to, for example, 50 years and giving judges guided discretion as to a few specially selected factors within that range”²⁵³ But the *Apprendi* Court was relatively unworried about such statutory amendments that would simply raise all maximum penalties. “Among other reasons, structural democratic constraints exist to discourage legislatures from enacting penal statutes that expose *every* defendant convicted of, for example, weapons possession, to a maximum sentence exceeding that which is, in the legislature’s judgment, generally proportional to the crime.”²⁵⁴ In other words, the “substantive content of . . . criminal laws,” including statutory penalty ranges, is subject to a “political check on potentially harsh legislative action.”²⁵⁵ This reasoning in *Apprendi*, combined with *Blakely*’s description of the jury as a “circuitbreaker,” might suggest that the only constitutional proportionality requirement is that decisions about the appropriate scope of criminal sentences be made by a democratically elected legislature and implicitly ratified by a criminal jury through its findings of fact.

There are significant flaws in the argument that the majoritarian process and jury trials will, independently or in tandem, be sufficient to ensure proportionality in criminal sentencing. In the first case,

253. 530 U.S. at 490 n.16.

254. *Id.*

255. *Id.* at 491 n.16 (quoting *Patterson v. New York*, 432 U.S. 197, 228–29 n.13 (1977) (Powell, J., dissenting)).

criminal justice policy is often dictated by factors other than simple majority preferences.²⁵⁶ Furthermore, limits on some extremely severe penalties may be desirable notwithstanding popular support for them, given that the criminal law is a classic example of an area in which majorities are likely to disregard the rights and interests of individuals. With respect to the claim that juries can serve as circuitbreakers to ensure proportional sentences, it is hard to see what could prompt the jury to throw the switch and break the circuit. It is unlikely to be the fact that harsh sentencing consequences will follow from certain factual findings, for in most cases juries will not have this information. In most U.S. jurisdictions, jurors are not informed of the specific penalties that attach to a charged offense.²⁵⁷ In fact, courts often deny defendants' explicit requests that the jury be instructed of mandatory minimum penalties.²⁵⁸ Thus, though democratic and legal processes may provide some protection for individual proportionality interests, this process-based protection is inadequate, and the judiciary has a role to play in enforcing a substantive (and political, nonpenological) proportionality requirement.

Even if the recent sentencing cases add no further support for such a substantive requirement,²⁵⁹ they are nonetheless instructive on the matter of how to implement it. These sentencing decisions demonstrate a mode of constitutional analysis that measures crimes, and their constitutional significance, without any reference to penological purpose. More specifically, these cases elaborate a

256. Professor Franklin Zimring has argued that even "populist" legislation such as California's three strikes law does not exactly originate from a spontaneous groundswell of majority support. See, e.g., FRANKLIN E. ZIMRING, GORDON HAWKINS, & SAM KAMIN, PUNISHMENT AND DEMOCRACY: THREE STRIKES AND YOU'RE OUT IN CALIFORNIA 160-61 (2001) (arguing that it is wrong to see public opinion as either "solely an input" or "solely an output" of the political process that determines crime policy, and suggesting that choices by political leaders sometimes shape public opinion on crime); see also *id.* at 166 ("The relative importance of crime as a government issue will also vary over time, and much of that variance will be produced by developments in noncrime issues" such as war or economic recession.).

257. See, e.g., Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings about Apprendi*, 82 N.C. L. REV. 621, 670 (2004) ("In our system, jurors in general are not given information about punishments, so all they can do is make assumptions about the likely sentence.").

258. For a collection of such cases, see Kristen K. Sauer, Note, *Informed Conviction: Instructing the Jury about Mandatory Sentencing Consequences*, 95 COLUM. L. REV. 1232, 1245 n.85 (1995) (citing cases).

259. As explained in Part II, *supra*, there is precedent for the notion of political proportionality in other doctrinal areas, including the Court's exactions jurisprudence, its limitations on punitive damages, and its pre-1980 Eighth Amendment decisions.

constitutional notion of guilt that is based not on retribution (or any other penological theory) but on actual conduct and mental state. Conduct-based guilt long preceded *Apprendi*, but these recent cases are unusual in their effort to deconstruct guilt from one generalized category into more nuanced degrees.

The Constitution does not explicitly mandate that only the guilty be punished, but it is well settled that the Due Process Clause requires proof of guilt as a condition of punishment.²⁶⁰ “Guilt,” in constitutional terms, is neither a strictly psychological state (though it may contain a mens rea requirement) nor an assessment of moral blameworthiness.²⁶¹ It is based on conduct and intent: one is guilty if one has engaged in proscribed conduct with a specified intent, or if one has failed to engage in required conduct with a specified intent.²⁶² Constitutional guilt can be assessed only in reference to a specific criminal offense, and guilt has not traditionally been assessed in degrees.²⁶³ For any given offense, the accused is either guilty or not guilty. And, of course, the Sixth and Fourteenth Amendments allow a defendant to demand that this guilt be proven to a jury rather than found by a judge.

Apprendi, *Blakely*, and *Booker* all looked beyond the simple fact that the defendant was found guilty of *something* to determine the precise offense and thus the relative degree of criminal guilt. A defendant who is found guilty (in constitutional terms) only of weapon possession cannot be punished with a sentence reserved for those who possess weapons and are also racially biased. In short, the

260. *Mullaney v. Wilbur*, 421 U.S. 684, 699–700 (1975); *In re Winship*, 397 U.S. 358, 361–62 (1970).

261. This distinction is particularly clear in capital punishment proceedings, which are divided into a “guilt phase” (at which the jury is instructed to decide whether the defendant engaged in conduct that constitutes a capital offense) and the “penalty phase,” sometimes called the “culpability phase” (at which the jury is instructed to determine whether the defendant is sufficiently morally blameworthy to deserve the death penalty).

262. Whether a crime of omission *must* have an intent requirement was the issue in *Lambert v. California*, 355 U.S. 225 (1957). The Supreme Court suggested that intent or at least constructive knowledge of a legal duty was indeed a requirement—a legislature could not create strict liability crimes of omission.

[C]onduct alone without regard to the intent of the doer is often sufficient. . . . But we deal here with conduct that is wholly passive—mere failure to register. It is unlike the commission of acts, or the failure to act under circumstances that should alert the doer to the consequences of his deed.

Id. at 228.

263. Offenses are, of course, divided into degrees: first-degree larceny, second-degree larceny, and so forth. But with respect to any given offense, guilt is all-or-nothing.

legislative definition of offenses and sentencing factors—of relevant types of conduct and mental states—gives the Court a way to make comparisons between different degrees of guilt.

Legislative definitions of relevant conduct and intent could also serve as the basis of constitutional proportionality review, especially in the context of comparative review as required by *Solem v. Helm*. Recall that under the three-part test in *Solem*, a court must consider (1) the gravity of the offense and the severity of the penalty, (2) sentences imposed on other offenders in the same jurisdiction, and (3) sentences imposed on similar offenders in other jurisdictions.²⁶⁴ The focus on conduct and intent in the *Apprendi* line of cases helps clarify how reviewing courts would apply the second and third parts of this test. The more extensive the criminal conduct, the more expansive the penal power.²⁶⁵

Of course, this type of offense-to-offense comparison will be easiest (and least controversial) when offenses identify roughly similar types of conduct as necessary elements. But this will be the case most of the time; there are few *sui generis* crimes. So even though many criminal offenses are arguably incommensurable—who is to say whether assault is worse than drug distribution?—courts doing proportionality review could compare assaults to other assaults and leave to the legislature the control over the relative severity of sentences for drug offenses in comparison to assault sentences.

The first factor of the *Solem* test is, of course, inevitably subjective to some degree. For those who want proportionality review to exclude all normative judgments, there is not a wholly satisfactory answer to this problem. But two observations suggest that the problem is hardly so acute as to require abandonment of judicial proportionality review. First, the more fixed, concrete aspects of the *Solem* test—intra- and interjurisdictional review—can serve as the primary basis of proportionality judgments. One way to determine whether a penalty is too severe for a given offense is to ask whether the state is willing to impose that penalty on everyone who is convicted of that offense. If the state is unwilling to impose a penalty

264. 463 U.S. 277, 290–92 (1983); see also *supra* Part II.C.

265. For a fascinating recent example of a similar approach, see *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004). Considering a proportionality challenge brought under the Equal Protection Clause rather than the Eighth Amendment, the district court found a mandatory sentence enhancement for use of a firearm to be irrational (but, perhaps concerned with being overruled on appeal, the court ultimately imposed the irrational sentence). *Id.* at 1263.

uniformly, then it is probably safe to conclude that the penalty is disproportionately severe.

Second, the admittedly subjective requirement that the severity of the penalty correspond to the severity of the offense is akin to the requirements of proportionality in other doctrinal contexts. In reviewing civil punitive damage awards, the courts consider the “reprehensibility of the defendant’s conduct” in relation to the damage award.²⁶⁶ Analogously, the test for exactions under the Takings Clause requires a reviewing court to consider whether the exaction is proportionate to the impact of the proposed property development.²⁶⁷ The requirement of proportionality is no more objective in these contexts or in the context of congressional power under the Fourteenth Amendment than it is in the context of criminal sentences.²⁶⁸ In all of these situations, the nature of liberal democracy and the need to define limits on governmental power require that judges conduct proportionality review even in the presence of metaphysical uncertainties.

It should be reemphasized that political proportionality would focus on the limits of the power to punish—not on the precise severity of punishment most appropriate to an individual defendant. An important consequence of this focus, and an important limitation on proportionality challenges, is that individual defendants would have to show that their sentences exceed the state’s power over their conduct. In other words, successful proportionality challenges would probably be limited to cases in which defendants could persuade a court that the upper limit of a statutory penalty range was facially invalid. A political proportionality principle is an effort to limit penal power based on the *conduct* that was criminalized—not based on the particular characteristics of each individual defendant. Or, put differently, if proportionality is not a matter of individual desert, then a defendant could not successfully challenge his sentence by arguing, “Given my particular circumstances, I don’t deserve this penalty.”

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266. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996).

267. *See supra* notes 99–101.

268. *See supra* Part II.A., which discusses *City of Boerne v. Flores*, 521 U.S. 507 (1997) and subsequent applications of its “congruence and proportionality” test.

Individual liberty is a fundamental right, both as a matter of liberal theory and as a matter of American constitutional doctrine. Disputes about the definition of liberty abound, but it seems clear that no matter how the term is defined, incarceration is an infringement of individual liberty. In the context of incarceration, however, the “fundamental right” status of liberty seems to be forgotten or neglected. As Sherry Colb has noted, the right to be free from incarceration is not protected with the same degree of judicial scrutiny as other fundamental rights.²⁶⁹ Although freedom from bodily restraint is classified as one of the Constitution’s “fundamental rights,”²⁷⁰ violations of which ordinarily incur strict scrutiny, prison sentences have been subjected to heightened scrutiny only when they also implicate other fundamental rights, such as First Amendment speech rights²⁷¹ or Fourteenth Amendment Equal Protection and Due Process rights.²⁷² Instead, the courts seem to assume that “if the government may prevent an activity, because there is no fundamental right to engage in that activity, then the government may elect . . . to deprive people of their liberty from incarceration as a penalty for engaging in the activity.”²⁷³ Although incarceration is clearly a deprivation of the right to be free from bodily restraint, the state need not satisfy the compelling interest or least restrictive means tests to justify its choice to incarcerate individuals who engage in particular activities.

Part of the problem, as suggested in Part I, is that criminal law and punishment are cordoned off from the rest of liberal constitutional politics, both as a matter of theory and as a matter of legal doctrine. Except in rare circumstances, such as analyses of civil

269. Sherry F. Colb, *Freedom From Incarceration: Why Is This Right Different From All Other Rights?*, 69 N.Y.U. L. REV. 781, 785 (1994) (“An individual’s interest in being free of physical confinement is a fundamental right . . . [T]his fundamental right has been treated differently from all other fundamental rights under the [Supreme] Court’s jurisprudence.”).

270. See *id.* at 787–88 (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and other cases that classify freedom from bodily restraint as part of the “fundamental right” to liberty protected by the Due Process Clause).

271. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 412 (1989) (applying “the most exacting scrutiny” to a Texas criminal statute prohibiting destruction of a venerated object, and reversing the defendant’s sentence of one year in prison and a \$2000 fine for burning an American flag (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988))).

272. See, e.g., *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967) (applying the “most rigid scrutiny” to reverse criminal sentences under a Virginia statute that prohibited interracial marriage (quoting *Korematsu v. United States*, 323 U.S. 214, 216 (1944))).

273. Colb, *supra* note 269, at 803.

disobedience,²⁷⁴ those suspected or convicted of breaking the law are treated as lesser beings without the ordinary rights and liberties of individuals in a constitutional democracy. The enumeration of specific protections for criminal defendants in the Bill of Rights, intended no doubt to ameliorate this problem, may actually aggravate it: judges, policymakers, and academic commentators tend to focus obsessively on the rights afforded specifically to criminal defendants and forget that as *persons*, these defendants also have the same basic human rights that are held by persons not under the scrutiny of a punishing authority. In thinking about the scope of the power to punish, it is necessary to situate that power in the context of the larger political system. When a liberal state punishes, it must do so consistently with the individual rights and interests understood to be fundamental.

But even as one situates the power to punish in its larger political context, it is also necessary to disaggregate that power in order to limit it effectively. Punishing is a complex practice that involves cooperation among all three branches of government and the exercises of different powers in each branch. The legislature defines activity as criminal and prescribes a range of penalties; the judiciary oversees the adjudication of guilt and the determination of sentence; the executive prosecutes individual defendants and later imposes the actual sentence—usually, by incarcerating. Attempts to protect individual defendants' rights at one point in the penal process are likely to be ineffective unless the process is viewed as a whole and the distinct branches can effectively check one another's power.

These types of concerns surface in arguments for the "constitutionalization" of substantive criminal law.²⁷⁵ In fact, almost thirty years ago, scholars calling for a constitutional substantive criminal law foresaw the quandary that would result if legislative

274. Civil disobedients get much more respect than "ordinary" criminals. Analyses by legal scholars and philosophers fully recognize the civil disobedient's continuing interest in liberty, even after an intentional violation of the law. For example, some theorists wonder whether one who breaks the law for ideological purposes has an obligation to submit to punishment. See, e.g., A.D. Woolzley, *Civil Disobedience and Punishment*, 86 ETHICS 323, 327 (1976) ("If we cannot make the moral demand of a civil disobedient that he await punishment, then we cannot refuse to call a man a civil disobedient on the ground that he does not await his punishment.").

275. See Hart, *supra* note 13, at 411 (questioning the wisdom of relying on the "legislature's sense of justice" rather than prescribing substantive constitutional limitations "on the kinds of conduct that can be declared illegal"); Stuntz, *supra* note 13, at 19 ("The normative argument that justifies the constitutionalization of criminal procedure justifies substantive constitutional restraints as well.").

power to define crimes were left unchecked. One problem these scholars identified was that the procedural protections of the Bill of Rights could be circumvented through creativity in the definitions of criminal offense.²⁷⁶ For example, Professor Ronald Allen expressed the fear that legislatures would engage in “semantic gamesmanship,”²⁷⁷ declining to label some of the categories of conduct that they wanted to punish as “elements” in order to avoid the requirement that prosecutors prove that conduct to a jury beyond a reasonable doubt. In short, Allen foresaw the problem that *Blakely* and *Booker* finally recognized. But Allen’s analysis also suggests that *Blakely* and *Booker* are incomplete solutions. Not surprisingly, Allen’s own antidote to “semantic gamesmanship” was a kind of proportionality review.²⁷⁸ Process-based protections of liberty can be undermined by a legislature with unfettered power to criminalize conduct. Accordingly, the procedural protections for proportionality defended in *Apprendi*, *Blakely*, and *Booker* need to be supplemented with a substantive proportionality requirement.

CONCLUSION

Judicial reluctance to conduct proportionality review has been the unfortunate result of a mistaken association between proportionality and particular penological theories. In fact, proportionality reflects basic liberal principles that have little to do with penology. A state incursion into individual liberty must be justified with specific reference to the conduct that prompts the incursion. Furthermore, impositions of punishment must adhere to the general rule that similarly situated individuals are equal before the law.

Whatever value there may be in criminal laws passed by democratically elected legislatures, the sanction is inevitably an interference with the bodily freedom (and sometimes, with the very

276. See, e.g., Ronald Jay Allen, *Mullaney v. Wilbur, the Supreme Court, and the Substantive Criminal Law—An Examination of the Limits of Legitimate Intervention*, 55 TEX. L. REV. 269, 291 (1977) (“The only clear directive in *Wilbur* is that Maine, in formulating its criminal statutes ran afoul of some unarticulated constitutional requirement.”); John Calvin Jeffries & Paul B. Stephan III, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325, 1328–33 (1979) (“*Winship* purported to fix the burden of proof as a matter of constitutional law. To make the scope of that doctrine depend on legislative allocation of the burden of proof is to assure the point in issue and thus reduce *Winship* to a circularity.”).

277. Allen, *supra* note 276, at 290.

278. *Id.* at 296–98.

biological existence) of an individual. But bodily freedom and biological existence are fundamental individual rights, and under ordinary circumstances, liberal governments are expected not to infringe on these rights and even to act affirmatively to protect them. Necessary and appropriate as criminal sentences may sometimes be, they must be meted out in a manner consistent with these basic liberal principles. It is probably the case that a liberal government cannot avoid exercising force against the bodies of some of its subjects in some circumstances. But the power to do so must be constrained if the punishing state is to remain a liberal state, and the best way to constrain the penal power may be through a liberal principle of proportionality.
