

RETHINKING PROPORTIONALITY UNDER THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

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ALTHOUGH a century has passed since the Supreme Court started reviewing criminal punishments for excessiveness under the Cruel and Unusual Punishments Clause, this area of doctrine remains highly problematic. The Court has never answered the claim that proportionality review is illegitimate in light of the Eighth Amendment's original meaning. The Court has also adopted an ever-shifting definition of excessiveness, making the very concept of proportionality incoherent. Finally, the Court's method of measuring proportionality is unreliable and self-contradictory. As a result, a controlling plurality of the Court has insisted that proportionality review be limited to a narrow class of cases. This area of doctrine needs rethinking.

This Article is the first to establish that the Cruel and Unusual Punishments Clause was originally meant to prohibit excessive punishments as well as barbaric ones and that proportionality review is therefore unquestionably legitimate. This Article also demonstrates that proportionality is a retributive concept, not a utilitarian one. Punishments are unconstitutionally excessive if they are harsher than the defendant deserves as a retributive matter. Finally, this Article shows that proportionality should be measured primarily in relation to prior punishment practice. The proposed approach will align the Court's proportionality jurisprudence more closely with the core purpose of the Cruel and Unusual Punishments Clause and will enable the Court to expand proportionality review to a much larger class of cases.

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INTRODUCTION¹

THE Supreme Court's proportionality jurisprudence under the Cruel and Unusual Punishments Clause appears to be undergoing a kind of renaissance. Since 2002, the Court has held that the death penalty is an excessive (and therefore cruel and unusual) punishment for the mentally disabled,² minors,³ and anyone convicted of a non-homicide offense against an individual.⁴ In the 2009 Term, the Court held that a life sentence without possibility of parole is an excessive punishment for juvenile non-homicide offenders.⁵ These decisions have grabbed headlines and caused a great flurry of activity on television and in the blogosphere. They have been greeted with fanfare by those who wish to see the courts take a more active role in protecting the rights of people subjected to criminal punishment.⁶ They have been greeted with consternation and condemnation by critics worried about judicial overreaching.⁷

Yet it is fair to ask whether these decisions truly are significant to the criminal justice system as a whole. Approximately 1,150,000

¹ This Article builds upon textual, historical, and normative arguments I made in an earlier article regarding the original meaning of the Cruel and Unusual Punishments Clause. See John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 *Nw. U. L. Rev.* 1739, 1815–17 (2008) [hereinafter Stinneford, *Original Meaning of Unusual*]. Although the present Article's arguments concerning proportionality stand on their own, one can gain a fuller sense of the implications of recognizing the original meaning of the Cruel and Unusual Punishments Clause by reading the two articles in conjunction with each other.

² *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

³ *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

⁴ *Kennedy v. Louisiana*, 554 U.S. 407, 447 (2008).

⁵ *Graham v. Florida*, 130 S. Ct. 2011, 2034 (2010).

⁶ See, e.g., Editorial, *A New Standard of Decency*, *N.Y. Times*, May 18, 2010, at A26 (“[This] welcome Supreme Court decision [in *Graham v. Florida*], banning sentences of life without parole for juvenile criminals who do not commit murder, recognizes that children mature and should not be irrevocably punished for a childhood act short of killing. But it also recognizes that nations mature—that standards of justice and constitutional principles change over the centuries and should be reinterpreted by new generations.”).

⁷ See, e.g., Kent Scheidegger, *Unaccountable Judicial Activism, Room for Debate* (May 17, 2010, 6:27 PM), <http://roomfordebate.blogs.nytimes.com/2010/05/17/redefining-cruel-punishment-for-juveniles/#kent> (“The Supreme Court chopped another chip of wood out of the tree trunk of democracy in its decision in *Graham v. Florida*. The [C]ourt usurped for itself one more decision that the Constitution actually leaves to the people.”).

offenders are convicted of felonies in the federal⁸ and state systems in a given year.⁹ By contrast, the decisions noted above save fewer than seven offenders per year (on average) from cruel and unusual punishments.¹⁰

In fact, if one takes all of the proportionality cases the Supreme Court has decided under the Cruel and Unusual Punishments Clause, only about ten defendants per year have been saved from cruel and unusual punishments.¹¹ Less than one one-thousandth of

⁸ See, e.g., U.S. Dep't of Justice, Office of Justice Programs, Compendium of Federal Justice Statistics, 2004, at 62 (2006), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs0404.pdf> (stating that 67,464 defendants were convicted of federal felonies between October 1, 2003 and September 30, 2004).

⁹ See, e.g., U.S. Dep't of Justice, Office of Justice Programs, Felony Sentences in State Courts, 2004, at 1 (2007), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc04.pdf> (stating that in 2004 an estimated 1,079,000 adult defendants were convicted of felonies in state courts).

¹⁰ This is a rough estimate based on the frequency with which the challenged punishments were imposed over a given time period in each of the Supreme Court's proportionality cases. Because the time period referenced in the studies cited by the Court varied from case to case, it is impossible to make a more precise estimate. See *Graham*, 130 S. Ct. at 2024 (noting that at the time of decision there were 123 prisoners in the United States serving life sentences with no possibility of parole for non-homicide offenses committed as juveniles). The opinion does not provide dates of conviction, but it is reasonable to assume, given the youth of the offenders at the time of conviction, that this group includes convicts whose sentences were imposed over the last thirty years. If 123 offenders received life sentences with no possibility of parole within the past thirty years, this works out to an average of 4.1 people per year subjected to this sentence. See also *Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008) (noting that no non-homicide offenders were executed between 1964 and 2008 and only two people were sentenced to death for such an offense between 1995 and 2008, an average of between 0 and 0.15 people per year); *Defendants with Mental Retardation Executed in the United States Since the Death Penalty Was Reinstated in 1976*, AdvocacyOne.org, <http://www.advocacyone.org/deathpenalty.html> (updating Denis Keyes, William Edwards & Robert Perske, *People with Mental Retardation are Dying, Legally*, 35 *Mental Retardation* 59, 60 (1997), cited in *Atkins v. Virginia*, 536 U.S. 304, 316 n.20 (2002), and finding that thirty-five people with known mental retardation were executed between 1976 and 2000, an average of 1.5 people per year); Victor L. Streib, *The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973–February 28, 2005*, at 3 (2005), http://www.law.onu.edu/faculty_staff/faculty_profiles/coursematerials/streib/juvdeath.pdf (finding that twenty-two people were executed for crimes committed as juveniles between 1973 and 2005, an average of 0.68 people per year). Note that a slightly older version of Streib's study was cited in *Roper v. Simmons*, 543 U.S. 551, 565 (2005). Based on these statistics, the Supreme Court's recent proportionality decisions have saved an average of 6.4 offenders per year from cruel and unusual punishments.

¹¹ Once again, this is a rough estimate based on the data presented to the Court in each of these cases. See *Enmund v. Florida*, 458 U.S. 782, 796 (1982) (noting that

one percent of all felony offenders are better off than they would have been had the Supreme Court never engaged in proportionality review.

The limited impact of the Supreme Court's proportionality review is not the happy by-product of a criminal justice system that almost always imposes proportionate sentences. Rather, it is the result of the Court's deliberate effort to limit proportionality review to a narrow range of cases, almost all of which involve the death penalty.¹² In several recent cases, the Court has signaled a willingness to uphold virtually any sentence of imprisonment for virtually any felony offense without engaging in substantive proportionality review. For example, it upheld a sentence of twenty-five years to life for a recidivist who shoplifted three golf clubs¹³ and a sentence of fifty years to life for a recidivist who shoplifted videotapes on two occasions.¹⁴ In the wake of these decisions, lower courts have held that it is constitutional to impose a sentence of twenty-five years to life on a recidivist who commits a crime as minor as stealing a slice of pizza.¹⁵

within the previous twenty-five years, no one had been executed for felony murder when they had not caused or intended the death of the victim); *id.* at 795 (“[T]here were 72 executions for rape in this country between 1955 and this Court’s decision in *Coker v. Georgia* in 1977.”) (footnote omitted). This made for an average of 3.3 executions per year for this crime. Cf. *Solem v. Helm*, 463 U.S. 277, 281, 299–300 (1983) (stating that there was no evidence that any other offender had been given a sentence of life with no possibility of parole for a crime comparable to Helm’s habitual offender conviction for uttering of a no-account check in the amount of \$100); *Weems v. United States*, 217 U.S. 349, 364–67 (1910) (asserting that the punishment of *cadena temporal* for the crime of falsifying a public document was so far outside the American experience of punishment that it “amaze[d] those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offence”).

¹² See Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 *Mich. L. Rev.* 1145, 1145 (2009).

¹³ *Ewing v. California*, 538 U.S. 11, 28, 30 (2003).

¹⁴ *Lockyer v. Andrade*, 538 U.S. 63, 66, 77 (2003).

¹⁵ Jack Leonard, ‘Pizza Thief’ Walks the Line, *L.A. Times*, Feb. 10, 2010, at Local-1, available at <http://articles.latimes.com/2010/feb/10/local/la-me-pizzathief10-2010feb10>. In the case of Jerry DeWayne Williams, the judge initially sentenced the defendant to twenty-five years to life for stealing a slice of pizza. Several years later, the judge reconsidered the sentence and exercised discretion to ignore some of the defendant’s prior convictions. Williams’s sentence was reduced to six years imprisonment. This decision was not based on any finding that the three-strikes law was not triggered by

A review of the Supreme Court's proportionality jurisprudence suggests three problems with the Court's approach that have caused it to limit proportionality review to a small class of cases.

First, there are doubts about the legitimacy of proportionality review. Unlike the Eighth Amendment's Excessive Bail and Excessive Fine Clauses, the Cruel and Unusual Punishments Clause contains no obvious reference to proportionality.¹⁶ Originalists like Justice Scalia have argued that the Clause was meant to forbid only barbaric methods of punishment, not disproportionate punishments.¹⁷ The Court has never provided a real answer to the originalists' claims, so the legitimacy of proportionality review has remained open to question.¹⁸ This has led influential members of the Court—particularly Justice Kennedy—to conclude that proportionality review must be confined to a “narrow” class of cases.¹⁹

Second, strangely, the Supreme Court has never clearly defined proportionality. When one says that a punishment must not be excessive, the natural next question is: “Relative to what standard?”²⁰ At times, the Court seems to define proportionality in relation to retribution; at times in relation to deterrence and incapacitation; and at times in relation to retribution, deterrence, incapacitation, and rehabilitation simultaneously.²¹ The meaning of proportionality changes drastically depending on which theory of punishment is

the pizza theft or that a punishment of twenty-five years to life would violate the Cruel and Unusual Punishments Clause. Between 1994 and 2004, 7,332 defendants were given sentences of twenty-five years to life under California's three-strikes law. See Cal. Dist. Attorneys Ass'n, *Prosecutors' Perspective on California's Three Strikes Law: A 10-Year Retrospective* 3, 17 (2004), <http://www.cdaa.org/WhitePapers/ThreeStrikes.pdf>. If prosecutors choose to bring two “three strikes” counts against a given defendant, as happened in *Lockyer*, the mandatory sentence can be increased to fifty years to life. See *Lockyer*, 538 U.S. at 77.

¹⁶ U.S. Const. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”).

¹⁷ See *infra* Section I.A.

¹⁸ See *infra* Subsection I.C.2.

¹⁹ *Harmelin v. Michigan*, 501 U.S. 957, 996 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (concluding that the historical status of proportionality review was uncertain but that *stare decisis* required the Court to adhere to a “narrow proportionality principle”).

²⁰ See Richard S. Frase, *Excessive Prison Sentences, Punishment Goals, and the Eighth Amendment: “Proportionality” Relative to What?*, 89 *Minn. L. Rev.* 571, 588–97 (2005).

²¹ See *infra* Section I.B.

used as the point of reference. A proportionality jurisprudence that either switches between theories from case to case or tries to reference them all at once is bound to be incoherent. This incoherence has led the Court to defer to the legislature in virtually all proportionality cases involving sentences of imprisonment.²²

Finally, the Supreme Court's method of measuring proportionality is ineffective and unreliable. Critics of proportionality review claim that there is no adequate constitutional standard for measuring proportionality and that any attempt to do so will be nothing more than the imposition of the subjective preferences of a majority of the Justices.²³ In response, the Court has held that proportionality can be measured in light of the "evolving standards of decency that mark the progress of a maturing society."²⁴ Under this test, a punishment can be held unconstitutional only if there is a societal consensus—measured largely in terms of legislative enactments and jury verdicts—against it.²⁵ In practice, however, the evolving standards of decency test rarely yields an unambiguous showing of societal consensus against a given punishment, for virtually all punishments reviewed by the Supreme Court enjoy significant public support. Worse, this test makes the rights of criminal offenders dependent on current public opinion. When societal attitudes turn against criminal offenders and legislatures respond by ratcheting up the harshness of punishments—as has happened over the past forty years—the evolving standards of decency test provides no protection.²⁶

²² See *Ewing v. California*, 538 U.S. 11, 27–28 (2003) (holding that in a case involving a sentence of twenty-five years to life, both the choice of punishment theory and the question of whether the punishment was effective in furthering its purposes were "appropriately directed at the legislature," not the Court); *Harmelin*, 501 U.S. at 994, 1003–04 (Kennedy, J., concurring in part and concurring in the judgment) (upholding mandatory life sentence for a drug trafficking offender with no prior record because there was a "rational basis" for the legislative authorization of this sentence).

²³ See, e.g., *Harmelin*, 501 U.S. at 986 ("[T]he standards [for proportionality review] seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective values.").

²⁴ *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

²⁵ Corinna Barrett Lain has argued that the Court's effort to tie its interpretation of the Cruel and Unusual Punishments Clause to current societal standards has parallels in other areas of constitutional interpretation. See Corinna Barrett Lain, *The Unexceptionalism of "Evolving Standards,"* 57 *UCLA L. Rev.* 365, 368–69 (2009).

²⁶ Numerous scholars have criticized the evolving standards of decency test on the ground that it uses majority opinion as the standard for determining whether criminal

As these problems have become more obvious, the Court has increasingly emphasized its right to exercise its “independent judgment” to strike down punishments even where they enjoy strong public support.²⁷ The Court has not, however, articulated any binding constitutional standards to guide this exercise of judgment. Reliance on “independent judgment” thus leads back to the standardless subjectivity originally decried by critics of proportionality review. The Court has tried to limit the scope of this problem by creating a two-track approach to proportionality review. In cases where the Court wishes to invalidate a particular application of the death penalty (and now, life sentences for juvenile non-homicide offenders), it simply pretends to find a societal consensus against the punishment to back up its “independent judgment.” In most cases involving sentences of imprisonment, on the other hand, the Court uses its “independent judgment” as a kind of gatekeeper, upholding virtually any sentence of imprisonment for virtually any felony. In these cases, the Court does not even consult current “standards of decency.”²⁸ We thus have the worst of both worlds: a

offenders will receive protection from majority opinion. See, e.g., John Hart Ely, *Democracy and Distrust* 69 (1980) (“[I]t makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority.”); Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 *Harv. L. Rev.* 43, 88 n.200 (1989) (“The preferences of the majority should not determine the nature of the [E]ighth [A]mendment or of any other constitutional right.”); Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 *N.C. L. Rev.* 1089, 1113 (2006) (“[D]eclaring an action unconstitutional because a significant number of states prohibit the practice leaves the Supreme Court enforcing constitutional protections only in cases where they are least needed.”). The majoritarian nature of the evolving standards of decency test has led some recent commentators to suggest that Congress or state legislatures should have the power to overturn the Supreme Court’s decisions concerning the Cruel and Unusual Punishments Clause. See Richard M. Ré, *Can Congress Overturn Kennedy v. Louisiana?*, 33 *Harv. J.L. & Pub. Pol’y* 1031, 1036 (2010); David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 *U. Chi. L. Rev.* 859, 868 (2009) (“[I]f there were to be a large-scale movement toward executing juveniles or the insane, the Court, if it were faithful to the approach it took in *Roper* and *Atkins*, would have to acquiesce . . .”).

²⁷ Strauss, *supra* note 26, at 863 n.8 (citing *Roper v. Simmons*, 543 U.S. 551, 574–75 (2005)).

²⁸ See *Harmelin*, 501 U.S. at 1005 (Kennedy, J., concurring) (“[I]ntra-jurisdictional and inter-jurisdictional [proportionality] analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality.”); see also *Ewing v. California*, 538

proportionality jurisprudence that is both narrow and unprincipled. The Court's approach to proportionality review needs rethinking.

As a starting point, it must be noted that both proponents and critics of proportionality review have failed to pay close attention to the text of the Cruel and Unusual Punishments Clause, focusing only on the word "cruel" and ignoring the word "unusual." In a prior article, I showed that in the context of the Eighth Amendment, the word "unusual" does not mean rare or uncommon but "contrary to long usage." Under the common law ideology that predominated at the time of the Eighth Amendment's adoption, a governmental practice that enjoyed long usage was considered presumptively just, whereas a governmental practice that ran contrary to long usage—an "unusual" practice—was considered presumptively unjust, particularly where it undermined longstanding common law rights.²⁹ The Cruel and Unusual Punishments Clause thus does not focus on punishments that are "cruel and rare" but on those that are "cruel and new." This focus on new punishments implies that the core purpose of the Clause is to protect criminal offenders when the government's desire to inflict pain has become temporarily and unjustly enflamed, whether this desire is caused by political or racial animus or moral panic in the face of a perceived crisis. In these situations, the Cruel and Unusual Punishments Clause is supposed to serve as a check on the impulse to ratchet up punishments to an unprecedented degree of harshness.

With these facts in mind, this Article will address the three problems, identified above, underlying the Court's current approach to proportionality.

First, the Article will establish the legitimacy of proportionality review by demonstrating that the Cruel and Unusual Punishments Clause was originally understood to prohibit excessive punishments.³⁰ The phrase "cruel and unusual" was widely used as a

U.S. 11, 30 (2003) (adopting Justice Kennedy's "threshold" analysis as the standard for judging the constitutionality of prison sentences).

²⁹See Stinneford, *Original Meaning of Unusual*, supra note 1, at 1815–17. The broader relationship between the United States Constitution and the customary English Constitution has been explored in Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* 9–34 (2004).

³⁰See *infra* Sections II.A–II.C. The question of whether a constitutional doctrine is legitimate only if it comports with original meaning is highly controversial. See, e.g., Mitchell N. Berman, *Originalism is Bunk*, 84 *N.Y.U. L. Rev.* 1, 4 (2009) (describing

synonym for “excessive” in several different contexts in the American legal system of the eighteenth and nineteenth centuries, and was thus a natural and appropriate means to express a prohibition of excessive punishments. Moreover, the historical evidence shows that the Cruel and Unusual Punishments Clauses in both the English and the American Bills of Rights were originally understood to forbid excessive punishments. The very Parliament that drafted the English Bill of Rights interpreted it to prohibit punishments that violated the common law prohibition (dating back to Magna Carta) against excessive punishments. In America, the Framers and early interpreters of the Cruel and Unusual Punishments Clause consistently interpreted it to encompass a principle of proportionality. Proportionality review is thus legitimate in light of the Constitution’s original meaning.

Second, this Article will provide a coherent definition of proportionality under the Cruel and Unusual Punishments Clause.³¹ A punishment is unconstitutionally excessive if it is greater than the offender deserves as a retributive matter. Utilitarian theories of deterrence, incapacitation, and rehabilitation play no role in the excessiveness inquiry, because they focus on whether the punishment is useful to society, not on whether it is just to the offender.³² The various protections the Constitution affords criminal defendants—including the protection against cruel and unusual punishments—are designed to ensure that defendants are not punished in the absence of culpability. To the extent a punishment *exceeds* the offender’s culpability, it is given in the *absence* of culpability and is cruel and unusual.³³

and critiquing the major arguments in favor of originalism). I do not mean to make that claim here. Rather, I make the more limited claim that a showing that a doctrine is supported by original meaning is one method of establishing its legitimacy.

³¹ See *infra* Section III.A.

³² This is not to say that utilitarian goals such as deterrence, incapacitation, and rehabilitation should play no role in criminal sentencing. It is perfectly appropriate for legislatures and judges to pursue such goals, so long as the resulting sentence does not exceed the defendant’s desert measured as a retributive matter.

³³ Several scholars have recently argued that the Cruel and Unusual Punishments Clause should be read to impose a retributive constraint on the legislative power to authorize punishment. See, e.g., Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 Va. L. Rev. 677, 699 (2005); Dan Markel, *Executing Retributivism: Panetti and the Future of the Eighth Amendment*, 103 Nw. U. L. Rev. 1163, 1218–22 (2009). But see Alice Ristroph, *Proportionality as a Principle of Limited*

Third, this Article will show that excessiveness should be determined primarily in light of prior punishment practice. As noted above, the Cruel and Unusual Punishments Clause prohibits punishments that are “cruel and new.” Whereas the evolving standards of decency test asks whether a punishment comports with current moral standards, the Cruel and Unusual Punishments Clause asks whether the punishment comports with the standards that have prevailed *until now*.³⁴ If a legislature or group of legislatures suddenly ratchets up the severity of punishment for a given crime beyond what the other states and the federal government have done up to that point, the punishment is unusual because it runs contrary to prior practice or usage. Because upward departures from prior practice are presumptively unjust, a large gap between the harshness of the new punishment and those that came before it would be strong evidence that the punishment is cruelly excessive.

This proposed approach to proportionality review would provide a more plausible basis for the Supreme Court’s decision to invalidate the death penalty for non-homicide offenses against individuals and for juvenile offenders and to restrict the imposition of life sentences without possibility of parole on juvenile offenders.³⁵ It would also permit the Court to engage in robust proportionality review of sentences of imprisonment imposed upon adult offenders whose sentences are currently beyond the purview of proportionality review.³⁶ It would not justify the Court’s decisions striking down traditional applications of the death penalty that have never fallen out of usage.³⁷

Government, 55 Duke L.J. 263, 286 (2005) (arguing that proportionality is best understood as a principle of limited government independent of the primary justifications for punishment).

³⁴ There has been some controversy among members of the Supreme Court and within the scholarly community as to whether the phrase “cruel and unusual” should be read in the conjunctive or the disjunctive. See Meghan J. Ryan, Does the Eighth Amendment Punishments Clause Prohibit Only Punishments that Are Both Cruel and Unusual?, 87 Wash. U. L. Rev. 567, 572 (2010) (describing the controversy and concluding that the phrase should be read in the conjunctive). This controversy stems largely from the Court’s misunderstanding of the meaning of the word “unusual,” which has led both originalists and non-originalists on the Court to ignore the word in practice. See Stinneford, Original Meaning of Unusual, *supra* note 1, at 1744, 1747–66.

³⁵ See *infra* Subsection III.B.3.

³⁶ See *id.*

³⁷ See *id.*

Part I of the Article will discuss the Court's current proportionality doctrine. It will demonstrate that the Court has failed to establish the legitimacy of proportionality review, to provide a coherent definition of proportionality, and to employ a workable method of measuring proportionality. Part II will answer the objections to the legitimacy of proportionality review by demonstrating that the Cruel and Unusual Punishments Clause was originally understood to forbid excessive punishments. Part III will show that proportionality should be defined in relation to retribution and should be measured primarily against prior practice.

I. THE SUPREME COURT'S CURRENT APPROACH TO PROPORTIONALITY REVIEW UNDER THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

The Supreme Court has held for the past century that the Cruel and Unusual Punishments Clause prohibits excessive punishments as well as barbaric ones.³⁸ But from the beginning, some members of the Court and the legal academy have fiercely criticized this holding, arguing that the Clause prohibits only barbaric methods of punishment.³⁹ Critics of proportionality review have also argued that any attempt by the courts to measure proportionality must be wholly subjective and thus will improperly invade the policy-making function of the legislature.⁴⁰

³⁸ See *Weems v. United States*, 217 U.S. 349, 366–67, 370–71 (1910). It has sometimes been argued that *Weems* is not truly a proportionality case, because the Supreme Court expressed shock at the method of punishment (“*cadena temporal*”) as well as its excessiveness. The historical evidence demonstrates, however, that *Weems* was originally seen as a proportionality case and not a case involving barbaric methods of punishment. After *Weems* was decided, both the United States Department of Justice and the Supreme Court of the Philippines took the position that it did not invalidate the use of *cadena temporal* in all cases but only in cases involving relatively minor crimes, such as the falsification of public records. Offenders convicted of violent crimes in the Philippines continued to be sentenced to *cadena temporal* after *Weems* was decided. See Margaret Raymond, “No Fellow In American Legislation”: *Weems v. United States* and the Doctrine of Proportionality, 30 Vt. L. Rev. 251, 293–95 (2006).

³⁹ See *infra* Section II.A.

⁴⁰ E.g., *Harmelin v. Michigan*, 501 U.S. 957, 986 (1991) (“The real function of a constitutional proportionality principle, if it exists, is to enable judges to evaluate a penalty that *some* assemblage of men and women *has* considered proportionate—and to say that it is not. For that real-world enterprise, the standards seem so inadequate that the proportionality principle becomes an invitation to imposition of subjective val-

The Supreme Court has failed to answer these claims. It has not demonstrated that the Cruel and Unusual Punishments Clause was originally meant to prohibit excessive punishments. It has failed to adopt a coherent, consistent definition of excessiveness. Finally, it has adopted a method of measuring proportionality that is incoherent and self-contradictory. Far from answering the objections of the critics of proportionality review, the Court's methodology has seemed to confirm their claims.

A. *The Basis for Proportionality Review*

The Eighth Amendment to the United States Constitution reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."⁴¹ The first two clauses of this amendment—the Bail Clause and the Fine Clause—include an explicit proportionality requirement. Both prohibit the imposition of "excessive" monetary burdens, a term the Supreme Court treats as synonymous with "disproportionate."⁴²

The phrase "cruel and unusual punishments," on the other hand, contains no obvious reference to proportionality. The 1785 edition of Samuel Johnson's dictionary defines the word "cruel" as "[b]loody; mischievous; destructive; causing pain."⁴³ Similarly, the 1828 edition of Noah Webster's dictionary defines "cruel" as "[i]nhuman; barbarous; savage; causing pain, grief or distress; exerted in tormenting, vexing or afflicting."⁴⁴ On its face, it is not obvious that a "bloody," "inhuman," or "barbarous" punishment is the same thing as an "excessive" or disproportionate punishment.

ues."); *Rummel v. Estelle*, 445 U.S. 263, 275 (1980) (arguing that application of proportionality review outside the context of the death penalty would be an "intrusion into the basic line-drawing process that is pre-eminently the province of the legislature when it makes an act criminal [that] would be difficult to square with the view . . . that the Court's Eighth Amendment judgments should neither be nor appear to be merely the subjective views of individual Justices").

⁴¹ U.S. Const. amend. VIII.

⁴² See, e.g., *O'Neil v. Vermont*, 144 U.S. 323, 339–40 (1892) (Field, J., dissenting) (justifying proportionality review on the ground that the "whole inhibition [of the Eighth Amendment] is against that which is excessive").

⁴³ Samuel Johnson, *A Dictionary of the English Language* (London, J. F. & C. Rivington 6th ed. 1785) (unpaginated).

⁴⁴ Noah Webster, *An American Dictionary of the English Language* (New York, S. Converse 1828).

Nonetheless, the Supreme Court has interpreted the Cruel and Unusual Punishments Clause to prohibit excessive punishments. It has justified this conclusion with one textual argument and one historical argument.

The Court's textual argument depends upon the canon *noscitur a sociis*, which says that an ambiguous statutory term should be interpreted consistently with the statutory text with which it is associated. Using this canon, the Court has held that the Eighth Amendment's prohibitions against "excessive bail," "excessive fines," and "cruel and unusual punishments" should be read together to forbid the government from laying disproportionate burdens on those subjected to the criminal justice system.⁴⁵ As Justice Field wrote in *O'Neil v. Vermont*, "The whole inhibition [of the Eighth Amendment] is against that which is excessive"⁴⁶

The Supreme Court has also offered a brief historical argument to support the claim that the Cruel and Unusual Punishments Clause prohibits excessive or disproportionate punishments. In *Solem v. Helm*, the Court noted that the language of the clause came originally from the English Bill of Rights.⁴⁷ According to the Court, the English version of the Cruel and Unusual Punishments Clause was part of a long common law tradition requiring proportionality in punishment. Magna Carta required that "amerce-ments"—monetary penalties that constituted the most common criminal punishments of the thirteenth century—be proportioned to offenses.⁴⁸ Similarly, English common law courts held that "imprisonment ought always to be according to the quality of the offence."⁴⁹ In light of this history, the Court concluded, the English

⁴⁵ See *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) ("The Eighth Amendment succinctly prohibits '[e]xcessive' sanctions. It provides: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.'"); *Solem v. Helm*, 463 U.S. 277, 285 (1983) ("The English Bill of Rights repeated the principle of proportionality in language that was later adopted in the Eighth Amendment: 'excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.'") (citation omitted); see also *Harmelin*, 501 U.S. at 1009–10 (White, J., dissenting); *Furman v. Georgia*, 408 U.S. 238, 279 (1972) (Brennan, J., concurring); *Weems v. United States*, 217 U.S. 349, 371 (1910).

⁴⁶ 144 U.S. at 340 (Field, J., dissenting).

⁴⁷ 463 U.S. 277, 285 (1983).

⁴⁸ *Id.* at 284 & nn.8–9.

⁴⁹ *Id.* at 285 (quoting *Hodges v. Humkin*, (1615) 80 Eng. Rep. 1015, 1016 (K.B.) (opinion of Croke, J.)).

Bill of Rights's prohibition of "cruel and unusual punishments" is most reasonably read to include a prohibition of excessive or disproportionate penalties.⁵⁰ The Supreme Court has not provided any direct historical evidence that the American version of the Cruel and Unusual Punishments Clause was originally understood to forbid excessive punishments. Rather, it has simply asserted that, because the framers of the American Bill of Rights were generally concerned with preserving the "liberties and privileges of Englishmen," they must have meant to incorporate the proportionality principle into the Cruel and Unusual Punishments Clause:

Although the Framers may have intended the Eighth Amendment to go beyond the scope of its English counterpart, their use of the language of the English Bill of Rights is convincing proof that they intended to provide at least the same protection—including the right to be free from excessive punishments.⁵¹

The Supreme Court's textual and historical arguments for proportionality review have been harshly criticized by some of the Court's dissenters. This criticism began with Justice White's dissent in *Weems v. United States*.⁵² It was developed most notably by Justice Scalia in *Harmelin v. Michigan*.⁵³ Justice Scalia argued that the Court's textual basis for proportionality review is implausible, because the phrase "cruel and unusual" would have been an "exceedingly vague and oblique" way to forbid excessive punishments.⁵⁴ Justice Scalia also argued that the historical evidence shows that neither the English⁵⁵ nor the American⁵⁶ version of the Cruel and

⁵⁰ Id. at 285.

⁵¹ Id. at 285–86 & n.10.

⁵² 217 U.S. 349, 387 (1910) (White, J., dissenting).

⁵³ 501 U.S. 957, 966–85, 991–93 (1991). Justice Scalia's opinion draws heavily on Justice White's dissent in *Weems* as well as an influential law review article by Anthony Granucci. See Anthony F. Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 Cal. L. Rev. 839 (1969). Because Justice Scalia's opinion contains all the major arguments that the Cruel and Unusual Punishments Clause was not originally understood to prohibit excessive punishments, this Article will focus on Justice Scalia's articulation of these arguments.

⁵⁴ *Harmelin*, 501 U.S. at 977.

⁵⁵ Id. at 974; see also Granucci, *supra* note 53, at 859.

⁵⁶ *Harmelin*, 501 U.S. at 976 ("[B]y forbidding 'cruel and unusual punishments,' . . . the Clause disables the Legislature from authorizing particular forms or 'modes' of punishment—specifically, cruel methods of punishment that are not regularly or customarily employed.") (citation omitted).

Unusual Punishments Clause was originally understood to prohibit excessive or disproportionate punishments.⁵⁷

The Supreme Court responded to the originalist argument against proportionality review by turning away from any inquiry into the original meaning of the Clause. When Justice White first made the originalist critique in *Weems*, the majority responded by saying that the evidence regarding original meaning was inconclusive⁵⁸ and that, in any event, the original meaning of the Clause might not be binding on the Court: “The clause . . . may be . . . progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.”⁵⁹ A half-century later, in *Trop v. Dulles*, the Supreme Court made its turn away from history more explicit, holding that the Cruel and Unusual Punishments Clause should be construed not according to its original meaning but according to the “evolving standards of decency that mark the progress of a maturing society.”⁶⁰

For the past fifty years, the Supreme Court has continued to follow the ahistorical approach to the Cruel and Unusual Punishments Clause set forth in *Trop*. Aside from its opinion in *Solem*, the Court has avoided historical inquiry and focused its analysis on contemporary standards of decency. In other words, it has ceded the question of original meaning to the critics of proportionality review. As a result, the Court has left the constitutional legitimacy of proportionality review open to challenge.

B. *The Definition of Excessive*

A second problem with the Supreme Court’s proportionality jurisprudence is that it has failed to define clearly what is meant by excessiveness or disproportionality. Noah Webster’s 1828 edition

⁵⁷ See *infra* Part II for a more detailed discussion of the arguments for and against the proposition that the Cruel and Unusual Punishments Clause was originally meant to prohibit excessive punishments as well as barbaric ones.

⁵⁸ 217 U.S. at 368 (“What constitutes a cruel and unusual punishment has not been exactly decided.”); *id.* (“The provision received very little debate in Congress.”); *id.* at 369 (“No case has occurred in this court which has called for an exhaustive definition.”); *id.* at 371 (“The law writers are indefinite.”); *id.* at 375 (“In the cases in the state courts different views of the provision are taken.”).

⁵⁹ *Id.* at 378.

⁶⁰ 356 U.S. 86, 101 (1958) (plurality opinion).

of *An American Dictionary of the English Language* defines “excessive,” in relevant part, as “beyond the bounds of justice.”⁶¹ But what does it mean to say that a punishment is beyond the bounds of justice? To answer this question, we need some sense of what justice requires.

There are four primary theories of punishment that might serve as a touchstone for proportionality review: retribution, deterrence, incapacitation, and rehabilitation.⁶² The Supreme Court has used these theories to determine the proportionality of punishments but in a highly inconsistent manner. At times, the Court has held that legislatures must use retribution as the baseline for proportionality.⁶³ At others, it has permitted legislatures to select from among some but not all of the four theories of punishment.⁶⁴ The Court’s current position appears to be that a legislature is free to choose from among any of the four major theories of punishment and that a punishment is not excessive if it satisfies any of the four.⁶⁵

The Supreme Court’s refusal to commit to a specific theory of punishment is problematic, because excessiveness has a different

⁶¹ Webster, *supra* note 44 (defining the term “excessive” as “[b]eyond the established laws of morality and religion, or beyond the bounds of justice, fitness, propriety, expedience or utility; as excessive indulgence of any kind”). Interestingly, Webster used the Excessive Bail Clause of the Eighth Amendment to illustrate this definition of the term. *Id.*; see also Johnson, *supra* note 43 (defining “excess” as “[m]ore than enough; faulty superfluity”).

⁶² See *Graham v. Florida*, 130 S. Ct. 2011, 2028 (2010) (citing *Ewing v. California*, 538 U.S. 11, 25 (2003) (plurality opinion)).

⁶³ See, e.g., *Coker v. Georgia*, 433 U.S. 584, 598 (1977) (plurality opinion) (“Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life.”).

⁶⁴ E.g., *Kennedy v. Louisiana*, 554 U.S. 407, 420 (2008) (“[P]unishment is justified under one or more of three principal rationales: rehabilitation, deterrence, and retribution.”); see also *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (holding the death penalty unconstitutional in certain felony murder cases because it does not “measurably contribute[]” to the goals of retribution and deterrence); *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (“The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.”).

⁶⁵ See *Graham*, 130 S. Ct. at 2028 (“With respect to life without parole for juvenile nonhomicide offenders, none of the goals of penal sanctions that have been recognized as legitimate—retribution, deterrence, incapacitation, and rehabilitation—provides an adequate justification.” (citing *Ewing*, 538 U.S. at 25 (“A sentence can have a variety of justifications, such as incapacitation, deterrence, retribution, or rehabilitation Selecting the sentencing rationales is generally a policy choice to be made by state legislatures, not federal courts.”))).

meaning under each. From a retributive point of view, a punishment is proportionate to the offense if it matches the offender's moral culpability or desert.⁶⁶ From a deterrent point of view, a punishment is proportionate if the cost it imposes on the offender and on society is equal to or less than the cost it saves by deterring others from committing crime.⁶⁷ Incapacitation is based upon the same basic calculus, but it compares the cost of punishment to the harm prevented by depriving the specific offender of the opportunity to commit crime. Finally, a punishment is proportionate as a matter of rehabilitation so long as it decreases the risk that the individual will reoffend once the punishment is finished.⁶⁸

These differences in meaning can lead to conflicting results. For example, the adoption of a deterrence theory of punishment will sometimes call for a harsher punishment than would be permitted under a retributive theory. Deterrence is generally thought to depend on two main factors: the perceived harshness of the punishment and the perceived likelihood of getting caught. In a world of scarce resources, where it would be very expensive to catch all (or even most) perpetrators, a state pursuing a deterrence rationale might choose to impose a very harsh punishment on a small number of criminals in order to achieve maximum deterrent effect.⁶⁹ Such a punishment would be proportionate as a matter of deterrence so long as the pain suffered by these offenders did not outweigh the deterrent benefit enjoyed by society as a whole.⁷⁰ From a retributive point of view, however, such punishments might be wildly excessive in relation to the offenders' moral desert. Similarly, an exclusive focus on rehabilitation might permit the state to incarcerate offenders for an extended period of time or subject them to coercive medical procedures that would not be permitted under a retributive theory of punishment.⁷¹

⁶⁶ See Richard S. Frase, *Punishment Purposes*, 58 *Stan. L. Rev.* 67, 73 (2005).

⁶⁷ See Frase, *supra* note 20, at 593–94; Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 *Yale L.J.* 315, 316 (1984).

⁶⁸ See Albert W. Alschuler, *The Changing Purposes of Criminal Punishment: A Retrospective on the Past Century and Some Thoughts about the Next*, 70 *U. Chi. L. Rev.* 1, 9 (2003).

⁶⁹ Richard A. Posner, *Economic Analysis of Law* 170 (2d ed. 1977).

⁷⁰ See *id.*

⁷¹ See Alschuler, *supra* note 68, at 7.

In several recent cases, the constitutionality of the punishment at issue appears to have turned, at least in part, on the theory the Supreme Court used as the baseline for proportionality review. For example, in *Ewing v. California*, the defendant was a recidivist who received a sentence of twenty-five years to life under California's "three strikes" law for shoplifting three golf clubs.⁷² The Supreme Court upheld the sentence on the ground that it was supported by the state's interest in deterrence and incapacitation.⁷³ The Court did not consider whether the punishment was justified as a retributive matter—a significant fact, given the seemingly great disparity between the moral culpability of a shoplifter (even a recidivist) and the pain inflicted by imprisonment of twenty-five years to life. Conversely, in *Atkins v. Virginia*, the Court invalidated the death penalty for the mentally disabled on the ground that the punishment was not proportionate as a matter of retribution or deterrence.⁷⁴ The Court did not mention incapacitation. As the dissent pointed out, this exclusion was significant because the execution of an offender who poses a risk of committing serious crimes in the future (inside or outside of prison) might serve the goal of incapacitation, even if the punishment does not appear justified as a matter of retribution or general deterrence.⁷⁵ As these cases show, the theory used as the measure of proportionality matters.

By permitting the legislature to use any one of four different theories of punishment as a baseline for measuring excessiveness, and thus giving the term "excessive" four distinct meanings, the Supreme Court has made the concept of proportionality incoherent. This approach also ensures that the least protective measure of proportionality will be employed in cases arising under the Cruel and Unusual Punishments Clause.

C. The Measurement of Excessiveness

The final problem with the Supreme Court's proportionality jurisprudence is the lack of a workable method for measuring the excessiveness of punishment.

⁷² 538 U.S. 11, 14 (2003).

⁷³ *Id.* at 25–27.

⁷⁴ 536 U.S. 304, 318–19 (2002).

⁷⁵ *Id.* at 350 (Scalia, J., dissenting).

All criminal punishment involves the infliction of physical or psychological pain—usually quite a lot of pain. How do we tell whether such pain is within the acceptable range or is unconstitutionally excessive? As noted above, critics of proportionality review argue that any attempt to make an excessiveness determination must be wholly subjective, and therefore the question of proportionality should be left solely to the legislature. The Supreme Court has attempted to answer this critique by adopting the “evolving standards of decency” test for determining whether a punishment is cruel and unusual.⁷⁶ Under this test, a punishment should be struck down if (and only if) a societal moral consensus has developed against it.⁷⁷

The evolving standards of decency test is supposed to have two primary virtues. First, it purports to be objective. By looking to various external indicia of current societal moral standards, it is claimed, the Court may make decisions regarding the constitutionality of punishment without relying on the subjective feelings of the individual Justices. Second, the evolving standards of decency test is supposed to free us from the outmoded standards of a vengeful past. When the Eighth Amendment was adopted, punishments such as flogging, mutilation, and branding were permissible.⁷⁸ The death penalty was imposed for crimes as minor as the stealing of a “ship or vessel, or any goods or merchandise to the value of fifty dollars.”⁷⁹ The evolving standards of decency test frees the Court from these harsh standards and allows it to enforce the presumed kinder and more civilized standards of today.

Unfortunately, the virtues of the evolving standards of decency test have proved illusory. In practice, the test has two major flaws. First, it nearly always yields ambiguous results. The Court attempts to measure societal moral consensus primarily by examining legis-

⁷⁶ See *Trop v. Dulles*, 356 U.S. 86, 100–01 (1958); see also, e.g., *Roper v. Simmons*, 543 U.S. 551, 560–61 (2005); *Atkins*, 536 U.S. at 311–12.

⁷⁷ See, e.g., *Roper*, 543 U.S. at 567–68 (striking down the death penalty for juvenile offenders because of an emergent societal consensus against its imposition).

⁷⁸ See Lawrence M. Friedman, *Crime and Punishment in American History* 40 (1993).

⁷⁹ See Act for the Punishment of Certain Crimes Against the United States, ch. 9, § 8, 1 Stat. 112, 114 (1790).

lative enactments⁸⁰ and jury verdicts⁸¹ and sometimes opinions of professional associations,⁸² public opinion polls,⁸³ and evidence regarding acceptance or rejection of the punishment in other countries.⁸⁴ These sources of information, however, rarely yield clear information about societal moral standards. Any challenged punishment that makes its way to the Supreme Court will have been authorized by at least one legislature and imposed by at least one judge or jury. Very often it will have been authorized by several legislatures and imposed by juries in a number of different cases. Similarly, public opinion about any given punishment is often divided, with many people opposing it and many supporting it. For every professional association that opines against a given punishment, another may opine in its favor. Foreign practice is often divided as well. Because the punishments challenged before the Supreme Court usually involve divided societal opinion, application of the evolving standards of decency test rarely leads to a plausible decision to declare a punishment unconstitutional.

Second, the evolving standards of decency test depends upon optimistic assumptions regarding the progressive nature of history—assumptions that have proven false. The evolving standards of decency test rests on the belief that societal moral standards are moving inexorably toward greater kindness, gentleness, and “decency.” The primary job of the Court, in this view, is to keep up with these progressive standards. Over the past forty years, however, societal attitudes have become harsher and more punitive, not less so. Legislatures have ratcheted up the severity of criminal punishments to an unprecedented degree. Drug offenders⁸⁵ and recidivists⁸⁶ face drastically increased sentences. Sex offenders have been hit with numerous new penalties, including longer prison sentences, the

⁸⁰ See, e.g., *Stanford v. Kentucky*, 492 U.S. 361, 370–71 (1989); *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987); *Gregg v. Georgia*, 428 U.S. 153, 175–76 (1976).

⁸¹ See *McCleskey*, 481 U.S. at 300.

⁸² See *Roper*, 543 U.S. at 575–78; *Atkins*, 536 U.S. at 316 n.21.

⁸³ See *Gregg*, 428 U.S. at 181 n.25.

⁸⁴ See, e.g., *Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010); *Roper*, 543 U.S. at 575–80. The Court’s decision to reference international opinion in its Eighth Amendment decisions has drawn significant controversy and scholarly commentary. See, e.g., Youngjae Lee, *International Consensus as Persuasive Authority in the Eighth Amendment*, 156 U. Pa. L. Rev. 63 (2007).

⁸⁵ See *Harmelin*, 501 U.S. at 961 & n.1.

⁸⁶ See *Ewing*, 538 U.S. at 14–15, 30.

death penalty for certain sex offenses, new forms of civil commitment designed to keep them locked up after they serve their prison sentences, registration laws, residency restrictions, and even chemical castration.⁸⁷ Juveniles have increasingly been moved into the adult system and punished to the same degree as adults.⁸⁸ The evolving standards of decency test does not enable the Supreme Court to strike down any of these new punishments so long as they enjoy public support, for the fact that they enjoy public support shows that they comport with current standards of decency.⁸⁹

These shortcomings in the evolving standards of decency test have led the Supreme Court to limit its application in two ways, described more fully below. First, in recent decades the Court has increasingly relied on its own “independent judgment” to supplement (or even replace) its assessment of current standards of decency. This approach has permitted the Court to strike down certain punishments that enjoy significant public support but has also led to a jurisprudence that is standardless and disingenuous. Second, as Professor Rachel Barkow and others have noted, the Court has limited proportionality review to a small class of cases involving the death penalty and (now) life sentences for juvenile

⁸⁷ See Michael Vitiello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 *Ariz. St. L.J.* 651, 653–54, 671–72 (2008); see also John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, the Eighth Amendment, and the Denial of Human Dignity*, 3 *U. St. Thomas L.J.* 559, 561–62 (2006) [hereinafter *Stinneford, Incapacitation Through Maiming*].

⁸⁸ See U.S. Dep’t of Justice, *Juvenile Offenders and Victims: 1999 National Report* 88–89 (1999) [hereinafter *1999 DOJ Report*].

⁸⁹ Numerous scholars have criticized the evolving standards of decency test’s reliance on majority will to provide content for the rights of a despised minority group. See, e.g., Jacobi, *supra* note 26, at 1113; Michael S. Moore, *Morality in Eighth Amendment Jurisprudence*, 31 *Harv. J.L. & Pub. Pol’y* 47, 63 (2008). Several scholars have also criticized the narrow formalism of the Court’s approach to the Cruel and Unusual Punishments Clause, which has led it to ignore the degrading conditions the criminal justice system imposes on criminal offenders. See, e.g., John D. Castiglione, *Quantitative and Qualitative Proportionality: A Specific Critique of Retributivism*, 71 *Ohio St. L.J.* 71, 74 & n.8, 75, 77, 81–82 (2010); Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 *N.Y.U. L. Rev.* 881, 889–90, 892, 973–74, 976 (2009); Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 *U.C. Davis L. Rev.* 111, 111, 140–46 (2007).

non-homicide offenders.⁹⁰ All other sentences of imprisonment remain effectively beyond the purview of proportionality review.

1. Evolving Standards and Independent Judgment

In recent years, the Supreme Court has attempted to overcome the shortcomings of the evolving standards of decency test by emphasizing its right to exercise its own “independent judgment” regarding the constitutionality of a given punishment.⁹¹ But the Court has never explicitly based a decision to invalidate a punishment solely on its independent judgment. Rather, in every case where the Court has found a punishment unconstitutionally cruel, it has claimed to find a societal consensus against the punishment.

For example, in *Roper v. Simmons*, the Court held that there was a societal consensus against the death penalty for juvenile offenders despite the fact that twenty states—a majority of all death penalty states—approved the practice.⁹² To reach this conclusion, the Court claimed that the absolute number of states that approved the punishment was less important than the fact that five states had eliminated punishment in the previous sixteen years.⁹³ This “trend” showed that societal standards were evolving away from acceptance of this punishment. Three years later, in *Kennedy v. Louisiana*, the Court found a societal consensus against imposition of the death penalty for aggravated rape of a child despite a six-state trend toward approval of the punishment.⁹⁴ In this case, the Court held that the trend was not as important as the small number of states that had adopted the punishment so far.⁹⁵ Most recently, in *Graham v. Florida*, the Supreme Court found a societal consensus against imposition of a life sentence without possibility of parole for juvenile non-homicide offenders despite the fact that the punishment was authorized by thirty-seven states, the federal govern-

⁹⁰ See Barkow, *supra* note 12 at 1145 (2009) (“The Supreme Court takes two very different approaches to substantive sentencing law. Whereas its review of capital sentences is robust, its oversight of noncapital sentences is virtually nonexistent.”).

⁹¹ See, e.g., *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010); *Kennedy v. Louisiana*, 554 U.S. 407, 446–47 (2008); *Roper v. Simmons*, 543 U.S. 551, 564 (2005).

⁹² 543 U.S. at 551, 566–68.

⁹³ *Id.*

⁹⁴ 554 U.S. at 431–34.

⁹⁵ *Id.* at 432–33.

ment, and the District of Columbia.⁹⁶ The Court based its finding of a societal consensus against the punishment primarily on the fact that only 129 offenders were currently serving this sentence, which showed that imposition of the punishment was “exceedingly rare.”⁹⁷ The Court did not consider whether there was a trend toward or against imposition of this punishment.

Roper, *Kennedy*, and *Graham* make clear that the evolving standards of decency test has no coherent core. In all three cases, the Supreme Court struck down a punishment that appeared to enjoy significant public support. In *Roper*, the Court treated the absolute number of states that authorized the punishment as unimportant; what mattered was the trend toward abolition. In *Kennedy*, the Court treated the trend as unimportant; what mattered was the absolute number of states. In *Graham*, the Court treated both the absolute number of states and the trend as unimportant; what mattered was rarity of imposition.

Roper, *Kennedy*, and *Graham* also show that the evolving standards of decency test is often deeply at odds with the Supreme Court’s own judgment. In each case, the Court had a firm conviction that the punishment was excessive in light of the offender’s culpability.⁹⁸ But in each case, there was no clear societal consensus against the punishment. Rather, societal opinion was divided. The Court in each case had three options: it could have followed the dictates of the evolving standards of decency test and let the punishment stand; it could have jettisoned the evolving standards of decency test and relied on its own judgment or on some other standard; or it could have come up with a fictionalized consensus against the punishment to support its own judgment. In all three cases, it chose the last and most disingenuous of these options.

Continuing down this road is untenable. When the Court engages in obvious manipulation to reach its desired conclusion, it

⁹⁶ 130 S. Ct. at 2023.

⁹⁷ *Id.* at 2026.

⁹⁸ *Id.* at 2028 (“[W]hether viewed as an attempt to express the community’s moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult.” (quoting *Roper*, 543 U.S. at 571)); *Kennedy*, 554 U.S. at 441–43 (holding that retribution does not justify the death penalty for child rape because the death penalty imposes a more severe harm—death—than the crime it punishes and because child victims will be harmed by protracted involvement in death penalty cases).

may undermine public respect for judicial review and for the law. Moreover, despite the notoriety of these cases, they have affected a very small number of offenders.⁹⁹ The Court's current approach to proportionality will never enable it to engage in substantial proportionality review of sentences that affect a large number of people, because the rarity of the punishment is essential to the claim that there is a societal consensus against it. Even envelope-pushing cases like *Roper*, *Kennedy*, and *Graham* rely heavily on the rarity of the punishment to support their result.

It is equally untenable for the Court to rely solely on its own independent judgment. As the critics of proportionality review often point out, a Court that overturns acts of legislation without the guidance of a constitutional standard becomes an antidemocratic force rather than an arbiter of law.¹⁰⁰ If the power of judicial review is pushed to this extreme, it is doubtful that it will long survive.

2. The Court's Two-Track Approach to Proportionality Under the Cruel and Unusual Punishments Clause

While the Supreme Court has used its independent judgment to strengthen its ability to strike down certain instances of the death penalty and juvenile life without parole, it has also used this judgment to eviscerate proportionality review in virtually all other cases involving sentences of imprisonment. In such cases, the Court employs its independent judgment to make a threshold determination concerning the gravity of the offense. If the Court considers the crime sufficiently grave to justify a long prison sentence, it will automatically uphold the sentence without considering whether it comports with current standards of decency. The Court's notion of a "grave" crime is minimalist. For example, it held that a recidivist who shoplifted three golf clubs had committed a sufficiently grave crime to be sentenced to twenty-five years to life imprisonment.¹⁰¹ On the very same day, it decided that a recidivist who shoplifted videotapes on two occasions could constitutionally be imprisoned fifty years to life.¹⁰² In both cases, the Court relied solely on its in-

⁹⁹ See *supra* Introduction.

¹⁰⁰ See Bradford R. Clark, *Constitutional Structure, Judicial Discretion, and the Eighth Amendment*, 81 *Notre Dame L. Rev.* 1149, 1159 (2006).

¹⁰¹ *Ewing v. California*, 538 U.S. 11 (2003).

¹⁰² *Lockyer v. Andrade*, 538 U.S. 63 (2003).

dependent judgment to justify the sentence. It did not consider whether the sentence comported with current standards of decency.

The Court's treatment of death penalty cases also differs from imprisonment cases in terms of the "fit" that must be shown between the challenged punishment and the proffered theory of punishment. In cases involving imprisonment of adults, the Court gives almost complete deference to the legislature.¹⁰³ In cases involving the death penalty or juvenile life without parole for non-homicide offenses, the Court appears to give no deference at all.¹⁰⁴

¹⁰³ See *Ewing*, 538 U.S. at 27–28 (refusing to judge whether the three strikes law was effective in furthering the goals of deterrence or incapacitation on the ground that such questions are "appropriately directed at the legislature"); *Harmelin v. Michigan*, 501 U.S. 957, 1003–04 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (upholding mandatory life sentence for a drug trafficking offender with no prior record because there was a "rational basis" for the legislative authorization of the sentence).

¹⁰⁴ See *Graham v. Florida*, 130 S. Ct. 2011, 2028–30 (2010) (striking down the penalty of life imprisonment without possibility of parole for juvenile non-homicide offenders on the ground that the punishment was not adequately justified on retributive, deterrent, incapacitative, or rehabilitative grounds); *Kennedy v. Louisiana*, 554 U.S. 407, 441–45 (2008) (recognizing that the death penalty for rape of a child might further retributive and deterrent goals but striking down the punishment on the ground that it created "risks of overpunishment" and might exacerbate the problem of underreporting of this crime); *Roper v. Simmons*, 543 U.S. 551, 571 (2005) (striking down the death penalty for juveniles because "[r]etribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity. As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles . . ."); *Atkins v. Virginia*, 536 U.S. 304, 319–20 (2002) (striking down the death penalty for the mentally retarded, reasoning that "[i]f the culpability of the average murderer is insufficient to justify the most extreme sanction available to the State, the lesser culpability of the mentally retarded offender surely does not merit that form of retribution With respect to deterrence—the interest in preventing capital crimes by prospective offenders—it seems likely that capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation Thus, executing the mentally retarded will not measurably further the goal of deterrence.") (citations omitted); *Enmund v. Florida*, 458 U.S. 782, 798–99 (1982) ("Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed We are quite unconvinced . . . that the threat that the death penalty will be imposed for murder will measurably deter one who does not kill and has no intention or purpose that life will be taken."); *Coker v. Georgia*, 433 U.S. 584, 598 (1977) ("Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life.").

The Supreme Court's decision to avoid substantive review of prison sentences stems partly from the sense that it lacks a reliable method to measure excessiveness. As noted above, the evolving standards of decency test almost always yields ambiguous results, a problem that seems exacerbated in cases involving prison sentences. Whereas a death sentence differs in kind from other sentences in terms of harshness and finality, the difference between various prison sentences seems more a matter of degree. Without a reliable method for making judgments of excessiveness, it is problematic to strike down a legislatively authorized sentence of imprisonment. Thus, in *Rummel v. Estelle*, the Court expressed doubt that it could draw "any constitutional distinction between one term of years and a shorter or longer term of years" without basing the judgment "merely [on] the subjective views of individual Justices."¹⁰⁵ Similarly, Justice Kennedy observed in his controlling concurrence in *Harmelin v. Michigan* that "we lack clear objective standards to distinguish between sentences for different terms of years."¹⁰⁶

The Court's decision to limit the scope of its proportionality analysis also stems partly from doubts about the legitimacy of proportionality review. As described above, critics of proportionality review have forcefully argued that the Cruel and Unusual Punishments Clause was meant to encompass only barbaric methods of punishment, not excessive punishments. This argument led a controlling plurality of the Court to conclude that the Court should enforce the proportionality principle in only a "narrow" range of cases.¹⁰⁷

In sum, doubts about the legitimacy and reliability of proportionality review have led the Court to effectively limit proportionality review to cases involving the death penalty, thus excluding 99.999% of offenders from the protection of the Cruel and Unusual Punishments Clause.¹⁰⁸ In the 2009 term, the Court signaled a possible willingness to expand the scope of proportionality review,

¹⁰⁵ 445 U.S. 263, 275 (1980).

¹⁰⁶ 501 U.S. 957, 1001 (1991) (Kennedy, J., concurring).

¹⁰⁷ *Id.* at 996 (asserting that, given the doubts about the original meaning of the Cruel and Unusual Punishments Clause, the Court should confine itself to enforcing a "narrow proportionality principle").

¹⁰⁸ See *supra* notes 8–11 and accompanying text.

holding that life sentences for juvenile non-homicide offenders are unconstitutionally excessive.¹⁰⁹ In so holding, the Court implied that the key distinction might not be between death penalty and imprisonment cases but rather between cases involving a “categorical” challenge to a certain type of sentence and cases involving a challenge to an individual sentence “given all the circumstances in a particular case.”¹¹⁰ In the former type of case the Court will employ robust proportionality review, but in the latter type the Court will continue to use its independent judgment to screen out cases involving “grave” crimes.¹¹¹ This change of focus may signal a willingness by the Court to expand proportionality review to sentences of imprisonment. But it is hard to see exactly how it will do so. The Court has not specified the standards for differentiating “categorical” challenges from challenges involving a “particular case.” More specifically, the Court has not resolved the reliability and legitimacy concerns that led it to limit the scope of proportionality review in the first place. Without doing so, any attempt to expand proportionality review will suffer from a lack of constitutional standards to guide it. If the Supreme Court is to engage in proportionality review under the Cruel and Unusual Punishments Clause that is substantive, consistent, and covers a broad range of cases, it must find a new approach. Such an approach is described in Parts II and III below.

II. PROPORTIONALITY AND THE ORIGINAL MEANING OF THE CRUEL AND UNUSUAL PUNISHMENTS CLAUSE

As noted above, several Supreme Court Justices and legal scholars have argued that the Cruel and Unusual Punishments Clause was originally understood to prohibit only barbarous methods of punishment, not disproportionate punishments. This argument has three basic components: (1) the English version of the Cruel and Unusual Punishments Clause prohibited only “illegal” punishments, not excessive ones; (2) in the American version of the Cruel and Unusual Punishments Clause, the phrase “cruel and unusual” cannot plausibly be read to forbid excessive punishments in light of

¹⁰⁹ *Graham*, 130 S. Ct. at 2034.

¹¹⁰ *Id.* at 2022–23.

¹¹¹ *Id.* at 2021–22.

the fact that Americans used more explicit references to proportionality in other contexts; and (3) the historical evidence shows that the Framers and early interpreters of the Clause believed it to cover only barbaric methods of punishment, not excessive ones.

Each of these assertions is demonstrably incorrect. The English version of the Cruel and Unusual Punishments Clause was specifically directed at excessive punishments, not simply illegal ones. In America, the phrase “cruel and unusual” was widely used within the legal system as a synonym for “excessive” and was not an “exceedingly vague” way to express the idea of disproportionality. Finally, the historical evidence shows that the Framers and early interpreters of the Cruel and Unusual Punishments Clause understood it to prohibit excessive punishments, not merely barbaric methods of punishment.

A. Proportionality in the Anglo-American Tradition

The idea that the punishment should fit the crime is as old as Western civilization. Aristotle wrote that justice requires proportionality and that laws that inflict disproportionate burdens are unjust.¹¹² Similarly, the Hebrew Scriptures commanded that wrongdoers should be punished in accordance with the wrong they committed: “An eye for an eye; a tooth for a tooth.”¹¹³ Over the years, this idea has been reaffirmed by numerous legal thinkers, including Aquinas,¹¹⁴ Montesquieu,¹¹⁵ and Beccaria.¹¹⁶ This idea is also a longstanding theme in the English common law tradition and finds expression in the great constitutional documents such as Magna Carta¹¹⁷ and the English Bill of Rights;¹¹⁸ in authoritative

¹¹² See Aristotle, *Nicomachean Ethics*, bk. V, ch. 3 (Roger Crisp trans., Cambridge Univ. Press 2004) (350 B.C.E.) (“What is just in this sense, then, is what is proportionate. And what is unjust is what violates the proportion.”).

¹¹³ See Exodus 21:25; Leviticus 24:19–20.

¹¹⁴ See 4 Thomas Aquinas, *Summa Contra Gentiles* 304 (English Dominican Fathers trans., Burns Oates & Washbourne 1929) (1264) (“[T]he punishment should correspond with the fault, so that the will may receive a punishment in contrast with that for love of which it sinned.”).

¹¹⁵ See Baron De Montesquieu, *The Spirit of the Laws* 89–90 (Thomas Nugent trans., Hafner Publ’g Co. 1949) (1748).

¹¹⁶ See Cesare Beccaria, *On Crimes and Punishments and Other Writings* 17 (Richard Bellamy ed., Richard Davies trans., 1995).

¹¹⁷ See *infra* notes 147–48 and accompanying text.

¹¹⁸ See *infra* Section II.B.

writers ranging from Bracton¹¹⁹ to Blackstone;¹²⁰ and in court cases interpreting both Magna Carta and the Bill of Rights.¹²¹

What differentiates the English (and later the American) legal tradition from that of other societies is that the principle of proportionality in sentencing did not remain at the level of normative aspiration. Rather, it played a direct role in constitutional struggles to limit the power of the sovereign, and it was embodied in documents meant to impose such limits: Magna Carta, the English Bill of Rights, and the United States Constitution.

The early English punishment system imposed a rough proportionality between crime and sentence.¹²² The legal codes in effect prior to the Norman Conquest assigned a series of fixed monetary penalties as punishments for various offenses. A person who committed homicide had to pay a “wer” to the family of the victim, and a person who committed a lesser offense had to pay a “bot.”¹²³ The offender was required to pay an additional sum, a “wite,” to the king or lord enforcing the punishment.¹²⁴ The amount of the overall payment due depended upon the nature of the offense and the status of the victim.¹²⁵

Shortly after the Norman Conquest, the mandatory system of wers, bots, and wites was replaced by a system of “amerancements.” Under this system, a person who committed a criminal offense was placed in the king’s “mercy.” Theoretically, the king could demand

¹¹⁹ See 2 William Bracton, *On the Laws and Customs of England* 299 (Samuel E. Thorne trans., Harvard Univ. Press 1968) (1300).

¹²⁰ 4 William Blackstone, *Commentaries on the Laws of England* 15 (Wayne Morrison ed., Cavendish Publ'g 2001) (1765–1769) (“It is . . . absurd and impolitic to apply the same punishment to crimes of different malignity.”).

¹²¹ See *infra* Sections II.A & II.B. The historical evidence relating to the question of whether the English version of the Cruel and Unusual Punishments Clause was originally meant to encompass a principle of proportionality has previously been discussed, to one degree or another, by a number of sources. See, e.g., Harmelin v. Michigan, 501 U.S. 957, 966–77 (1991); Solem v. Helm, 463 U.S. 277, 284–86 (1983); Granucci, *supra* note 53, at 843–44, 853–60; Stinneford, *Original Meaning of Unusual*, *supra* note 1, at 1819–21.

¹²² See Granucci, *supra* note 53, at 844–45.

¹²³ See William McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 285 (1914).

¹²⁴ See *id.*

¹²⁵ See *id.*

all that the offender owned.¹²⁶ A customary system of procedure quickly grew up, however, to ensure proportionality in the imposition of amercements.¹²⁷ First, the judge determined the maximum possible amercement based on the nature of the crime. Greater crimes called for greater penalties and lesser crimes for lesser ones. The amount due for each crime was determined by custom. Second, after the amercement was determined, a group of men from the community determined how much the defendant could afford to pay.¹²⁸ The amount of the amercement would then be reduced so as to prevent it from destroying the offender's livelihood.¹²⁹

During the reign of King John, this system began to break down. John had lost his lands in France in an unsuccessful conflict with Philip Augustine, incurring heavy expenses at the same time he lost a major source of revenue.¹³⁰ To make up this loss, John sought additional sources of revenue within England itself. He increased feudal duties owed to the king, levied an income tax, and—most importantly for our purposes—abandoned proportionality in the imposition of amercements, imposing “extortionate” penalties on those convicted of criminal offenses.¹³¹ Ultimately, the barons of England rebelled against the king and forced him to accept the terms they set forth in Magna Carta as a condition of his continued kingship.

Three chapters of Magna Carta addressed the problem of excessive amercements. Chapter 20 specified that freemen, merchants, and villeins “shall not be amerced for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity.”¹³² Similarly, Chapters 21 and 22 specified that earls, barons, and members of

¹²⁶ See *id.* at 285–86; 2 Sir Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I*, at 514 (Glasgow, James Maclehose & Sons 2d ed. 1898) [hereinafter Pollock & Maitland].

¹²⁷ See McKechnie, *supra* note 123, at 286.

¹²⁸ See *id.*

¹²⁹ See *The Treatise on the Laws and Customs of the Realm of England Commonly Called Glanvill* 114 (G.D.G. Hall trans., 1965) (circa 1187) (“Amercement by the lord king here means that he is to be amerced by the oath of lawful men of the neighborhood, but so as not to lose any property necessary to maintain his position.”).

¹³⁰ See A.E. Dick Howard, *Magna Carta: Text and Commentary* 5–6 (1964).

¹³¹ J.C. Holt, *Magna Carta* 231 (1965).

¹³² *Id.* ch. 20.

the clergy should be amerced only “in accordance with the nature of the offence.”¹³³

These were not mere words. Some evidence suggests that in the thirteenth and fourteenth centuries, the proscription against excessive amercements was enforced through the writ *de moderata misericordia*.¹³⁴ In 1253, such a writ was issued instructing the sheriff of Northampton to ensure that John le Franceys was not subjected to “any amercement contrary to the tenor of the great charter of liberties.”¹³⁵ In the same year, the church of St. Albans successfully appealed the imposition of a £100 amercement that had been imposed on the church as punishment for the failure of several mayors within its jurisdiction to respond to a royal summons. The church argued that the amercement was illegal for several reasons, one of which was that it “exceeded the just penalty of the offence,” and thus “injured the liberty against the common charter, where it is said that free men should be amerced according to their offences.”¹³⁶ In 1316, a man named LeGras filed a writ arguing that an amercement of two marks, which would require the seizure of two horses in payment thereof, was an excessive penalty for violating common law pleading rules. When the case went before the Court of Common Pleas, the bailiff claimed that the amercement was only for ten shillings, and so the court was not required to decide the excessiveness issue. The court stated in dicta, however, that if the assessment were for two marks it would be invalidated.¹³⁷

Amercements gradually fell out of use after the beginning of the fourteenth century, possibly because royal officials discovered that they could use fines—which had originally been voluntary payments offered to secure the king’s favor—to get around the proportionality requirements imposed by Magna Carta on excessive

¹³³ Id. chs. 21–22.

¹³⁴ See Anthony Fitz-Herbert, *The New Natura Brevium* 167–71 (reprinted London 1687) (1534); see also Granucci, *supra* note 53, at 846.

¹³⁵ Close Rolls 66, m.7d, *translated and reprinted in part in* F. Thompson, *The First Century of Magna Carta* 46 (1925).

¹³⁶ 3 Matthew Paris, *English History from the Year 1235 to 1273*, at 444 (J.A. Giles trans., London, Selden Society 1854).

¹³⁷ *Le Gras v. Bailiff of Bishop of Winchester*, Y.B. 10 Edw. 2, pl. 4 (C.P. 1316), *reprinted in* 20 Selden Society 3 (1934).

ameracements.¹³⁸ For example, the king could order a person to be imprisoned and refuse to release him until he had paid some specified fine.¹³⁹ In this manner, fines ceased to be voluntary and came to replace ameracements as the predominant form of criminal punishment. Ultimately, however, the proportionality requirements imposed on ameracements were applied in cases involving fines as well.¹⁴⁰

Magna Carta's prohibition against excessive ameracements came to embody the broader principle that governmental power to punish should be limited by customary notions of proportionality. Indeed, even in the thirteenth century, legal thinkers saw proportionality in punishment as a principle that should be followed in all cases. For example, William Bracton, whose work *On the Laws and Customs of England* was the most comprehensive treatment of English law before Blackstone, wrote: "It is the duty of the judge to impose a sentence no more and no less severe than the case demands."¹⁴¹ This principle applied to "pecuniary as well as corporal punishment."¹⁴²

The principle of proportionality also appears to have been considered applicable to cases involving sentences of imprisonment, although this form of punishment was rare prior to the eighteenth century. In *Hodges v. Humkin*, Hodges was thrown into prison without food or bedding for insulting the mayor with vulgar words and gestures.¹⁴³ He petitioned for a writ of habeas corpus, and the Court of King's Bench ordered his release, holding that under Magna Carta and the Statute of Marlbridge, "imprisonment ought always to be according to the quality of the offence."¹⁴⁴

¹³⁸ See Pollock & Maitland, *supra* note 126, at 517–18.

¹³⁹ See *id.*

¹⁴⁰ See *The Case of William Earl of Devonshire*, (1689) 11 How. St. Tr. 1353–72 (K.B.).

¹⁴¹ Bracton, *supra* note 119, at 299.

¹⁴² *Id.* at 300.

¹⁴³ (1615) 80 Eng. Rep. 1015 (K.B.).

¹⁴⁴ *Id.* at 1016.

B. Proportionality and the Prohibition of “Cruell and Unusuall Punishments” in the English Bill of Rights

The seventeenth century was a period of intense constitutional struggle within England. Efforts to constrain the sovereign to follow the rule of law were directed first against the absolutist Stuart kings, then against the absolutist Parliament that succeeded them after the English Civil War, and finally against the Stuart kings who returned to power after the Restoration. The sovereign claimed absolute freedom to impose his will. Opponents claimed that he could not legitimately take actions that violated fundamental principles of justice embodied in the common law.¹⁴⁵

These conflicts culminated in the Glorious Revolution. Members of the English aristocracy invited William and Mary to invade England and depose King James II on the ground that James had violated the rights of English citizens in a variety of ways, including the imposition of “excessive baile,” “excessive fines,” and “illegall and cruell punishments.”¹⁴⁶ Parliament offered to recognize William and Mary as king and queen on the condition that they accept a Bill of Rights designed to limit the arbitrary exercise of the monarch’s power.¹⁴⁷ The Bill of Rights specified certain actions that the sovereign should not take, including the requirement that “excessive bail ought not to be required nor excessive fines imposed nor cruell and unusuall punishments inflicted.”¹⁴⁸

As noted above, Justice Scalia has argued that the English prohibition against “cruell and unusuall punishments” was not intended to prohibit excessive punishments. Rather, he has argued that the prohibition was meant to prevent judges from imposing punishments unauthorized by the common law or by statute or otherwise beyond their jurisdiction.¹⁴⁹ Justice Scalia’s primary basis

¹⁴⁵ See generally Stinneford, *Original Meaning of Unusual*, supra note 1, at 1781–86.

¹⁴⁶ An Act Declareing the Rights and Liberties of the Subject and Settleing the Succession of the Crowne (1688), in 6 Statutes of the Realm 142, 143 (1819) [hereinafter 1688 Act]; see also Granucci, supra note 53, at 852.

¹⁴⁷ See, e.g., Sir David Lindsay Keir, *The Constitutional History of Modern Britain Since 1485*, at 267–68 (9th ed. 1969); Thomas Pitt Taswell-Langmead, *English Constitutional History: From the Teutonic Conquest to the Present Time* 507 (Philip A. Ashworth ed., 6th ed. 1905)

¹⁴⁸ See 1688 Act, supra note 146, at 143.

¹⁴⁹ *Harmelin v. Michigan*, 501 U.S. 957, 974 (1991).

for this conclusion was *Titus Oates' Case*, the first case decided under the English Cruell and Unusuall Punishments Clause.¹⁵⁰

Titus Oates was a disreputable Anglican cleric who briefly achieved fame and fortune by claiming to know of a “popish plot” to kill the king.¹⁵¹ Oates’s testimony resulted in the execution of fifteen innocent people before it was discovered that he had fabricated his entire story.¹⁵² Oates was ultimately convicted of perjury.¹⁵³ At sentencing, Chief Justice Jeffreys expressed his regret that the death penalty was not available for this crime and declared that “it is left to the discretion of the court to inflict such punishment as they think fit” so long as it “extend not to life or member.”¹⁵⁴ The Court then sentenced Oates to be whipped continuously as he crossed the city of London “from Aldgate to Newgate,” and then two days later “from Newgate to Tyburn.” He was also sentenced to life imprisonment, pillorying four times a year for life, a fine of 2000 marks, and defrockment.¹⁵⁵

After enactment of the English Bill of Rights, Oates appealed his sentence to Parliament, arguing that it violated the prohibition of “cruell and unusuall punishments.” Both houses of Parliament agreed that the sentence was illegal.¹⁵⁶ In fact, representatives from the House of Commons asserted that the House had Oates’s case in mind when it drafted the Bill of Rights.¹⁵⁷ Thus, Oates’s case is a good illustration of the original meaning of the English Cruell and Unusuall Punishments Clause.

As Justice Scalia pointed out, much of the parliamentary debate in Oates’s case focused on the unprecedented nature of his pun-

¹⁵⁰ Id. at 969.

¹⁵¹ The trials in which Oates gave perjured testimony relating to this “plot” are described in 1 James Fitzjames Stephen, *A History of the Criminal Law of England* 383–404 (London, MacMillan & Sons 1883).

¹⁵² See id.; see also Granucci, *supra* note 53, at 857.

¹⁵³ See *The Trial of Titus Oates*, (1685) 10 How. St. Tr. 1079–1330 (K.B.); see also Granucci, *supra* note 53, at 857–58.

¹⁵⁴ Id. at 1227, 1314–15.

¹⁵⁵ Id. at 1315.

¹⁵⁶ See 10 H.C. Jour. 246, 249 (1689). The House of Lords refused to grant the appeal, however, because it thought Oates was such a bad person. See id. at 249.

¹⁵⁷ 10 H.C. Jour. 247 (1689) (“[T]he Commons had a particular Regard to these Judgments, amongst others, when that Declaration [the Cruel and Unusual Punishments Clause] was first made; and must insist upon it, That they are erroneous, cruel, illegal, and of ill Example to future Ages.”).

ishments.¹⁵⁸ They were “contrary to Law and ancient Practice.”¹⁵⁹ There was “no precedent[]” to support them.¹⁶⁰ Citing this language, Justice Scalia argued that the term “unusuall” probably meant “contrary to usage,”¹⁶¹ which is another way of saying “contrary to the common law.” The problem with Oates’s punishment was not that it was disproportionate but that it was unsupported by statute or precedent and was thus beyond the court’s power to inflict.¹⁶²

This argument fails to take one key fact into account: Members of Parliament did not simply complain that the punishments inflicted on Oates were unprecedented or illegal; they also called them “extravagant,” “exorbitant,”¹⁶³ and “barbarous, inhuman and unchristian.”¹⁶⁴ This language implies that Parliament did not simply object to the unprecedented nature of these punishments but also to their cruelty.

In what sense were the punishments inflicted on Oates cruel? Every element of his punishment (except defrocking) was well accepted under the common law; none was considered an inherently barbarous method of punishment. Moreover, even if one stacked up all of Oates’s punishments together—the fine, the whippings, the imprisonment, the pillorying, and the defrockment—their cumulative effect was less harsh as an absolute matter than some punishments considered acceptable at the time, such as drawing and quartering or burning at the stake.¹⁶⁵ If the punishments inflicted on Oates were unacceptably cruel, this could only be because they were disproportionate to the crime of perjury. This conclusion is supported by the fact that the punishments were described in the parliamentary debates as “extravagant” and “exorbitant,” which are synonyms for “excessive” or “disproportionate.”

Justice Scalia’s attempt to separate the unprecedented nature of Oates’s punishments from their excessiveness was mistaken. In the

¹⁵⁸ See *Harmelin v. Michigan*, 501 U.S. 957, 973–74 (1991).

¹⁵⁹ 14 H.L. Jour. 228 (1689).

¹⁶⁰ *Id.*

¹⁶¹ *Harmelin*, 501 U.S. at 974.

¹⁶² *Id.* at 973–74.

¹⁶³ 10 H.C. Jour. 249 (1689).

¹⁶⁴ 14 H.L. Jour. 228 (1689).

¹⁶⁵ See Blackstone, *supra* note 120, at 376–77.

parliamentary debates over Oates's punishments, the speakers used the unprecedented nature of the punishments as *evidence* of their excessiveness, describing them at one moment as "contrary to law and ancient practice" and at another as "extravagant" or "exorbitant." To understand why the speakers would make this link between precedent and proportionality, one needs to understand the common law ideology that predominated in England and America from the seventeenth century through much of the nineteenth century.

Under the common law, punishments that were unsupported by precedent were considered presumptively unreasonable. In the seventeenth, eighteenth, and nineteenth centuries, the common law was described as the law of "custom and long usage."¹⁶⁶ Judges deciding common law cases used precedent to identify and apply longstanding practices.¹⁶⁷ By remaining within the bounds established by longstanding precedent, judges were thought to guarantee the reasonableness of their decisions. "Long usage" was considered powerful evidence that a given practice was reasonable and enjoyed the consent of the people, for if it lacked these qualities it would have fallen out of usage.¹⁶⁸ By contrast, new practices that violated the bounds established by long usage were considered presumptively unreasonable.¹⁶⁹ Such practices were described as "unusual."¹⁷⁰

In prohibiting "cruell and unusuall punishments," Parliament drew upon the idea that long usage tends to reveal what is just and that lack of long usage tends to reveal what is unjust. The English Bill of Rights forbade judges from imposing new ("unusual") punishments that were significantly more harsh ("cruel") than those that were traditionally permitted under the common law. The court's deviation from longstanding precedent in *Titus Oates' Case* was important because it showed that the punishment was unreasonable. The punishment was excessive or disproportionate because it was significantly harsher than the punishments that had previously been given for the crime of perjury.

¹⁶⁶ See Stinneford, Original Meaning of Unusual, *supra* note 1, at nn. 167–84.

¹⁶⁷ See *id.*

¹⁶⁸ See *id.* at 1771–86.

¹⁶⁹ See *id.* at 1775–77.

¹⁷⁰ See *id.* at 1768–71.

The fact that Parliament measured the proportionality of punishments by comparing them to prior practice may be seen in another case that came before Parliament in the same year Titus Oates made his appeal, *The Earl of Devonshire's Case*.¹⁷¹ The case arose in 1687 when the Earl of Devonshire beat Colonel Culpepper with a stick (in retaliation for a prior "affront") while both were visiting the king's palace at Whitehall.¹⁷² Ultimately, the Earl pled guilty to a misdemeanor and was assessed a fine of £30,000,¹⁷³ which is the equivalent of £2,624,100.00¹⁷⁴ (or about \$4,250,000.00¹⁷⁵) in modern currency.

In 1689, after enactment of the English Bill of Rights, the earl appealed his punishment to Parliament on the ground that the fine was disproportionate to the offense. An advocate for the earl argued that the Court of King's Bench used the wrong standard to determine the size of the penalty. He described the proper standard as follows:

There are two things which have heretofore been looked upon as very good guides, 1st, what has formerly been expressly done in the like case; 2dly, for want of such particular direction, then to consider that which comes the nearest to it, and so proportionably to add or abate, as the manner and circumstance of the case do require.¹⁷⁶

In other words, the earl's advocate argued that a punishment is proportionate to the offense if it comports with prior punishment practice regarding that offense. If there are precedents directly on point, those precedents should be followed. If not, the court should identify the closest precedents it can find and use those as a guide in determining what to do in the new case.

Given the importance of precedent in determining the just degree of punishment, the advocate's description of the fine imposed on the Earl of Devonshire was damning: "[F]or ought that I can

¹⁷¹ (1687) 11 How. St. Tr. 1353 (Parl.).

¹⁷² *Id.* at 1354.

¹⁷³ *Id.* at 1357.

¹⁷⁴ UK National Archives Currency Converter, <http://www.nationalarchives.gov.uk/currency/default0.asp#mid> (last visited Jan. 28, 2011).

¹⁷⁵ Google Finance Currency Converter, <http://www.google.com/finance?q=GBPUSD> (last visited Feb. 18, 2011).

¹⁷⁶ *The Earl of Devonshire's Case*, 11 How. St. Tr. at 1362.

learn or find, this [punishment] of my lord Devonshire is an original.”¹⁷⁷ Like the punishment imposed on Titus Oates, the fine imposed on the Earl of Devonshire was original, harsher than precedent would allow, and therefore disproportionate. For this reason, Parliament found the judgment illegal. The House of Commons described the fine as “excessive and exorbitant, against Magna Charta, the common right of the subject, and against the law of the land.”¹⁷⁸ This language is similar to the parliamentary description of the punishments inflicted on Titus Oates: “extravagant,” “exorbitant,” and “contrary to law and ancient practice.”¹⁷⁹ Similar language was used in both cases—despite the fact that Oates’s case arose under the Cruell and Unusuall Punishments Clause and *The Earl of Devonshire’s Case* arose under the Excessive Fines Clause—because both punishments suffered from the same defect: they were disproportionate to the crime in light of the long usage of the common law.

Titus Oates’ Case demonstrates that the English Cruell and Unusuall Punishments Clause was originally understood to prohibit new punishments that were excessive in light of prior practice. But because the English version of the Clause was directed only at judges, not Parliament, its significance in England was limited. As the doctrine of parliamentary supremacy developed over the course of the eighteenth century, Parliament repeatedly innovated in a manner contrary to fundamental common law principles.¹⁸⁰ These innovations included imposition of the “bloody code,” which, as Justice Scalia pointed out, punished more than two hundred crimes, major and minor, with death.¹⁸¹ Because the Cruell and Unusuall Punishments Clause did not apply to Parliament, it did nothing to stop this process in England.

In America, things were different. The American Revolution was motivated largely by Americans’ rejection of the doctrine of parliamentary supremacy.¹⁸² The provisions of the Bill of Rights,

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 1370.

¹⁷⁹ 14 H.L. Jour. 228 (1689); 10 H.C. Jour. 249 (1689).

¹⁸⁰ See Stinneford, Original Meaning of Unusual, *supra* note 1, at 1790–92 (describing Blackstone’s critique of Parliament’s harsh deviations from common law precedent in criminal punishment).

¹⁸¹ See *Harmelin v. Michigan*, 501 U.S. 957, 975 (1991).

¹⁸² See Stinneford, Original Meaning of Unusual, *supra* note 1, at 1792–1800.

including the Eighth Amendment's prohibition of Cruel and Unusual Punishments, were intended to constrain Congress as well as the courts.¹⁸³ As will be shown below, the American version of the Cruel and Unusual Punishments Clause included the English version's prohibition of excessive punishments.

C. Proportionality and "Cruel and Unusual Punishments" in the Eighth Amendment

Justice Scalia has made a textual and an historical argument against the proposition that the Cruel and Unusual Punishments Clause prohibits excessive punishments. Both arguments are incorrect and will be addressed in turn below.

1. "Cruel and Unusual" as a Synonym for "Excessive"

As noted above, the Supreme Court has taken the position that the three clauses of the Eighth Amendment (the Excessive Bail Clause, the Excessive Fines Clause, and the Cruel and Unusual Punishments Clause) should be read together as imposing a general prohibition of excessive criminal penalties.¹⁸⁴

Justice Scalia has argued that this reading of the Cruel and Unusual Punishments Clause is implausible. Although he acknowledged that the phrase "cruel and unusual" could be construed to forbid excessive punishments,¹⁸⁵ he asserted that this phrase would have been "an exceedingly vague and oblique way" of expressing such a prohibition.¹⁸⁶ Legislatures at the time the Eighth Amendment was adopted knew how to prohibit excessiveness explicitly. The constitutions of Pennsylvania, South Carolina, and New Hampshire all contained explicit references to proportionality in sentencing.¹⁸⁷ Thomas Jefferson narrowly failed in convincing the Virginia legislature to pass a "Bill for Proportioning Punishments,"¹⁸⁸ and, of course, both the Bail and Fine Clauses of the Eighth Amendment used the word "excessive." The fact that the

¹⁸³ See *id.* at 1800–10.

¹⁸⁴ See *supra* Section I.A.

¹⁸⁵ *Harmelin*, 501 U.S. at 976.

¹⁸⁶ *Id.* at 977.

¹⁸⁷ *Id.* (citing N.H. Bill of Rights art. XVIII (1784); Pa. Const. § 38 (1776); S.C. Const. art. XL (1778)).

¹⁸⁸ *Id.*

Framers chose not to use this word in the Punishments Clause indicates, Justice Scalia has argued, that they did not intend it to forbid excessive punishments.

Justice Scalia's argument shows that Americans sometimes used words like "excessive" or "proportioned" when describing proportionality in sentencing. But this fact, in and of itself, does not show that the phrase "cruel and unusual" was a vague or improbable way to express the same idea. The key question is whether there is direct evidence that the phrase "cruel and unusual" was used as a synonym for "excessive" in the early American legal system. If so, Justice Scalia's vagueness argument loses its force.

There is such evidence. The phrase "cruel and unusual" was consistently used as a synonym for "excessive" in two major areas of law outside of criminal punishment. First, a number of state statutes contained references to homicide committed in a "cruel and unusual" manner. Second, several federal and state laws prohibited those in positions of authority—including slave owners, ship's officers, parents, and teachers—from inflicting "cruel and unusual punishments" on their underlings.¹⁸⁹ In both of these contexts, the phrase "cruel and unusual" meant excessive or disproportionate, not barbaric.

In the late eighteenth and nineteenth centuries, several states referenced "cruel and unusual" killings in their homicide laws. In every case involving such a killing, the phrase "cruel and unusual" was used as a synonym for "excessive." Some states treated "cruel and unusual" homicide as a form of murder. In these states, a beating was considered "cruel and unusual" if it was so excessive that it demonstrated intent to kill or its equivalent.¹⁹⁰ Other states treated

¹⁸⁹ See *infra* notes 192–96 and accompanying text.

¹⁹⁰ See *State v. Norris*, 2 N.C. (1 Hayw.) 429, 440–41 (Super. L. & Eq. 1796) ("If the [provocation caused by the victim was such] as would in ordinary tempers have produced only a slight resentment, not rising so high as to aim at the life of the offender, but only to a punishment proportionable to the offence, and yet the person offended has attacked and beaten the other, in such a manner or with such a weapon as shews an intent to kill, and not only to chastise; and in beating he has killed the other, the law will deem it murder: because the beating in a cruel or unusual manner, or with such a weapon, are circumstances attending the fact which shew the heart of the slayer to have been more than ordinarily cruel and regardless of another's woe." (quoting the argument of the Solicitor General)); *Jacob v. State*, 22 Tenn. (3 Hum.) 493, 496 (1842) ("Express malice is, where one with a sedate, deliberate mind and formed design, kills another . . . Also, if upon a sudden provocation, one beats an-

“cruel and unusual” homicide as a form of manslaughter. In these states, a beating was considered “cruel and unusual” if it was disproportionate to any threat or provocation that came from the victim.¹⁹¹ In nearly one hundred reported cases decided in the eighteenth and nineteenth centuries, not one involved a claim that “cruel and unusual” homicide occurred only when the offender employed a barbaric mode or method. Rather, in all cases, the phrase “cruel and unusual” was used as a synonym for “excessive.”

The phrase “cruel and unusual” was also employed to describe the use of excessive force by superiors against inferiors. At common law, masters were permitted to use moderate physical force to discipline their servants; parents were permitted to use moderate force to discipline their children; and teachers were permitted to use moderate force to discipline students.¹⁹² When a superior used

other, in a cruel and unusual manner, so that he dies, though he did not intend his death.”); *McWhirt v. Commonwealth*, 44 Va. (3 Gratt.) 594, 594 (Gen. Ct. 1846) (“Murder is the unlawful killing of any person with malice aforethought: and malice is either *express*; as where one person kills another with a sedate, deliberate mind, and formed design; such formed design being evidenced by external circumstances, discovering the inward intention And so, where, upon a sudden provocation, one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder by express malice: that is, by an express evil design, the genuine sense of *malitia*.”).

¹⁹¹ *Chase v. State*, 46 Miss. 683, 702 (1872) (detailing an instruction that the jury consider whether “the homicide [was] committed by accident and misfortune, in the heat of passion, upon sudden and sufficient provocation, or upon sudden combat, without any undue advantage being taken, and without any dangerous weapon being used, and not done in a cruel or unusual manner, and thereupon excusable”) (internal quotations omitted); *People v. Rector*, 19 Wend. 569, 607 (N.Y. Sup. Ct. 1838) (“[W]hen the killing is in a heat of passion, but in a cruel or unusual manner, or by a dangerous weapon, the crime may be only manslaughter: but when perpetrated by an act imminently dangerous to others, and evincing a depraved mind, regardless of human life, it will be murder.”); *People v. Sherry*, 2 Edm. Sel. Cas. 52, 53 (N.Y. Sup. Ct. 1849) (In a case involving a drunken fight in which the defendant killed the victim by knocking him down and jumping on his chest, “The Judge charged the jury that the main question was, whether the offence was murder or manslaughter in the second degree. Murder was effecting death with intention to kill. Manslaughter in the second degree was effecting death in a cruel and unusual manner, without an intention to kill.”); *Bull v. Commonwealth*, 55 Va. (1 Gratt.) 613, 616 (1857) (affirming conviction where the trial court instructed that “if the jury are satisfied from the evidence that the manner of inflicting the blows was cruel and unusual, and exceeded in number and violence what was necessary to repel the deceased, and the deceased died of such beating, then the prisoner is guilty of voluntary manslaughter”).

¹⁹² See 1 Matthew Hale, et al., *Historia Placitorum Coronae: The History of the Pleas of the Crown* 454 (1st American ed. 1847).

excessive force, however, this discipline was described as a “cruel and unusual punishment.” Masters could be indicted for imposing cruel and unusual punishments on slaves.¹⁹³ Ship’s officers could be indicted for inflicting cruel and unusual punishments on seamen.¹⁹⁴ Teachers could be fired for imposing cruel and unusual punishments on students.¹⁹⁵ And parents could lose custody of their children for inflicting cruel and unusual punishments on them.¹⁹⁶ In these cases, as in the homicide cases, the phrase “cruel and unusual” always meant immoderate, excessive, or disproportionate. In none of these cases was it suggested that the phrase only applied to inherently barbaric modes of punishment.

The homicide cases and the private punishment cases show that the phrase “cruel and unusual” was widely used in the early American legal system as a synonym for “excessive.” This means that the phrase “cruel and unusual punishments” would *not* have been an “exceedingly vague and oblique” way to convey the con-

¹⁹³ See *Oliver v. State*, 39 Miss. 526, 539 (1860) (holding that a master would be guilty of “cruel and unusual” murder or manslaughter if he wantonly killed a slave using force greater than “the necessity occasioned by unlawful resistance to lawful authority”); *Kelly v. State*, 11 Miss. (3 S. & M.) 518, 526 (1844) (noting that the criminal prohibition of cruel and unusual punishment of slaves derives from the common law rule that masters could punish servants but only with moderation); cf. *Mann v. Trabue*, 1 Mo. 709, 710 (1827) (addressing a claim in a civil suit that a person who had hired out a slave had killed her through the use of “cruel and unusual” force).

¹⁹⁴ See *Burrmeister v. Seyer*, 2 Haw. 255, 258 (1860) (“Had the beating inflicted upon Burrmeister by the officers been merited by reason of his insubordination, or other misconduct, it could not perhaps be designated as cruel or unusual, but as the case stands, it was harsh and inexcusable.”); *United States v. Trice*, 30 F. 490, 491–95 (D. Tenn. 1887) (holding that a federal statute forbidding ship’s officers from imposing “cruel and unusual punishment” on seamen applied to anyone in a position of authority who inflicted an excessive beating on an inferior as punishment for disciplinary infraction); cf. *United States v. Rauscher*, 119 U.S. 407, 410 (1886) (deciding whether the federal courts had jurisdiction, in light of an extradition treaty with Great Britain, to hear a case alleging that a ship’s second mate had assaulted a crew member, and had thereby inflicted a cruel and unusual punishment on him).

¹⁹⁵ See *Shirley v. Bd. of Trs. of Cottonwood Sch. Dist.*, 31 P. 365, 366 (Cal. 1892) (“Said discharge of plaintiff was for the alleged cause of . . . cruel and unusual punishment of a pupil, but plaintiff . . . did not punish said child either in a cruel or unusual manner, nor for any purpose except for just cause, and to a moderate extent . . .”).

¹⁹⁶ See *In re Kottman*, 20 S.C.L. (2 Hill) 363, 363 (1834) (holding that in a custody case, “to show that the Court ought not to interpose in favor of the father, affidavits were read, that the father had beaten this son in a cruel and unusual manner without any just cause”).

cept of excessiveness in the Cruel and Unusual Punishments Clause. To the contrary, it would have been strange for the phrase not to have conveyed this meaning. As the discussion below will show, the Framers and early interpreters of the Cruel and Unusual Punishments Clause understood it to have this meaning.

2. Excessiveness and the Original Meaning of the Eighth Amendment

The historical evidence shows that the Framers and early interpreters of the Eighth Amendment's Cruel and Unusual Punishments Clause understood it to prohibit punishments that were excessive in light of prior practice. Like their English predecessors, the Framers of the American Bill of Rights saw the common law as a key source of individual rights against the state.¹⁹⁷ They knew that the term "unusual" meant "contrary to long usage," and they argued that a prohibition of cruel and unusual punishments was needed to prevent Congress from throwing off common law limitations in the imposition of punishment, including common law rules against excessive punishments.¹⁹⁸

The early interpreters of the Cruel and Unusual Punishments Clause also read it to include a prohibition of excessive punishments. Virtually every case interpreting the Cruel and Unusual Punishments Clause or an analogous state provision between 1791 and 1865 read the Clause to contain such a prohibition.¹⁹⁹ The Supreme Court appears to have read the Clause in precisely the same way during the nineteenth century,²⁰⁰ as did the legal commentators who considered the issue.²⁰¹ Finally, the actions of early legislatures are consistent with the idea that the Cruel and Unusual Punishments Clause prohibits cruelly excessive punishments.²⁰²

¹⁹⁷ See *infra* Subsection II.C.2.a; see also Stinneford, *Original Meaning of Unusual*, *supra* note 1, at 1792–1810.

¹⁹⁸ See Stinneford, *Original Meaning of Unusual*, *supra* note 1, at 1810–15.

¹⁹⁹ See *infra* Subsection II.C.2.b.

²⁰⁰ See *infra* Subsection II.C.2.c.

²⁰¹ See *infra* Subsection II.C.2.e.

²⁰² See *infra* Subsection II.C.2.d.

a. The Intent of the Framers

The argument that the Cruel and Unusual Punishments Clause was not originally understood to prohibit excessive punishments depends on two related assumptions: (1) that Americans did not know that the original English version of the Clause prohibited punishments that were excessive in light of the common law tradition,²⁰³ and (2) that even if they had known what the English version of the Clause meant, Americans would not have adopted the same meaning, for they would not have seen the common law as a relevant source of standards for judging whether a punishment was cruel and unusual.²⁰⁴

These arguments are incorrect. As early as the seventeenth century, Americans saw the common law as a source of fundamental rights against the state.²⁰⁵ By the end of the eighteenth century, this view was nearly universal.²⁰⁶ During the American Revolution, American colonists used Parliament's alleged violation of their common law rights—particularly the right not to be taxed without representation and the right to be tried by a jury of one's peers—as the primary justification for rebelling against England.²⁰⁷ Americans described Parliament's violations of their rights as “unusual” because they were contrary to the long usage of the common law.²⁰⁸

When the United States Constitution was ratified, the Bill of Rights was adopted largely to ensure that the new federal government would be required to recognize the fundamental common law

²⁰³ See *Harmelin v. Michigan*, 501 U.S. 957, 975–76 (1991).

²⁰⁴ See *id.* at 976 (“Wrenched out of its common-law context, and applied to the actions of a legislature, the word ‘unusual’ could hardly mean ‘contrary to law.’”).

²⁰⁵ See Stinneford, *Original Meaning of Unusual*, *supra* note 1, at 1793–94.

²⁰⁶ See *id.* at 1793.

²⁰⁷ See *id.* at 1794–1800.

²⁰⁸ For example, the Virginia House of Burgesses described a British plan to try American protesters in England, rather than in the vicinage of the offense as “new, unusual . . . unconstitutional and illegal.” *Journals of the House of Burgesses of Virginia, 1766–1769*, at 215 (John Pendleton Kennedy ed., Richmond 1906) (1769). Similarly, the Declaration of Independence complained about Britain's effort to disrupt legislative assemblies by calling them to meet at “places unusual.” The Declaration of Independence para. 6 (U.S. 1776). The practice of convening tribunals and legislative assemblies at “unusual” or noncustomary locations was itself contrary to the common law. See 2 William Hawkins, *A Treatise of the Pleas of the Crown* 55–56 (London, E. and R. Nutt 1739).

rights of American citizens.²⁰⁹ In the ratification debates, Antifederalists such as George Mason²¹⁰ and Patrick Henry complained that, without a Bill of Rights, the Constitution would not bind Congress to respect common law rights, particularly those relating to criminal trial and punishment.²¹¹ The lack of common law constraints on the proposed new federal government led Patrick Henry to describe the government itself as a series of “new and unusual experiments.”²¹² These complaints were sufficiently influential that the Federalists agreed to a Bill of Rights prohibiting the federal government from violating citizens’ rights, many of which (including the right against cruel and unusual punishments) were common law rights.²¹³

The evidence also shows that the Framers understood the Cruel and Unusual Punishments Clause to forbid the imposition of punishments that were harsher than those permitted by common law precedent. The Antifederalists advocated for a prohibition of cruel and unusual punishments as part of a larger argument regarding the need to constrain Congress within common law limits. For example, after George Mason left the Constitutional Convention, he complained that the lack of common law constraints in the new Constitution would empower Congress to “constitute new crimes, inflict unusual and severe punishments, and extend their powers as far as they shall think proper.”²¹⁴ Similarly, numerous Antifederalists expressed concern that Congress would abandon common law protections relating to criminal trial and punishment and adopt the cruel practices of European civil law countries.²¹⁵

²⁰⁹ See Stinneford, *Original Meaning of Unusual*, supra note 1, at 1800–10.

²¹⁰ George Mason was the primary drafter of the Virginia Declaration of Rights, many provisions of which (including a prohibition of “cruel and unusual punishments”) were later imported into the Bill of Rights. See Granucci, supra note 53, at 840.

²¹¹ See *id.* at 840–42.

²¹² 3 Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution 170–72* (photo. reprint 2d ed. 1974) (1968) [hereinafter *Elliot’s Debates*].

²¹³ See Stinneford, *Original Meaning of Unusual*, supra note 1, at 1808.

²¹⁴ 2 *The Records of the Federal Convention of 1787*, at 637–40 (Max Farrand ed., 1911) [hereinafter *Farrand*].

²¹⁵ See Stinneford, *Original Meaning of Unusual*, supra note 1, at 1800–03 & nn. 372–94.

Sometimes these arguments centered on the worry that Congress would authorize barbaric practices, such as torture, that were forbidden by the common law but permitted in civil law jurisdictions. In the Massachusetts ratifying convention, Abraham Holmes worried that the lack of common law constraints would permit Congress to impose “cruel and unheard-of punishments” such as “racks and gibbets.”²¹⁶ In the Virginia ratifying convention, Patrick Henry argued that a prohibition of cruel and unusual punishments was needed to ensure that Congress would follow the example of its English forebears, who “would not admit of tortures, or cruel and barbarous punishment.”²¹⁷

The argument for the prohibition of cruel and unusual punishments went beyond opposition to barbaric methods of punishment. Antifederalists also focused on the need to prevent Congress from circumventing common law rules against retroactive punishments and—most significantly for our purposes—excessive punishments. In the Virginia ratifying convention, Patrick Henry argued that without a Bill of Rights specifically forbidding the practice, the Treaty Power would enable the President and Senate to collude with a foreign power to impose “unusual punishments” on American citizens by adopting a treaty that retroactively criminalized conduct that had already occurred.²¹⁸ Henry also argued that, in the absence of a constitutional prohibition, the Militia Power would enable Congress to turn the militia into an instrument of tyranny by imposing excessive punishments on soldiers. Henry described such punishments as “unusual and severe” and “cruel and ignominious.”²¹⁹ Neither of these arguments focused on the common law prohibition of barbarous methods of punishment. Rather, they focused on the need to prevent Congress from violating common

²¹⁶ 2 Elliot’s Debates, *supra* note 212, at 111.

²¹⁷ 3 Elliot’s Debates, *supra* note 212, at 447.

²¹⁸ 3 Elliot’s Debates, *supra* note 212, at 503–04. Henry’s argument concerning retroactive punishments seems strange in light of the Constitution’s Ex Post Facto Clause. See U.S. Const. art. I, § 9, cl. 3. Because this Clause is worded as a limitation on Congress’s legislative power, Henry appears to have been concerned that the President could use the Treaty Power to circumvent it.

²¹⁹ 3 Elliot’s Debates, *supra* note 212, at 412.

law rules against retroactive punishments and excessive punishments.²²⁰

The fact that the Antifederalists' discussion of cruel and unusual punishments focused not only on barbaric methods of punishment but also on retroactive and excessive punishments is consistent with the overall tenor of the argument concerning adoption of the Bill of Rights. During the Constitutional ratification debates, Antifederalists argued for adoption of a Bill of Rights to protect against potential federal tyranny. But there was doubt as to whether any written Bill of Rights could be sufficiently broad to protect all of the traditional rights that Americans had previously enjoyed as English citizens. Federalists argued that the enumeration of specific rights in the Constitution might cause courts to exclude from constitutional protection any traditional rights that were not mentioned in the text.²²¹ The Ninth Amendment was added to the Constitution to protect against this possibility.²²² In light of the fact that the Framers did not want the Bill of Rights to reduce the scope of the rights previously enjoyed, it is unlikely that they would have understood the Cruel and Unusual Punishments Clause to be narrower than the preexisting common law limitations on punishment. Patrick Henry's arguments during the Virginia ratifying convention show that the Framers understood the prohibition of cruel and unusual punishments to encompass excessive punishments as well as barbaric ones.

²²⁰ Henry's argument concerning the infliction of "unusual[,] severe[,] cruel[,] and ignominious" punishments on the militia appears to be directly analogous to the common law principle, discussed *infra* Subsection II.C.1, forbidding the imposition of immoderate or excessive force on slaves, seamen, students, and children.

²²¹ See, e.g., James Wilson, Speech to the Pennsylvania Convention for Ratifying the United States Constitution (Dec. 4, 1787), *in* 2 Elliot's Debates, *supra* note 212, at 454. In this speech, Wilson argued against adoption of a Bill of Rights on the ground that it could never be sufficiently comprehensive to cover all the natural and political rights of American citizens:

I consider that there are very few who understand the whole of these rights. All the political writers, from Grotius and Puffendorf down to Vattel, have treated on this subject; but in no one of those books, nor in the aggregate of them all, can you find a complete enumeration of rights appertaining to the people as men and as citizens.

Id.

²²² See U.S. Const. amend. IX ("The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.").

In sum, the evidence from the ratification debates shows that Americans saw the common law as a major source of individual rights against the state. They knew that the word “unusual” meant “contrary to long usage” and that a prohibition of cruel and unusual punishments would forbid punishments that were unduly harsh in light of the common law tradition.²²³ They argued that it was necessary to add a prohibition of cruel and unusual punishments to the Constitution to prevent Congress from abandoning traditional common law limitations on criminal punishment. Although one function of such a prohibition was to prevent Congress from approving the use of torture, proponents of the Cruel and Unusual Punishments Clause also wanted to prevent the imposition of retroactive punishments and (most relevant for our purposes) excessive punishments. There is no evidence that any of the Framers understood the Cruel and Unusual Punishments Clause to prohibit *only* barbaric methods of punishment.

b. The Early Case Law

Seventy-six years passed between the adoption of the Eighth Amendment and the first Supreme Court case involving a claim of excessive punishment. During this time, however, several state courts were asked to decide whether state constitutional prohibitions of cruel and unusual punishments forbade excessive or disproportionate punishments. These cases show that from the 1790s through the 1860s, courts consistently interpreted state analogues to the federal Cruel and Unusual Punishments Clause to prohibit punishments that were excessive in relation to the defendant’s criminal culpability. Throughout this period, courts measured excess by reference to prior practice, upholding punishments that were roughly equal in severity to punishments that previously had been given for the same or similar crimes and striking down punishments that were significantly harsher than precedent would permit. In only one case did a court clearly assert that the Cruel and

²²³ During the debate in the First Congress regarding adoption of the Eighth Amendment, Representatives Livermore and Smith expressed the concern that the Cruel and Unusual Punishments Clause was too vague to be useful. There is no evidence that other Framers shared this concern. Furthermore, Livermore’s thinking about the common law appears to have been outside the mainstream. See Stinneford, *Original Meaning of Unusual*, *supra* note 1, at 1808–09.

Unusual Punishments Clause did not prohibit excessive punishments. The significance of this assertion must be discounted, however, because the assertion was dictum, contradicted prior and subsequent holdings by the highest court of the same state, and appears to have been motivated by strong racial animus.

In the late eighteenth and early nineteenth centuries, courts struck down punishments as cruel and unusual if they were greater than the defendant deserved given the offense of conviction. For example, in *Jones v. Commonwealth*, the defendants were convicted of assaulting a magistrate. As punishment, they were given a joint fine and were ordered to be imprisoned until the fine was paid.²²⁴ The Supreme Court of Appeals of Virginia invalidated this punishment on the ground that it violated the common law prohibition of joint fines in criminal cases. The problem with a joint fine was that it could require the defendant to “endure a longer confinement or to pay a greater sum than his own proportion of the fine” if one of his codefendants died, escaped, or became insolvent.²²⁵ Because the sentence subjected the defendant to a punishment “beyond the real measure of his own offence,” the Court held that it violated both the constitutional command that “excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted,” and a statutory command (based on Magna Carta) that any “fine or amercement ought to be according to the degree of the fault and the estate of the defendant.”²²⁶

Courts enforced the prohibition against excessive punishments in cases involving corporal punishment as well as fines. For example, in *Ely v. Thompson*, the Kentucky Court of Appeals struck down a statute that made it a crime punishable by thirty lashes for a person of color to lift his hand to a white person, even if necessary for self-defense.²²⁷ The Court held that it would be “cruel indeed” to impose a whipping on a defendant whose actions were justified under the common law doctrine of self-defense, for such a defendant did not deserve punishment at all.²²⁸ Similarly, in *Com-*

²²⁴ 5 Va. (1 Call) 555 (1799).

²²⁵ Id. at 558.

²²⁶ Id. 557–58.

²²⁷ 10 Ky. (3 A.K. Marsh.) 70 (1820).

²²⁸ Id. at 74.

monwealth v. Wyatt, the Court stated that a judge could violate the cruel and unusual punishments clause by ordering the defendant to undergo excessive floggings, although a statute giving the judge discretion to impose flogging on operators of an illegal gambling business was not facially unconstitutional.²²⁹

In determining whether a challenged punishment was unconstitutionally excessive, early courts compared the punishment to what had previously been permitted at common law. For example, as noted above, the court in *Jones* invalidated a joint fine, because it violated the common law rule against requiring a defendant to bear more than his proportionate share of punishment.²³⁰ Similarly, the Court in *Ely* invalidated a statute that abrogated the common law doctrine of self-defense, because it imposed punishment in the absence of culpability.²³¹

Just as early courts struck down punishments that exceeded common law limits, they upheld punishments that were consistent with prior punishment practice. In *Barker v. People*, for example, the Supreme Court of New York upheld the punishment of disenfranchisement for the crime of dueling, noting that it was a traditional punishment that had long been imposed for similarly serious crimes: “The disenfranchisement of a citizen is not an unusual punishment; it was the consequence of treason, and of infamous crimes, and it was altogether discretionary in the legislature to extend that punishment to other offences.”²³² Similarly, in *Commonwealth v. Hitchings*, the Supreme Judicial Court of Massachusetts upheld a ten-dollar fine for the unlawful sale of liquor, holding that this was “the lightest punishment[] known to our law; and ha[s] been constantly applied to similar offences. The question whether

²²⁹ 27 Va. (6 Rand.) 694 (Va. Gen. Ct. 1828); see also *Ex parte Hickey*, 12 Miss. (4 S. & M.) 751, 778 (Miss. Err. App. 1844) (striking down a statute giving courts an unlimited power to imprison people for contempt, noting that “[i]t is a maxim of law that where a discretion is allowed courts in the punishment of defined offenses, that discretion must be regulated by law. But in this instance, the law, as claimed, sets to itself no bounds, and, under the influence of strong passions, punishment may be inflicted to a cruel, an unusual and excessive degree”).

²³⁰ 5 Va. (1 Call) at 557.

²³¹ 10 Ky. (3 A.K. Marsh.) at 74–75.

²³² 20 Johns. 457, 459 (N.Y. Sup. Ct. 1823).

the punishment is too severe, and disproportionate to the offence, is for the legislature to determine.”²³³

It is possible to read some of the language used in *Barker* and *Hitchings* as announcing that the legislature has absolute discretion to impose punishments and that no punishment authorized by a legislature can be considered “cruel and unusual” unless it involves a barbaric method of punishment. As noted above, the *Barker* court says that the decision to extend the punishment of disenfranchisement to the crime of dueling is “altogether discretionary in the [l]egislature,”²³⁴ and the *Hitchings* court says that questions of proportionality are “for the legislature to determine.”²³⁵ Such a reading of *Barker* and *Hitchings*, however, is undermined by the fact that both courts engaged in precisely the same proportionality review that Parliament did in *Titus Oates’ Case* and *The Earl of Devonshire’s Case*: they compared the challenged punishment to prior punishments given for the same or similar crimes and found the punishment to be consistent with prior practice. These cases do not stand for the broad proposition that the legislature has absolute power to impose any sentence it wants so long as it does not employ inherently cruel methods. Rather, they stand for the more limited proposition that the legislature has discretion to impose punishments so long as it remains within the reasonable bounds determined by prior practice.

In only one case decided prior to 1866 did a court explicitly declare that a state analogue to the Cruel and Unusual Punishments Clause forbids only barbaric methods of punishment. In *Aldridge v. Commonwealth*, the defendant was a “free person of color” who

²³³ 71 Mass. (5 Gray) 482, 486 (1855); see *Whitten v. State*, 47 Ga. 297, 301 (1872) (holding that six months’ imprisonment for committing a knife attack is not cruel and unusual in light of the fact that it is a much lighter punishment than many punishments authorized at the time the constitution was ratified and noting that “larceny was generally punished by hanging; forgeries, burglaries, etc., in the same way, for, be it remembered, penitentiaries are of modern origin, and I doubt if it ever entered into the mind of men of that day, that a crime such as this witness makes the defendant guilty of deserved a less penalty than the Judge has inflicted”); see also *Garcia v. Territory*, 1 N.M. (Gild., E.W.S. ed.) 415, 418 (1869) (“In many of the states the practice of whipping criminals convicted of theft has prevailed for over fifty years, without any doubt as to its constitutionality.”).

²³⁴ 20 Johns. at 459.

²³⁵ 71 Mass (5 Gray) at 486.

had been convicted of larceny.²³⁶ The statute had recently been amended to change the maximum sentence for a “free person of color” who committed the crime from three years imprisonment to a punishment of whipping, being “sold as a slave, and transported and banished beyond the limits of the United States.”²³⁷ The defendant argued that this was a cruel and unusual punishment in violation of Virginia’s Declaration of Rights. The court ruled against the defendant on the ground that the Declaration of Rights did not apply to descendants of slaves and gave no protection to the defendant.²³⁸ The court declared, in dictum, that the state cruel and unusual punishments clause did not forbid excessive punishments, declaring that the “provision was never designed to control the Legislative right to determine *ad libitum* upon the *adequacy* of punishment, but is merely applicable to the modes of punishment.”²³⁹

The *Aldridge* court’s claim that the state’s cruel and unusual punishments clause prohibits only barbaric methods of punishment must be discounted for several reasons. First, it was unnecessary to the decision of the case and was therefore dictum. Second, this claim contradicts actual holdings of Virginia courts made both before²⁴⁰ and after²⁴¹ *Aldridge* was decided. Finally, given the extreme injustice of the punishment upheld by the *Aldridge* court, this decision is explicable only as an expression of racial hatred.

In sum, in virtually every proportionality case decided in the first seventy-five years after adoption of the Eighth Amendment, the court either explicitly recognized that the prohibition of cruel and unusual punishments includes a prohibition of excessive punishments or implicitly recognized this fact by engaging in proportionality analysis. In these cases, the court determined the proportion-

²³⁶ 4 Va. (2 Va. Cas.) 447, 447 (Va. Gen. Ct. 1824).

²³⁷ *Id.* at 447–48.

²³⁸ *Id.* at 449.

²³⁹ *Id.* at 449–50.

²⁴⁰ *Jones*, 5 Va. (1 Call) at 556 (“This is so unjust and contrary to the spirit of the Bill of Rights that . . . even if an act of Assembly should pass authorising it . . . I should most probably be of opinion [that it should be] declared unconstitutional and not law.”).

²⁴¹ *Commonwealth v. Wyatt*, 27 Va. (6 Rand.) 694, 700 (Va. Gen. Ct. 1828) (“[The authority to enact cruel and unusual punishments,] being prohibited to the Legislature[,] cannot by it be delegated to the Courts.”).

ality of the punishment primarily by comparing it to prior practice. In only one case did the court claim that a state cruel and unusual punishments clause prohibited only barbaric methods of punishment—and the claim in that case was not only obviously unjust but was also dictum that was inconsistent with prior and subsequent decisions of Virginia’s highest court. The early case law supports the proposition that the Cruel and Unusual Punishments Clause was meant to forbid excessive punishments as well as barbaric ones.

c. The Supreme Court’s Nineteenth-Century Cases

Whether the Cruel and Unusual Punishments Clause forbids excessive or disproportionate punishments was raised in two nineteenth-century Supreme Court cases: *Pervear v. Massachusetts*²⁴² and *O’Neil v. Vermont*.²⁴³ In both cases, the Court declined to decide the proportionality question on the ground that the Eighth Amendment did not apply to the states. Nonetheless, the opinions issued in those cases imply that the Court recognized a proportionality principle under the Clause.

In *Pervear*, the defendant was convicted of maintaining an unlicensed “tenement for the illegal sale and illegal keeping of intoxicating liquors” and was sentenced to three months’ imprisonment at hard labor and fined fifty dollars.²⁴⁴ The defendant appealed his conviction to the United States Supreme Court, arguing that the penalties authorized under the statute violated the Eighth Amendment’s Cruel and Unusual Punishments Clause.²⁴⁵ As noted above, the Court refused to decide the Eighth Amendment issue on the ground that the Amendment did not apply to the states. Nonetheless, the Court went on to say that even if the Eighth Amendment applied, the defendant would lose: “We perceive nothing excessive, or cruel, or unusual” in the sentence.²⁴⁶

Another claim of excessive punishment arose in 1892 under a statute similar to the one at issue in *Pervear*. In *O’Neil v. Vermont*, the defendant operated a New York-based wholesale and retail

²⁴² 72 U.S. (5 Wall.) 475 (1866).

²⁴³ 144 U.S. 323 (1892).

²⁴⁴ 72 U.S. (5 Wall.) at 480.

²⁴⁵ *Id.* at 479.

²⁴⁶ *Id.* at 479–80.

liquor distribution business that filled mail orders from out-of-state locations, including Vermont.²⁴⁷ Vermont law made it a misdemeanor punishable by a fine ranging from ten to twenty dollars per violation to sell liquor “without authority” within the state.²⁴⁸ O’Neil did not have a license to sell liquor within Vermont but had been filling mail orders for liquor in that state on an ongoing basis. The state charged him with a separate statutory violation for each order it could prove, and ultimately convicted him of 307 violations.²⁴⁹ As a result, O’Neil was fined \$6,140²⁵⁰—nearly eight times the average annual wage of a worker in the liquor industry at that time.²⁵¹ Because he could not pay this fine, O’Neil was subject to a sentence of 19,914 days (or fifty-four and one-half years) in prison²⁵² pursuant to a Vermont statute that called for three days of imprisonment for every dollar of a defaulted criminal fine.²⁵³ O’Neil appealed to the United States Supreme Court, arguing that this sentence was so disproportionate to the offense that it violated the Cruel and Unusual Punishments Clause. A majority of the Court refused to decide the merits of the case on the ground that the Eighth Amendment did not apply to the states.²⁵⁴ But three justices dissented.

The primary dissent was written by Justice Field, who argued that the Cruel and Unusual Punishments Clause should be read to prohibit cruelly excessive punishments such as the punishment given to O’Neil. The textual basis for Justice Field’s argument was the *noscitur a sociis* canon: since the other clauses of the Eighth Amendment prohibit excessive bail and excessive fines, the Cruel and Unusual Punishments Clause should be read to prohibit excessive punishments.

The heart of Justice Field’s argument, however, was not textual but normative. Justice Field insisted that reading the Cruel and

²⁴⁷ 144 U.S. at 327–30.

²⁴⁸ *Id.* at 325–26.

²⁴⁹ *Id.* at 327.

²⁵⁰ *Id.* at 330.

²⁵¹ Statistics as to Labor, N.Y. Times, Jan. 24, 1897, available at http://query.nytimes.com/mem/archive-free/pdf?_r=1&res=9E00E6DA1E3DE433A25756C2A9679C94669ED7CF.

²⁵² *O’Neil*, 144 U.S. at 330.

²⁵³ *Id.* at 331.

²⁵⁴ *Id.* at 331–32.

Unusual Punishments Clause as prohibiting barbaric methods of punishment but not excessive punishments made no sense. Legislatures are capable of using non-barbaric methods to create new punishments that are every bit as horrifying as the rack or the screw. Although the state has the power to impose a criminal punishment for “the drinking of one drop of liquor,” for example, it would be an “unheard-of cruelty” if the law directed the court to “count the drops in a single glass, and make thereby a thousand offences,” thus imposing a life sentence “for drinking the single glass of liquor.”²⁵⁵ Similarly, Justice Field wrote that although the state has the power to punish a petty offense with twenty lashes, this does not mean that the state has the power to order that a person who has committed one hundred petty offenses “be scourged until the flesh fall from his body.”²⁵⁶ As these examples show, the question courts must answer under the Cruel and Unusual Punishments Clause is not simply whether the punishment involves a barbaric method but whether the punishment is excessive to the point of cruelty.

Turning to O’Neil’s case specifically, Justice Field used the same method to measure proportionality that Parliament used in *Titus Oates’ Case* and *The Earl of Devonshire’s Case* and that state courts used in the decades after adoption of the Eighth Amendment. He compared O’Neil’s punishment to prior practice. Justice Field first noted that O’Neil’s punishment “exceed[s] in severity . . . anything which I have been able to find in the records of our courts for the present century.”²⁵⁷ He then found that O’Neil’s punishment was harsher than the punishments authorized for more serious crimes (burglary, highway robbery, manslaughter, forgery, and perjury).²⁵⁸ O’Neil’s punishment was cruel and unusual, because it was harsher than prior practice had allowed for the same crime and even for more serious crimes.

In sum, although the Supreme Court did not decide the merits of any proportionality cases under the Cruel and Unusual Punishments Clause during the nineteenth century, the majority opinion in *Pervear* and Justice Field’s dissent in *O’Neil* indicate that the

²⁵⁵ Id. at 340 (Field, J., dissenting).

²⁵⁶ Id. at 340, 364.

²⁵⁷ Id. at 338.

²⁵⁸ Id. at 339.

Court's view of the issue was consistent with that of the early English and American cases: the Cruel and Unusual Punishments Clause forbids punishments that are cruelly excessive in light of prior practice.

d. Early Legislation and Constitutional Provisions

Justice Scalia has pointed to two ways in which early legislative action seems inconsistent with the idea that the Cruel and Unusual Punishments Clause forbids legislative authorization of excessive sentences. First, several states adopted constitutions that contained both a prohibition of cruel and unusual punishments and a requirement that the legislature proportion the punishment to the crime.²⁵⁹ If the framers of these state constitutions believed that the Cruel and Unusual Punishments Clause required proportionality in sentencing, there would have been no need to adopt a separate proportionality requirement.²⁶⁰ Second, the First Congress enacted a penal statute that imposed the same punishment—death—on crimes ranging from treason and murder to the stealing of a “ship or vessel, or any goods or merchandise to the value of fifty dollars.”²⁶¹ The lack of gradation indicated to Justice Scalia that the First Congress did not think that the Cruel and Unusual Punishments Clause required it to observe proportionality in sentencing.²⁶²

The fact that some state constitutions contained both a prohibition of cruel and unusual punishments and a requirement of proportionality in sentencing does not call into significant question the Cruel and Unusual Punishments Clause's prohibition of excessive sentences. Rather, this fact reflects two realities about eighteenth- and nineteenth-century constitutional lawmaking.

First, in the relevant state constitutions, the prohibition of cruel and unusual punishments and the requirement of proportionality in sentencing served distinct but related functions. The former provision protected against legislative excess while the latter encouraged legislative reform.

²⁵⁹ Harmelin v. Michigan, 501 U.S. 957, 982 (1991).

²⁶⁰ Id. at 980–82.

²⁶¹ Id. at 980–81 (citing Act for the Punishment of Certain Crimes Against the United States, 1 Stat. 114 (1790)).

²⁶² Id. at 981.

In 1764, Cesare Beccaria wrote the highly influential treatise *On Crimes and Punishments*, which argued for abolition of the death penalty and torture and for a general reduction in the severity of criminal punishment to make it more proportionate to the crime.²⁶³ Although Beccaria's writing was focused on the punishment systems of continental Europe, it was also influential in England²⁶⁴ and America.²⁶⁵ For example, Blackstone used Beccaria to support his own argument regarding the need for greater proportionality in punishment:

It is . . . absurd and impolitic to apply the same punishment to crimes of different malignity. A multitude of sanguinary laws . . . do likewise prove a manifest defect either in the wisdom of the legislative, or the strength of the executive power It has been therefore ingeniously proposed [by Beccaria], that in every state a scale of crimes should be formed, with a corresponding scale of punishments, descending from the greatest to the least; but, if that be too romantic an idea, yet at least a wise legislator will mark the principle divisions, and not assign penalties of the first degree to offenses of an inferior rank.²⁶⁶

Beccaria's reform ideas (at least as translated by Blackstone) were influential in America. The four earliest state constitutional references to proportionality are explicitly worded as instructions for legislative reform. The Pennsylvania Constitution directed that "[t]he penal laws as heretofore used shall be reformed by the legislature of this state, as soon as may be, and punishments made in some cases less sanguinary, and in general more proportionate to

²⁶³ See Beccaria, *supra* note 116 at 4–5; see also John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement*, 4 *Nw. J.L. & Soc. Pol'y* 195 (2009).

²⁶⁴ See Simon Devereaux, *Imposing the Royal Pardon: Execution, Transportation, and Convict Resistance in London, 1789*, 25 *Law & Hist. Rev.* 101, 123 (2007) (describing the publication of Beccaria's work as causing a "great burst of discussion regarding law reform" in England).

²⁶⁵ See Deborah A. Schwartz & Jay Wishingrad, *Comment, The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 *Buff. L. Rev.* 783, 813–23 (1975) ("The force of Beccaria's treatise *On Crimes and Punishments* was felt as much in America as in Europe.").

²⁶⁶ 4 Blackstone, *supra* note 120, at *17–18.

the crimes.”²⁶⁷ The South Carolina Constitution repeated this direction almost word for word.²⁶⁸ The New Hampshire and Ohio Constitutions contained a lengthy exhortation, derived primarily from the Blackstone passage quoted above, on the foolishness of sanguinary laws and the desirability of proportionality.²⁶⁹ The remaining five nineteenth-century state constitutional references to proportionality also appear to be instructions for legislative reform, although they are less explicit than the four earlier constitutions.²⁷⁰

Beccaria’s ideas were also translated into concrete efforts to reform penal statutes. For example, Thomas Jefferson narrowly failed in his attempt to get Virginia to enact his “Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital,”²⁷¹

²⁶⁷ Pa. Const. of 1776, § 38.

²⁶⁸ See S.C. Const. of 1778, art. XL.

²⁶⁹ See N.H. Const. of 1784, art. I, § XVIII (“All penalties ought to be proportioned to the nature of the offence. No wise legislature will affix the same punishment to the crimes of theft, forgery and the like, which they do to those of murder and treason; where the same undistinguishing severity is exerted against all offences; the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do those of the lightest dye: For the same reason a multitude of sanguinary laws is both impolitic and unjust. The true design of all punishments being to reform, not to exterminate, mankind.”); Ohio Const. of 1802, art. VIII, § 14 (“All penalties shall be proportioned to the nature of the offence. No wise Legislature will affix the same punishment to the crimes of theft, forgery, and the like, which they do to those of murder and treason. When the same undistinguished severity is exerted against all offences, the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant, with as little compunction as they do the slightest offences. For the same reasons, a multitude of sanguinary laws are both impolitic and unjust; the true design of all punishment being to reform, not to exterminate mankind.”).

²⁷⁰ See Ga. Const. of 1868, art. I, §§ 16, 21 (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted, nor shall any person be abused in being arrested, whilst under arrest, or in prison . . . All penalties shall be proportioned to the nature of the offence.”); Ind. Const. of 1816, art. I, §§ 15–16 (“Excessive bail shall not be required; excessive fines shall not be imposed; nor cruel and unusual punishments inflicted . . . All penalties shall be proportioned to the nature of the offence.”); Me. Const. of 1819, art. I, § 9 (“Sanguinary laws shall not be passed; all penalties and punishments shall be proportioned to the offence; excessive bail shall not be required nor excessive fines imposed, nor cruel nor unusual punishments inflicted.”); R.I. Const. of 1842, art. I, § 8 (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted; and all punishments ought to be proportioned to the offence.”); W.Va. Const. of 1861–1863, art. II, § 2 (“Excessive bail shall not be required, or excessive fines imposed, or cruel and unusual punishments inflicted. Penalties shall be proportioned to the character and degree of the offence.”).

²⁷¹ See John D. Bessler, *supra* note 263, at 213.

which set forth a scale of crimes and punishments in the manner suggested by Beccaria and Blackstone.²⁷² Similarly, the Pennsylvania legislature instituted a number of criminal law reforms, including division of the crime of murder into degrees, so that punishment would comport more closely with the culpability of the defendant.²⁷³

The constitutional prohibition against cruel and unusual punishments and the exhortation in several state constitutions toward greater proportionality served different but related functions. The former told legislatures what they could not do: increase the severity of punishment so as to transform it from roughly proportionate to excessive. The latter told legislatures what they should do: reform the penal system to make punishments generally less harsh and more proportionate. There is no inconsistency in a state constitution that simultaneously prohibits excessive punishments and exhorts legislatures to make punishments more proportionate. The two ideas are complementary.

Second, to the extent there is redundancy in these two provisions, this redundancy is consistent with the drafting practices of eighteenth- and nineteenth-century legislatures. Drafters of early state laws and constitutions used redundancy as a means of protecting against possible loopholes in the protection of constitutional rights. As is discussed above, prior to the drafting of state constitutions and declarations of rights, the rights enjoyed by American colonists were primarily unwritten and customary in nature.²⁷⁴ A major objection to reducing the rights of Americans to writing was that any Bill of Rights would fail to capture their full scope of the rights.²⁷⁵ This objection was largely resolved at the federal level by the adoption of the Ninth Amendment.²⁷⁶ At the state level, however, legislators appear to have used redundancy in phrasing to reduce the risk of overly narrow construction of constitutional rights.

²⁷² See *id.* at 212; see also Thomas Jefferson, A Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital, *in* 2 *The Papers of Thomas Jefferson* 492–504 (Julian P. Boyd ed., 1950).

²⁷³ See Friedman, *supra* note 78, at 73.

²⁷⁴ See *infra* Subsection II.C.2.a.

²⁷⁵ See *id.*

²⁷⁶ See *id.*

For example, the Virginia Declaration of Rights, enacted in 1776, declared that “excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”²⁷⁷ A separate Virginia statute governing indictments and informations, enacted in 1786, stated that all fines and amercements “ought to be according to the degree of the fault and the estate of the defendant.”²⁷⁸ Given the constitutional right against excessive fines, a separate statutory provision requiring fines to be proportionate to the offense would seem to be unnecessarily redundant. Indeed, the statute might be doubly redundant. For if the Declaration of Rights’ Cruel and Unusual Punishments Clause were interpreted to forbid excessive punishments, then a single disproportionate fine could simultaneously be characterized as an excessive fine, a cruel and unusual punishment, and a fine not given “according to the degree of fault.” Yet this is precisely how the Supreme Court of Appeals of Virginia interpreted these provisions. As described above, the Supreme Court of Appeals of Virginia held in *Jones v. Commonwealth* that a joint fine imposed on a criminal offender violated the Excessive Fines Clause, the Cruel and Unusual Punishments Clause, and the statutory requirement of proportionality in sentencing.²⁷⁹ The legislative purpose behind this double redundancy, the Court explained, was to ensure that “no addition, under any pretext whatever, was to be imposed upon the offender, beyond the real measure of his own offence.”²⁸⁰

The final question relating to early legislative practice is whether the first federal penal statute shows that the First Congress did not believe that the Cruel and Unusual Punishments Clause forbids excessive punishments. This statute made capital offenses of crimes ranging from treason and murder to the stealing of a “ship or vessel, or any goods or merchandise to the value of fifty dollars.”²⁸¹ This lack of gradation, Justice Scalia has argued, shows that Con-

²⁷⁷ Virginia Declaration of Rights § 9 (1776), *reprinted in* 1 The Founders’ Constitution 6 (Philip B. Kurland & Ralph Lerner eds., 1987).

²⁷⁸ Act of Feb. 26–Mar. 1, 1819, § 48, *reprinted in* Digest of the Laws of Virginia 269 (Joseph Tate ed., Richmond, Smith and Palmer, 2d ed. 1841).

²⁷⁹ 5 Va. (1 Call) at 556–59.

²⁸⁰ *Id.* at 558.

²⁸¹ Act of Apr. 30, 1790, ch.9, § 8, 1 Stat. 112, 113–14 (1790).

gress did not believe itself bound by any requirement of proportionality in sentencing.²⁸²

A closer look at this statute, however, shows that it did distinguish between greater and lesser crimes. For example, although treason was a capital offense, the maximum sentence for concealment or misprision of treason was seven years imprisonment and a one thousand dollar fine.²⁸³ Similarly, the maximum penalty for misprision of felony was three years imprisonment and a five hundred dollar fine.²⁸⁴ The maximum penalty for manslaughter was three years imprisonment and a one thousand dollar fine.²⁸⁵ Thus, it appears that the First Congress did make an effort to apply the principle of proportionality in the first federal penal statute. Although the First Congress's application of this principle seems harsh from a modern perspective, this does not mean (as Justice Scalia has argued) that Congress did not recognize the principle at all.

e. Early Legal Commentators

Finally, the writings of nineteenth-century legal commentators suggest that they considered the Cruel and Unusual Punishments Clause to prohibit excessive punishments, although they rarely addressed the issue directly. For example, Thomas Cooley wrote that the Clause permitted new statutory offenses to be punished "to the extent permitted by the common law for similar offences."²⁸⁶ Justice Story read all three clauses of the Eighth Amendment as originating from the same tendency of the Stuart courts to impose excessive penalties on political enemies: "In those times, a demand of excessive bail was often made against persons, who were odious to the court, and its favourites; and on failing to procure it, they were committed to prison. Enormous fines and amercements were also sometimes imposed, and cruel and vindictive punishments in-

²⁸² See *Harmelin v. Michigan*, 501 U.S. 957, 980–81 (1991).

²⁸³ Act of Apr. 30, 1790, ch.9, § 2, 1 Stat. at 112.

²⁸⁴ See *id.* § 6, at 113.

²⁸⁵ See *id.* § 7 at 113.

²⁸⁶ Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 328–29 (Boston, Little, Brown & Co. 1868).

flicted.”²⁸⁷ Benjamin Oliver colorfully described various barbaric methods of punishment prohibited by the Clause²⁸⁸ but also asserted that “imprisonment for an unreasonable length of time[] is . . . contrary to the spirit of the constitution . . . [and] must be contrary to the intention of the framers of the constitution.”²⁸⁹ Other commentators, such as James Bayard and Chancellor Kent, did not consider whether the Cruel and Unusual Punishments Clause was meant to prohibit excessive punishments.²⁹⁰

In sum, the writings of nineteenth-century legal commentators are consistent with the proposition that the Cruel and Unusual Punishments Clause prohibits excessive punishments as well as barbaric ones.

III. RETHINKING PROPORTIONALITY

The Supreme Court’s decision to engage in proportionality review under the Cruel and Unusual Punishments Clause is well-founded as a textual and historical matter. Two significant problems remain: the Court has failed to provide a clear definition of “excessive”²⁹¹ and has failed to develop a workable method for measuring excessiveness.²⁹² The remainder of this Article will show that proportionality should be defined in terms of retributive justice and that excessiveness should be measured primarily against prior practice. By reorienting its proportionality jurisprudence in this fashion, the Supreme Court can make the Cruel and Unusual Punishments Clause stronger, more stable, and protective of a broader group of offenders.

²⁸⁷ 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1896, at 750–51 (Boston, Hilliard, Gray & Co. 1833) (footnote omitted).

²⁸⁸ See Benjamin L. Oliver, *The Rights of an American Citizen* 186 (Boston, Marsh, Capen & Lyon 1832).

²⁸⁹ *Id.* at 185–86.

²⁹⁰ See James Bayard, *A Brief Exposition of the Constitution of the United States* 153–54 (Philadelphia, Hogan & Thompson, 2d ed. 1840); 2 James Kent, *Commentaries on American Law* 10–11 (New York, O. Halsted 1827) (“But while cruel and unusual punishments are universally condemned, some theorists have proposed the entire abolition of the punishment of death[] . . .”).

²⁹¹ See *supra* Section I.B.

²⁹² See *supra* Section I.C.

A. The Definition of Excessive

As noted above, Webster's 1828 *American Dictionary of the English Language* defines the term "excessive" as meaning "beyond the bounds of justice."²⁹³ This definition reminds us of two facts about punishment. First, because punishment involves the deliberate infliction of pain, it is only permissible if it has some justification—some reason that makes the deliberate infliction of pain just. Second, a punishment is permissible only to the *extent* that it is justified. If the punishment inflicts more pain than its justification will permit, it is "beyond the bounds of justice" and therefore excessive.

It is important to note the distinction between the justification for punishment and the purposes of punishment. A punishment's justification is that which gives the punishment the quality of justice. At the time the Eighth Amendment was adopted (as today), "justice" meant principally "[t]he virtue which consists in giving to every one [sic] what is his due."²⁹⁴ The justification for punishment is that which ensures that the offender gets his due. By contrast, the purposes of punishment are the good things we hope to achieve through it, without respect to what is due to the offender as a matter of justice.

It is doubtful that any theory of punishment other than retribution can properly be considered a justification, for only retribution asks whether the offender is given what he is due as an individual. The other three theories—deterrence, incapacitation, and rehabilitation—ask only whether the punishment benefits the community. For example, a deterrence rationale would permit punishment of the innocent so long as the pain inflicted on the offender is less than the benefit enjoyed by society as a whole.²⁹⁵ On the face of it, it would seem that utilitarian theories cannot tell us whether a punishment is just, merely whether it is useful.

²⁹³ Webster, *supra* note 44.

²⁹⁴ Webster, *supra* note 44; see also Aristotle, *supra* note 112, at 76.

²⁹⁵ See Michael Moore, *Placing Blame: A General Theory of the Criminal Law* 93 n.19 (1997) ("The main problem with the pure utilitarian theory of punishment is that it potentially sacrifices the innocent in order to achieve a collective good."); Kent Greenawalt, *Punishment*, in 4 *Encyclopedia of Crime and Justice* 1336, 1341 (Sanford H. Kadish ed., 1983) (noting that the most "damaging" critique of utilitarianism is that it "admits the possibility of justified punishment of the innocent").

An examination of the common law requirements for criminal liability—requirements that generally survive today—shows that retribution has traditionally been the primary justification for punishment. First and most importantly, the common law forbade punishment in the absence of culpability. As early as the thirteenth century, Bracton wrote: “[A] crime is not committed unless the intention to injure exists, It [sic] is will and purpose which mark *maleficia*”²⁹⁶ Similarly, in the eighteenth century, Blackstone wrote, “[A]n unwarrantable act without a vitious will is no crime at all.”²⁹⁷

The prohibition of punishment without culpability is reflected throughout the structure of criminal law. At common law, a person generally could not be punished for causing harm through an involuntary act such as a reflex, because such an act cannot “induce any guilt: the concurrence of the will, when it has its choice either to do or to avoid the fact in question, being the only thing that renders human actions either praiseworthy or culpable.”²⁹⁸ Similarly, when a person lacked the capacity for free choice due to youth²⁹⁹ or insanity,³⁰⁰ he could not be criminally punished. When a person with lawful intentions violated the law due to mistake of fact,³⁰¹ or in order to prevent a greater evil,³⁰² he could not be criminally punished because he lacked moral culpability. A person who commit-

²⁹⁶ 2 Bracton, *supra* note 119, at 384 (“[C]rimen non contrahitur nisi voluntas nocendi intercedat. Et voluntas et propositum distinguunt maleficia. . . .”) (footnotes omitted).

²⁹⁷ 4 Blackstone, *supra* note 120, at *21.

²⁹⁸ *Id.* at *20–21.

²⁹⁹ See *id.* at *22 (“Infants under the age of discretion, ought not to be punished by any criminal prosecution whatever.”).

³⁰⁰ See *id.* at *24 (“[I]diots and lunatics are not chargeable for their own acts, if committed when under these incapacities. . . .”). The prohibition on punishing the insane included punishment of those who became insane after committing the crime. Thus, for example, Edward Coke condemned a law enacted under Henry the Eighth (and subsequently repealed) that allowed execution of those who committed treason before becoming insane. He described this law as exhibiting “extreme inhumanity and cruelty.” Sir Edward Coke, *The Third Part of the Institutes of the Laws of England* 6 (4th ed. London; Crooke, Leake, Roper, Tyton, Dring, Collins, Place, Starkey, Baffet, Pawlett, Heyrick & Dawes 1669).

³⁰¹ 4 Blackstone, *supra* note 120, at *27 (“[W]hen a man, intending to do a lawful act, does that which is unlawful[,] . . . there is not that conjunction between [the deed and the will] which is necessary to form a criminal act.”).

³⁰² See *id.* at *30–31.

ted a crime due to threats of death or bodily harm could raise a limited defense of compulsion, because he committed the crime unwillingly.³⁰³ This defense did not excuse homicide, however, “for he ought rather to die himself, than escape by the murder of an innocent.”³⁰⁴ It was permissible to kill an assailant who threatened a person with death, however, for “the law of nature, and self-defence, its primary canon, have made him his own protector.”³⁰⁵ The thread running through all these common law doctrines is the prohibition of punishment without culpability. If the defendant did not make a morally blameworthy choice, he could not be criminally punished.

The same thread runs through the United States Constitution’s treatment of criminal law. As Henry Hart pointed out in his classic article *The Aims of the Criminal Law*, the Constitution provides a number of procedural protections to criminal defendants that make sense only if the primary justification for criminal punishment is retribution.³⁰⁶ Criminal defendants have the right to be indicted³⁰⁷ and tried by jury,³⁰⁸ to confront witnesses,³⁰⁹ to subpoena witnesses,³¹⁰ and to have the assistance of counsel.³¹¹ Defendants also have the right not to be subjected to ex post facto laws³¹² or to double jeopardy.³¹³

Collectively, these protections only make sense if their purpose is to ensure that the defendant not be punished beyond the measure of his culpability. For example, the rights to be tried by a jury

³⁰³ See *id.* at *27 (“As punishments are therefore only inflicted for that abuse of that free will, which God has given to a man, it is highly just and equitable that a man should be excused for those acts, which are done through unavoidable force and compulsion.”).

³⁰⁴ *Id.* at *30.

³⁰⁵ *Id.*

³⁰⁶ See Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 *Law & Contemp. Probs.* 401 (1958) (asserting that the Constitution’s criminal procedural safeguards make sense only if the function of the criminal law is to express the “community’s solemn condemnation of the accused as a defaulter in his obligations to the community”).

³⁰⁷ U.S. Const. amend. V.

³⁰⁸ U.S. Const. amend. VI.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² U.S. Const. art. I, § 9.

³¹³ U.S. Const. amend. V.

of one's peers, to have the assistance of counsel, to confront witnesses, and to subpoena witnesses are all designed to protect against the danger of wrongful conviction. Such rights would not be necessary if deterrence were the primary justification for punishment, for deterrence permits conviction of the innocent so long as the punishment deters a greater number of others from committing the crime.³¹⁴ If deterrence were the Constitution's primary concern, then its focus would be to ease the conviction of the guilty, not to make the conviction of the innocent more difficult.

Similarly, the Supreme Court has recognized that the prohibitions of ex post facto punishments and double jeopardy are not needed if the justification for punishment is to incapacitate or rehabilitate dangerous offenders. In *Kansas v. Hendricks*, the defendant was civilly committed under Kansas's Sexually Violent Predator Act after completing a ten-year prison sentence for taking "indecent liberties" with two thirteen year old boys.³¹⁵ The defendant argued that his commitment constituted double jeopardy, because it subjected him to a second round of imprisonment after he had completed his criminal sentence.³¹⁶ He also argued that his commitment violated the Ex Post Facto Clause, because the Sexually Violent Predator Act was enacted more than ten years after he committed his crime.³¹⁷ The Supreme Court held that neither of these protections applied to the defendant, because the purpose of the Act was not punitive.³¹⁸ Rather, its purpose was "to hold the person until his mental abnormality no longer causes him to be a threat to others."³¹⁹ Because the purpose of the Act was to incapacitate (and possibly rehabilitate), but not to further the goals of retribution or deterrence, the constitutional limitations on punishment reflected in the Double Jeopardy Clause and the Due Process Clause did not apply.

The historical evidence demonstrates that the focus of the Cruel and Unusual Punishments Clause, like the constitutional criminal provisions discussed above, was retributive rather than utilitarian.

³¹⁴ See Hart, *supra* note 306, at 411.

³¹⁵ 521 U.S. 346, 350–54 (1997).

³¹⁶ *Id.* at 360–61.

³¹⁷ *Id.* at 350–53, 360–61.

³¹⁸ *Id.* at 361.

³¹⁹ *Id.* at 363.

In *Jones v. Commonwealth*, for example, the Supreme Court of Appeals of Virginia struck down a joint fine as cruel and unusual, because it could cause the defendant to be punished “beyond the real measure of his own offence [sic].”³²⁰ Similarly, Justice Field’s argument in *O’Neil v. Vermont* that a sentence of fifty-four years’ imprisonment was unconstitutionally excessive appeared to rest primarily on the low level of culpability associated with commission of a regulatory offense such as selling liquor without a license.³²¹

The most instructive early case regarding the relationship between the Cruel and Unusual Punishments Clause and common law notions of retribution is *Ely v. Thompson*.³²² As described above, the defendant was convicted of violating a Kentucky statute making it a crime for a person of color to lift his hand to a white person, even in self-defense.³²³ Under the common law, every person was considered to have a natural right to self-defense.³²⁴ Therefore, a person who acted in self-defense could not be criminally punished, because he lacked moral culpability.³²⁵ For this reason, the Kentucky Court of Appeals struck down the statute punishing free persons of color who acted in self-defense, holding that such punishment was “cruel indeed.”³²⁶

This is not to say that utilitarian theories of punishment were completely unknown at the time the Eighth Amendment was adopted. Such theories first came into circulation in the late eighteenth and early nineteenth centuries. Beccaria based his argument for reform of the criminal punishment system largely on principles of deterrence,³²⁷ and Blackstone repeated these in his *Commentaries*.³²⁸ Several state constitutions contained provisions calling for re-

³²⁰ 5 Va. (1 Call) 555 (1799).

³²¹ 144 U.S. 323, 339–40 (1892) (Field, J., dissenting).

³²² 10 Ky. (3 A.K. Marsh.) 70 (1820).

³²³ *Id.* at 70–73.

³²⁴ See 4 Blackstone, *supra* note 120, at *30.

³²⁵ See *id.*

³²⁶ 10 Ky. (3 A.K. Marsh.) at 74.

³²⁷ See Jeffrey Fagan & Tracey L. Meares, Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities, 6 Ohio St. J. Crim. L. 173, 180 (2008) (“[T]he formal emergence of a deterrence framework for punishment is often identified with the writings of Cesare Beccaria . . .”).

³²⁸ See 4 Blackstone, *supra* note 120, at *11.

form of criminal punishment in accordance with Beccaria's principles.

As noted above, however, the Cruel and Unusual Punishments Clause's prohibition of excessive punishments appears to have performed a different function than the state constitutional provisions calling for penal reform. The former provision was thought to embody a traditional right dating back to Magna Carta against punishment in excess of the defendant's moral culpability.³²⁹ The latter provisions, by contrast, called for reform of the penal system in light of Beccaria's utilitarian principles. There is no evidence that anyone at the time the Eighth Amendment was adopted believed that the Cruel and Unusual Punishments Clause incorporated Beccaria's ideas. All the early cases discuss the Cruel and Unusual Punishments Clause in light of traditional common law standards of proportionality, not new ideas regarding deterrence.³³⁰

This is as it should be. As shown above, utilitarian theories cannot properly be considered justifications for punishment. Such theories focus on collective welfare, not individual rights.³³¹ They permit the individual to be used solely for the benefit of the group, without regarding what is due to him as an individual. Deterrence, incapacitation, or rehabilitation may be an appropriate secondary purpose of punishment. But only retribution can justify punishment, and only punishment that goes beyond a defendant's moral desert can be considered "beyond the bounds of justice."³³² For this reason, the Supreme Court should recognize that excessiveness

³²⁹ See generally Stinneford, *Original Meaning of Unusual*, *supra* note 1, at 1758–59.

³³⁰ Some scholars have argued that the idea that a person should be punished no more than necessary to achieve a consequentialist goal such as deterrence should form part of the constitutional standard under the Cruel and Unusual Punishments Clause. See, e.g., Michael J. Perry, *Is Capital Punishment Unconstitutional? And Even if We Think It Is, Should We Want the Supreme Court to So Rule?*, 41 *Ga. L. Rev.* 867, 881–90 (2007).

³³¹ See, e.g., Bruce A. Ackerman, *Social Justice in the Liberal State* 343 (1980) (“[T]here is nothing the utilitarian will not countenance in his single-minded search for the collective happiness.”).

³³² Webster, *supra* note 44; see also, e.g., Alschuler, *supra* note 68, at 19; Frase, *supra* note 66, at 73. This idea was most famously expressed by Immanuel Kant: “[The criminal] must first be found to be deserving of punishment before any consideration is given to the utility of this punishment for himself or for his fellow citizens.” Immanuel Kant, *The Metaphysical Elements of Justice: Part I of the Metaphysics of Morals* 100 (John Ladd trans., 1965).

under the Cruel and Unusual Punishments Clause is a retributive concept and should not permit legislatures to pursue utilitarian goals at the expense of individual justice. This approach would be consistent with the original meaning of the Cruel and Unusual Punishments Clause and would make the Court's approach to proportionality more coherent and protective of individual rights.

B. The Measurement of Excessiveness

The evolving standards of decency test has proven itself an unreliable and ineffective measure of cruelty.³³³ Sole reliance on the Court's "independent judgment," on the other hand, would be standardless and potentially antidemocratic.³³⁴ A new approach to the measurement of excessiveness is needed.

As will be discussed below, the text of the Cruel and Unusual Punishments Clause and the early case law suggest that excessiveness should be measured primarily against the boundaries established by prior practice. If a punishment is significantly harsher than prior practice would permit for a given crime, the punishment is unusual and therefore presumptively cruel. Such a punishment would only be upheld in the rare circumstance in which the increase could be justified as a matter of retribution.

1. Determining Whether the Punishment Is Unusual

The word "unusual" means "contrary to long usage," which is another way of saying "contrary to longstanding practice."³³⁵ This choice of wording reflects the common law ideology that predominated at the time the Eighth Amendment was adopted. The common law was predicated upon the idea that practices that enjoy long usage are presumptively reasonable and enjoy the consent of the people.³³⁶ Longstanding practices that were used throughout the jurisdiction attained the status of law, despite never being codified by a legislature. On the other hand, unusual practices—that is, new practices that ran contrary to long usage—were presumed to be

³³³ See *supra* Section I.C.

³³⁴ See *id.*

³³⁵ See Stinneford, Original Meaning of Unusual, *supra* note 1, at 1764.

³³⁶ See *id.* at 1770–75.

unreasonable, particularly where they undermined traditional rights.³³⁷

Under the Cruel and Unusual Punishments Clause, a punishment is unusual if it exceeds the bounds established by the punishment practices that preceded it. This may happen when the government employs a previously impermissible method of punishment (such as torture) or where it imposes a punishment that is excessive relative to the crime of conviction.³³⁸ Such punishments are presumptively cruel. Indeed, in this context, the word “unusual” is virtually a synonym for “cruel,” for the fact that the punishment is significantly harsher than prior practice would permit is powerful evidence that the punishment is unjustly harsh (and thus cruel).

The Cruel and Unusual Punishments Clause focuses on “new” punishments because the core purpose of the Clause is to prevent government from acting on a temporarily enflamed desire to inflict pain on criminal offenders. The government has a pronounced tendency to react to perceived crises by ratcheting up the harshness of punishments. Such crises occur in a variety of circumstances. Sometimes a person commits a crime in an outrageous manner, provoking an outcry for extreme punishment.³³⁹ Sometimes the government “has it in for” a political enemy or a member of a disfavored group and inflicts cruel punishments out of animosity or prejudice.³⁴⁰ And sometimes there is a societal moral panic. A

³³⁷ See *id.* at 1774–75.

³³⁸ See *supra* Subsection II.C.2.

³³⁹ For example, Titus Oates’s perjured account of a popish plot to kill the king created a great panic that led to the execution of fifteen innocent people. The cold-hearted malignity of Oates’s commission of this crime motivated the court to impose a much harsher punishment than had been previously imposed for perjury. See *supra* Section II.B.

³⁴⁰ In the early nineteenth century, African Americans were often the targets of such heightened punishment. For example, as discussed above, the Kentucky Court of Appeals struck down a statute that made it a crime for an African American to raise his hand to a white person, even in self-defense. See *Ely v. Thompson*, 10 Ky. (3 A.K. Marsh.) 70, 70–71, 74–76, as discussed *supra* Subsection II.C.2. Similarly, as seen in *Aldridge v. Commonwealth*, 4 Va. (2 Va. Cas.) 447, 447–48 (1824), the state larceny statute was amended to impose a sentence of whipping, enslavement, and banishment on free persons of color who committed this crime, whereas white offenders faced a maximum punishment of three years imprisonment. Laurence Claus has argued that the true purpose of the Cruel and Unusual Punishments Clause is to invalidate discriminatory punishments such as these. See Laurence Claus, *The Antidiscrimination*

moral panic occurs when a given problem suddenly appears to be beyond the capacity of government to control via traditional means:³⁴¹ the public is led to believe that crack cocaine is a powerful new drug that is instantly addicting and much more harmful than powder cocaine,³⁴² or that a rising generation of superpredators will tear apart the fabric of society,³⁴³ or that all sex offenders are remorseless pedophiles who will never stop raping children until they are jailed, killed, or castrated.³⁴⁴ When such situations occur, enormous pressure is placed upon the legislature to do something to show that it is in control. The Cruel and Unusual Punishments Clause is meant to prevent the government from responding to such situations by drastically increasing punishments beyond their traditional bounds.

The English and early American case law confirms that both versions of the Cruel and Unusual Punishments Clause were directed at new punishments that were harsher than permitted by prior practice. As discussed above, Parliament condemned the punishment inflicted on Titus Oates as “contrary to Law and ancient Practice.”³⁴⁵ In the eighteenth and nineteenth centuries, courts interpreting state analogues to the Eighth Amendment struck down punishments where the judge or legislature had abrogated a traditional common law rule designed to ensure proportionality be-

Eighth Amendment, 28 Harv. J.L. & Pub. Pol’y 119, 121 (2004). Claus rejects the argument that the Clause was intended to prohibit excessive punishments that are not also discriminatory. See Laurence Claus, Methodology, Proportionality, Equality: Which Moral Question Does the Eighth Amendment Pose?, 31 Harv. J.L. & Pub. Pol’y 35, 38–39 (2008).

³⁴¹ See Elizabeth S. Scott & Laurence Steinberg, Blaming Youth, 81 Tex. L. Rev. 799, 807 (2003) (describing moral panic as a situation in which “media, politicians, and the public reinforce each other in an escalating pattern of alarmed reaction to a perceived social threat. The elements of a moral panic include an intense community concern (often triggered by a publicized incident) that is focused on deviant behavior, an exaggerated perception of the seriousness of the threat and the number of offenders, and collective hostility toward the offenders, who are perceived as outsiders threatening the community.” (footnotes omitted)).

³⁴² See Michael M. O’Hear, Perpetual Panic, 21 Fed. Sent’g Rep. 69, 73 (2008).

³⁴³ See Scott & Steinberg, *supra* note 341, at 807–11 (describing contemporary juvenile justice policy as the product of a moral panic).

³⁴⁴ See O’Hear, *supra* note 342, at 69; Stinneford, Incapacitation Through Maiming, *supra* note 87, at 561.

³⁴⁵ 14 H.L. Jour. 228 (1689).

tween culpability and punishment³⁴⁶ but upheld punishments that were consistent with prior practice.³⁴⁷ Justice Field's dissent in *O'Neil* condemned the punishment as "exceeding in severity . . . anything which I have been able to find in the records of our courts for the present century."³⁴⁸ Indeed, in *Weems v. United States*, the first case in which the Supreme Court actually struck down a punishment as being unconstitutionally excessive, the Court made a point to note that the punishment was inconsistent with the prior practice of the American criminal justice system.³⁴⁹

A focus on prior practice does not require courts to employ the standards of the eighteenth century in determining the constitutionality of a punishment.³⁵⁰ Under the common law, if a given practice fell out of usage, it was no longer a "usual" punishment and lost its presumption of validity.³⁵¹ If the legislature later reintroduced such a punishment, it was regarded as a "new" or "unusual" punishment.³⁵² Thus, in comparing a challenged punishment to prior practice, the Court should compare the practice to those that came immediately before it, not to those that fell out of usage in the eighteenth or nineteenth centuries.

Because the Eighth Amendment applies to both the federal government and the states,³⁵³ the Court should compare the challenged punishment to prior practice in all of these jurisdictions. This part of the inquiry is similar to the Court's current approach under the evolving standards of decency test, but its purpose is different. Under both approaches, the Court looks at sentencing statutes and

³⁴⁶ See *Ely v. Thompson*, 10 Ky. (3 A.K. Marsh.) 70, 70 (involving a statute that abrogated the common law defense of self-defense); *Jones v. Commonwealth*, 5 Va. (1 Call) 555, 555 (holding that the punishment violated the common law rule against joint fines).

³⁴⁷ See *Commonwealth v. Hitchings*, 71 Mass. (5 Gray) 482, 486 (1855); *Barker v. People*, 20 Johns. 457 (N.Y. Sup. Ct. 1823). These cases are discussed in detail *supra* Subsection II.C.2.b.

³⁴⁸ 144 U.S. at 338 (1892) (Field, J., dissenting).

³⁴⁹ 217 U.S. 349, 366–67, 377 (1910) (noting that "[s]uch penalties for such offences amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths" and that this punishment "has no fellow in American legislation").

³⁵⁰ See Stinneford, *Original Meaning of Unusual*, *supra* note 1, at 1813–15.

³⁵¹ *Id.* at 1814.

³⁵² See *id.* at 1819.

³⁵³ See *Robinson v. California*, 370 U.S. 660 (1962).

jury verdicts in the fifty states and the federal system to serve as a point of comparison for the challenged punishment. The purpose of the evolving standards of decency test is to determine whether the punishment meets today's standards, but what the Court should really be asking is whether the punishment meets the standards that have prevailed *up until* today.

The Court's review of prior practice will not normally yield a single permissible sentence for a given crime. Over time, the harshness of the punishment imposed for any given crime sometimes increases and sometimes decreases. Moreover, at any given time, the punishments imposed in the fifty states and the federal system vary from each other to some degree. These punishment practices do not establish a single permissible sentence. Rather, they establish a range of reasonableness. Punishments that fall within this range are not "unusual."

2. Determining Whether the Punishment Is Cruel

If a punishment is found to be unusual, the next question is whether it is cruel. To answer this question, a court should ask whether the departure from prior practice appears to be justified as retribution. If the punishment is unjustly harsh in light of the defendant's culpability, it is cruel.

This part of the inquiry involves an exercise of the Court's own judgment. Unlike the Court's current approach to exercising "independent judgment" under the Cruel and Unusual Punishments Clause, however, there are constitutional guideposts to assist the inquiry. The most important of these is the size of the gap between prior punishment practice and the new punishment being challenged. Because departures from prior practice are presumptively unjust, a large gap between the harshness of the new punishment and those that came before it would be strong evidence that the punishment is cruelly excessive.

The Court should also ask whether some change in circumstances relevant to the offender's culpability justifies an increase in the harshness of punishment beyond what prior practice permitted. For example, in an age of financial globalization, corporate executives bent on fraud can now create financial harm that is far greater than was possible in the past—a fact that might justify a significant increase in punishment. Given the presumption that punishments

that exceed the bounds established by prior practice are unjust, however, a court should be reluctant to accept the argument that changed circumstances justify a drastic increase in the harshness of punishment.

3. *Effect on the Court's Recent Proportionality Cases*

In several cases, comparison of the challenged punishment to prior practice would provide a more plausible basis for the decisions the Supreme Court has made under the evolving standards of decency test. As described above, in *Roper v. Simmons*³⁵⁴ and *Kennedy v. Louisiana*,³⁵⁵ the Court claimed to find a societal consensus against the death penalty for juveniles and for non-homicide offenses against individuals. Similarly, in *Graham v. Florida*,³⁵⁶ the Court claimed to find a societal consensus against sentences of life imprisonment without possibility of parole for juvenile non-homicide offenders. The Court's finding of societal consensus in these cases was implausible because the primary indicia of current standards of decency—legislative enactments and jury verdicts—showed substantial public support for these punishments.³⁵⁷ The Court's decision to strike down these punishments would have been more plausible had the Court compared the punishments to prior practice, for all three punishments were both new and substantially harsher than the punishments that preceded them.

Louisiana's statute permitting the execution of offenders who committed aggravated rape of a child was enacted a mere thirteen years before *Kennedy* was decided, and no executions had yet been performed under it.³⁵⁸ It was part of a wave of state statutes passed since the mid-1990s authorizing the death penalty for non-homicide offenses for the first time since the 1970s.³⁵⁹ The last execution for a non-homicide offense occurred in 1964, nearly half a century before *Kennedy*.³⁶⁰ As these facts indicate, Louisiana's effort to reintroduce the death penalty for non-homicide offenses

³⁵⁴ 543 U.S. 551, 567 (2005).

³⁵⁵ 554 U.S. 407, 422–26 (2008).

³⁵⁶ 130 S. Ct. 2011, 2023–26 (2010).

³⁵⁷ See *supra* Section I.C.

³⁵⁸ 554 U.S. at 418, 433.

³⁵⁹ *Id.* at 423.

³⁶⁰ *Id.* at 433.

was “unusual” because it attempted to bring back a practice that had fallen out of usage decades before. It was also at least arguably “cruel,” because the death penalty is significantly harsher than life imprisonment and because there did not appear to be any new evidence relating to the culpability of such offenders or the harm caused by their crimes.

Similarly, the Court’s decisions in *Roper*³⁶¹ and *Graham*³⁶² to restrict the punishments that can be imposed on juvenile offenders would be more defensible had the Court referred to prior practice rather than current standards of decency. For most of the twentieth century, juvenile courts had exclusive original jurisdiction over all criminal matters involving defendants under eighteen years of age.³⁶³ The juvenile process focused primarily on rehabilitation rather than punishment, and juvenile offenders were released from confinement when they were rehabilitated or reached the age of twenty-one, whichever came first.³⁶⁴ Juvenile courts had the power to waive jurisdiction and allow the offender to be transferred to the adult system, but waivers were made on a case-by-case basis, using a “best interests of the child and public standard.”³⁶⁵ In the 1980s and 1990s, public concern about juvenile crime spiraled into a panicked belief about a rising generation of “superpredators.”³⁶⁶ Legislatures responded with an “unprecedented . . . crack down” on juvenile crime.³⁶⁷ In a mere five-year period, forty-five states changed their laws to make it easier to transfer juveniles to adult court and thus make them potentially subject to sentences of death or life without possibility of parole.³⁶⁸ The superpredator scare was wildly exaggerated, and juvenile crime rates have significantly dropped since the 1990s.³⁶⁹

³⁶¹ 543 U.S. at 567.

³⁶² 130 S. Ct. at 2023–26.

³⁶³ See 1999 DOJ Report, *supra* note 88, at 86.

³⁶⁴ See *id.* at 86–87.

³⁶⁵ See *id.* at 86.

³⁶⁶ See Stephen J. Morse, *Delinquency and Desert*, 564 *Annals Am. Acad. Pol. & Soc. Sci.* 56, 57 (1999).

³⁶⁷ See 1999 DOJ Report, *supra* note 88, at 89.

³⁶⁸ See *id.*

³⁶⁹ See Terry A. Maroney, *The False Promise of Adolescent Brain Science in Juvenile Justice*, 85 *Notre Dame L. Rev.* 89, 102 (2009).

These facts support the argument that it is cruel and unusual to impose on juvenile offenders either a death sentence or a life sentence without possibility of parole, at least in most cases. The current wholesale treatment of many juvenile offenders as adults is unusual because it involves a drastic change from prior practice. At least some of the punishments authorized under this new regime may also be fairly characterized as cruel because they are much harsher than would have been available prior to the 1990s. One would need to examine the contrast between prior practice and current practice more closely to reach a firm conclusion—and the final result would probably be more nuanced than the *Roper* and *Graham* Courts' categorical approach to the issue. But the conclusion that imposition of punishments such as the death penalty or life imprisonment without possibility of parole on juvenile offenders violates the Cruel and Unusual Punishments Clause would be more plausible based on a comparison to prior practice than on the evolving standards of decency test.

A focus on prior practice would also lead the Court to extend the protection of the Cruel and Unusual Punishments Clause to a broader group of offenders. In cases involving imprisonment of adult offenders, the Court currently gives blanket deference to the legislature whenever the underlying crime has sufficient gravity (in the Court's judgment) to justify a long prison sentence.³⁷⁰ Under this approach, virtually every crime the legislature defines as a felony—including, for example, the crime of shoplifting by a recidivist—is considered sufficiently serious to preclude proportionality review. As shown above, the Court's refusal to engage in a more searching proportionality review in such cases appears to stem largely from the standardless nature of the Court's current proportionality jurisprudence.³⁷¹

A focus on prior practice would provide the Court a sufficiently determinate standard to enable it to judge the proportionality of prison sentences. For example, in *Ewing v. California*, the Court upheld a mandatory sentence of twenty-five years to life in prison for a small-time recidivist convicted of shoplifting three golf

³⁷⁰ See *Ewing v. California*, 538 U.S. 11, 30–31 (2003); *Harmelin v. Michigan*, 501 U.S. 957, 1005 (1991) (Kennedy, J., concurring).

³⁷¹ See *supra* Subsection I.C.2.

clubs.³⁷² Because the crime was a felony and because crimes by recidivists are more serious than those committed by first offenders, the Court upheld the sentence without making any effort to determine whether legislative enactments or jury verdicts showed it to be excessive in light of current standards of decency.³⁷³ Had the Court focused on prior practice, the result would likely have been different. The California three strikes law under which Ewing was convicted represented a drastic change from prior practice. As Justice Breyer noted in his dissent, prior to the enactment of this law “no one like Ewing could have served more than 10 years in prison.”³⁷⁴ In other words, the minimum time Ewing would spend in prison under the three strikes law was 250% greater than the maximum sentence he could previously have received anywhere in the country. The statute authorizing this punishment was new, and the punishment was significantly harsher than prior practice had permitted. It was cruel and unusual.

Similarly, in *Harmelin v. Michigan*, the Supreme Court upheld a statute imposing a mandatory life sentence with no possibility of parole for a first-time offender convicted of possessing with intent to distribute 650 grams of cocaine.³⁷⁵ The punishment required by the statute was much harsher than had previously been required in Michigan or any other American jurisdiction. Prior to 1978, there was no mandatory minimum punishment for the crime in Michigan, and the maximum punishment available for the crime was twenty years.³⁷⁶ No other state’s sentencing statute required a mandatory minimum sentence of more than fifteen years, and federal law required a mandatory minimum sentence of five years imprisonment.³⁷⁷ Although several state statutes theoretically permitted a maximum sentence of life in prison, they all permitted parole after

³⁷² 538 U.S. at 11.

³⁷³ *Id.* at 30–31.

³⁷⁴ *Id.* at 43 (Breyer, J., dissenting).

³⁷⁵ 501 U.S. at 957.

³⁷⁶ See Brief of Petitioner at *9, *Harmelin v. Michigan*, 501 U.S. 957 (1991) (No. 89-7272), 1990 WL 515104.

³⁷⁷ See *Harmelin*, 501 U.S. at 1026–27 (White, J., dissenting); Brief of Petitioner at 17A, *Harmelin v. Michigan*, 501 U.S. 957 (1991) (No. 89-7272), 1990 WL 515104 (table setting forth sentences authorized for the same crime in other states).

a term of years.³⁷⁸ There was no evidence that a life sentence without possibility of parole had ever been imposed on someone like Harmelin, a first-time offender with no aggravating factors. The statute requiring a minimum sentence of life imprisonment with no possibility of parole was new and was significantly harsher than prior practice would support. Nor was there any new evidence regarding the culpability of drug dealers. The Court should have found the punishment cruel and unusual.

A focus on prior practice would probably not support the Court's conclusion that several traditional applications of the death penalty were cruel and unusual. For example, in *Coker v. Georgia*, the Court struck down the death penalty for rape of an adult.³⁷⁹ The Court based its decision largely on the fact that Georgia was the only state that still imposed the death penalty for the crime of rape.³⁸⁰ This decision was almost certainly not correct in light of the original meaning of the Cruel and Unusual Punishments Clause. A punishment may be cruel and unusual only if it is significantly harsher than prior practice would permit, because only then is it both cruel and "contrary to long usage." It appears, however, that Georgia had a long and unbroken tradition of imposing the death penalty for this crime.³⁸¹ There was no reasonable way to characterize the punishment as "unusual," at least when the case was decided in 1977. It could not be properly held to be unconstitutionally excessive.³⁸²

In short, a focus on prior practice would significantly increase the scope of protection the Cruel and Unusual Punishments Clause provides to criminal offenders generally. It would provide a stronger foundation for several recent decisions striking down pun-

³⁷⁸ See Brief of Petitioner at *17A, *Harmelin v. Michigan*, 501 U.S. 957 (1991) (No. 89-7272), 1990 WL 515104.

³⁷⁹ 433 U.S. 584 (1977).

³⁸⁰ *Id.* at 595–96.

³⁸¹ *Id.* at 593–94.

³⁸² The result in *Coker* would have been more plausible had the case been decided today, assuming that no offenders had been executed in the intervening years. As noted above, when a practice falls out of usage for decades, it becomes "unusual" and may be struck down as cruel and unusual if the legislature seeks to reintroduce it. At the time *Coker* was decided, the true gap between the last execution for rape and the imposition of *Coker*'s sentence was less than ten years, since there was a gap of several years after the Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), during which time the death penalty itself was forbidden throughout the United States.

ishments that enjoyed strong popular support, but would not support the Court's decision to invalidate traditional applications of the death penalty that were still in use at the time of the Court's decision.

CONCLUSION

The Cruel and Unusual Punishments Clause was meant to prohibit excessive punishments as well as barbaric ones. A punishment's proportionality is to be measured primarily in terms of prior practice. If the punishment is significantly harsher than the punishments that have previously been given for the offense, it is likely to be excessive relative to the offense. By refocusing its proportionality jurisprudence on prior practice, the Court could use the Cruel and Unusual Punishments Clause to protect against legislative efforts to ratchet up punishments severely in response to moral panics, without intruding upon the legitimate policymaking function of the legislature. The Court's ability to review the constitutionality of punishments of imprisonment would be strengthened, but the Court's approach to traditional applications of the death penalty would require reconsideration.