Qualitative and Quantitative Proportionality - A Specific Critique of Retributivism

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QUALITATIVE AND QUANTITATIVE PROPORTIONALITY – A SPECIFIC CRITIQUE OF RETRIBUTIVISM

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This article presents a normative model of proportionality review under the Cruel and Unusual Punishments Clause. The model divides proportionality review into two organizing concepts: “quantitative proportionality,” which concerns the temporal length of the sentence imposed, and “qualitative proportionality,” which concerns the methods used to punish the individual and the conditions under which he serves his sentence. When viewed through the quantitative/qualitative structure, the Cruel and Unusual Punishments Clause is best understood to mandate review of the qualitative proportionality of the punishment, but not the quantitative proportionality of the sentence.

The key feature of this model is an appreciation for the role of human dignity as it relates to the Eighth Amendment. As the Supreme Court has recognized, the basic concept underlying the Eighth Amendment is “nothing less than the dignity of man.” A quantitative/qualitative proportionality model respects this guidance by suggesting that only punishments that are truly violative of human dignity must be invalidated as disproportional. Further, this model is consistent with the text of the Eighth Amendment, relieves the structural tensions inherent in judicial review of legislatively-determined sentence length, and gives courts an active, vigorous role in policing inhumane punishments. It also would end the slow-motion doctrinal train wreck that is the determination of whether a given prison term is quantitatively “too long,” something courts and scholars have proved themselves unable to accomplish coherently.

Importantly, this model also functions as a specific critique of retributive punishment theory. Retributivists often point to the Cruel and Unusual Punishments Clause as mandating retributivism as a side constraint on governmentally-imposed punishment. However, to the extent human dignity is considered to be the primary animating principle behind the Clause, and to the extent that mandatory quantitative proportionality review is undermined on that basis, it becomes far less clear that the Eighth Amendment mandates, or even suggests, punishment consistent with retributivism.
Cruelty is a deliberate and focused attempt to cause pain so that the torturer may receive pleasure in another’s suffering. It is tearing off a butterfly’s wings and then smiling as the insect squirms on the ground. It is offering cutting remarks and then savoring the attempt to salvage some dignity. It is the most ugly of all vices.1

Introduction

I recently had a client named Richard2 who was convicted of felony possession of a controlled substance with intent to sell. At the time of his conviction, Richard was in his late thirties. No violence was involved in the incidents leading to his arrest, and Richard had a short and unimpressive criminal history at the time of conviction. He was sentenced to approximately eight years in prison, spending most of his time in maximum security facilities. After all was said and done, Richard served almost all of the eight year sentence, finally leaving prison when he was in his mid-forties.

About halfway through his stay in prison, Richard suffered a severe injury that would eventually require arthroscopic surgery. After almost two-and-a-half years of substandard (and at time non-existent) care, Richard, acting pro se, initiated an action in federal court, alleging that his treating physicians were deliberately indifferent to his medical needs,3 and therefore had violated his right to be free from cruel and unusual punishment under the Eighth Amendment to the United States Constitution.4 The case attracted my attention,5 and I became

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2 For purposes of confidentiality, I have changed the name of my client and omitted certain identifying details. No other details recounted herein have been altered.

3 Eighth Amendment liability for substandard medical care is evaluated under a “deliberate indifference” standard, which has two elements; first, the inmate must show that he had an objectively “sufficiently serious” injury, and second, the inmate must show that prison officials knew of and disregarded an excessive risk to his health and safety via their treatment (or lack thereof). This second prong is essentially a recklessness standard. Farmer v. Brennan, 511 U.S. 825 (1994) (“A prison official's ‘deliberate indifference’ to a substantial risk of serious harm to an inmate violates the Eighth Amendment . . . [deliberate indifference is established when] the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.”).

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

5 What drew me to the case was that Richard had defeated the state’s motion to dismiss while acting pro se. As anyone familiar with pro se prisoner suits under 42 U.S.C. § 1983 or Bivens will tell you, many are frivolous, and very few will survive the state’s motion to dismiss or, alternatively, the state’s Rule 56 motion for summary
Richard’s *pro bono* counsel more than a year after the initial complaint had been filed.

Throughout the representation, one thing that struck me was how Richard reflected upon his time served. Over the two years I represented him, I never once heard Richard complain about the length of his incarceration, which to me seemed quite long relative to what I saw as the severity of his offense and his unremarkable criminal history. I found Richard’s sanguinity somewhat surprising, given that at the time of his arrest, Richard had children, decent job prospects, and what appeared to be a vibrant family life. By any measure, a significant portion of the prime of Richard’s life was spent behind bars, and yet I never once heard him complain about the length of his sentence.

Richard would, however, complain stridently about the conditions under which he served his time. He described a prison world that was over-crowded and often violent; a place where mental relaxation and trust of fellow inmates was non-existent. He described a medical system that was largely unresponsive to conditions that could not be easily discerned by sight, and a system of discipline that was – to his eyes – often arbitrary. It bears noting that Richard served his time in institutions that would not be considered amongst the worst in the nation – not even close. This was a sobering thought. While anecdotal reflections are not, of course, necessarily generalizable, although Richard’s experience does comport with well-known findings on the state of the American judgment (which often takes the functional place of a motion to dismiss). A complaint that does survive the state’s dismissal motion - either because of the strength of the allegations in the complaint, the conscientious efforts of the *pro se* plaintiff, or both - to my mind merits notice, since it is a fairly rare occurrence.

My review of Richard’s medical records confirmed the patent inadequacy of the medical care he received; conditions like rashes or other outwardly-apparent injuries or ailments were treated promptly, while injuries or illnesses whose diagnosis would require more than a cursory visual examination went largely untreated. This observation was buttressed by our deposition of the prison doctors and nurses named in Richard’s suit; we discovered that their “medical examinations” often consisted of nothing more than a quick look through the cell window or feeding porthole, which, depending on the institution, might be smaller than a laptop computer screen. It became our impression that this was common practice at state facilities. See D. Rudovsky, et al., *The Rights of Prisoners*, at 79 (4th Ed. S. Ill. U. Press) (“In many prisons, only the most serious ailments are treated . . . minor ailments are often ignored for lack of a doctor or nurse or for more callous reasons . . .”).

It bears noting that Richard was no shrinking violet; he was a physically large, smart, tough individual that was not laboring under any illusions about what he should have expected while incarcerated. On a number of occasions, he said to me that while he understood that he did not expect medical care “like I would have gotten in a hospital,” he nevertheless felt that his right to even a minimal level of care was ignored. He was not, in other words, what some have labeled a “sensitive” inmate. Adam Kolber, *The Subjective Experience of Punishment*, Col. L. Rev. (forthcoming 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090337 (“[s]ensitive [inmates] experience more distress than [i]nsentive” ones given identical conditions of incarceration).
prison system. What struck me most, though, about Richard’s refusal to complain about the length of his sentence, when contrasted to his strident objections to the conditions under which he served it, was that his complaints touched on a controversial and unsettled segment of Eighth Amendment law – the debate over proportionality under the Cruel and Unusual Punishments Clause. Richard’s complaints strengthened my conviction that proportionality jurisprudence, which struggles to articulate a workable theory of proportionality between the crime committed (or the culpability of the offender) and the temporal length of custodial sentences, is fundamentally misguided. How and why this is (and how it effects individuals like Richard) is the subject of this article.

It has become conventional wisdom that Eighth Amendment proportionality jurisprudence is a mess. This is perhaps not surprising; in the


See, e.g., Donna H. Lee, Resuscitating Proportionality in Noncapital Criminal Sentencing, 20 Ariz. St. L. J. 527, 528 (2008) (hereinafter Lee, Resuscitating Proportionality) (arguing that the last twenty-five years of Supreme Court proportionality decisions “do not provide practical guidance or a coherent theoretical framework for analyzing proportionality challenges”); Thomas G. Stacy, Cleaning up the Eighth Amendment Mess, 14 William & Mary Bill of Rights J. (2005) (arguing that the Court's Eighth Amendment jurisprudence is plagued by deep inconsistencies concerning the text, the Court's role, and a constitutional requirement of proportionate punishment); Steven Grossman, Proportionality in Non-Capital Sentencing: The Supreme Court’s Tortured Approach to Cruel and Unusual Punishment, 84 Ky. L. J. 107 (1996) (arguing that the Court’s proportionality jurisprudence is “confused”); Adam M. Gershowitz, The
past few decades, the Supreme Court has issued scores of opinions regarding the scope of the Cruel and Unusual Punishments Clause, many concerning the existence (or lack thereof) of a proportionality principle. 10 Some of those decisions cannot be easily reconciled.11 The Supreme Court has admitted as much: “our precedents in this area have not been a model of clarity. . . . [i]ndeed, in determining whether a particular sentence for a term of years can violate the Eighth Amendment, we have not established a clear or consistent path for courts to follow.”12

The scholarship has embraced the notion that something is wrong with proportionality jurisprudence, and scholars have been quite active in recent years attempting to articulate descriptive and normative explanations of a proportionality principle.13 These efforts largely bemoan the Court’s inability to


12 Lockyer, 538 U.S. at 71 (O’Connor, J).

13 See, e.g, John F. Stinneford, The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation, 102 Northwestern Univ. L. Rev. (2008) (arguing that the word “unusual” was a term of art that referred to government practices that deviate from “long usage,” and therefore the principle danger against which the Cruel and Unusual Punishments Clause was designed to protect is the “tyranny of enflamed majority opinion.”) (hereinafter Stinneford, Cruel Innovation); Lee, Resuscitating Proportionality (proposing “three principles” to “contribute to the development of a more coherent jurisprudence of proportionality”: transparency, limited deference, and a “felt sense of justice”); Carol S. Steiker, Panetti v. Quarterman: Is There a “Rational Understanding” of the Supreme Court’s Eighth Amendment Jurisprudence?, 5 Ohio St. J. Crim. L. 285 (2007) (exploring the “tensions and uncertainties that plague the Supreme Court’s Eighth Amendment jurisprudence.”); Eva S. Nilsen, Decency, Dignity, and Desert: Restoring Ideals of Human Punishment to Constitutional Discourse, 41 UC-Davis L. Rev. 111 (2007) (arguing that the Court’s “narrow and formalistic reading of the Eighth Amendment” has allowed “longer and meaner” sentences and more “degrading and dangerous” prison conditions.); Laurence Claus, Methodology. Proportionality, Equality: Which Moral Questions Does the Eighth Amendment Pose?, 31 Harv. J.L. & Pol’y 35 (2007) (“The Eighth Amendment
articulate compelling theoretical justifications for its proportionality decisions, \textsuperscript{14} and most decry the Court’s general unwillingness to submit what they believe to be unduly lengthy custodial sentences to close scrutiny. \textsuperscript{15} Some have drawn the camera back, so to speak, and explored the primary justifications for punishment (incapacitation, deterrence, rehabilitation, and retribution), and – especially in the case of retributivism – offered sophisticated analyses of how courts’ current understanding of proportionality should be informed by theory. \textsuperscript{16}

While enlightening and well-intentioned, these efforts have largely failed at offering compelling normative models for ordering Eighth Amendment jurisprudence in a way that fulfills what should be the four goals of any proportionality regime:

1. consistency with the text of the Cruel and Unusual Punishments Clause;

2. respect for the divided institutional responsibility for sentencing implementation and administration;

3. objective, coherent, and replicable methodology;


\textsuperscript{14} See supra n.\_\_ (ed note: cite to FN immediately preceding this FN); see also Samuel B. Lutz, Note, \textit{The Eighth Amendment Reconsidered: A Framework for Analyzing the Excessiveness Prohibition}, 80 N.Y.U. L. Rev. 1862, 1865-66 (2005) (exploring the social values that should inform the interpretation of the Eighth Amendment, arguing that “there has been a general failure to develop any larger theory of the Eighth Amendment”).

\textsuperscript{15} See, e.g., Lee, \textit{Resuscitating Proportionality}, at 583 (arguing that “[p]roportionality in noncapital cases can [and should] be resuscitated by clarifying the theoretical framework already contained in Supreme Court precedent”); Note, \textit{The Eighth Amendment, Proportionality, and the Changing Meaning of “Punishments}, 122 Harv. L. Rev. 960 (2009) (“rejecting a proportionality requirement may not be consistent with original intent”).

\textsuperscript{16} See, e.g., Youngjae Lee, \textit{The Constitutional Right Against Excessive Punishment}, 91 Va. L. Rev. 677 (2005) (proposing a model of “retributivism as side constraint” as a conception of proportionality review that could harmonize seemingly disparate proportionality case law).
4. reasonable consistency with Supreme Court precedent.

Most proposed proportionality regimes arguably fail each of these goals, including the Supreme Court’s current regime, which is best described as “limited” or “narrow” proportionality review, and very rarely results in an invalidated sentence. Is there a common thread amongst these models that can account for their shortcomings? I believe that the reason these models fail is because any proportionality regime that requires the temporal length of a sentence to be “proportional” with the severity of the crime or the culpability of the offender is bound to fail goals one and three above, and likely to fail goal two. Therefore, only a proportionality regime that seeks to regulate the “method” of punishment (defined broadly), and not the temporal length of a sentence can even in theory fulfill all four goals identified above.

Part I of this Article briefly recounts the thorny issues that have bedeviled efforts to articulate a coherent model of Eighth Amendment proportionality. First, I consider how courts have struggled to give consistent meaning to the Cruel and Unusual Punishments Clause, suggesting that the genesis of the problem lies in persistent differences in constitutional interpretive theory. Second, I recount how the literature has struggled to reconcile a regime of proportionality with the Supreme Court’s view that a punishment is constitutionally justified so long as it rationally furthers any reasonable penological theory. I further consider how the literature has struggled to articulate a coherent normative account of desert in relation to proportionality determinations. Ultimately, I conclude that these problems are intractable, because their proponents have failed to properly account for the idea that there are in fact two types of proportionality review, only one of which is actually authorized by the Cruel and Unusual Punishments Clause.

In Part II, I describe these two types of proportionality review: “quantitative proportionality” review, and “quantitative proportionality” review. “Quantitative proportionality” refers to the proportionality, under any theory, between the crime committed (or the culpability of the offender, or both) and the


18 The fourth goal, that a proportionality regime be “reasonably consistent with past Supreme Court precedent,” is perhaps better described as an aspirational goal, although if one aspires to move beyond of the realm of the theoretical and into the realm of spurring real change for how the American criminal justice system operates, this goal is perhaps more important the all the other factors combined. See Whitman, Against Retributivism, at 93 (“To the extent we claim to be seeking the correct moral stance, we have an obligation to take careful stock of the realities of the society in which we live.”). As discussed below, the normative account I supply here, which diverges in important respects with the Court’s current regime, in fact would align the form of the proportionality regime with its current “limited” or “narrow” substance, with minimal doctrinal upheaval. See section __, infra.

19 See sections __ - __, infra.
temporal length of the punishment imposed.\(^\text{20}\) It can be likened to what others have called “proportionality of amount.”\(^\text{21}\) Most salient would be the length of the custodial sentences imposed on individuals subjecting them to incarceration, but the concept also applies to the duration of non-custodial sentences like probation or community service. On the other hand, “qualitative proportionality” refers to the proportionality, under any theory, of the crime committed (or the culpability of the offender, or both), and the non-durative conditions of the punishment imposed.\(^\text{22}\) Put another way, “viciousness of method”\(^\text{23}\) - for instance, placement in solitary confinement, infliction of corporal punishment, exposure to risk of violence or injury, ability to access medical care, infliction of capital punishment, etc. Importantly, qualitative proportionality concerns itself with the “mundane” aspects of punishment, which include familiar condition-of-confinement issues: indifference (or attention) to medical needs, overcrowding, etc. Qualitative proportionality review seeks to determine whether the conditions of punishment as the individual experiences those conditions is commensurate with the crime committed and/or the culpability of the offender, under any penological theory.

One the reasons the literature has failed to offer compelling models of proportionality review is because the literature has failed to divide it into its constituent “qualitative” and “quantitative” aspects. Most scholars, as I argue in Part II, have simply assumed (wrongly) that the “cruel and unusual” language in the text is synonymous with “excessiveness” and “proportionality.”\(^\text{24}\) This assumption is incorrect, both as a matter of linguistic common sense and formal textual interpretation.\(^\text{25}\) Many scholars (and courts) have read the Eighth Amendment ratification history, along with the pre- and early-post-adoption case law to suggest that originalist arguments support the notion that quantitative proportionality is required under the Clause.\(^\text{26}\) However, I find that these arguments depend on evidence and case law interpretation that is, at best, weakly suggestive of their proffered conclusion.\(^\text{27}\) Ultimately, I conclude that requiring quantitative proportionality between crime/culpability and punishment cannot be
reconciled with the text of the Eighth Amendment and cannot be rationally and predictably applied by reviewing courts.

On the other hand, I suggest that requiring qualitative proportionality between crime/culpability and sentence does fulfill the four goals outline above. It is consistent with the text, it can be (and has) been applied rationally by courts, and it gives proper respect to the institutional roles (and competencies) of the legislatures and the courts, by confining courts to the job they do well – policing the conditions of punishment – and limiting their authority to do a job they do not do well – determining how long a sentence “should be.”

In Part III, I offer a purposive argument that supports this qualitative/quantitative model, which also addresses a third failing in the literature to date: an under-appreciation of the role of human dignity in the context of proportionality jurisprudence. I argue from a purposive perspective that there is not compelling justification for the notion that the length of custodial sentences is relevant to determining whether a given punishment violates notions of human dignity. Rather, it is the conditions of punishment that qualitative proportionality properly gauges in relation to the crime (and/or the culpability of the offender). The proportionality model presented here – one that bars quantitative proportionality review but engages in vigorous qualitative proportionality review – fulfills the most basic directive of the Eighth Amendment by requiring courts to monitor the conditions of punishment such that human dignity, the central concern of the Eighth Amendment, is not gratuitously violated.

Finally, in Part IV, I consider the implications of this model on retributive punishment theory in the American system. Advocates of retributive punishment theory like to argue that justification can be found in the Eighth Amendment; they argue that the ban on “cruel and unusual” is, in essence, a command that the punishment received by an offender be tied to his desert. In other words, that punishment be gauged in proportion to blameworthiness. The model presented here refutes this claim; if it is true that there is no quantitative limit imposed by the Eighth Amendment, then it is necessarily true that the Amendment does not require retributively proportional sentences. While this is not an argument that there should not be qualitative proportionality between crime and/or the culpability of the suspect and punishment as a matter of substantive legislative principle, it is an argument that such a project cannot be accomplished via the Eighth Amendment.

It is time, as they say, to pronounce the body of Eight Amendment qualitative proportionality dead, and to begin working on a model that can explain courts’ willingness to closely monitor the conditions of confinement, while also explaining courts’ unwillingness to strike down custodial incarcerations on the basis of temporal length. The model presented here does

28 See Trop v. Dulles, 356 U.S. 86, 100 (1958) (Warren, C.J.) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”).

29 I have (shamelessly) borrowed this line from Professor Weisselberg. Charles D. Weisselberg, Mourning Miranda, 96 Cal. L. Rev. 1519, 1521 (2008).
both, by fulfilling the textual command of the Eight Amendment that punishments not be “cruel and unusual,” as well as its and its purposive place in the constitutional structure as a guarantor of human dignity.

I. THE PROPORTIONALITY “MESS”

“Confused,” “inconsistent,” and “uncertain” are but some of the adjectives used to describe the Court’s Eighth Amendment proportionality jurisprudence. Some even describe the Court as exhibiting “schizophrenia” on the subject. Now, it is probably true that “the state of the law with respect to proportionality in sentencing is confused, and what law can be discerned rests on weak foundations.” The genesis of this confusion is the Supreme Court’s contradictory holdings on the question of the proportionality for non-capital sentences, which even the Court itself admits “ha[s] not been a model of clarity.” Over the last thirty years, the Court’s direction, as expressed in the “Proportionality Sextet” of *Lockyer v. Andrade*, *Ewing v. California*, *Harmelin v. Michigan*, *Solem v. Helm*, *Hutto v. Davis*, and *Rummel v. Estelle* has oscillated between a pronouncement that “for crimes . . . punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative,” to a

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38 454 U.S. 370 (1982).


40 *Id.*
clear statement that the Cruel and Unusual Punishments Clause “prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed,”41 to a plurality holding that “the Eighth Amendment contains no proportionality guarantee,”42 to a pseudo-middle ground holding by a “convoluted plurality”43 that while Solem is still good law, a sentence of twenty-five years to life for recidivist petty theft is appropriate under proportionality principles.44 No wonder confusion reigns.

In-depth treatments of the Proportionality Sextet, along with the Court’s first decision considering Eighth Amendment proportionality almost a century ago in Weems v. United States,45 have been presented elsewhere, and I will not duplicate those efforts here.46 Suffice it to say that the current state of the jurisprudence is an odd one, satisfying to no one.47 As expressed in Lockyer, “[a] gross disproportionality principle is applicable to sentences for terms of years” under the Eighth Amendment,48 but almost all prison sentences – not matter how seemingly unfair – will likely be upheld as non-disproportionate to the crime or the culpability of the offender, because the bar to showing gross disproportionality is so high.49 The facts of Ewing are a good example of the confused state of affairs. There, the defendant (a repeat offender with the proverbial mile-long record) was convicted of stealing approximately one thousand dollars worth of golf clubs under California’s three-strikes law and

45 217 U.S. 349 (1910).
47 Jennifer Edwards Walsh, Three Strikes Laws, at 99 (Greenwood Publishing Group, 2007) (“Many constitutional scholars hoped that the Court [would] finally resolve[e] the Rummell-Solem-Harmelin conflict. However, the Court failed to agree on an approach that would clear up the confusion.”).
48 538 U.S. at 72.
49 Jennifer Edwards Walsh, Three Strikes Laws, at 99 (Greenwood Publishing Group, 2007) (“the Court’s decision to uphold Ewing’s sentence means that three strikes defendants will likely be unsuccessful in contesting the constitutionality of their sentences in the future . . . [unless] the court changes its mind about the standard that should be used to judge the constitutionality of a non-capital sentence”); see also James Headley, Proportionality Between Crimes, Offenses, and Punishments, 17 St. Thomas L. Rev. 247, 253, 254 (2004) (“It is hard to image a fact pattern that would satisfy Kennedy, O’Connor and Souter’s definition of ‘grossly disproportionate’.”).
sentenced to twenty-five years to life. The Court held that this sentence was not grossly disproportionate; the Court found it to be a rational expression of legislative’s judgment regarding the need to incarcerate repeat offenders so as to effectuate incapacitative and deterrent goals.

In the wake of Lockyer and Ewing, commentators agree that “it remains very unclear when the Court will find a prison sentence unconstitutionally disproportionate.” Most observers (and seemingly most interested scholars) consider this to be an intolerable state of affairs. This is not surprising - these holdings are intuitively troubling. Can it really be the case that life in prison for a handful of property crimes is proper? Can it really be the case that such a sentence is not unconstitutionally excessive? And if it is, how did we arrive at such an odd place? How is it that a controlling opinion of the Supreme Court can state unequivocally that a principle of proportionality exists under the Eighth Amendment, but nearly all commentators feel justified in concluding (with reason) that the Court’s opinions have rendered proportionality all but a dead letter?

The roots of the confused state of affairs lay in the divergent methods of interpretation and conceptions of constitutional purpose used by the shifting majorities and pluralities on the Court. First, the justices’ divergent methods of interpretation mean that, at the very start, there are at least three ways to view the Cruel and Unusual Punishments Clause, each leading to fundamentally different constructions of the clauses’ effect. An approach based in originalism posits essentially that there is no evidence that the drafters of the Eighth Amendment (or anyone else at the time) believed that it would operate to limit a sentence of a term of years. This view is most commonly associated with Justice Scalia’s

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51 Id. at 24-26.
53 See n.__ and accompanying text.
54 See (“In the wake of . . . Harmelin, following the decisions in Rummel, Davis, and Solem, a great deal of confusion exists respecting the application of a proportionality principle to non-capital sentences. Much of that confusion stems from the inability of the Justices to agree upon and articulate clearly an Eighth Amendment proportionality principle, and from the mixed signals they have given with respect to application of such a principle. These problems derive in large part from the Court's failure to develop a convincing philosophical basis on which to premise a meaningful ban on grossly disproportionate punishments.”).
55 See Alice Ristroph, Sexual Punishments, 15 Colum. J. Gender & L. 139, n.129 (2006) (“Justice Scalia has read the Cruel and Unusual Punishments Clause [to] suggest[] that the phrase “cruel and unusual” means simply, “not authorized by law” or “illegal.”), citing Harmelin v. Michigan, 501 U.S. 957, 969-75 (1991) (analyzing historical evidence and concluding that the Cruel and Unusual Punishments Clause contains no proportionality requirement but instead prohibits punishments not authorized by statute or common law) (hereinafter Ristroph, Sexual Punishments).
opinion in *Harmelin*.

The effect of this approach, shared to some degree by Justice Thomas and other more strict textualists, is that the Eighth Amendment is understood to contain no proportionality requirement at all, “but instead [only] prohibits punishments not authorized by statute or common law.”

In contrast, a non-originalist or non-textualist approach takes a decidedly more expansionist view of what is barred by the Clause – essentially, that the Clause bars sentences that are excessive in relation to the crime or the culpability of the offender. There are two strands of this non-originalist or non-textualist construction: the “narrow” view (commonly associated with Justices O’Connor and Kennedy, and expressed in cases like *Lockyer* and *Ewing*), that a gross disproportionality bar exists, even if it is a bar not easily met by litigants. The more vigorous view, commonly associated with Justices Stevens and others, essentially adopts the view of the Court in *Solem* and would act as a strong check on the ability of the legislature to impose long punishments that are deemed excessive. The rub, of course, is that the narrow proportionality regime (which prevails today) is generally considered to be an empty shell – it prohibits punishments that are “grossly disproportionate,” but almost never leads to the overturning of a sentence of a term of years.

This is a classic case of what some have called Justice Kennedy’s brand of “Door to Elijah” jurisprudence. Given these interpretive cross-currents that have split the Court into three seemingly unwavering factions, the doctrinal confusion arising out of the Proportionality Sextet – where even slim majority opinions were hard to come by – is easy to explain.

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56 See *id.*
57 *Id.* at 170, n. 129.
58 *Id.* at n.129.
59 See n.____ - ___ and accompanying text.
60 Supreme Court reporter Dahlia Lithwick summed up Justice Kennedy’s tendency to agree in principle with a particular line of reasoning, but to ultimately require facts so specific that it becomes difficult or impossible for plaintiffs to meet the standard:

> Kennedy, in short, look[ed] poised to do that thing he does—close the constitutional door to everyone but Elijah . . . This brand of jurisprudence is the Kennedy blue-plate special. He is officially waiting for the perfect facts before he decides environmental cases, racial gerrymandering cases, and possibly voluntary desegregation cases, too. He’ll agree with the liberals in theory, agree with the conservatives in specifics, and nobody will know what to do about anything.


61 The best place to see these different strains in action is in *Harmelin*, where the originalists (via Justice Scalia and Chief Justice Rehnquist, won out, the “narrowists” concurred (and set up the decisions in *Ewing* and *Lockyer*), and the non-originalists dissented, harkening back to *Solem*. 
The second source of confusion flows from the Court’s determination that the Constitution does not mandate any one theory of punishment. This is an often overlooked, but ultimately more important, problem, because it essentially means that interpretation and application of the Cruel and Unusual Punishments Clause must proceed without a grounding theory. The Court – by design – has refused to read into the Constitution an endorsement (or requirement) of any of the four basic theories of punishment: retribution, deterrence, incapacitation, and rehabilitation. Leaving aside whether this is a instrumentally desirable position, and leaving aside whether it would ever be logically possible to erect and administer a regime of punishment based only on one of these theories (and whether such a regime would correspond to public conceptions of the purpose of criminal punishment), this determination – what I call the Non-Preference Doctrine - creates fundamental stresses in the jurisprudence. To the extent that utilitarian theories of punishment do not suggest proportionality in most instances, whereas retributive theories of punishment generally do, the stresses become apparent. If the position is taken that a given legislatively-imposed punishment is a rational application of, say, general deterrence principles, then it is not immediately clear that proportionality between punishment and crime/culpability is necessary. For instance, if the legislature has determined that the interests of society are well-served by imposing a thirty-year sentences for auto theft, which the legislature believes will deter future auto thieves, then there is little room to argue under most accounts that this sentence is (or can theoretically be) “disproportionate” in terms of its deterrent value.

Conversely, if the legislature has determined that a sentence of thirty years for car theft is appropriate, non-utilitarian theories based on desert will have much room to argue that the offender has been over-punished, given the relative gravity of the crime committed. The classic example is the “life sentence for traffic violations” thought experiment, first used (I believe) in Rummel, where a dissenting Justice Powell noted (rather non-controversially) that “[a] statute that levied a mandatory life sentence for overtime parking might well deter vehicular lawlessness, but it would offend our felt sense of justice.” This is a retributive argument – Justice Powell argues that punishment should not be calibrated in reference to the societal benefit to be gleaned therefrom; rather, a punishment

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63 See n. ___ and accompanying text. (Ed Note: cite to section on consequences of my model for retributivist theory).

64 See n. ___ and accompanying text. (Ed Note: cite to section on consequences of this theory for retributivist theory).

65 I will return to the question of whether utilitarian theories necessarily must disclaim proportionality as a general matter. See section __, infra.

should be calibrated (somehow) to the crime/culpability such that it is not “grossly unjust” as an abstract matter.  

The Court’s adherence to the Non-Preference Doctrine, however justified as a jurisprudential matter, seemingly leaves proportionality theory at a perpetual cross-roads – if we look toward utilitarian punishment goals, proportionality seems unnecessary (or at least un-mandated); if we look towards retributive goals, proportionality is plainly required. It therefore seems true that “[t]he Court’s ‘proportionality’ decisions exert friction upon one another along multiple axes,”68 and those axes are, fundamentally, (1) conflicting views among Court personnel on proper constitutional interpretive and constructive theory,69 which leads to basic disagreements over the purpose and effect of the Cruel and Unusual Punishments Clause as a constitutional-interpretive matter, and (2) a commitment to the notion that the Constitution does not prescribe or proscribe any one penological theory, which introduces a fundamental (and indeterminate) variable at the most basic stage of the analysis.70 What has resulted is what we have today: an unstable regime of “narrow proportionality,” which (1) almost never leads to invalidated sentences, (2) is difficult to apply in practice (without troubling levels of instrumentalism),71 and (3) is unloved (or even particularly liked) by anyone, academics and jurists alike.

II. CHANGING THE TERMS OF THE DEBATE: A “NEW” MODEL OF PROPORTIONALITY JURISPRUDENCE

Is there a way out? Is it necessarily the case that, as long as there remain committed originalists, textualists, and “living constitutionalists,” and as long as the Supreme Court remains committed to the Non-Preference Doctrine, proportionality jurisprudence must remain mired in confusion, prohibiting, in theory, excessive custodial sentences but in practice never actually striking down such sentences? As the name of this section implies, I think there is a place for

67 Id. at 307. Justice Rehnquist repeated this example by noting in Rummel that a proportionality principle might “come into play in the extreme example mentioned by the dissent if a legislature made overtime parking a felony punishable by life imprisonment.” The example has been perpetuated ever since both in case law and Eighth Amendment scholarship, sometimes staying true to its “overtime parking” roots and sometimes morphing into “jaywalking.” See, e.g., Younghae Lee, Constitutional Right, at n.16, n.180, n.185, p. 700; Note, The Eighth Amendment, Proportionality, and the Changing Meaning of “Punishments, 122 Harv. L. Rev. 960 (2009) (“What if a legislature were to punish parking violations with life in prison?”).


69 See section __, supra.

70 See section __, supra.

71 Ewing v. California, 538 U.S. 11, 27 (2003) (“We do not sit as a ‘superlegislature’ to second-guess these policy choices. It is enough that [states have] a reasonable basis for believing that [sentences] enhance the goals of [its] criminal justice system in any substantial way”).

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proportionality under the Eighth Amendment, if one re-evaluates the term “proportionality” in light of the purpose of the Eighth Amendment, which the Supreme Court has recognized is the protection of human dignity.

Some background is in order. To understand how the concept of human dignity weighs on the subject of proportionality, the very concept of “punishment” must be broken down into its two basic components. First, the “qualitative” component, which is the actual punishment imposed (including the conditions under which it is imposed); and second, the “quantitative” component, which is frequency of the punishment imposed or the length of time it remains imposed upon the individual. So, if an individual is sentenced to twenty years hard labor, the quantitative component is the “twenty years,” and the basic qualitative component is the “hard labor,” along with the incarceration that necessarily goes along with it. If an individual is sentenced to one year incarceration and five years probation, the qualitative components are, respectively, the incarceration, and the probation, and the quantitative components are one year incarceration and five years probation, respectively.

Simple enough. However, as I set forth below - and where I part ways with most commentators – I posit that the best view of the Cruel and Unusual Punishments Clause is that proportionality is required only between the qualitative component of the punishment and the crime committed (and/or the culpability of the offender), but not between the quantitative component and the crime committed (and/or the culpability of the offender). In other words, the Eighth Amendment does not prohibit punishments that are quantitatively excessive in relation to the crime committed and/or the culpability of the offender. Rather, the Eighth Amendment requires only that the method of

72 As noted above, there is much more that goes into the “qualitative component” than simply the “hard labor” – the qualitative component of the punishment consists of all the conditions of the punishment experienced by the individual. This will be discussed in more detail in section __, infra.

73 A possible third component of a punishment would a “collateral component” – the fallout, if you will, from the fact that a punishment has in fact been imposed. This can be analogized to (but is distinct from) the collateral consequences of a conviction. So, for a sentence of ten days community service, the qualitative component would be the community service, the quantitative component would be the ten days, and the “collateral component” of the punishment would be any consequences or stigma attached to having been so sentenced – for instance, being seen in your neighborhood being punished for a crime, thereby signaling to your community that you are a criminal, time missed from work (and resultant loss of income), etc.

With the steadily increasingly acceptance and institution of shaming punishments, an appreciation for the collateral component of a punishment is important. Nevertheless, I will focus here on the core components of punishment – the qualitative component and the quantitative component. While more exploration is perhaps needed in the future, it is my view at this point that accounting for the collateral component of a punishment is probably not an appropriate exercise for an Eighth Amendment proportionality regime, primarily because any collateral component of a punishment is not under the control of the sentencing entity – if it was, the collateral component would be properly considered as part of the quantitative component. I should admit that I could probably be convinced otherwise, though.
punishment chosen, and the way in which that punishment is enacted (and experienced by the punishee) not be excessive in relation to the crime committed and/or the culpability of the offender. The reason I believe this model is preferable to the “strong,” “weak,” or “no” proportionality models is that it emphasizes (and incorporates) the core function of the Eighth Amendment as enunciated by the Supreme Court – the protection of the dignity of the person by a bar on punishments that are unnecessarily cruel or degrading.74

This normative account avoids the inconsistencies (the “schizophrenia,” if you will),75 of current approaches, because it does not impose an artificial and subjective proportionality on the length of custodial sentences. It does, however, recognize that there are some punishments whose methods are so odious as to be disproportional to any crime committed – something that courts do regularly already.

A. Qualitative and Qualitative Proportionality

As noted above, “qualitative proportionality” refers to the proportionality, under any theory, of the crime committed (or the culpability of the offender, or both), and the non-durative conditions of the punishment imposed. Qualitative proportionality is concerned with what is actually done to the individual – a sentence of incarceration, corporal punishment, execution, etc. It also encompasses the conditions under which the punishment is imposed. For instance, the qualitative aspects of a prison sentence include not only the fact of being imprisoned, but all the elements that go into being incarcerated: medical care, hygiene, diet, safety, and so forth. Similarly, for capital punishment, qualitative proportionality encompasses with the type of execution imposed - electrocution, firing squad, lethal injection, etcetera – and the conditions under which that particular method is exacted upon the individual (e.g. the particular drug cocktails used for lethal injection, etc.). These qualitative conditions are then balanced against the crime committed and/or the culpability of the offender in order to arrive at a determination as to whether there is proportionality, or at least not gross disproportionality.

“Quantitative proportionality,” on the other hand, refers to the proportionality, under any theory, between the crime committed (or the culpability of the offender, or both) and the length or frequency of the sentence imposed. Most salient would be the length of the custodial sentences imposed on individuals subjecting them to incarceration. The concept also applies to the length or duration of non-custodial sentences, like probation or community service. The concept also encapsulates the frequency of punishment – for instance, the number of lashings imposed.76 For instance, the quantitative proportionality of a sentence of ten years in prison for, say, automobile theft would be the proportionality between the crime of car theft (or the culpability of

74 Trop v. Dulles, 356 U.S. 86, 100 (1958) (Warren, C.J.) (The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.").

75 See n.__, supra.

76 See n.__, infra. (Ed. Note – cite to notes and text discussing Mass. Bay Colony charter).
the offender) and the fact that the given punishment imposed will be of ten years’ duration. It is not the fact that a prison sentence is imposed at all (which is the qualitative component). Of course, there can be, and often will be, multiple distinct quantitative components to a sentence because of non-custodial supervision following incarceration, such as prison, probation, or registration. So, the exercise of evaluating the quantitative proportionality of a sentence of ten years incarceration and ten years probation for car theft would need to account for both the length of the prison term and the length of the probationary term.77

**B. Quantitative Proportionality Is Not Required by the Eighth Amendment**

Assuming that punishments have two fundamental components, the question is whether the Cruel and Unusual Punishments Clause should be read to prohibit punishments that are not qualitatively and quantitatively proportional to the crime (and/or the culpability of the offender). I assume for purposes of this Article that the Clause does require qualitative proportionality, given the Amendment’s basic role as a guarantor of personal dignity, which acts as a limit on the qualitative aspects of a punishment.78 This assumption proceeds in part from the belief that courts have, in effect, determined that certain punishments are always qualitatively disproportionate to any crime or any degree of culpability. For instance, courts will uniformly find that physical torture like the rack and screw are violations of the Eighth Amendment. Another way of saying this would be to say that punishments with such qualitative characteristics are necessarily disproportionate to the crime/culpability under any penological theory.

The more pressing question, though, for purposes of proportionality jurisprudence – and the question that has vexed courts - is whether the Clause requires **quantitative** proportionality. I address that question in this section, working through textual, originalist, and purposive arguments.

1. **Text of the Cruel and Unusual Punishments Clause**

It is difficult to reconcile the notion that courts should be required to strike down quantitatively disproportional punishments with the text of the Eighth Amendment, which provides that “cruel and unusual punishments [shall not be] inflicted.”79 Of course, there is no explicit requirement in that phrase that a punishment be “proportional” to the crime committed (or to the culpability of the offender),80 or even that the punishment imposed not be “excessive.”81 The

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77 Not all would agree that there is a neat division between quantitative and qualitative punishment as experienced by the individual. See, e.g., Ristroph, Sexual Punishments, at 161 (questioning the traditional “legal construction of punishment that has rendered the law blind to the [] corporal aspects of incarceration”).

78 This, of course, leads to interesting questions regarding the death penalty. Can it be the case that physical impositions short of death can be disproportionate to any crime, but execution cannot be?

79 U.S. Const. amd. VIII.

80 See id.
question, then, is whether one can persuasively draw the conclusion that excessively long (i.e. quantitatively non-proportional) punishments are inherently “cruel” and/or “unusual” as those terms might be reasonably defined.  

The logical first question is whether it is significant as a matter of textual interpretation that the drafters could have – but did not – explicitly bar “excessive” punishments, using that term. May have argued that it is not. Justice Stevens observed in Ewing that “[i]t would be anomalous indeed to suggest that the Eighth Amendment makes proportionality review applicable in the context of bail and fines but not in the context of other forms of punishment, such as imprisonment.” Many others have made similar arguments; perhaps the earliest was Benjamin Oliver in 1832, who observed that, as a textual matter, while “no express restriction is laid . . . upon the power of imprisoning for crimes,” it is nevertheless the case that quantitatively disproportionate punishments would be “contrary to the spirit of the constitution” when viewed with respect to the Excessive Fines Clause. 

Such observers do not give sufficient respect to this very real textual distinction. Rather than seeing two different texts and pronouncing them the same, what would be anomalous would be to read the three clauses of the Eighth Amendment as meaning the same thing when the text is so clearly different.

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81 See id.

82 I leave as beyond the scope of this article whether the Cruel and Unusual Punishments Clause can or should be read disjunctively, a topic upon which consensus has not emerged. See, e.g., Margaret Jane Radin, The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause, 126 U. Pa. L. Rev. 989, n.8 (1978); Granucci, “Nor Cruel and Unusual Punishments Inflicted:” The Original Meaning, 57 Calif. L. Rev. 839, 855-59 (1969) (arguing that the use of the word “unusual” in the English Bill of Rights was due to chance or sloppy draftsmanship); see also Furman v. Georgia, 408 U.S. 238, 276 n.20 (1972) (Brennan, J.) (“The question [whether the word ‘unusual’ has meaning distinct from ‘cruel’] is of minor significance; this Court has never attempted to explicate the meaning of the Clause simply by parsing its words.”); but see John F. Stinneford, The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation, 102 Northwestern Univ. L. Rev. (2008) (arguing that the word “unusual” was a term of art that referred to government practices that deviate from “long usage”); United States v. Polizzi, No. 06-CR-22 (E.D.N.Y. Apr. 1, 2008) (“it cannot be said that the statute is unconstitutional because it is not both cruel and unusual”) (emphasis in original).


84 Note, Changing Meaning of Punishments, at 978, citing Benjamin L. Oliver, The Rights of an American Citizen 186 (1832).

85 See Laurence Claus, The Anti-Discrimination Eighth Amendment, 28 Harv. J. L. & Pub. Pol’y (2005) (hereinafter Claus, Antidiscrimination) (“It is the text of the amendment that seems ‘anomalous indeed.’ If that text were meant simply to condemn excessive punishment, why does it not say so? The term ‘excessive’ was, after all, on the tips of the drafters’ tongues, for they used it in respect of bail and fines. Why was it not deployed more generally?”).
The amendment provides that “[e]xcessive bail shall not be required, nor excessive fines imposed.”86 The term “excessive,” by its nature, implies a measure of proportionality,87 and as such it is perfectly appropriate that courts can (and do) make what is in effect a modified quantitative proportionality decision when determining whether a given bail or fine is “too high.”88 The text plainly demands it. But the term “excessive” is not repeated in the third sub-clause. While this distinction may seem facile at first, it is surely significant. At the very least, one can posit that the set of punishments meant to qualify as “cruel and unusual” must be different from the set of punishments that would be “excessive.”89 The question then becomes whether the set of quantitatively “excessive” punishments is necessarily contained within the set of “cruel and unusual” punishments.90 For reasons discussed in section ___ below, I do not believe that to be the case.91

As such, the best interpretation of the text on its face seems to be that the Bail Clause and the Fines Clause direct courts to engage in an examination of the “quantitative proportionality” between the amount of the bail or fine and the counterbalanced wrongdoing (or risk of flight), and that the conspicuous absence

Professor Claus ultimately comes to a different conclusion about the purpose of the Cruel and Unusual Punishments Clause. In his view, “[h]istory resolves the Eighth Amendment’s linguistic anomaly by revealing that the amendment was meant to address a problem distinct from excessive punishment or vicious punishment. That problem was discriminatory punishment. The principle that lies behind the eighth amendment is non-discrimination. The eighth amendment is a founding-era expression of equal protection.”

Id.

86 U.S. Const. Amd. XIII.
87 Oxford English Dictionary, “excessive” (2d Ed. 1989) (“b. Exceeding what is right, proportionate, or desirable; immoderate, inordinate, extravagant.”)
88 Of course, these determinations are cabined by certain criteria – for instance, bail is calculated in reference to the risk of flight or the gravity of the crime. See, e.g., Stack v. Boyle, 342 U.S. 1, 4 (1951) (“the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant. The traditional standards as expressed in the Federal Rules of Criminal Procedure 3 are to be applied in each case to each defendant”), citing Fed. R. Crim. P. 46(c)(“the amount [of bail] shall be such as [to] insure the presence of the defendant, having regard to the nature and circumstances of the offense charged, the weight of the evidence against him, the financial ability of the defendant to give bail and the character of the defendant.”).
89 A complicating factor in this analysis is that while the Bail and Fines clauses deal only with one “medium” (money), the Cruel and Unusual Punishments Clause necessarily must cover myriad punishments – incarceration, corporal punishment, compulsory service, shaming, etc.
90 Lee, Constitutional Right, at 680 (“the proposition that “cruel and unusual” and “excessive” are different does not imply that one cannot be a subset of the other “).
91 A district court recently made this point explicitly. United States v. Pollizi, No. 06-CR-22 (JBW) (E.D.N.Y. Apr. 1, 2008) (“suffice it to say that in terms of imposing punishment, a sentence of imprisonment for five years is not necessarily constitutionally ‘cruel,’ however excessive it might seem to the laity in the context of a particular case.”).
of the term “excessive” from the Cruel and Unusual Punishments Clause is strong textual clue that there is no qualitative proportionality requirement springing from the text.

2. The Argument from Originalism: Early History Of the Cruel and Unusual Punishments Clause

Original understandings of the clause offer some support to my textual argument, although the evidence is mixed.92 Scholars agree that “[t]he English Bill of Rights of 1689 is recognized as the template followed by the Eighth Amendment’s drafters.”93 Further, “several early American statutes also included [] protections against unreasonable punishments,”94 and those laws “likely influenced the [Eighth] Amendment’s final composition.”95 An inspection of the most prominent of those early statutes provides some evidence that, at the time of the drafting, a distinction was understood between “cruel” and “excessive” punishments.

For instance, the first legal code established in America, the Massachusetts Bay Colony’s Body of Liberties, drafted “to guide the magistrates in the administration of their office,”96 contained three prohibitions against severe punishments:

WHEREAS the late King James the Second, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavor to subvert and extirpate . . . the laws and liberties of this kingdom . . . And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects . . . And excessive fines have been imposed; and illegal and cruel punishments inflicted . . ." 


93 Catherine Rylyk, Note, Lest We Regress to the Dark Ages: Holding Voluntary Surgical Castration Cruel and Unusual, Even for Child Molesters, 16 Wm. & Mary Bill Rts. J. 1305, 1308 (2008) (hereinafter Rylik, Lest We Regress). As the Court noted in Ingraham, the English Bill of Rights contains a preamble, portions of which are interesting for our purposes:

WHEREAS the late King James the Second, by the assistance of divers evil counsellors, judges, and ministers employed by him, did endeavor to subvert and extirpate . . . the laws and liberties of this kingdom . . . And excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects . . . And excessive fines have been imposed; and illegal and cruel punishments inflicted . . .”

94 Id.

95 Id.

96 Id. at 1309.
Clauses 45 and 46 seem to be direct limitations on the quality of punishments that can be imposed – “[b]arbarous and inhumane” tortures and other “cruel” punishments are outlawed. Clause 43, in contrast, imposes an explicit quantitative restriction – whips are limited to forty. Significantly, the Cruel and Unusual Punishments Clause of the Eighth Amendment echoes the construction of Clauses 45 and 46 (generally prohibiting qualitatively cruel punishments), but not the construction of Clause 43, with its explicit qualitative ceiling.

The 1776 Virginia Declaration of Rights borrows more directly from the English Bill of Rights, using language that would be imported essentially whole cloth into the Eighth Amendment:

That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted.
Scholars suggest that the Virginia drafters’ intent in importing the English Bill of Rights provision stemmed from a desire on the part of “the American founders[] to do whatever it was that the English had done.”

Namely, in the words of Patrick Henry, “What has distinguished our ancestors?—That they would not admit of tortures, or cruel and barbarous punishment.” Indeed, the Bill of Rights-less Constitution was criticized on the grounds of the “absence of a provision restraining Congress in its power to determine ‘what kind of punishments shall be inflicted on persons convicted of crimes.’”

Unfortunately for us, there was little mention of the Eighth Amendment during the ratification debates in Congress, and so we can draw only limited first-hand conclusions as to the intent of the voting body. What scant evidence does exist from the debates offers some support – albeit weak – that the Clause was intended to only prohibit certain “forms” of punishment:

Very little was said concerning the meaning of the Eighth Amendment during the Congressional debates. Indeed, there were only two comments. One comment noted that it was troublesome because it might prohibit certain acceptable forms of punishment for crimes and the other that the meaning of the amendment was so vague as to mean nothing.

To the extent one can draw any conclusions at all from the brief ratification debates, one might suggest that the concern about form of punishment meant that the proposed Amendment was understood to act as a limit on the qualitative character (the “form”) of available punishments. However, given the thin evidence, generalization should be limited.

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104 See Claus, Antidiscrimination, at ___.

105 Some suggest that this importation of English terminology brought with it the English concept of proportionality. See also Rylik, Lest We Regress, at 1311 (“the Court suggested that the Framers ‘also adopted the English principle of proportionality’ when incorporating language from the English Bill of Rights.”).

106 Ingraham, 430 U.S. at __, citing 2 J. Elliot, Debates on the Federal Constitution 111 (1876) (comments of Abraham Holmes).


108 Id., quoting citing 1 Annals of Cong. 782-783 (John Gales, ed. 1789).

109 See, e.g., Davis v. Berry, 216 F. 413, 417 (1914) (“No doubt delegates to the conventions, in providing against cruel punishment, had largely in mind what Blackstone had then recently written, in volume 4, page 376, such as being drawn or dragged to the place of execution, emboweling alive, cutting off the hands or ears, branding on the face or hand, slitting the nostrils, placing the prisoner in the pillory, the ducking, the rack, and the torture, and, as in Spanish countries, crucifying.”

110 Justice Thurgood Marshall noted the historical confusion in his Furman v. Georgia concurrence, where he noted that “[w]hether the English Bill of Rights’ prohibition against cruel and unusual punishments is properly read as a response to
The same is true regarding state constitutional provisions adopted around the time of the ratification. Some of those contained express proportionality provisions. This has appeared to some – including Justice Scalia – as irrefutable proof that the lack of such an express provision in the federal constitution indicates a rejection by the framers of proportionality principles. However, there really is no persuasive evidence that the federal drafters were aware of these state provisions, or that they consciously rejected inclusion of similar language.

Early case law is similarly indeterminate on the question of original intent or meaning with regards to proportionality. The early Supreme Court cases applying the clause limited its application to “tortures,” explicitly holding that “cruel” punishments were those that applied “inhuman techniques.” It suffices to note that the primary concern of the drafters was to proscribe “tortures” and other “barbar(ous) methods of punishment.” An early prominent dissent by Justice Field in *O’Neil v. Vermont* - often cited by scholars (and courts) as support for a deeply-rooted commitment on the parts of early American courts to quantitative proportionality - actually makes no such claim. In *O’Neil*, the defendant was convicted in state court of “307 offenses” of distributing intoxicating liquors “without authority and contrary to the laws of Vermont” and he was fined “$6140, the costs of prosecution, taxed at $497.96, and stand committed until the sentence should be complied with; and that if the said fine and costs ... should not be paid before [approximately 4 months hence], he should be confined at hard labor, in the house of correction at Rutland, for the term of 19,914 days,” or about 55 years. The majority’s decision

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111 See N.H. Bill of Rights art. XVIII (adopted 1792); Ohio Const. of 1802, art. VIII, §14.


113 The early case law really is not all that early; the Supreme Court did not squarely interpret the Cruel and Unusual Punishments Clause for the first time until *Wilkerson v. Utah* in 1879, more than one hundred years after ratification. *Wilkerson*, 99 U.S. at 136 (“[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment”).

114 *Wilkerson*, 99 U.S. at 136 (“The Clause is directed, not only against punishments which inflict torture, ‘but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.’”) quoting *O’Neil v. Vermont*, 144 U.S. 323, 339-340 (1892) (Field, J., dissenting).


116 See, e.g., *Weems v. United States*, 217 U.S. 349, 371 (1910) (“The Clause is directed, not only against punishments which inflict torture, ‘but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.’”) quoting *O’Neil v. Vermont*, 144 U.S. 323, 339-340 (1892) (Field, J., dissenting).

117 *Id.* at 327.

118 *Id.*
upholding the sentence concerned itself only with jurisdictional issues, but a large portion of Justice Field’s lengthy dissent objects to the structure of the sentence. He noted that the Amendment’s “inhibition is directed, not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged.” However, the unique facts of the case vitiate the power of Justice Field’s proclamation regarding quantitative proportionality. Justice Field’s dissent is animated primarily by a concern about the dubious method of charging over three-hundred separate offenses for what amounted to one crime – a problem distinct from that of over-punishing for one offense, which is what the modern proportionality debate is about. In effect, what Justice Field was concerned with was not quantitative proportionality in the strictest sense, but in a method of charging that seemed patently unfair and effectively acted to subvert the will of the legislature by attaching huge penalties to one criminal act by virtue of a charging gimmick.

Nevertheless, some early cases drew upon Justice Field’s dissent in O’Neil to analyze sentence length in reference to the severity of the crime committed. Again, though, it is not clear that these cases were concerned exclusively – or even primarily – with quantitative proportionality. This is vividly seen in Weems, decided in 1910, where the Court struck down as disproportionate a sentence fifteen years of “hard and painful labor,” shackling from wrist to ankles at all times, a fine and, and other monitoring and disqualifying punishments, all for a fairly minor accounting fraud. While

119 Id. at 339.

120 Id. at 340 (“The State may, indeed, make the drinking of one drop of liquor an offence to be punished by imprisonment, but it would be an unheard-of cruelty if it should count the drops in a single glass and make thereby a thousand offences, and thus extend the punishment for drinking the single glass of liquor to an imprisonment of almost indefinite duration.”).

121 Rylik, Lest We Regress, at ___ ; see also See., e.g., Davis, 216 F. at 417 (“Usually the length of imprisonment following a conviction is within the discretion of the legislative body, and we have an extreme case in [O’Neil], [in which] quite a per cent. of the bar of the country are of the opinion that the dissenting opinion by Justice Field [] was the stronger.”); State v. Ross, 55 Ore. 450 (1909) (striking down “excessive” sentence for unlawful conversion imposing imprisonment until half-million dollar fine was paid; finding this tantamount to life imprisonment”); Ex parte Karlson, 160 Cal. 378 (1911) (“The danger that persons may be imprisoned for an unlimited period for non-payment of a fine for contempt is, as we think, completely removed by the constitutional guaranty that, ‘excessive bail shall not be required, nor excessive fines imposed; nor shall cruel or unusual punishments be inflicted.’”).

122 See, e.g., Davis, 216 at 417 (invalidating sentence of castration).

123 Id. at 364. These punishments included “Civil interdiction [which] shall deprive the person punished as long as he suffers it, of the rights of parental authority, guardianship of person or property, participation in the family council, marital authority, the administration of property, and the right to dispose of his own property by acts inter vivos . . . fixing his domicil and giving notice thereof to the authority immediately in charge of his surveillance, not being allowed to change it without the knowledge and permission of said authority in writing.” Id.
many (including the Court itself) have cited Weems for the prospect that an excessive term of years is unconstitutional.\(^\text{125}\) A close reading of Weems reveals that the Court in fact objected primarily to the qualitative component of the punishment—hard labor, shackling, and so forth. To the extent Weems is seen as a strong early endorsement of quantitative proportionality, that view is questionable at best, mistaken at worst.

Ultimately, the most we can confidently say about the intentions of the drafters and the early case history is that, “[i]n its most straightforward and historically contextualized reading, the Eighth Amendment [w]as recognized as protecting against ‘inhumane, [b]arbarous, or cruel’ treatment”\(^\text{126}\) — a conclusion consistent with a qualitative proportionality requirement, but no more. Conclusions drawn further—particularly conclusions regarding quantitative proportionality—are unsupported by the historical record or the early cases.

### III. A DIGNITY-BASED APPROACH TO EIGHTH AMENDMENT PROPORTIONALITY

So, where does that leave us? In the preceding section, I have put forth a particular reading of the text, and offered a brief recounting of original intent and understanding arguments. Ultimately, the text is susceptible to two reasonable interpretations as it relates to quantitative proportionality. First, that a punishment consisting of a term of years that is “excessive” in relation to the crime committed or the culpability of the offender (under either utilitarian or retributivist theory) is not necessarily “cruel and unusual,” and therefore the Clause generally does not act as a limit on the temporal length of a sentence. The second interpretation is, essentially, that it would be “cruel” to imprison someone for longer than is deserved. Therefore, the Clause—properly understood—acts as a limit on the length of custodial sentences, because excessive sentences (presumably under any of the theories of punishment) are cruel, and therefore prohibited. This is the view that most scholars and jurists have accepted.\(^\text{127}\)


\(^\text{125}\) See Lee, Constitutional Right, at n.246 (describing Weems as “the seminal excessiveness case dealing with a noncapital sentence[s]”).

\(^\text{126}\) Ryllyk, Lest We Regress, at 1311.

\(^\text{127}\) Those accepting this second view have not, to my mind, offered a compelling justification for why an excessive quantitative sentence is “unusual.” Suffice it to say that sentences that seem too long in relation to the crime committed are nothing new in American jurisprudence, and certainly should not strike anyone as “unusual.”

However, descriptive and normative accounts of the place of “unusual” in the jurisprudence have been lacking. See John F. Stinneford, The Original Meaning of “Unusual”: The Eighth Amendment as a Bar to Cruel Innovation, 102 Northwestern Univ. L. Rev. (2008) (arguing that the meaning of the word unusual “has largely been ignored by both the ‘originalist’ and ‘evolutionist’ members of the Supreme Court, some of whom have occasionally ventured an opinion as to the word’s meaning (or lack thereof), but all of whom have ignored the word in practice. Scholars have also generally ignored the word in their treatment of the Cruel and Unusual Punishments Clause.”). Perhaps the best justification for finding long custodial sentences “unusual” is that, generally, policies should be calibrated to effectuate their purpose, and it would unusual
Further, as I have outlined above, originalist accounts are of limited value; the historical evidence of original intent and public meaning is mixed (if anything, perhaps slightly supportive of my thesis), and one should be loathe to draw conclusions.

How to break the tie, if you will, between these readings? Assuming that both are superficially plausible, and assuming that limited pre-ratification history and early post-ratification case law that exists is of limited guidance, how should one determine whether the Cruel and Unusual Punishments Clause does or does not (or perhaps should or should not) constrain the quantitative component of a punishment? The answer is that one should read the clause purposively, with an appropriate regard for the protection of human dignity as the core value underlying the Eighth Amendment. As the Supreme Court has held, and as this sections will discuss, “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.” In other words, the Cruel and Unusual Punishments Clause is meant to protect individuals from being subjected to punishments that are unduly violative of their inherent dignity as human beings. Therefore, if the Cruel and Unusual Punishments Clause is to be primarily concerned with the protection of human dignity, it becomes harder to justify a proportionality regime that mandates quantitative proportionality between the crime committed (and/or the culpability of the offender) and the sentence imposed, because there is not necessarily an obvious connection between the temporal length of a sentence and impacts on the dignity of the offender.

A. Human Dignity Under the Eighth Amendment

To appreciate how conceptions of dignity weigh on how we should think about Eighth Amendment proportionality, it is worth recounting first how dignity to insist on continuing a policy (in this case, further incarceration) after its purpose (of, say, rehabilitating or deterring a prisoner) has been fulfilled. Query whether this is in any sense an “unusual” occurrence in the American system of society, governance, and punishment. Such a phenomenon is probably better described as undesirable, not “unusual.” Cf. Jonathan Rauch, Demosclerosis at 132 (Times Books 1994) (“it is scarcely an exaggeration to say that, in Washington, every program lasts forever”).

I should note here that I do not generally consider myself a textualist or originalist as those terms are commonly understood. However, I do think the textualist argument has special salience here, for two primary reasons. First, as discussed above, when dealing with an Eighth Amendment that seems to make a clear distinction between the terms “excessive” and “cruel and unusual,” I think special regard must be given to the vagaries of the text. See section___, supra. Second, given the “mess” of proportionality jurisprudence, which I attribute in large part to attempts to make the Eighth Amendment say something that it doesn’t, I think a promising avenue for clarifying matters is a return to a focus on the text.

Ultimately, though, like any other constitutional issue, when the text is susceptible to multiple plausible readings, we must turn to the values underlying the particular provision to determine what exactly it the text is trying to accomplish. This is the issue to which I turn in this section.

See section __, supra.

as a concept has been understood to impact other areas of constitutional law in general, and Eighth Amendment jurisprudence in particular.

At the most basic level, dignity’s place in legal thought – and the American constitutional order in particular - is unevenly understood. While the concept has always existed on the periphery of constitutional theory and doctrine, especially for politically contentious issues touching on issues of privacy, health, and human life, it is only fairly recently that serious, substantial efforts have been made to explore dignity’s role in the larger American constitutional scheme. This lack of attention has been attributed by some to be a function of American rights-based constitutionalism, which is argued to be an unnatural fit, as it were, with a value-based conception of human dignity. This may have some validity; certainly, the contrast between the

131 See George W. Harris, Dignity and Vulnerability 1 (1997) (‘Moralists of various sorts use the terms ‘human dignity’ and ‘human worth’ often, but frequently these words have little more than rhetorical effect, even among professional philosophers. The fact is that we have a fairly vague concept of human worth and dignity, though there is a core that is instructive.’); Denise G. Réaume, Indignities: Making a Place for Dignity in Modern Legal Thought, 28 Queens L.J. 61, 62 (2002) ([D]ignity has attracted relatively little analysis as a concept, whether by legal scholars or philosophers.


133 See, e.g., United States v. Balys, 524 U.S. 666, 713 (1998) (Breyer, J., dissenting) (discussing “the insult to human dignity created when a person” is forced to self-incriminate); Lawrence v. Texas, 539 U.S. 558, 567 (2003) (holding in the context of consensual homosexual relations, “adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons . . . . The liberty protected by the Constitution allows homosexual persons the right to make this choice.”); Planned Parenthood Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) (“These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.”); Guy E. Carmi, Dignity—The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as a Free Speech Justification, 9 U. Pa. J. Const. L. 957 (critiquing the use of dignity as an independent justification for free-speech protection, noting that articulations of a dignity rationale are either so broad as to threaten restriction of speech, or are subsumed under the “argument from autonomy”).


American focus on individual rights with the more “social” orientation of post-war European constitutionalism supports this claim. Others have offered more mundane accounts of dignity’s historical absence in American constitutionalism; they argue that the slipperiness of dignity as an analytical concept is primarily to blame, and that until human dignity is better understood as a theoretical matter, practical application will concomitantly lag. In any event, while the scholarship on the precise boundaries of the dignitary interest under the United States Constitution is underdeveloped, a few principles have gained some measure of acceptance. One of those principles is that “constitutional dignitary” stands in contrast to concepts like brutality, degradation, or otherwise “uncivilized or barbarous behavior.” This conception is consonant with the

the Supreme Court, seems to offer less protection to the values and rights associated with the idea of human dignity than the average European Constitution. Even at the level of ordinary legislation these rights and values appear to enjoy a lesser standing in America.”)


138 See Castiglione, Human Dignity, at 676, citing Denise G. Reaume, Indignities: Making a Place for Dignity in Modern Legal Thought, 28 Queens L. J. 61, 62 (2002) (“[D]ignity has attracted relatively little analysis as a concept, whether by legal scholars or philosophers.;) see also Erin Daly, Constitutional Dignity: Lessons from Home and Abroad (2007); SSRN Working Paper Series, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=991608 (surveying American and foreign case law on “institutional” and individual dignity, and arguing that across all constitutional provisions, the Supreme Court has often referred to, and at times relied on, dignity, but that “defining it and understanding it have almost completely escaped the Court’s grasp.”).

139 Wright, Dignity and Conflicts (arguing that dignity is best understood as standing in contrast to concepts like brutality, cruelty, humiliation, barbarity, etc.; see also also Jeffrey Rosen, The Purposes of Privacy: A Response, 89 Geo. L. J 2117 (2001) (“Offenses against dignity involve a failure to show people the respect and deference to which they are entitled by virtue of their intrinsic humanity”).
understanding of the cruel and unusual punishments clause outlined here, which “rests on fundamental considerations of human decency.”

In contrast to broader constitutionalism, dignity actually has a relatively well-established place in Eighth Amendment jurisprudence. The idea that “[t]he Eighth Amendment rests on fundamental considerations of human decency” has never really been challenged. There is general agreement that the Amendment embodies “broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . against which we must evaluate penal measures.” Of course, the practical effect of the Amendment has changed over time. The Cruel and Unusual Punishments Clause has always been understood to bar “the dunking stool, [] the whipping post, the pillory, mutilation, and execution for anything but the most serious offenses.” As the jurisprudence settled on the oft-controversial “evolving standards of decency” test a concern for the dignity of the individual – which lies at the heart of being “decent” – became the conceptual engine that powered the progression of the doctrine. As the theory would have it, as society advances and, presumably, becomes more enlightened, the appreciation of the dignity of the person becomes more acute, and the punishments that may be meted out accordingly become increasingly circumscribed. A voluminous literature has correspondingly

\[140\] D. Rudovsky, et al., The Rights of Prisoners at 1 (4th Ed. S. Ill. U. Press); see also Estelle v. Gamble, 429 U.S. 97, 102 (1976) (Marshall, J.) (the Eighth Amendment embodies “broad and idealistic concepts of dignity, civilized standards, humanity, and decency . . . against which we must evaluate penal measures.”) (internal quotation omitted); see also Youngiae Lee, Desert and the Eighth Amendment, 11 J. Const. L. 101, 110 (2008) (identifying “cruelty, sadism, inhumanity, [and] racial hatred and prejudice” as “impulses that have no place in [our] criminal justice system”).


\[142\] Estelle, 492 U.S. 102, quoting Jackson v. Bishop, 404 F. 2d 571, 579 (8th Cir. 1968); see Shannon Gilreath, Cruel and Unusual Punishment and the Eighth Amendment as a Mandate for Human Dignity: Another Look at Original Intent, 25 T. Jeff. L. Rev. 559-592 (2003) (“It is appropriate [] to look at the Eighth Amendment not as a proscription of procedure but as a mandate for recognition and protection of human dignity.”); Rycyk, Lest We Regress, at 1311 (“Restated, all punishments must ‘comport[] with human dignity.’”).

\[143\] Stinneford, Cruel Innovation, at 67.

\[144\] Trop v. Dulles, 356 U.S. 86 (1958)

\[145\] See n. ___, supra, and accompanying text.

\[146\] Of course, there are limits to how this can work in reality; taken to its logical extreme, all punishment could someday be considered violative of human dignity. See Gilreath, Another Look, at n.___ (“South Africa’s attorney-general has argued that all punishment is an impairment of human dignity, noting the restriction of movement and expression concomitant with a prison sentence are severe infringements of dignity. See S. v. Makwanyane and Another, 1995(6) BCLR 665, 722.”). Of course, no society could long survive (in recognizable form, anyway) without imposing punishment upon violators of law.
arisen noting the “dehumanizing” effect of American incarceration and advocating for an increased responsiveness by courts to these dignitary harms.\(^{147}\)

This concern for human dignity as expressed in Eighth Amendment law is perhaps most clearly demonstrated in the cases concerning the conditions of inmate confinement, encompassing not only the physical conditions of facilities, but the availability of medical services, tolerance of violence, and interactions between staff and inmates. For instance, concern for the dignity of the person lies at the core of the prohibition against excessive force. “After incarceration[,] the unnecessary and wanton infliction of pain constitutes cruel and unusual punishment forbidden by the Eighth Amendment.”\(^{148}\) To determine whether the pain inflicted upon a prisoner was unnecessary and wanton, courts will generally consider “whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.”\(^{149}\) The fact that significant injury is not necessary to establish a claim for excessive force (so long as the force was applied maliciously) stems from the recognition that “the malicious use of force to cause harm ‘constitutes an Eighth Amendment violation per se whether or not significant injury is evident ... because when prison official maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated.’”\(^{150}\) A respect for the dignity of the person is the basis for the concern that standards of decency – a concept that has at its roots a concern for dignity\(^{151}\) - be upheld.

Further, compelling arguments have been made that, in the last few decades, American society has actually \emph{regressed} when it comes to the willingness to impose punishments on individuals convicted of crimes, which may be betray a lessening concern for the dignity of the person. Whitman, \emph{Against Retributivism}, at ___; Nilsen, \emph{Decency, Dignity}, at 116 (“the prison experience is, in many ways, harsher than it has ever been.”); Haney, \emph{Prison Pain}, at ___ (“prison pain is not only widespread but has become the raison d’être of American corrections.”). Some, as mentioned above, have tied this to the widespread acceptance of retributivism. \emph{See} Whitman, \emph{Against Retributivism}, at __. To the extent one believes this retraction to be true, it casts doubt on the common notion that the “evolving standards of decency” test inexorably leads to punishments more respectful of human dignity.

\(^{147}\) \emph{See, e.g.}, Nilsen, \emph{Decency, Dignity}, at 130-134 (decrying the Supreme Court’s erection of procedural hurdles that undermine the “Eighth Amendment guarantees [that] every citizen [has] a right of human dignity against which all sentences should be assessed.”).

\(^{148}\) \emph{Ingraham v. Wright}, 430 U.S. 651, 670 (1977) (quotation marks and citations omitted); \emph{Whitey v. Albers}, 475 U.S. 312, 319 (1986) (The general requirement [is] that an Eighth Amendment claimant [must] allege and prove the unnecessary and wanton infliction of pain”).


\(^{150}\) \emph{Hudson v. McMillian}, 503 U.S. 1, 9 (1992) (emphasis added); \emph{Trop v. Dulles}, 356 U.S. 86, 101 (1958) (“Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society”) (internal quotations omitted).

\(^{151}\) Oxford English Dictionary (2d ed. 1989) (“decency” - What is appropriate to a person’s rank or dignity.”)
A concern for the dignity of the person also lies at the core of the prohibition against deliberate indifference to inmate medical needs. 152 The constitutional requirement that inmates’ medical needs be fulfilled flows directly from a concern for the inherent worth of the human prisoner. Similarly, dignitary concerns have also been expressly tied to cases of extreme failure to protect on the part of corrections officials, as well as holdings that the allowance of excessive inmate-on-inmate violence “is offensive to any modern standard of human dignity.”

Ultimately, it makes sense that dignity has settled at the center of Cruel and Unusual Punishments doctrine, given the deeply-engrained recognition that “[p]ractices of punishment are often infected by a dangerous impulse toward degrading the individual,”154 and the corresponding textual bar to “cruelty.” In this light, courts can be seen to have situated themselves as guardians of prisoners’ interests, given the lack of any effective political constituency operating on their behalf, or as guardians of society’s broader interest in treating offending members humanely, thereby acting as checks on the “ politicization” of punishment that some have argued cannot help but push to further “humiliate”

152 Weyant v. Okst, 101 F.3d 845, 856 (2d Cir. 1996), quoting Farmer v. Brennan, 511 U.S. 825, 825 (1994) (“[A]cting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk.”).


155 Stuntz argues that the casual relationship in fact runs in the opposite direction; he argues that courts’ relative unwillingness to substantively regulate punishment (and eagerness to regulate policing and trial procedure) gives legislatures more room to operate, as it were, in the realm of punishment and incarceration, shifting resources and attention away from policing and trial procedure. William Stuntz, The Political Constitution of Criminal Justice, 199 Harv. L. Rev. 780, 782-84 (2006). Others have similarly argued that it is upon courts that much of the blame lay for deteriorating prison conditions and increasing acceptance of cruelty in punishment. Haney, Prison Pain, at ___ (“[The public has] been convinced that cruel treatment is a carefully considered, effective, and perhaps even the only viable strategy to be followed in achieving meaningful crime control. This shift, combined with the politicizing of the question of pain by the courts (many of whom have arguably abdicated their regulatory function in deference to explicitly popular, political forces) means that there are few if any limits on what can be done in the name of ‘corrections,’ even as we have abandoned any hope of ever correcting anything.”).
and “degrade” prisoners.\textsuperscript{156} The recognition by courts that they are in a unique position to protect the dignity of the prisoner is justifiable.\textsuperscript{157}

To be sure, a noble respect for human dignity is not the only reason for maintaining decency inside the prison walls, and is not the only basis upon which courts have erected this particular strand of Cruel and Unusual Punishments jurisprudence. There are important practical reasons for treating prisoners with respect, or at least not brutalizing them. Evidence suggests that rehabilitative and deterrent efforts are undermined by degrading or dehumanizing conditions,\textsuperscript{158} and in an era of overcrowded and violent facilities,\textsuperscript{159} many have observed that institutional safety is in a large degree dependent on treating the inmates with decency and professionalism.\textsuperscript{160} The lessons of Attica – however ambiguous – should not be forgotten.\textsuperscript{161}

\textsuperscript{156} Whitman, Against Retributivism, at 100-103 (arguing that the widespread acceptance of retributivism as the only moral basis for punishment has, in fact, exacerbated the problems of degradation and humiliation always present in the American system of punishment); cf. Haney, Prison Pain, at 499-500 (“With unprecedented speed, national prison policy has become remarkably punitive, and, correspondingly, conditions of confinement have dramatically deteriorated in the United States.”) (hereinafter Haney, Prison Pain).

\textsuperscript{157} It is beyond the scope of this article to offer a thorough exegesis of human dignity as a concept. Suffice it to say that I find George Wright, Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection, 43 San Diego L. Rev. 527 (2006) (arguing that because “dignity” as a concept is, to some extent, inherently ethereal, defining what dignity stands in contrast to is informative; dignity is best understood as standing in contrast to concepts like brutality, cruelty, humiliation, and “uncivilized or barbarous behavior”) (hereinafter Wright, Dignity and Conflicts); R.A. Duff, Punishment, Dignity, and Degradation, 25 Ox. J. L. Stud. 141, 149-51 (2005) (noting that the concept of degradation offers important definitional lessons for conceptualizing dignity).

\textsuperscript{158} Keith Chen and Jesse M. Shapiro, Do Harsher Prison Conditions Reduce Recidivism? A Discontinuity-Based Approach, 9 Am. L. Econ. Rev. 1 (2007) (our estimates suggest that harsher prison conditions lead to more post-release crime”); Drago, et al., Prison Conditions and Recidivism, IZA Discussion Paper No. 3395 (March 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1136200 (showing a positive correlation between certain aspects of harshness of prison conditions and recidivism; “our results indicate that the deterrent effects of bad prison quality on crime found by previous papers are probably due to deterring potential criminals and not criminals already treated by imprisonment”).

\textsuperscript{159} See citations supra n.\textsuperscript{___}.

\textsuperscript{160} See Richard G. Singer, Privacy, Autonomy, and Dignity in the Prison: A Preliminary Inquiry Concerning Constitutional Aspects of the Degradation Process in Our Prisons, 21 Buff. L. Rev. 669, 669 (1972); Editorial, Barbaric Jail Conditions, N.J.L.J., Nov. 12, 2007, at 22 (discussing the “deplorable conditions” at New Jersey’s Passaic County Jail and noting that “[i]nmate violence, caused by the predictable consequences of . . . overcrowded conditions, is common”); cf. Nilsen, Decency, Dignity, at 125 (“[T]oday’s prison conditions are harsher, more violent, and more degrading than anyone might have imagined in [an] earlier era.”).

On the other hand, some have observed how violence may, in some circumstances, be tolerated by corrections officials (and even society at large) as a
Curiously, though, concepts of dignity have not, however, generally been explored in connection with questions regarding the existence (or lack thereof) of a proportionality guarantee. That is the subject to which I now turn.

B. A Dignity-Centered Approach Suggests That Only Qualitative Proportionality Review is Mandated by the Eighth Amendment

There seems to be deep support for the notion that the fundamental value underlying the Eighth Amendment is human dignity. Put another way, there seems to be deep support for the notion that the Eighth Amendment acts primarily to prohibit unreasonable degradations of the person in the administration of punishment. If sufficient regard is given to this notion, the argument that the Eighth Amendment prohibits “excessive” quantitative punishments is weakened, and the argument that the Amendment only prohibits qualitatively disproportionate punishments is strengthened. This is because the length of a custodial sentence – or more generally the temporal length of any imposed sentence – has no readily apparent connection to the dignity interest. Rather, the dignity interest speaks directly to the type of punishment imposed – in other words, the qualitative character of the punishment. The dignity interest can be seen, then, break the tie between the two plausible readings of the text method of imposing otherwise unconstitutional punishments on prisoners, and as a method of asserting enhanced institutional control. Mary Sigler, *By the Light of Virtue: Prison Rape and the Corruption of Character*, 91 Iowa L. Rev. 561 (2006) (“In a 1994 survey, fifty percent of respondents said they believed that society accepts prison rape as part of the price criminals pay for wrongdoing. Similarly, at least some prison staff reportedly view rape as a legitimate deterrent to crime and a just desert for its commission. Other observers have suggested that rape is used as a management tool, a means of maintaining peace by allowing aggressive predators to have their way. In extreme cases, prison staff have orchestrated inmate-on-inmate rapes to punish rules violations or to enhance the punishment of despised sex offenders.”).

161 In September, 1971, prisoners at Attica Correctional Facility in upstate New York rioted and captured control of the facility. At the time, the facility – designed to hold around twelve-hundred prisoners – held approximately 2200. While accounts differ over the motives of the rioters, it is clear that the deplorable conditions at the institution played a major role in the insurrection. See Bert Useem, Peter Kimball, *States of Siege: U.S. Prison Riots 1971-1986*, at 22 (Oxford Univ. Press 1991) (noting that while “[l]ife at Attica was terrible,” it was likely not worse than any other New York state institution at the time, but that “the standards by which inmates judged prisons changed dramatically” around the time of the riot, leading to the feeling amongst the population that conditions could not longer be tolerated). In any event, the revolt sparked widespread reevaluation of prison conditions. See id.

162 *Id.*

discussed above, and informs the purposive application of the clause in a manner that suggests that only qualitative proportionality is required, because it is not clear how a quantitatively excessive custodial sentence would impact an individual’s dignitary interest.

Assuming that the conditions of a given prisoner’s confinement are sufficiently humane so as not to constitute a qualitative proportionality violation, the fact that a sentence is longer than it might otherwise be (i.e., it is quantitatively disproportionate) seems not impact a dignity-based interest. Rather, it seems to impact a liberty- or autonomy-based interest. This distinction is crucial to understanding the quantitative/qualitative proportionality model suggested here. Arguments in support of quantitative proportionality review under the Eighth Amendment (either strong quantitative proportionality review, like many scholars support, or weak quantitative proportionality review, like the Court applied in Solem and its progeny) contain an underlying assumption that, in essence, the individual has been imprisoned longer than he “should have been.” But these arguments generally are not made in reference to the dignity of the individual; rather, they assume that the individual has been denied the liberty that is justified, because the individual is prevented from leaving his jail cell for longer than is right or just. Such arguments, in effect, carry an implicit assumption that the Eighth Amendment protects a liberty or autonomy interest — no person should be deprived of his liberty (via incarceration) longer than is “deserved” under whichever theory of punishment being applied.

While one might normatively argue that the Cruel and Unusual Punishments Clause protects both dignity and some sort of liberty interest, there is not strong indication in the history or the case law that the Eighth Amendment has been or should be understood to protect liberty-type interests, however defined. This is not surprising; the text barring the infliction of “cruel and unusual punishments,” seems, on its face, calibrated to speak not to a liberty-type interest (i.e. the interest one has not to be incarcerated or immobilized against one’s will by the state), but to some notion that punishments may not wantonly inflict pain, suffering, or humiliation on the convicted (and arguably that the punishers themselves be saved from inflicting such punishments).  

164 See section __, supra.

165 See section __, supra.

166 See n.__, supra (Ed Note – cite to FN in intro listing scholars’ widespread approval of quantitative proportionality).

167 Such arguments have been legion in response to cases like Harmelin, Ewing, and Lockyer, where the convicted individual received life sentences for property crimes the severity of which, at least on first review, might not appear commensurate with the lengthy sentence. See, e.g., Lee, Resuscitating Proportionality, supra n.__ (criticizing the “absolute deference to legislatively imposed sentencing protocols” in the wake of Solem and its progeny).

168 U.S. Const. amend. VIII.

169 An acceptance of the notion that the Cruel and Unusual Punishments Clause is undergirded by notions of human dignity gives rise to intriguing questions regarding the extent to which the clause could be plausibly understood to bar punishments the
Further, to the extent that one accepts the notion that imprisonment as we know it was not a feature of the American systems of punishment at the time of the founding, it would be difficult to argue that, as an originalist matter, the Eighth Amendment was intended or understood to speak to a such a liberty-type interest.

What remains is the purposive question – how can we best characterize the interest protected by the Cruel and Unusual Punishments Clause, and how can proportionality jurisprudence be constructed in such a way as to effectuate that value? The Supreme Court has answered the first part of this query – the fundamental interest protected by the Cruel and Unusual Punishments Clause is the dignity of individual. The answer to the latter portion of the question is model I have proposed here. To the extent punishments must “comport[] with the basic concept of human dignity at the core of the [Eighth] Amendment,” and to the extent that dignity as a concept stands in contrast to brutality, degradation, and humiliation, a proportionality regime can (should) be styled such that punishments which serve to brutalize or degrade are within the ambit of the Cruel and Unusual Punishments Clause, and subject to qualitative proportionality review, but punishments that do not degrade or dehumanize – however “excessive” one might find them to be as a quantitative matter – are not within the scope of the Clause, and therefore may not be invalidated pursuant to it.

Consider, for instance, a first-time offender named John. John steals a bicycle without resort to violence, is convicted of petty larceny, and is sentenced to twenty years in a state penitentiary. This clearly seems out of proportion to the crime under any theory – there seems no reason to believe that the community would need to be protected from John for that amount of time, or that such a

infliction of which would necessarily involve the degradation of the individual tasked with inflicting the punishment. Such discussions would involve foundational questions regarding the scope of the dignitary interest (for instance, whether an individual’s dignity can be undermined by the actions of that individual himself) and the administerability of such a regime in a constitutional republic that highly values personal autonomy.

Note, The Eighth Amendment, Proportionality, and the Changing Meaning of “Punishments, 122 Harv. L. Rev. 960 (2009) (“Incarceration, the sine qua non of modern American punishment, played a very minor role in colonial criminal justice.”).


Gregg v. Georgia, 428 U.S. at 182.

Some European nations have embarked upon a regime of incarceration animated by what the Germans call the “principal of approximation” – “the principal that life within penal institutions should resemble life in the outside world as closely as possible.” Whitman, Against Retributivism, at 97. This regime strives to eliminate what Americans would consider the hallmarks of a prototypical prison: uniforms, bars on the cell doors, harsh behavior by guards (even if such behavior is in some sense “justified” by the behavior of the prisoners. Id. Whitman has tied this project to a European acceptance of the role of the concept of human dignity in punishment. Id. While one would rightly question whether an “approximation” system is particularly well-suited for the current moment in American sociopolitical history, it shares some obvious parallels with a proportionality regime that finds no constitutional violation with temporally long sentences as long as prison conditions adhere to notions of dignity.
sentence would be necessary to rehabilitate him, or that deterrent purposes would not be served by a lighter sentence. Further, almost anyone would say that such a sentence was more than John deserved as matter of pure moral desert. Now, imagine that the prison to which John is sent is clean, safe, and John has access to reasonable levels of health care and rehabilitative services (education, skills training, and so forth). He can visit often with family and friends. The guards treat him with respect. And assume that these conditions remain for the duration of his stay. While some might argue, quite persuasively, that twenty years in prison is “excessive” in relation to the crime which John committed under any theory (and especially under principles of desert), one would be hard-pressed to argue coherently that John, in this hypothetical, has been stripped of his dignity. He is not subject to physical abuse or the threat thereof; he is provided the basic necessities of life in an advanced society; he has not been degraded or otherwise humiliated. All he lacks is freedom of physical movement (and, of course, the “life choices” that are denied him in prison). Under this hypothetical, John is subject to what would best be described as an imposition of his liberty (or autonomy) interest, and has suffered no apparent dignitary harm, however “excessive” his sentence might be.174 In other words, while John’s sentence may not be fair, and while it may not be beneficial to him or to society, it is just not clear that a dignity-focused Cruel and Unusual Punishments Clause has anything to say about it.

C. Consequences for Reform

This leads to an important point regarding the real world consequences of the model presented here. Justice Souter remarked in *Lockyer* that “if [a]
sentence [of life for a third offense of felony petty theft] is not grossly disproportionate, the principle has no meaning.” That may well be true, as it were. It may certainly be the case (and I tend to think it is) that locking up petty criminals for extremely long periods of time is a bad idea, and arguably fails each theory of punishment, to the extent one believes that each theory demands that punishment be calibrated so as to either (1) best serve society’s and/or the prisoner’s interests, or (2) be retributively fair to the offender. Certainly, one could argue coherently that the paradigmatic petty criminal often would not “deserve” to be locked up for years or for life, and that society would also not be optimally served, because such an individual would not be “rehabilitated” by such a sentence (and probably would be more likely to re-offend as a consequence). Further, such an individual would likely not be specifically deterred from committing more crimes, and because society would not be effectively “protected” by his incapacitation, since that individual did not represent any significant threat in the first place. The increasing dissatisfaction over Rockefeller-like drug laws and recidivist statutes, especially in the face of increasingly distressing empirical data concerning those laws’ effectiveness (or lack thereof), is worth recalling here.

The deterrent goals of punishment, both general and specific, are also likely not served by quantitatively disproportionate sentencing. Regarding specific deterrence, there is evidence that harsh prison conditions (independent of “teaching” effects) can increase recidivism. This is an especially trenchant observation given the bloated and deteriorating state of the American prison system. Extremely long sentences do not significantly reduce the likelihood of re-offending; rather, the risk of re-offending is merely shifted to inside the prison

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175 Lockyer v. Andrade, 538 U.S. at 82.
177 See James Headley, Proportionality Between Crimes, Offenses, and Punishments, 17 St. Thomas. L. Rev. 247, 253, 248 (2004) (describing an Eighth Amendment regime that does not include quantitative proportionality as “unfair”).
178 Nilsen, Decency, Dignity, at 134-139 (exploring “post-conviction disabilities” and recidivism).
179 These arguments apply with special force to petty drug related crimes, especially in cases of true simple possession.
181 Chen and Shapiro, supra n.__, at 1; Drago, et al., supra n.__; Nilsen, Decency, Dignity, at 134-139.
182 See supra n.__ (discussing recent work on the deteriorating state of the American prison system).
walls.\textsuperscript{183} In addition, there is little or no evidence that lengthy prison sentences reduce crime in the aggregate, casting doubt on notions of general deterrence.\textsuperscript{184} Certainly, utilitarian parsimony goes out the window in such a scenario.

Ultimately, it is easy to simply feel uncomfortable with the notion that there is no constitutional remedy available to an individual who is condemned to spend most – or even a significant portion - of his life behind bars for a middling offense.\textsuperscript{185} These are not, however, arguments that are particularly appropriate for determining the best meaning of the Cruel and Unusual Punishments Clause. “[N]ot every good idea finds a home in our Federal Constitution.”\textsuperscript{186} As I have

\textsuperscript{183} See n.\textsubscript{\textae}, infra.

\textsuperscript{184} See, e.g., William J. Stuntz, Of Seatbelts and Sentences, Supreme Court Justices and Spending Patterns – Understanding the Unraveling of American Criminal Justice, 119 Harv. L. Rev. F. 148 (2006) (noting the lack of correlation between imprisonment rates and crime reduction); Richard L. Lippke, Crime Reduction and the Length of Prison Sentences, 24 L. & Pol’y 17 (2002) (“The issue discussed is whether policies of imposing increasingly lengthy prison sentences on serious criminal offenders reduce crime. The empirical evidence for the deterrence and incapacitation effects of incarceration is first examined and found to be of limited help in answering the question whether lengthy prison sentences reduce crime. Conceptual and normative analysis of deterrence and incapacitation suggest that we have little reason to believe that the general use of lengthy prison terms produces more good than harm for society, especially if the burdens of and alternatives to such prison terms are taken into account.”).

\textsuperscript{185} A recent decision by the Ninth Circuit vividly demonstrates the problem. In Gonzales v. Duncan, the petitioner was convicted by a jury of failing to update his annual sex offender registration within five working days of his birthday, in violation of California law. No. 06-56523 (9th Cir. Dec. 30, 2008). Gonzales did not change residences; rather, he simply failed to alert the state in a timely fashion that he still resided at the address the state had on file. \textit{Id.} at 16834. Because of his prior criminal convictions, Gonzales received a sentence of 28 years to life imprisonment under California’s “Three Strikes” law. On habeas review, the Ninth Circuit found that the sentence violated Eighth Amendment’s prohibition against cruel and unusual punishment under Solem and Lockyer. \textit{Id.} at 16849. Writing for the court, Judge Bybee held that :[i]n comparison to the passive, harmless, and technical violation that triggered Gonzalez’s sentence, “the severe penalty imposed on [Gonzalez] appears disproportionate by any measure.” \textit{Id., quoting People v. Cluff}, 105 Cal. Rptr. 2d 80, 87 (Cal. Ct. App. 2001).

Clearly, it would seem a miscarriage of justice to allow an individual to spend the rest of his life in prison for “a technical violation of a regulatory crime of omission,” as Judge Bybee put it. To do so would seem to be the height in bureaucratic illogic. \textit{Cf.} Rachel E. Barkow, The Ascent of the Administrative State and the Demise of Mercy, 121 Harv. L. Rev. 1332 (2008) (arguing that the rise in administrative law as a “pervasive force” in criminal law has weakened the exercise of mercy in the connection with punishment in both obvious and non-obvious ways, including the exercises of parole, sentencing, executive clemency, and jury nullification).

\textsuperscript{186} Stephen E. Henderson, “Move On” Orders as Fourth Amendment Seizures, 2008 B.Y.U. L. Rev. 1 (2008), \textit{citing Hudson v. McMillian}, 503 U.S. 1, 18 (1992) (Thomas, J., dissenting) (“In my view, a use of force that causes only insignificant harm to a prisoner may be immoral, it may be tortious, it may be criminal, and it may even be remediable under other provisions of the Federal Constitution, but it is not cruel and unusual punishment.”).
argued above, if one accepts the purposive argument presented here – that the Eighth Amendment exists primarily to protect human dignity – there is no reason to believe that the underlying purpose of the Eighth Amendment requires there to be quantitative proportionality, and by implication, no reason to believe that the Constitution has anything whatsoever to say about how best to punish offenders so as to reduce crime or how to treat the offender “fairly,” short of its implicit pronouncement that the nation and the offender are best served when punishments are not torturous or otherwise barbarous.187

I will not belabor, except to mention briefly, that there are many more appropriate (and likely effective) ways to ensure imposition of sentences that serve society (and prisoners’) interests in justice and thrift: legislative abolition of mandatory minimums; alternative punishment for non-violent drug offenders; targeted decriminalization; three-strike reform (to prevent the types of seeming unfairness in cases like Lockyer, Ewing, and others); and real efforts to establish rehabilitative programs in prison facilities. While these are difficult challenges that will require political will (and funding) that may or may not be easily summoned,188 success will likely prove more comprehensive. Despite scholars’ best efforts, history suggests that truly systematic, effective sentencing reform will likely never come about through the courts, especially not through proportionality jurisprudence.189 While the occasional appellant will win the lottery and have his custodial incarceration sentence struck down on disproportionality grounds, like in Gonzales,190 virtually no defendants are, or will be, served by continued attempts to fit the square peg of quantitative proportionality into the round hole of the Cruel and Unusual Punishments Clause.

187 See section __, supra.

188 Recent high-profile efforts have been undertaken to begin addressing this constellation of related issues. In December, 2008, Senator James Webb announced his intention to pursue prison and sentencing reform. Sandhya Somashekhar, “Webb Sets His Sights on Prison Reform,” The Washington Post, Dec. 30, 2008, at B01 (“This spring, Webb (D-Va.) plans to introduce legislation on [ ] reforming the U.S. prison system . . . Webb aims much of his criticism at enforcement efforts that he says too often target low-level drug offenders and parole violators, rather than those who perpetrate violence . . . [h]e also blames policies that strip felons of citizenship rights and can hinder their chances of finding a job after release.”). Early skeptics were in bountiful supply. Posting to Mother Jones Blog, available at http://www.motherjones.com/mojoblog/archives/2008/12/11497_jim_webb_prison_reform.html (“Senator Jim Webb is about to take on one of the most thankless issues in America: prison reform.”).

189 See Ristroph, Sexual Punishments, at 174 (“Distinct from the failures of the Supreme Court’s Eighth Amendment doctrine [ ] there may exist unavoidable limits on the utility of the Eighth Amendment as a tool to reform prisons”); United States v. Pollizi, No. 06-CR-22 (JBW) (E.D.N.Y. Apr. 1, 2008) (“Even though many would characterize some mandatory minimum sentences as ‘draconian,’ the Supreme Court has repeatedly upheld their constitutionality.”).

190 Gonzales v. Duncan, No. 06-56523 (9th Cir. Dec. 30, 2008); see n.__, supra.
IV. CONSEQUENCES FOR RETRIBUTIVE THEORY

The thoughts presented here have important consequences for retributive punishment theory. The Court’s project of defining the scope of proportionality under the Eighth Amendment, undertaken in the “Proportionality Sextet” of Lockyer,\(^{191}\) Ewing,\(^{192}\) Harmelin,\(^{193}\) Solem,\(^{194}\) Hutto,\(^{195}\) and Rummel,\(^{196}\) spans the last thirty years, beginning with Rummell in 1980. This rather tightly coincides with the rise of retributivism as a widely accepted justification for punishment – in theory and increasingly in practice – over the same period.\(^{197}\) The embrace of retributivism has occurred amongst all the players in the criminal justice system – academics,\(^{198}\) lawmakers (including the drafters of the Model Penal Code),\(^{199}\) and jurists.\(^{200}\)

In its most basic form, retributive theory posits that punishment of the offender “finds its value [] without reference to the benefits that might be achieved for the public . . . [the value] is internal to its practice and not contingent upon the achievement of some future benefit .”\(^{201}\) In other words,


\(^{197}\) Whitman Against Retributivism, at __ (noting the rise of retributivism over the past three decades); Dan Merkel, Executing Retributivism, Northwestern U. L. Rev. (forthcoming 2009), available at http:ssrn//ssrn.com/abstract=1263683 (“support for retributivism has re-emerged over the last thirty years, and indeed retributive ideas are regarded as sufficiently respectable as to justify punishments ranging from the death penalty for murder to punitive damages”).

\(^{198}\) Id.


The story of retributivism’s acceptance on the Supreme Court is a remarkable one; less than half a century ago, retributivism (or concepts relating thereto) was often described by influential Justices as nothing more than “naked vengeance” that was “masked in formal legal procedure”. In re Yamashita, 327 U.S. 1, 41 (1946) (Murphy, J., dissenting); see also Kennedy v. Mendoza-Martinez, 372 U.S. 144, 189 (1963) (Brennan, J., concurring) (describing retribution as “naked vengeance”). While describing the evolution of Court personnel on this point over the last-half century is beyond the scope of this article, the rise in retributivism’s acceptance on the Court coincides neatly with retributivism’s acceptance amongst academics and lawmakers.

punishment in response to a criminal act is justified in and of itself, independent of any utilitarian benefit that might accrue to society as a result of the punishment. Although accounts of retributivism differ in certain important respects, I will not delve into the details of those differences here. Rather, it is sufficient for our purposes to say that retributivism posits that just systems of punishment must incorporate the notion that only those that deserve to be punished should be punished, and that equivalence between the offenders’ desert and the punishment inflicted must exist for a given punishment to be justifiable. Systems that fail to account for retributive theories are, under this set of theories, unjust, and – importantly - out of sync with the public’s general conception of the proper basis for punishment, which retributivists believe, with reason, is based in large part on the public’s belief that criminals simply deserve to be punished. Professor Robinson describes a typical account of a retributive punishment scheme thusly:

[a] distributive [retributive] principle might be outlined in this way: (i) In determining punishment, look to the extent of the offender’s blameworthiness (including the seriousness of the offense), (ii) but reliance upon the traditional

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202 In contrast, utilitarian or instrumentalist theories of punishment posit that society should essentially accrue a benefit from the punishment inflicted upon the individual – future offenders are deterred from acting because they have observed the punishment visited upon the present offender, the offender is removed from society for the duration of the punishment (forever in the case of capital punishment), thus keeping society safe from the offender during that period, or the offender is metamorphosed in such as way as to remove his desire (or, in theory, ability) to re-offend.

203 Perhaps the most prominent cleavage is between those who believe that retributive theory permits punishment on the basis of the desert of the actor (so called “permissive” or “negative” retributivism) and that retributive theory requires punishment equal to the desert of the offender (“mandatory” or “positive” retributivism). Other accounts distinguish between pure retributive theory and “desert” theory, although the differences between retributivism and desert theory can be slight and account for little practical distinction.

204 Parr, New Perspective, at 60 (“In contrast to utilitarian theories, retribution theory offers a principled basis for proportionality. Andrew von Hirsch states that the ‘[s]everity of punishment should be commensurate with the seriousness of the wrong.’ He justifies this statement with the following three-step argument. First, the main purpose of the criminal sanction is to express censure for particular conduct (that is, retribution). Second, the severity of the sanction conveys the magnitude of the censure. Third, as a result, criminal sanctions should be proportioned to the severity of the conduct because to do otherwise would be unjust.”).

205 James O. Fickenauer, Public Support for the Death Penalty: Retribution as Just Deserts or Retribution as Revenge?, 5 Justice Quarterly 81, 93 (1988) (“considerable support for a retributive doctrine of punishment exists both in the general public and among judges, philosophers, and legal scholars.”); see also Stephen T. Parr, Symmetric Proportionality: A New Perspective on the Cruel and Unusual Punishments Clause, 68 Tenn. L. Rev. 41 (2000) (“Most persons readily accept the claim that the severity of a sentence should be proportioned, in some measure, to the offense committed.”) (hereinafter Parr, New Perspective).
utilitarian purposes of rehabilitation, general deterrence, and incapacitation of the dangerous, as well as “restoration of crime victims and communities,” is permitted where the purpose can effectively be achieved, (iii) but such reliance may not produce punishment in conflict with the offender’s degree of blameworthiness.206


Incapacitation theory strives to reduce crime by physically preventing offenders from committing additional crimes. Determination of sentences under incapacitation theory derives primarily from an assessment of the offender's likelihood of re-offending. The assessment is based on criteria such as prior criminal history and drug use. A dangerous person who committed a minor crime, for example, could be sentenced more severely than a nondangerous person who committed a more serious crime in the heat of passion. In addition, someone who had not even committed a crime could be incapacitated based on his likelihood of offending for the first time . . .

Deterrence theory relies on the threat of punishment to deter persons at large (general deterrence) or particular individuals (specific deterrence) from offending or re-offending, respectively. In a deterrence-based system, the magnitude of punishment is determined by comparing the benefits of crime reduction to society, achieved through threat of punishment, with the costs of punishment to the object of punishment, usually the offender. Common critiques of general deterrence theory state that it justifies the punishment of innocent people and the severe punishment of minor offenders (exemplary sentences) if such sentences would deter others from offending. Specific deterrence theory suffers from the same critiques leveled against incapacitation theory . . .

Rehabilitation theory seeks to prevent crime by affecting positive change in offenders so that they no longer desire to commit crimes. The crucial issue for the sentencer under rehabilitation theory is ‘not the gravity of the offense committed’ but the ‘needs of the offender.’
While a thorough exegesis of retributive theory and critiques thereof would take more space than is available here, it is important to our purpose to note that one feature of all variations on retributive theory is that proportionality between crime (or the culpability of the offender) and the punishment imposed is necessarily implied.207 In the words of Professor Dripps, “all retributive theories share a family resemblance, rooted in the reciprocal ideas that punishment can be deserved, and thus it should never be undeserved.”208 “A punishment would be excessive [under principles of desert] if the degree of condemnation symbolized by the amount of punishment were too high relative to the criminal’s blameworthiness.”209 This makes sense; if you are to be punished because you deserve to be punished, it should be non-controversial that you not be punished more than in fact you “deserve,” however that desert is defined.210 Punishing excessively would serve no retributive purpose, since the optimally-punished offender has already received everything that is in fact deserved. Punishment imposed beyond the retributively-acceptable amount could therefore only be justified on non-retributive utilitarian grounds (e.g. a desire to deter, or to further

Parr, New Perspective, at 60-61.

207 See, e.g. Youngjae Lee, Recidivism as Omission: A Relational Account, 87 Tex. L. R. (forthcoming 2009) (a common objection to three strikes laws by desert theorists “is made on the principle that punishment should be proportional to the crime”); Merkel, Executing Retributivism, at __, citing J.L. Mackie, Retributivism: A Test Case for Ethical Objectivity, in Philosophy of Law 677, 678 (Joel Feinberg & Hyman Gross, eds., 4th Ed. 1991) (discussing the “quantitative variant of negative retributivism, that even if someone is guilty of a crime it is wrong to punish him more severely than is proportional to the crime”); Dan Markel, State, be Not Proud: A Retributivist Defense of the Commutation of Death Row and the Abolition of the Death Penalty, 40 Harv. C.R.-C.L.L. Rev. 407, at 434-435 (2005) (discussing “frugal proportionality” in the context of retributive systems); Paul H. Robinson, The A.L.I.’s Proposed Distributive Principle of “Limiting Retributivism”: Does It Mean in Practice Anything Other than Pure Desert?, 7 Buff. Crim. L. Rev. (2004) (“Desert demands that a case of greater blameworthiness receive greater punishment than a case of comparatively less blameworthiness. Given the limited range of punishments a liberal democracy ought to be willing to inflict, distinguishing cases of distinguishable blameworthiness means that the deserved punishment in any given case will fall within a narrow range on the punishment continuum.”).


210 See cites in n.___. A less discussed corollary to this notion is that one should also not be punished less than one deserves, although not all permissive retributivists would necessarily agree. See Dripps, supra n.___, at 1422 (“Retributivists disagree about whether blameworthy conduct affirmatively requires punishment or merely permits punishment if the balance of other considerations so inclines.”). For instance, Professor Y. Lee’s model of retributivism as a side-constraint to proportionality review would not necessitate punishment equal to the desert of the actor, only that the punishment not go beyond the retributively-permissible maximum. Youngjae Lee, The Constitutional Right Against Excessive Punishment, 91 Va. L. Rev. 677 (2005).
incapacitate the offender), or would otherwise be an exercise of simple vengeance. 211

A model of proportionality review, then, that does not require quantitative proportionality between crime and punishment has important implications for retributive theory as it relates to constitutional criminal procedure. While retributivists are careful to note the Supreme Court’s declaration that “the Constitution does not mandate adoption of any one penological theory,”212 (the Non-Preference Doctrine), and argue merely that retributive principles should stand beside these other theories, the retributive notion that courts are constrained, via the Eighth Amendment, in the punishments they can inflict upon an offender by principles of desert213 does in fact call for a

211 Some argue that utilitarian systems of punishment do not (and indeed cannot) share this concern with proportionality. For instance Professor Parr argues that “[n] utilitarian theories of punishment . . . requires or even suggests a proportionality requirement.” Parr, New Perspective, at 60-61. He continues:

Fundamentally, all utilitarian theories are forward-looking or consequentialist; they look to future behavior, future harm, and future benefits. Proportionality between sentence and offense, however, is necessarily backward-looking; it looks to the severity of the offense already committed. Therefore, punishments distributed according to a utilitarian theory can only be proportionate or serve as a guide to proportionality by accident.

Id., see also id. at 64 (“only retribution theory provides a sound theoretical basis for developing a proportionality principle.”). Many, as Parr recognizes, have disagreed, including Bentham, Beccaria, Rawls and others. Id. (discussing utilitarian defenses of proportionality); see also See John Rawls, Two Concepts of Rules, 64 Phil. Rev. 3 (1955) (arguing that there is no utilitarian justification for a system that has no upper limit on punishment).

One might further posit that over-punishment (both as a general and a specific matter) might in fact encourage further criminality. see n. - ___ and accompanying text (Ed note: cite to discussion in preceding section about how excessively long sentences actually increase recidivism). Similarly, it seems that one could posit a utilitarian system of incapacitation that requires an upper limit on the quantitative component of incarceration, if one believes that excessive prison terms remove any incentive for prisoners to behave peaceably while on the inside (or even encourage further offending in the facility). To the extent that one recognizes that prisons themselves are societies (with guards, personnel, and prisoners as the members), a wildly excessive prison term that removes incentive for good behavior does not prevent further crimes (i.e. it does not truly “incapacitate”) – it merely changes the society in which the individual commits his offenses.


grafting of a retributivist requirement onto the Cruel and Unusual Punishments Clause in contravention of the Non-Preference Doctrine.

My proposal here – that the Eighth Amendment does not in fact require (or, in a stronger formulation, permit) courts to calibrate the quantitative aspect of a punishment can therefore be read as a specific critique on retributive accounts of Eighth Amendment proportionality. If the Eighth Amendment allows a prisoner to be quantitatively punished in excess of what one might consider the offender to have “deserved” under retributive theory, then a major plank of a certain strain of retributivist argument – the notion that retributivism is required (or at least endorsed) by the Eighth Amendment – is undermined.

A step back is perhaps in order. In essence, what these retributivists have done – under the guise of respecting the Non-Preference Doctrine – is assume the principle that they seek to prove. They argue that the language of the Cruel and Unusual Punishments Clause (sub silencio, of course), requires proportionality between crime/culpability and punishment. This, they argue, is at bottom a retributive principle. Therefore, some level of retributivist constraint on punishment must be mandated by the Eighth Amendment. Going further, these retributivists argue that because retributivism is mandated by the Eighth Amendment, retributive punishment is fundamental to the American system of punishment as a whole, and therefore retributive goals should be further generalized. I see things precisely reversed. As I have argued above, the Cruel and Unusual Punishments Clause (as understood through a dignity-purposive lens) should be understood to do nothing to limit the quantitative component of a punishment. By implication, it would be error to require retributive principles (as a side-constraint or otherwise) be applied to the qualitative component of a punishment under the guise of a faithful application of Amendment); see also Youngjae Lee, Desert and the Eighth Amendment, 11 J. Const. L. 101 (2008) (discussing “the view [that] the purpose of the Eighth Amendment is to enforce the retributivist constraint,” a view that “coheres well with a common image of constitutional rights in general and of the Cruel and Unusual Punishments Clause in particular, as the Clause is typically understood as playing the role of holding the excessive, and frequently irrational, punitive instincts of ‘the people’ in check by imposing a moral constraint.”).

214 See citations id.

215 See n.____, supra (Ed. Note: cite to FN’s concerning how proportionality is a retributivist concept).

216 See, e.g., Lee, Constitutional Right, at 683 (“the Eighth Amendment ban on excessive punishment should be understood as a constitutional norm adapted from the retributivist principle that the harshness of punishment should not exceed the gravity of the crime—one should not be punished more harshly than one deserves.”).


218 See section __, supra.
the Eighth Amendment, because nothing in the Eighth Amendment rightly limits the qualitative component of a given punishment. As such, under the model presented here, the Eighth Amendment is decidedly not a basis for retributive limits on sentence length, and should not be used as support either for constitutional retributive side-constraints, or for a wider application of retributive principles in American criminal law.

To be clear, the normative account presented here should not be read as a general critique on retributive theory itself. Such an effort – while in my opinion ripe for renewal – is beyond what I hope to accomplish in this article. Indeed, my account of qualitative proportionality under the Eighth Amendment presents no critique at all of retributivism; there is nothing in my account which would, in theory, prevent a court from using retributive principles to find an Eighth Amendment violation based upon the qualitative component of a punishment. This would be consistent with the Non-Preference Doctrine, allowing courts to apply principles of any theory (retribution, incapacitation, deterrence, or rehabilitation) to determine whether the qualitative aspect of a given punishment is disproportional. In fact, such an exercise is natural under the model presented here; surely one could imagine a scenario whereby the conditions of confinement were so offensive to human dignity as to constitute punishment beyond that deserved by the offender, without reference to utilitarian goals. Equally, there is a large body of literature that questions the imposition of the death penalty from a retributive perspective, and my efforts here do little to disturb those efforts.

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219 See id.

220 Justice Marshall, for one, was notoriously wary of viewing the Eighth Amendment as primarily retributive in nature; indeed, he believed that the Amendment was adopted in part to counter the temptation to apply retributive principles too vigorously to American criminal law. See Furman v. Georgia, 408 U.S. 238, 343 (1972) (Marshall, J., concurring) (“Punishment as retribution has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance.”). Even he, though, recognized retributivism’s growing acceptance. See, e.g., id. at __ (“there is no authority suggesting that the Eighth Amendment was intended to purge the law of its retributive elements . . . it would be reading a great deal into the Eighth Amendment to hold that punishment [] cannot constitutionally reflect a retributive purpose.”).


222 See, e.g., Merkel, Executing Retributivism, at __ (arguing that the Supreme Court’s decision in Panetti v. Quarterman, 127 S. Ct. 2842, 2859 (2007), which struck down the death penalty for offenders who cannot rationally understand why they are being killed, adopts a theory of communicative retributivism that undermines the death penalty generally, given that the communicative exchange between the government and the offender via the punishment is wasted on individuals who are killed by the very punishment that is the communicative tool).

223 To the extent one reads cases like Coker, Atkins, and Roper as proclamations by the Court that capital punishment should not be applied to special groups of offenders because they do not deserve it (based on their status as minors, mentally disabled, or because of insufficiently serious culpability), the model presented here obviously has
Those who advocate for more humane prison conditions would find a natural home under the model proposed here, especially those who question the practice of placing non-violent petty offenders in prison, where they are surrounded by hardened, often gang-affiliated lifers, typically in over-crowded conditions. Of course, such conditions might also just as comfortably be questioned from a rehabilitative perspective, as well as a “societal self-protection” perspective, given the wide-spread belief that such conditions turn relatively inexperienced offenders into the proverbial better class of criminal.

Readers should take this article only as a specific critique on efforts of retributivists to extend their efforts into the area of constitutional criminal procedure via the Eighth Amendment. Given a jurisprudence centered, as the Court held in *Trop*, around the protection of human dignity, it is simply not clear that the Eighth Amendment says what these retributivists want it to say – that is, that the quantitative component of punishments (most often the temporal length of a custodial prison sentence) must be proportionate to the desert of the actor. Rather, the Eighth Amendment, properly understood, does not limit the length of custodial sentences, regardless of the desert of the actor, so long as the punishment imposed does not unduly infringe upon the dignitary interests of the individual. And so, if the Eighth Amendment does not encapsulate a quantitative proportionality component, then the argument that there is (or should be) a retributive side constraint on the length of criminal sentences under the Constitution is greatly weakened.

Conclusion

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225 See notes ___-___, and accompanying text.

226 *Trop v. Dulles*, 356 U.S. 86, 100 (1958) (Warren, C.J.) (“The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.”).

227 There are, of course, non-constitutional solutions to excessive sentencing: changing the penalties associated with given crimes, executive clemency (state and federal); amending the Constitution to add an explicit “excessive custodial sentence” clause, etc. Of course, one may legitimately question the odds of any such alternative solutions gaining widespread acceptance given the incentives of actors in the political branches.

228 To be sure, many have made retributive arguments against the more odious feature of the American system(s) of punishment that do not rely on the Eighth Amendment or seek to constitutionalize retributive principles, see, e.g., Michael Vitiello, *Three Strikes: Can We Return to Rationality?*, 87 Crim. L. & Criminology 395, 425-33 (1997) (critiquing three-strikes statutes on retributive grounds), even though there is reason to believe that it is because of the widespread acceptance of retributive thinking that such regimes were spawned in the first place. Whitman, *Against Retributivism*, surpra n. ___ at __.
When the prison gates slam behind an inmate, he does not lose his human quality . . . his yearning for self-respect does not end, nor is his quest for self-realization concluded. If anything, the needs for identity and self-respect are more compelling in the dehumanizing prison environment.  

Eighth Amendment jurisprudence is not a “mess.” It need not be a mess, if courts and academics remain focused on the purpose behind the Eighth Amendment, which is, in the words of Chief Justice Warren, is “the dignity of man.” If that is the goal (and a worthy goal it is), than the charge of the courts is to ensure that no punishment be inflicted upon an individual that is an affront to human dignity. I have argued that human dignity can best be conceptualized in reference to its relationship to cruelty, humiliation, and degradation. Viewed through this dignitary lens, an Eighth Amendment proportionality jurisprudence organized around the concepts of quantitative and qualitative proportionality makes sense – the role of the courts is to (1) ensure that the types of punishments from which a court may select comport with abstract notions of human dignity, and (2) that the manner in which the chosen punishment is actually inflicted upon the individual does not unnecessarily infringe upon that individual’s dignitary interest.

Second-guessing the length of a custodial sentence does not fall within that purview, because it is appears not to be the case even as an abstract matter that the dignity interest is necessarily implicated by the length of custodial sentence. Rather, the dignitary interest is implicated only by the conditions of the sentence (and arguably by the fact that a custodial sentence was imposed at all). This conclusion is buttressed by arguments that quantitative

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230 See n. ___ infra.


232 See section __, infra; see also John D. Castiglione, Human Dignity Under the Fourth Amendment, __ Wis. L. Rev. __ (2008) (“Because dignity as a concept is, to some extent, inherently ethereal . . . defining what dignity stands in contrast to is informative in determining what it actually is . . . dignity stands in contrast to brutality, cruelty, humiliation, ‘uncivilized or barbarous behavior,’ harsh treatment, and so on. Others have [noted] that the concept of ‘degradation,’ offers important definitional lessons.”) (internal citations omitted).

233 Again, room might also be made here for a proportionality jurisprudence that excludes under the Eighth Amendment punishments that require the punishing agent to degrade himself (like torture), see n. __, supra and accompanying text, although such an understanding would be at the very margins of proportionality and general constitutional dignitary theory.

234 See section __, supra.

235 Whether an individual’s dignitary interest is implicated by the mere fact that a prison sentence was imposed at all for a particular crime is questionable (unlike the obvious dignitary implications of the imposition of, say, a court-imposed public
proportionality review appears not to be textually authorized by the Eighth Amendment; and that, pace Justice Scalia, there is no practicable way for courts to engage in quantitative proportionality review consistent with the role of a court in a federal system.

Of course, the Court’s holdings since *Rummel* have been less than clear on what exactly are the contours of permissible proportionality review for custodial sentences; the Court has gone from essentially rejecting the notion of quantitative review in *Rummel* to resurrecting it in *Solem* (in an opinion written by Justice Powell, who dissented in *Rummel*), to muddying the conceptual waters in *Harmelin*. Today, however, the new Roberts Court has an opportunity to clear up the doctrinal confusion once and for all on the question of whether quantitative proportionality review has a future in Eighth Amendment jurisprudence.

Perhaps the drafters and adopters of the Eighth Amendment were wise to prohibit only cruel and unusual punishments, a prohibition that seems comfortably within courts’ competence to enforce. Perhaps they were wise to omit reference to “excessive” or “proportional” punishments, which increasingly seem outside courts’ institutional competence to enforce with any degree of rationality. Courts and commentators would be wise to hew more closely to the Framer’s calculated linguistic choice, and should abandon the pursuit of a goal – the requirement of proportionality between crime, culpability and humiliation). Strong arguments can be made that the liberty interest is most implicated by the fact of the imposition of a custodial sentence. This, of course, assumes that the liberty and dignitary interests are clearly defined and accepted as exclusive of one another, which is unclear under current theories.

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236 See section , supra.

237 See section , supra.

238 See n. and accompanying text.

239 *Rummel v. Estelle*, 445 U.S. 263, 274 (1980) (Rehnquist, C. J.) (“one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.”).

239 *Solem v. Helm*, 463 U.S. 277, 285-289 (1983) (“There is no basis for the State's assertion that the general principle of proportionality does not apply to felony prison sentences. The constitutional language itself suggests no exception for imprisonment.”).


241 As of this writing, Chief Justice Roberts and Justice Alito have yet to address proportionality. Further, there is little in their lower-court history upon which to base confident predictions.

242 See section , supra.

243 See section , supra.
quantitative punishment under the Eighth Amendment - that has proven itself elusive.